Lopresti v Zuar
2009 NY Slip Op 32383(U)
September 16, 2009
Supreme Court, Suffolk County
Docket Number: 06-35960
Judge: Peter Fox Cohalan
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SHORT FORM ORDER

INDEX No. 06-35960
CAL. No. 08-02439-OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 5-20-09
ADJ. DATE 8-10-09
MNEMONIC: # 004 - MD
005 - XMG

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FRANK A. LOPRESTI, III, an infant by his father and natural guardian, FRANK A. LOPRESTI, JR. and FRANK A. LOPRESTI, JR., individually,

Plaintiffs,

- against -

CHARLES ZUAR and LYNSEY ZUAR,

Defendants.

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Upon the following papers numbered 1 to 40 read on this motion for summary judgment and cross motion to amend the complaint; Notice of Motion/ Order to Show Cause and supporting papers (004) 1-17 ; Notice of Cross-Motion and supporting papers (005) 18-31 ; Answering Affidavits and supporting papers 32-34 ; Replying Affidavits and supporting papers 36-36; 37-38 ; Other Sur Reply 39-40 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (004) by the defendants, Charles Zuar and Lynsey Zuar, for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint on the basis that the plaintiff Frank A. Lopresti, III is liable for his own injuries pursuant to Inland Rules, New York State Navigation Law, and the Town Code of the Town of Babylon, New York and for a further order dismissing the cause of action in which the plaintiffs seek property damage is denied; and it is further

ORDERED that cross-motion (005) by the plaintiffs, Frank A. Lopresti III and Frank A. Lopresti, Jr., pursuant to CPLR §3025 (b) for leave to serve an amended complaint to substitute Markel American Insurance Company Inc. as equitable subrogee in place and instead of the plaintiffs in the second cause of action on the property damage claim is granted and the proposed amended complaint is deemed served nunc pro tunc.

The plaintiff's claim that on June 25, 2005, while Frank Lopresti III (hereinafter plaintiff), was operating a jet ski at or about Snake Hill Channel, Town of Babylon, New York, he was injured by the alleged negligence of the defendants who caused and permitted their vessel to come into contact with the jet ski. The second cause of action claims property damage to the jet ski in the amount of $8,200.00 plus interest. The third cause of action asserts a derivative claim on behalf of Frank A. Lopresti, Jr. (the father of the plaintiff). The defendants have not asserted a counterclaim against the plaintiffs in their answer.

The defendants now move for summary judgment in their favor dismissing the first and third causes of action stated in the complaint because the infant plaintiff violated the Inland Rules, New York State Navigation Law (hereinafter Navigation Law) and the Town of Babylon, New York (hereinafter Town) Code regarding piloting personal watercraft and is therefore liable for his own injuries. The defendants present Section 181 et seq. of Title 46 USC Rule F of the Supplemental Rules for Certain Admiralty and Maritime claims and argue that the plaintiff violated the Navigation Law §45 and §73(a) as the plaintiff operated the watercraft in a manner that was not reasonable and prudent and without an efficient sound producing mechanical appliance, violated Town Code Chapter 86 in that the plaintiff was recklessly operating the watercraft, operated the watercraft at a speed greater than is reasonable and prudent under the conditions, operated the watercraft over five miles per hour within one hundred feet of the shore, dock pier, raft, float or an anchored or moored vessel, and operated the watercraft in excess of forty-five miles per hour, and operated the watercraft in excess of twelve miles per hour. The defendants further seek dismissal of the second cause of action because the plaintiffs recovered their property damage claim for the replacement value of the jet ski in the amount of $7,700.00 plus $500.00 deductible from their carrier, Markel American Insurance Company, Inc. (hereinafter Markel), and a subrogation claim was made by Markel against Allstate Insurance Company (hereinafter Allstate).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979] , ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of the motion for summary judgment, the defendants have submitted, inter alia, an attorney's affirmation; a copy of the summons and complaint, defendants' answer and demands, verified bill of particulars, response to discovery and inspection, supplemental bill of particulars, the defendants' response to demand for bill of particulars; copies of the transcripts of the examinations before trial (hereinafter EBT) of Frank A. Lopresti, III, Frank A. Lopresti, Jr., Lynsey Zuar and Charles Zuar, all dated December 17, 2007; and a partial copy of the

Inland Navigation Rules of the Code of Federal Regulation of Currentness, Title 33. Navigation and Navigable Waters.

