

Wright v Freeport Hudson Anglers, Inc.

2009 NY Slip Op 30836(U)

April 6, 2009

Supreme Court, Nassau County

Docket Number: 04164-02

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 23

-----X

TONI WRIGHT, as Administratrix of the Estate of
ROBERT A. WRIGHT, decedent,

Plaintiff,

Action No. 1
Index No. 014164/02

-against-

FREEPORT HUDSON ANGLERS, INC. and HELGA
S. HAMMAN, as Administratrix of the Estate of
ROBERT G. HAMMAN, SR., a/k/a ROBERT
GEORGE HAMMAN, SR.,

Defendants.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

DEBORAH MARY MITCHELL, as Administratrix of the
Estate of Peter D. Quinn,

Index No. 008011/04

Plaintiff,

Action No. 2
Mot. Sequence.....02
Motion Date...03/17/09

-against-

FREEPORT HUDSON ANGLERS, INC., A Not-for
Profit Corporation, INTERNATIONAL GAME FISH
ASSOCIATION, INC., a Not-For Profit Corporation,
NEIL WEISS, JOE MELOGRANE, JACK YOLINSKY,
and GREG TAMPANARO, individually and in their capacities

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and GREG TAMPANARO, individually and in their capacities

as officers and/or directors and/or committee directors/
chairmen of FREEPORT HUDSON ANGLERS, INC.,
JOHN DOES 1-10, individually, and in their capacities as
officers and/or directors and/or members of FREEPORT
HUDSON ANGLERS, INC., GEORGE STEININGER and
DONALD TOBY, HELGA S. HAMMAN, as
Administratrix of the Estate of ROBERT G. HAMMAN,
SR., and HELGA S. HAMMAN, individually,

Defendants.

-----X
FREEPORT HUDSON ANGLERS, INC., NEIL WEISS,
JOE MELOGRANCE, JACK YOLINSKY, GREG
TIMPANARO, GEORGE STEININGER and DONALD
TOBY,

Third-Party Plaintiffs,

-against-

HELGA S. HAMMAN, as Administratrix of the Estate of
ROBERT G. HAMMAN, SR.

Third-Party Defendant.

-----X
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X
HELGA S. HAMMAN, as Administratrix of the Estate of
ROBERT G. HAMMAN, SR., Decedent and HELGA S.
HAMMAN, individually,

Index No. 008066/04

Action No. 3

Plaintiff,

-against-

FREEPORT HUDSON ANGLERS, INC., A Not-for
Profit Corporation, INTERNATIONAL GAME FISH
ASSOCIATION, INC., a Not-For Profit Corporation,

NEIL WEISS, JOE MELOGRANE, JACK YOLINSKY,
and GREG TIMPANARO, individually and in their capacities
as officers and/or directors and/or committee directors/
chairmen of FREEPORT HUDSON ANGLERS, INC.,
JOHN DOES 1-10, individually, and in their capacities as
officers and/or directors and/or members of FREEPORT
HUDSON ANGLERS, INC., GEORGE STEININGER and
DONALD TOBY,

Defendants.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

HELGA S. HAMMAN, as Administratrix of the Estate of
ROBERT G. HAMMAN, JR., Decedent

Index No. 008067/04

Plaintiff,

Action No. 4

-against-

FREEPORT HUDSON ANGLERS, INC., A Not-for
Profit Corporation, INTERNATIONAL GAME FISH
ASSOCIATION, INC., a Not-For Profit Corporation,
NEIL WEISS, JOE MELOGRANE, JACK YOLINSKY,
and GREG TIMPANARO, individually and in their capacities
as officers and/or directors and/or committee directors/
chairmen of FREEPORT HUDSON ANGLERS, INC.,
JOHN DOES 1-10, individually, and in their capacities as
officers and/or directors and/or members of FREEPORT
HUDSON ANGLERS, INC., GEORGE STEININGER and
DONALD TOBY,

Defendants.

-----X

FREEPORT HUDSON ANGLERS, INC., NEIL WEISS,
JOE MELOGRANCE, JACK YOLINSKY, GREG TIMPANARO,
GEORGE STEININGER and DONALD

Third-Party Plaintiffs,

-against-

HELGA HAMMAN as Administratrix of the ESTATE OF
ROBERT G. HAMMAN, SR.

Third-Party Defendant

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

-----X

TONI WRIGHT, as Administratrix of the Estate of
ROBERT A. WRIGHT, Decedent

Index No. 9512/05

Plaintiff,

Action No. 5

-against-

INTERNATIONAL GAME FISH ASSOCIATION, INC.,
a Not-For Profit Corporation, NEIL WEISS, JOE
MELOGRANE, JACK YOLINSKY, and GREG
TIMPANARO, individually and in their capacities
as officers and/or directors and/or committee directors/
chairmen of FREEPORT HUDSON ANGLERS, INC.,
JOHN DOES 1-10, individually, and in their capacities as
officers and/or directors and/or members of FREEPORT
HUDSON ANGLERS, INC., GEORGE STEININGER and
DONALD TOBY,

Defendants

-----X

INTERNATIONAL GAME FISH ASSOCIATION, INC.,

Third-Party Plaintiff,

-against-

HELGA HAMMAN as Administratrix of the ESTATE OF

ROBERT G. HAMMAN, SR.

Third-Party Defendant.

-----X
NEIL WEISS, JOE MELOGRANE, JACK YOLINSKY, GREG
TIMPANARO, GEORGE STEININGER and DONALD TOBY,

Second Third-Party Plaintiffs,

-against

HELGA HAMMAN as Administratrix of the ESTATE OF
ROBERT G. HAMMAN, SR.

Second Third-Party Defendant.

-----X
Papers Submitted:
Notice of Motion.....X
Affirmations in Opposition (3).....X
Reply Affirmation.....X

This motion by the Defendants/Third-Party Plaintiffs/Second Third-party Plaintiffs, Freeport Hudson Anglers, Inc. ("FHA"), Neil Weiss, Joe Melograne, Jack Yolinsky, Greg Timpanaro, George Steininger and Donald Toby, for an order, pursuant to CPLR §3212, granting them summary judgment dismissing all of the Plaintiffs' complaints as well as all cross-claims against them, or, in the alternative, an order entering judgment on behalf of each plaintiff in the amount of \$325; and, an order conditionally requiring the Defendant, Helga S. Hamman, as Administratrix of the Estate of Robert G. Hamman, Sr., to indemnify them in these actions, is **DENIED**.

These actions arose from Robert Wright, Robert G. Hamman, Sr., Robert G.

Hamman , Jr., and Peter Quinn's deaths. Hamman, Sr. was the Captain and Wright, Quinn and Hamman, Jr. were passengers on the Eleni II, a boat owned and operated by Robert G. Hamman, Sr., which participated in a shark fishing tournament on June 15, 2002 that was run by the Defendant, FHA via its officers and directors, the individual Defendants, Neil Weiss, Joe Melograne, Jack Yolinsky and Greg Timpanaro. Hamman, Sr. and Wright's bodies were found approximately two weeks later and Hamman, Jr. and Quinn's remains were never recovered. In these actions, the Plaintiffs allege that FHA, its officers and directors, and the Defendants, Steininger and Toby, who operated the weather boat, acted negligently in that they not only failed to properly monitor the sea and weather conditions, but in fact allegedly misrepresented those conditions to the participants, in particular, the decedents, resulting in their participation in the tournament to their demise.

In Action No. 1, in her complaint, Mrs. Wright, as Administratrix of Wright's estate, seeks to recover of the FHA and Robert Hamman, Sr.'s estate. She alleges that in advertising for the tournament, the Defendants represented that its weather boat would run off shore of Jones Inlet prior to the start of the tournament to report the sea and weather conditions and that if the tournament was to be delayed or called off for any reason, it would be broadcast. Wright alleges that Robert Wright relied on that representation and would not have otherwise participated in the tournament. She alleges that the Eleni II left the Jones Inlet at approximately 6:00 AM on June 15, 2002 to participate in the shark tournament. She alleges that the Eleni II's last known position was approximately 12 miles off of Jones Beach;

that the boat encountered heavy rough seas and strong excessive winds; and, that as a result of the Defendants' negligence, the Eleni II was caused to capsize and/or sink, resulting in Robert Wright's death. More specifically, Wright alleges that the Defendants were negligent in advising the participants that it was safe to operate the Eleni II despite the perilous conditions, including stormy rough seas; in failing to warn the participants of the impending dangerous conditions including high rough seas and the dangers posed to smaller craft, including the Eleni II; in advising the participants that it was safe for boats the size of the Eleni II to proceed on to the high seas despite small craft warnings, advisories and other warnings of rough seas and inclement weather; in initially cancelling the tournament but then advising the participants that it was safe to proceed despite the impending storm and high seas in order to avoid refunding the entry fees; and, in failing to postpone or cancel the tournament despite the perilous conditions and the forecast.