The Court, after reviewing the submissions, finds that the defendants have not established prima facie entitlement to summary judgment dismissing the first and third causes of action.

The plaintiff testified at his EBT that his date of birth was July 6, 1990, and on July 24, 2005, at age fifteen, he was involved in an accident while using a personal watercraft owned by his father, Frank Lopresti, Jr. He was licensed to operate a personal watercraft or jet ski. The watercraft, a Kawasaki 1500 STX, could reach the speed of about forty-five miles per hour and needed about eight inches minimum draw and was used with his father's permission. He had operated it previously on multiple occasions for about one hundred hours, and on the date of the accident, had operated it for about four hours, and for about forty five minutes just prior to the accident at Gilgo Beach, New York. He was unsure where the accident occurred, whether in the Great South Bay or in one of the channels that led into or out of it. As he was enroute to Gilgo Beach, he crossed through a channel into the Great South Bay where the shallow flat water was, and proceeded south towards the snake cut (hereinafter S cut) when the accident occurred in the S cut. As he entered the S cut, he steered to the right for about thirty seconds and was traveling about thirty miles per hour. He then began to travel east, staying on course for about twenty-five more seconds at about thirty miles per hour. He then began to travel south for about ten seconds with his highest rate of speed at about thirty five miles per hour. About two minutes before the accident he saw the defendants' small white boat with an outboard motor on the back of it while he was proceeding south across the flat portion of the bay and the boat was in the State channel traveling east. From the flatlands, the portion of the S cut that travels south is the last section of the S cut. As he entered the south portion of the S cut, the defendants' boat was traveling north in the same section traveling towards his jet ski off to the left side. That part of the S cut he described as being approximately a hundred feet wide and he stated he was on the right side. He changed the direction of his watercraft by turning east and also decelerated to avoid a collision with the boat and passed partially in front of the small white boat as he moved east. He testified that he could not have traveled in any other direction to avoid the accident. The bow of his watercraft and the bow of the boat came into contact, but he did not know the speed of his watercraft or the boat when the impact occurred. Before the impact he yelled out "What are you doing?" He did not remember if anyone responded. In the ten seconds before the impact, the boat moved more westward towards the right side (to his right) of the channel of the cut. The next thing he remembered was getting out of the water, raising up his head. He was trying to stand but he couldn't. He then pulled himself up on the marsh. Someone who was not involved in the accident pulled his watercraft next to him. He did not remember talking to anyone after the accident, he was feeling pain in his back and did not know how long he was unconscious.

Lynsey Zuar (hereinafter defendant) testified at her EBT that she was operating a Boston Whaler with a 25 Mercury outboard motor on June 25, 2005. The boat was owned by her father the co-defendant Charles Zuar. Her date of birth was May 29, 1987 and she'd

operated the boat every summer since she was 10 years old and was eighteen years of age at the time of the accident. The defendant had a boating license and took a boating course with the Village of Lindenhurst, New York in fifth grade. She had been at Gilgo Beach for a few hours and was traveling home when the accident occurred. Her cousin, Matthew Gillan and her friends Joseph Bianco and Nick Lucivero were with her on the boat when the accident occurred. She could not remember how many times she navigated through the S cut prior to the accident, but said it was more than ten times. She did not remember if the tide was high or low and did not know the wind conditions or that of the waves. She stated the S cut is not marked with channel markers. She got into the channel which passes by Gilgo Beach and made a left into the S cut, heading north, and stated the S cut then goes a little to the west. The defendant thought she couldn't have been going more than ten or fifteen miles per hour. The first time she saw the plaintiff's personal watercraft was to her right a few seconds before the actual impact occurred, but she did not know how far away it was. She was pointing north and was in the marshland that forms the channel in the S cut. She stated she was as far to the right as she could be without running the boat's prop aground. She did not know what depth water she needed for the boat and she did not know the depth of the channel of the S cut where she was and she stated it was different on the outside of turns as sediment got deposited so it was higher on those parts of the turns of the S cut. When the defendant first saw the watercraft she was preparing to turn her boat to the left to go around the S part of the S cut and was in about the middle of the channel. She then testified that she was coming around a bend, a curve that could "semi-obstruct" but she could see over the marsh, but did not describe how far she could see. She was seated behind the wheel and said she tried to avoid getting hit but did not remember which direction she went. She slowed her boat down but did not remember how much. She estimated the plaintiff's watercraft was traveling about fifty or sixty miles per hour. Upon impact, the watercraft flew over her boat. She spoke to the plaintiff afterwards and stated that he said he was going really fast. She believed he said fifty or sixty miles per hour.