Wright specifically alleges that the Defendants were negligent in allowing the tournament to proceed despite the fact that there were waves of six to seven feet or more out of the north when the Defendants knew or should have known that a pleasure boat like the Eleni II was proceeding in a southerly direction with the waves coming from behind which, she alleges, was an extremely dangerous condition; in permitting the tournament to proceed despite the fact that there were 12 to 15 foot rogue waves rolling in from the west; and, in failing to advise the participants, including the Eleni II, that the wind was from the northeast, thereby making the weather conditions even more dangerous. Wright further alleges that the

Defendants acted negligently by failing to have the spotting boat proceed to where the tournament participants were heading to fish in order to accurately determine the sea conditions there and that the Defendants dangerously, negligently and incompetently reported the weather conditions to the tournament participants despite knowing that they were being relied upon for that report. Wright also alleges that the Defendants acted negligently in failing to advise all boats under 35 feet not to participate due to the weather and sea conditions, more specifically, in falsely advising the participants that the spotting boat, a 25 foot boat, was reporting three to five foot conditions ten miles off shore at 2:00 a.m., when, at the JI (Jones Inlet) buoy, there were reports of average wave heights of 7-9 feet. She also alleges that the Defendants acted negligently in failing to send warnings to tournament participants after they had left the harbor about the adverse and unsafe weather conditions.

Wright also alleges that Hamman, Sr., was negligent in failing to properly equip the Eleni II with safety equipment as well as in his operation of the boat.

Via her first cause of action, Wright seeks to recover for pecuniary loss and loss of support, maintenance and education for Robert Wright's next of kin. Via her second cause of action, Wright seeks to recover for her husband Robert Wright's grievous injuries, agony and mental anguish until the time of his death and his fear of impending serious injury and drowning. In her second complaint, (Action No. 5) Wright has named the individual Defendants, FHA's officers and directors as well as the weather boat operators, the Defendants, Steininger and Toby.

In Action No. 2, in her Amended Complaint, which names FHA, its officers and directors, Steininger and Toby as well as Hamman, Sr.'s estate as defendants, Lang, as Administratrix of Quinn's estate, seeks to recover via her first cause of action for negligence and gross negligence. She alleges that the Defendants knew of the turbulent sea conditions, including wave heights of 10-12 feet, winds of 10-25 knots, limited visibility and small craft advisories, but they negligently failed to warn of those conditions as well as the dangers posed to the vessels, in particular those of the type and size of the Eleni II, and that the Defendants were negligent in failing to delay, cancel, or postpone the tournament. Lang alleges the Defendants created a foreseeable risk to the tournament's participants. She specifically alleges that the Eleni II was last seen 10-12 nautical miles southeast of Jones Inlet and that at some time between 7 a.m. and 9:10 a.m., it attempted to turn around and return to shore but due to shifting winds, turbulent seas and wave heights of 10 feet, it was caused to capsize and sink. Lang alleges that the Eleni II placed a Mayday call at about 9:10 a.m. and that ultimately only Hamman, Sr. and Wrights' bodies were recovered. In her second cause of action, Lang alleges that the Defendants misrepresented "that the sea and weather conditions were safe for all vessels, specifically those of the size and type of the Eleni II, to participate in the Tournament, when, in fact, the sea and weather conditions posed grave danger to vessels of the size and type of the Eleni II, and its passengers." Lang alleges that the Defendants induced Quinn to rely on them for their representations regarding the sea conditions and weather and that he, in fact, did so to his detriment. In her third cause of action, Lang alleges

that the Defendants breached their duty to act with reasonable prudence in establishing a protocol that all vessels keep tuned into one channel in order to allow information and advisories to be reported, thereby creating a foreseeable risk to vessels in distress, in particular the Eleni II. In her fourth cause of action, Lang alleges that the Defendants acted in concert in making their actual and implied representations that the weather and sea were safe and in failing to accurately warn of the conditions of which they were aware. In her fifth cause of action, Lang seeks to recover punitive damages. Via all of these causes of action, Lang seeks to recover for Quinn's harm, injury, anguish, apprehension of imminent death, extreme pain and suffering and perishing at sea.

In her sixth cause of action, Lang alleges that Robert Hamman, Sr. and Helda Hamman, as the co-owner of the Eleni II, owed a duty to the boat's passengers which they breached by failing to equip the Eleni II with proper and sufficient safety equipment. As and for her seventh cause of action, Lang alleges that Hamman, Sr. as the Captain of Eleni II, breached his duty to warn the passengers of the weather and sea conditions, including wave height, winds, fog and small craft advisories. She also alleges that Hamman, Sr. breached his duties to his passengers in his negligent operation and piloting of the Eleni II. As and for her eighth cause of action, Lang alleges that Hamman, Sr. failed to follow protocol in placing his Mayday call, in particular, in failing to announce the boat's location and its problems. As and for her ninth cause of action, Lang alleges that Hamman, Sr. negligently and dangerously operated the Eleni II, without proper skill and training. As and for her tenth cause of action,

Lang alleges that Hamman breached his duty to his passengers by failing to communicate with the United States Coast Guard in a timely and proper fashion. As and for her eleventh cause of action, Lang alleges that Hamman, Sr. breached his duty to his passengers as Captain by failing to instruct them to put on life preservers. As and for her twelfth cause of action, Lang alleges that Hamman, Sr. negligently and incorrectly warranted that the Eleni II was seaworthy. As and for her thirteenth cause of action, Lang seeks punitive damages from Hamman's estate.

In Action No. 3, Hamman, as Administratrix of her husband, Robert G. Hamman, Sr.'s estate and in Action No. 4, Hamman as Administratrix of her son, Robert G. Hamman, Jr.'s estate, makes allegations identical to Lang's. As and for her first and third causes of action, she seeks to recover of the Defendants for negligence and gross negligence; as and for her second cause of action, she seeks to recover for misrepresentation; as and for her fourth cause of action, she alleges that Defendants acted in concert and in joint enterprise; as and for her fifth cause of action, in Hamman, Jr.'s action, and her sixth cause of action in Hamman, Sr.'s action, she seeks to recover punitive damages; and, as and for her fifth cause of action in Hamman, Sr.'s action, she seeks to recover for loss of consortium.

The FHA, its officers and directors and the weather boat operators have advanced claims of negligence against Hamman, Sr.'s estate via third-party actions or counterclaims.

The Defendants seek summary judgment dismissing all of the complaints and

cross-claims against them. In the alternative, they seek to limit the Plaintiffs' recovery to \$325 per decedent and/or to obtain conditional indemnification from Robert G. Hamman, Sr.'s estate.

“On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.” Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept. 2004), aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). “Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept. 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept. 1990).

All of the participants in the tournament, including the four decedents, were required to execute a Disclaimer and Assumption of the Risk document which provides:

Freeport Hudson Anglers, Inc., a Not-For-Profit Corporation, its officers, agents or employees accept no liability to the

contestants. The liability of Freeport Hudson Anglers, Inc., its officers, agents or employees for negligence, breach of contract (implied, oral or otherwise), errors, omissions or delay resulting in personal, financial or medical injury or damage to any person or persons who are affected by this contest or any consequential damages is limited to the amount of the fee paid for entrance.

Hamman, Sr. executed the Disclaimer as Captain and Wright, Quinn and Hamman, Jr., executed the Disclaimer as Anglers. The Rules of the tournament provide that the "Freeport Hudson Anglers" Weather Boat will run off shore of Jones Inlet prior to the start of the Tournament to report the sea and weather conditions at that time." It also provided that "[i]n any event, the Freeport Hudson Anglers, Inc., its officers or the Tournament Committee, accept no responsibility for the safety of any boat or its occupants. At all times, and in any weather, the owners or persons in charge of the boats entered in the contest will make their own decisions concerning the operation of their boats and all matters relating thereto."