Based upon the foregoing, factual issues exist concerning the rate of speed the plaintiff was traveling and why the defendant did not see the plaintiff until just seconds before the impact, and whether the parties were operating their respective vessels in a reasonable and prudent manner. The plaintiff observed the defendants' boat for about two minutes prior to the accident and swerved his jet ski to avoid impact. The plaintiff stated the boat was cutting him off and he was all the way to the left. The defendant testified she was in the middle of the channel. Therefore, the conflicting testimonies raise factual issues precluding summary judgment. No evidentiary submissions have been presented to determine the rate of speed the jet ski was capable of traveling. The plaintiff estimated he was traveling thirty to thirty five miles an hour and the defendant said he was traveling fifty or sixty miles per hour. Also the speed limit in the S cut has not been established. It has not been established why the defendant could not see the watercraft and if she had visibility beyond the two passengers on the bow of the boat in front of her as she was seated behind the wheel. Both the plaintiff and the defendant testified that they tried to avoid the accident. The plaintiff testified that he was traveling all the way to his left. The defendant, approaching from the opposite direction, testified that the plaintiff was traveling to her right. Both the plaintiff and the defendant claim that the other operator cut him or her off. Therefore, there are factual issues concerning who

crossed in front of whom or who cut off the other operator. The defendants have not established that the rules they claim to have been violated are applicable to the S cut and whether the S cut is a channel, and whether it is considered a narrow channel as argued by the defendant. It has not been established by admissible evidence that the site of the accident was within navigable waters and in the Town.

Navigation Law §45 subsection 1 (a) provides in relevant part that the operator of a vessel shall at all times navigate the same in a careful and prudent manner in such a way as not to unreasonably interfere with the free and proper use of the navigable waters of the state and all tidewaters bordering on or lying within the boundaries of Nassau and Suffolk counties. As set forth in ***People v English***, 242 AD2d 940, 662 NYS2d 890 [4th Dept 1997], appeal den [1997] 90 NY2d 1010, 666 NYS2d 105, even though CLS Nav §45 is entitled "Reckless operation of a vessel; speed," the standard for determining violation is ordinary negligence measured by conduct of a reasonably prudent person, rather than recklessness, because the statutory text unambiguously refers to navigation in a careful and prudent manner so as not to unreasonably endanger others. Thus, the factual issue of whether the defendant acted in a careful and prudent manner must be determined by the trier of fact.

The standard of care required of the operator of a vessel under Navigation Law §45 is simply ordinary care for safe navigation and adherence to established rules for navigation of vessels (***People v Cummings***, 36 Misc2d 800, 233 NYS2d 723 [City Court of New York, Binghamton County 1962]). The defendants have not established by any admissible evidence the established rules for navigation to demonstrate who had the right of way.

Navigation Law §1 provides for state control of navigation and use of navigable waters of the state. Navigable waters of the state are defined in Navigation Law §2 (4) as all lakes, rivers, streams and waters withing the boundaries of the state and not privately owned, which are navigable in fact or upon which vessels are operated, except all tidewaters border on and lying within the boundaries of Nassau and Suffolk Counties (***Town of Islip v Stewart Powell et al,*** 78 Misc2d 1007, 358 NYS2d 985 [Supreme Court of New York, Special Term, Suffolk County 1974]). Thus only the tidewaters of Nassau and Suffolk are immune from the operation of the Navigation Law. Except for the conclusory assertions of defendants' counsel, the defendants have not demonstrated that the body of water where the accident occurred was a channel, that it was within the territorial limits of the Town, whether it was tidal, or if it was a navigable waterway (see, generally ***The People of the State of New York v John Bianchi,*** 3 Misc2d 696, 155 NYS2d 703 [District Court, Second District, Nassau County 1996]), causing this Court to speculate as to the same. Therefore, these factual issues preclude summary judgment as well.