Anthony Franco, the operator of the Michael Angelo, testified at an Examination Before Trial that he last saw the Eleni II shortly after clearing the Jones Inlet buoy. However, he remained in radio contact with the Eleni II for a "good hour and a half". He testified that the Eleni II was heading to a location known as the schooner, about 48 miles from shore, to fish. He testified that under good conditions, it would take approximately 45 minutes to an hour to reach there. He last spoke with Hamman, Sr. at about 8:30 a.m. and he related that they were en route to the schooner. Franco described the weather as "a little nasty" but he continued on course until one engine broke down about 25 miles out where he fished for two hours and then returned because his bait was being eaten by dog fish. As for

the weather report, he testified:

“They supposedly sent a boat five miles offshore. I figured it was really rough in the beginning because I told you it was open sea and it comes to the Inlet. I figured they knew something I didn’t know five miles out there. I figured maybe it was only five-mile seas. As I’m riding the boat, I’m like where are the five-foot seas. I never found—I never found them.”

Louis Pepe Maura testified, at an Examination Before Trial, that he last saw the Eleni II about eight miles outside of the Jones Inlet. He described the ocean as “roughly six to eight foot and building.” Maura testified that he chose to continue on and to go slowly hoping that the ocean would go down. He heard a distress call later that morning but the transmission was “horrible” and broken up: All that could be heard on the distress call was “Mayday,” “we’re going in.” Maura testified that he later put two and two together and realized that it was the Eleni II’s distress call. He fished about 32 miles off shore and returned at 5:30 p.m.

Franco testified that it was up to the captain of each vessel to decide whether to participate in the tournament. Maura testified that the captain and participants were obligated to make their own decisions about participating in the tournament.

In opposition to the Defendants’ application, Wright has submitted Affidavits by Franco and Maura. They attest that the participants were told the night before the tournament that the weather boat would be sent out five miles and that if the waves were higher than five feet, the tournament would be rescheduled: Based on the weather forecast, they both expected the tournament to be cancelled. Franco thought that the directors must

have had better information than him when the tournament wasn't cancelled and he relied on the directors' word in participating in the tournament. Furthermore, he attests "[i]t became clear during the tournament that there is no way that the weather boat went out 5 miles. I know this because at the 5 mile mark the waves were much bigger than 5 feet. In fact, they were about ten feet high." Maura attests that his decision to participate in the tournament was only partially predicated on relying on the weather boat's information. However, he too attested that the waves, at the five-mile mark, were much bigger than five feet.

Preliminarily, this Court is asked to determine the applicability of the Death on the High Seas Act or "DOHSA." "DOHSA applies where the wrongful act occurred 'beyond a marine league from the shore of any state.'" Vo v Yamaha Golf Car Co., 267 Ga. App. 742 (Ga. Ct. App. 2004), p. 744, fn. 11, citing 46 USC§ 761. "That is three miles from shore, measured in nautical miles, or approximately 3.45 statute miles." Vo v Yamaha Golf Car Co., supra, p. 744, fn. 11, citing Chute v United States, 466 F.Supp. 61, 63 (D. Mass. 1978). The Act limits recovery to the "fair compensation for pecuniary loss sustained by the individuals for whose benefit the action is brought." 46 USCSA §762. Pre-death pain and suffering as well as state law survival claims such as grief, bereavement, loss of society and loss of consortium are precluded under the DOHSA. Mobil Oil Corp. v Higginbotham, 436 US 618 (1978), rehearing denied 439 US 884 (1978). While the Defendants are correct that the wrongful act here did not occur in port, but, rather, wherever the Eleni II went down, they have, in fact, not established that the Eleni II went down on the high seas. If the wrongful act

occurred in the territorial waters of New York State, New York State's wrongful death laws would apply. Offshore Logistics, Inc. v Tallentine, 477 US 207, 216 (1986). An issue of fact exists as to where the wrongful act occurred and concomitantly, whether the DOHSA applies here. Blome v Aerospatiale Helicopter Corp., 924 F.Supp. 805 (S.D. Tex. 1996), aff'd, 114 F.3d 1184 (5th Cir. 1997).

The Defendants, nevertheless, seek summary judgment dismissing the complaints on the ground that there is no evidence that the Eleni II capsized or sunk on account of the weather and sea conditions for which the Plaintiffs seek to hold them responsible. The Defendants allege that to prove negligence, "the Plaintiffs must prove [they] owed and breached a legal duty to the decedents and that said breach was the proximate cause of their deaths." The Defendants argue that the "**plaintiffs cannot do so** . . . and thus, their complaints must be dismissed." In support of that argument, the Defendants lament that the Eleni II may have been the victim of a mechanical malfunction, an explosion, a collision or another calamity or tragedy that could befall a boat on the open seas. The Defendants are blatantly misapplying the summary judgment standards: it is their obligation in the first instance to establish their entitlement to summary judgment as a matter of law by conclusively establishing an absence of negligence or that their acts were not a proximate cause of the decedent's demise. Pointing to possible gaps in the Plaintiffs' proof hardly suffices. See, Totten v Cumberland Farms, Inc., 57 AD3d 653 (2nd Dept. 2008), citing Picart v Brookhaven Country Day School, 37 AD3d 798 (2nd Dept. 2007). In any event, the operators of the

weather boat have not been deposed, thereby further justifying the denial of the Defendants' motion under CPLR §3212(f).

The Defendants are not entitled to dismissal of the Plaintiffs' complaints pursuant to the doctrine of primary assumption of the risk or based on the disclaimers that the decedents executed, either.

“If a participant makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks.” Turcotte v Fell, 68 NY2d 432, 438 (1986). “[B]y engaging in a sport or recreational activity, a participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation.” Morgan v State, 90 NY2d 471, 484 (1997), rearg den. sub. nom. 90 NY2d 936 (1997). “[A]ssumption of risk . . . is really a *principle of no duty*, or no negligence and so *denies the existence of any underlying cause of action*.” Morgan v State, supra, at p. 485. “Accordingly, the analysis of care owed to plaintiff in the . . . sporting event by a coparticipant and by the proprietor of the facility in which it takes place must be evaluated by considering the risks plaintiff assumed when he elected to participate in the event and how those assumed risks qualified defendants' duty to him.” (Turcott v Fell, supra, at p. 438; see also, Morgan v State, supra, at p. 485. “[P]articipants will not be deemed to have assumed the risks of reckless or intentional conduct . . . or concealed or unreasonably increased risks.” Morgan v State, supra, at p. 485, citing Turcotte v Fell, supra, at p. 439; McGee v Board of Educ., 16 AD2d 99, 101-102 (1st Dept.

1962), app. dism. 2 NY2d 1100 (1963), app. den. 19 AD2d 526 (1st Dept. 1963), app. den. 13 NY2d 596 (1963); Benitez v New York City Bd. of Educ., 73 NY2d 650 (1989); see also, Fithian v Sag Harbor Union Free School Dist., 54 AD3d 719 (2nd Dept. 2008). “Therefore, in assessing whether a defendant has violated a duty of care within the genre of tort-sports activities and their inherent risks, the applicable standard . . . include[s] whether the conditions caused by the defendants’ negligence are ‘unique and created a dangerous condition over and above the usual dangers that are inherent in the sport.’ ” Morgan v State, supra, at p. 485, quoting Owen v R.J.S. Safety Equip., Inc., 79 NY2d 967, 970(1992), citing Cole v New York Racing Assn., 24 AD2d 993 (2nd Dept. 1965), aff’d. no opn., 17 NY2d 761 (1966). “A ‘showing [of] some negligent act or inaction, referenced to the applicable duty of care owed to him by [the] defendants, which may be said to constitute “a substantial cause of the events which produced the injury” ’ is necessary.” Morgan v State, supra, at p. 485, quoting Benitez v New York City Bd. of Educ., supra, at p. 659. “[A]ssessing the duty of care owed by an owner or operator of a sporting facility requires that the participant have ‘not only knowledge of the injury-causing defect but also appreciation of the resultant risk.’ ” Morgan v State, supra, at p. 486, quoting Maddox v City of New York, 66 NY2d 270, 278 (1985). And, the “awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff.” Morgan v State, supra, at p. 486, quoting Maddox v City of New York, supra, at p. 278.

Here, the decedents who are not alleged to be experienced proficient seamen

relied on the Defendants to decide whether the tournament should be held and to accurately and completely advise them what the weather and sea conditions were. The Defendants have not established that their decision to hold the tournament was not negligent nor have they established that the prevailing conditions represented by them were true and accurate. Moreover, they have not demonstrated that the tournament was adequately and properly monitored and supervised. In fact, again, discovery regarding the actual sea and weather conditions as well as the veracity of what was reported to the participants remains outstanding. CPLR §3212(f). At this juncture, an issue of fact exists as to whether the Defendants' alleged negligent acts created a dangerous condition over and above the usual dangers and whether the Plaintiff's claims are accordingly barred by their primary assumption of the risk. Fithian v Sag Harbor Union Free School Dist., *supra*; Pantalone v Talcott, 52 AD3d 1148 (3rd Dept. 2008); Murphy v Polytechnic University, 18 Misc3d 623 (New York Supreme 2007).

Section 5-326 of the General Obligations Law provides that where the owner receives compensation for the use of such facility, agreements between the owner or operator of a recreational establishment and the user of such facility which exempt the owner or operator from liability for damages caused by or resulting from the owner or operator's negligence, are deemed to be void as against public policy and wholly unenforceable. While the Disclaimer here is adequately clear, dismissal based on it does not lie. *See*, Bacciocchi v Ranch Parachute Club, Ltd., 273 AD2d 173 (1st Dept. 2000 (disclaimer to Parachute Club

Company not enforced against plaintiff who was injured when she landed in a tree); see also, Nutley v Skydive the Ranch, 22 Misc3d 1122(A) (Supreme Court New York County 2009) (disclaimer to skydiving company not enforced against plaintiff who was injured when parachute malfunctioned); Wurzer v Seneca Sport Parachute Club, 66 AD2d 1002 (4th Dept. 1978) (disclaimer not enforced where injury occurred at parachute and recreation center).

The moving Defendants have not established their entitlement to a conditional order of indemnification by Hamman, Sr.'s estate.

The tournament application specifically provides that “[t]he Captains herein agree to have all participating anglers execute this disclaimer and assumption of the risk and it is further agreed to indemnify and hold harmless Freeport Hudson Anglers, Inc., its officers, agents or employees from any claim of their participating anglers.”

“Indemnification agreements are to be strictly construed against the drafter.” Steuben Contracting, Inc. v Griffith Oil Co., Inc., 283 AD2d 1008 (4th Dept. 2001), citing Sivert v Morlef Holding Co., 241 AD2d 445 (2nd Dept. 1997). “[W]here the language is ambiguous, parol evidence may be received to elucidate the intention of the parties.” Steuben Contracting, Inc. v Griffith Oil Co., Inc., *supra*, at p. 1008-1009, citing Pollak v Lincoln Ctr. for Performing Arts, 276 AD2d 403, 404 (1st Dept. 2000). “While the meaning of a contract is ordinarily a question of law, when a term or clause is ambiguous and the determination of the parties’ intent depends upon the credibility of extrinsic evidence or a choice among inferences to be drawn from extrinsic evidence, then the issue is one of fact.” Amusement


Business Underwriters, a Div. of Bingham & Bingham, Inc. v American Intern. Group, Inc., 66 NY2d 878, 880 (1985); see also, Spears v Spears Fence, Inc., __ AD3d __, 2009 WL614262 (2nd Dept. 2009); Joseph v Rubinstein Jewelry Mfg. Co., Inc., 18 AD3d 615, 615 (2nd Dept. 2005).

While it is clear that FHA is entitled to indemnification for the anglers' claims, it is far from clear that it is entitled to indemnification for the captain's claims. More importantly, it is not clear who it is entitled to indemnification from FHA, Hamman, Sr., as the Captain, or the Anglers, i.e., Wright, Quinn and Hamman, Jr.

The Plaintiffs' request for permission to amend their complaints is not in the proper form and is **DENIED**. CPLR §2215.

This constitutes the decision and order of the Court.

DATED: Mineola, New York
April 6, 2009



Hon. Randy Sue Marber, J.S.C.

ENTERED

APR 08 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**