Accordingly, that part of the defendants' motion (004) which seeks summary judgment on liability is denied.

The defendants further seek dismissal of the second cause of action for the property damage claim because the plaintiffs recovered the replacement value for the jet ski, in the amount of $7,700.00 plus $500.00 deductible from Markel, their carrier, and a subrogation claim was made by Markel against Allstate.

[* 6]

The plaintiffs cross-move for an order granting the plaintiffs leave to amend the complaint to include Markel should this Court find that the plaintiffs are unable to pursue the claim for property damage. In support of this application the plaintiffs have submitted, inter alia, an attorney's affirmation; a copy of the complaint and answer; copies of the transcripts of the EBTs of Frank A. Lopresti, III, Frank A. Lopresti, Jr., Lynsey Zuar and Charles Zuar, all dated December 17, 2007; Certificate of Accomplishment dated May 13, 2003; photographs; notice of subrogation claim by Latitude Subrogation Services; verified bill of particulars; and a copy of the proposed amended complaint.

Subrogation is the right of one person, upon discharging another person's obligation, to be substituted for the other person's obligee so as to stand in the same position as the obligee had stood against the other person before the obligation was discharged. An insurer has the right to recover, by way of subrogation, for damages that it has been called to pay an insured under its policy. The subrogation of an indemnity insurer arises by operation of law when it makes payment to the insured. Subrogation is a normal incident of indemnity insurance (***Kozlowski et al v Briggs Leasing Corp et al,*** 96 Misc 2d 337, 408 NYS2d 1001 [Supreme Court of New York, Trial Term, Kings County 1978]).

It is undisputed that the property damage claim was paid by Markel to the plaintiffs thus giving rise by operation of law to its right to recover by way of subrogation for the property damages paid to the plaintiffs for damage to the jet ski. The cause of action for property damage was timely set forth in the complaint by the plaintiffs. However, the doctrine of subrogation was formulated by equity to prevent unjust enrichment and prevent double recovery by the insured and to force the wrongdoer to bear the ultimate costs (***Kozlowski et al v Briggs Leasing Corp et al,*** supra). Based upon the foregoing, the plaintiffs have demonstrated a meritorious claim for subrogation on behalf of Markel. The plaintiffs have already received payment for their property damage loss and therefore there is a basis for amending the complaint to assert the property damage claim for Markel as equitable subrogee. The defendants don't claim that Allstate reimbursed any money to Markel on its subrogation claim.

Latitude Subrogation Services, on behalf of Markel, provided notice of subrogation to Allstate and its representative, Theresa Sturges, by letter, dated August 17, 2006, for property damage which Markel paid in the amount of $7,700.00 and deductible in the amount of $500.00, for a total of $8,200.00. The defendants acknowledge that on or about October 2, 2007, the plaintiffs provided the documents relating to the subrogation claim. However, they now argue that the Note of Issue should be stricken to allow them to conduct further discovery on the subrogation claim.

The defendants have been aware of the property damage claim since the inception of this action. The defendants have known for three years that Markel paid the property damage claim to the plaintiffs, and despite that knowledge now claim they wish to conduct discovery but offer no explanation for the failure to do so over the past three years. The Note of Issue and Certificate of Readiness were filed wherein the defendants agreed discovery was complete.

[* 7]

CPLR §3025 provides that amendments to pleadings shall be freely granted in the absence of prejudice to the nonmoving party (***Llama v. Mobile Service Station,*** 262 A.D.2d 457, 692 N.Y.S.2d 987). Here, there would be no prejudice to the defendants if the plaintiffs were permitted to serve an amended complaint substituting Markel as equitable subrogee for the plaintiffs in that the defendants have been aware of the property damage claim since the onset of litigation and of the subrogation claim for three years, having been notified of the same. Furthermore, a copy of the records maintained by Markel has been previously provided to the defendants

Accordingly, motion (005) by the plaintiffs to serve an amended complaint substituting Markel for the plaintiffs on the property damage claim is granted and the proposed amended complaint annexed to the plaintiff's moving papers is deemed served nunc pro tunc; and that part of motion (004) which seeks dismissal of the second cause of action in the complaint is denied.

Dated: September 16, 2009

J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION