

Harsch v Island Boatyard, Inc.

2010 NY Slip Op 33428(U)

November 30, 2010

Supreme Court, Suffolk County

Docket Number: 07-4662

Judge: Peter Fox Cohalan

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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 9-22-10 (#002)
MOTION DATE 10-27-10 (#003)
ADJ. DATE 10-27-10
Mot. Seq. # 002 - MD
003 - XMG

-----X	:		:	
KENNETH HARSCH and DIANA HARSCH,	:		:	FABER & TROY, ESQS.
	:		:	Attorney for Plaintiffs
Plaintiffs,	:		:	180 Froehlich Farm Boulevard
	:		:	Woodbury, New York 11797
- against -	:		:	
	:		:	ANDREA G. SAWYERS, ESQ.
ISLAND BOATYARD, INC.,	:		:	Attorney for Defendant
	:		:	3 Huntington Quad
Defendant.	:		:	Melville, New York 11747
-----X	:		:	

Upon the following papers numbered 1 to 21 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (002) 1 - 15 ; Notice of Cross Motion and supporting papers (003) 16-19 ; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other 20-21 ; ~~(and after hearing counsel in support and opposed to the motion-~~) it is

ORDERED that this motion (002) by the defendant, Island Boatyard, Inc., pursuant to CPLR §3212 for summary judgment dismissing plaintiffs' complaint is denied; and it is further

ORDERED that this motion (003) by the plaintiffs, Kenneth Harsch and Diana Harsch, pursuant to CPLR §3126 for an order striking the defendant's answer based on common law spoliation and permitting an adverse inference at trial or precluding defendant from offering evidence of the condition of the instrumentality that caused the plaintiff Kenneth Harsch's injury is granted to the extent that the defendant's answer is struck and the defendant is precluded from offering witness or expert testimony at the time of trial concerning the condition of the step and ladder.

In this action Kenneth Harsch (hereinafter plaintiff) claims he sustained injury on July 22, 2005 while exiting the swimming pool at the defendant's premises located at 65 South Menantic Road, Shelter Island, New York. He claims that the top step (rung) of the pool's ladder broke as he attempted to exit it. He has brought a negligence cause of action with a derivative claim on behalf of his spouse, Diana Harsch. The plaintiff claims that the defendant had actual and constructive notice of the defect giving rise to the injury.

The defendant moves for summary judgment dismissing the complaint because it was not negligent and had no actual or constructive notice of the defect.

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]).

The plaintiff testified at his examination before trial (hereinafter EBT), dated May 29, 2008, that he was injured on July 22, 2005. On the date of his arrival at the defendant's premises, he went to the pool with his son and swam. He used the ladder located in the deep end of the pool when he was leaving the pool. He was holding onto the stainless rails on the ladder with his hands and put his left foot on the bottom plastic rung of the ladder and his right foot on the top plastic rung. As he was lifting his left leg to step onto the cement outside the pool, the top step broke and his right knee came down on the outer edge of the brickwork or cement on the pool and he fell back into the water. He thereafter handed the lifeguard a piece of the broken step which he found floating in the pool. He described the step as discolored, off-white and old.

Diana Harsch testified at her EBT, dated November 17, 2008, testified that her husband was involved in an accident in the defendant's pool on July 22, 2005, but she did not witness it.

Donald Cocks (hereinafter Cocks) testified at his EBT, dated February 12, 2009, that he began employment with the defendant in September 2000 and that he was a service manager for about 3 years on the date of the accident. His job involved taking care of the marina, service, and day to day operations. The defendant owns the business which was on 19 acres of property. He was not working on the date of the accident. He saw the ladder with the broken step in the shop the next day when he came into work. The lifeguard, Joseph Napolitano, had filled out an injury slip for the injury log. The pool was used by seasonal customers and transients who used the marina. He described the pool as being about 35 feet by 20 feet and ranged from 3 feet to 8 feet deep. The pool ladder was on the deep end of the pool. When he came to work the day after the accident, he found the ladder in the work shed but he did not know who removed the ladder from the pool. He described the ladder as having stainless steel handrails and 3 white nylon treads

each spaced about a foot apart. He did not know how many years the ladder had been used. He did not know the maximum weight the ladder could bear. The subject ladder was the only ladder used in the 2005 season. At the end of each season, the ladder was removed on Labor Day and was inspected and any steps that were loose were tightened as the steps were secured by screws. He did not notice any defects in the ladder in 2004. He did not know if he performed any maintenance of the ladder in 2004. The ladder had not been replaced from when he started working there in 2000 and he did not know if any maintenance had been performed on the ladder prior to the accident. During the summer, he never checked the pool ladder. The lifeguard used the ladder everyday and would let him know if there was something wrong with the ladder or any problem with the pool. The defendant no longer had the ladder involved in the accident and he did not know what happened to it or where it was. He testified that the bottom rung of the ladder broke and he did not know where that rung was. In 2005, he and the lifeguards were the only people at the defendant's premises responsible for the pool. He dealt with absentee owners and he did not answer to a supervisor. He did not know if the pool had been subject to an inspection by the Suffolk County Health Department or if the ladder had been removed to inspect it by any Suffolk County employee.

The affidavit of Thomas J. Griffiths (hereinafter Griffiths), notarized in the State of Pennsylvania, is not in admissible form pursuant to CPLR §2106 and §2309(c), and lacks a certificate of conformity as required by Real Property Law §299-a(1) (See, **Ford Motor Credit Company v Prestige Gown Cleaning Service**, 193 Misc2d 262, 748 NYS2d 235 [Civ Ct Queens County 2002]). Even if the affidavit were in admissible form, Griffith has not stated his qualifications as an expert and does not aver to the veracity of the annexed curriculum vitae. Further, his affidavit is conclusory, does not state the type of ladder, its make or model, its weight bearing capacity, or that he inspected the ladder so as to comment on its condition.

Based upon the foregoing, the defendant has not demonstrated prima facie entitlement to summary judgment dismissing the complaint due, inter alia, to the factual issues raised by the inadequacy of the defendant's expert's affidavit and lack of testimony as to any specific inspections or repairs of the ladder, its make and model and weight bearing ability, the policy for inspection of the ladder, and type and frequency of inspections of the ladder.

As to plaintiffs motion (003), "Spoliation is the destruction of evidence. Although originally defined as the intentional destruction of evidence arising out of a party's bad faith, the law concerning spoliation has been extended to the nonintentional destruction of evidence. Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence... before the adversary has an opportunity to inspect them. Dismissal is a viable remedy for loss of a key piece of evidence that thereby precludes inspection. Drastic sanctions are not necessarily unduly harsh sanctions when a critical item of evidence is not preserved," (**Kirkland et al v New York City Housing Authority et al**, 236 AD2d 170, 666 NYS2d 609 [1st Dept 1997]).

"Spoliation of evidence occurs when a party alters, loses, or destroys key evidence before it can be examined by the other party's expert. Spoliation was originally limited to the intentional

destruction of evidence arising out of a party's bad faith, however, spoliation has since been expanded by the courts to include the destruction of evidence based on negligence since a party's negligent loss of evidence can be just as fatal to the other party's ability to present a defense. The trend toward the expansion of sanctions for the inadvertent loss of evidence recognizes that such physical evidence often is the most eloquent impartial witness to what really occurred and further recognizes the resulting unfairness inherent in allowing a party to destroy evidence and then to benefit from that conduct or omission" (see, ***Cordero v St. Vincent's Hospital and Medical Center of New York***, 2008 Misc Lexis 3315; 239 NY Slip Op 3134U [Supreme Court of New York, New York County 2008]). "The spoliation doctrine is distinguished from sanctions to dismiss under... CPLR 3126 in that it is applied even if the destruction of key evidence occurs through negligence rather than willfulness, and even if the evidence is destroyed before the spoliator became a party, provided it is on notice that the evidence might be needed for future litigation" (***Klein et al v Seenauth et al***, 180 Misc2d 213, 687 NYS2d 889 [Civil Court of the City of New York, Queens County 1999]).

Cocks, the defendant's service manager, testified that he had no idea where the ladder was or what happened to it. The defendant's expert does not state in his affidavit that he inspected the ladder. The ladder has not been produced for inspection by the plaintiffs.

In a letter, dated September 22, 2005, the plaintiffs' counsel apprised the defendant of the accident and asked the defendant to advise its insurance carrier immediately of the occurrence of the plaintiff's injuries. The defendant was further advised that an action would be commenced if there was no response to the letter within 10 days.

The defendant's expert's affidavit does not indicate that an actual inspection of the ladder was effectuated, nor does the expert give information concerning the manufacturer, make and model of the ladder at issue, its weight bearing load, the lifespan of the substance of the material of which the step is made, the effects of chlorine on the step, proper maintenance of the step, or other information necessary for the trier of fact to make a determination with regard to the issues in this action.

While sanctions should not be imposed if the offending party offers a "reasonable excuse" for noncompliance with certain discovery demands, particularly if an effort is made to provide other relevant discovery (***Cordero v St. Vincent's Hospital and Medical Center of New York, supra***), the defendant has offered no excuse for not preserving the subject ladder for the plaintiffs' inspection and for trial. The plaintiffs will be severely prejudiced and suffer undue hardship due to the failure of the defendant to preserve the subject ladder and have it available for trial. Here the defendant was notified within about 8 weeks after the occurrence of the accident of a potential lawsuit and was asked to notify its insurance carrier immediately of the same. No testimony has been offered concerning any efforts to preserve the step and ladder.

Accordingly, motion (003) is granted to the extent that the defendant's answer is struck and the defendant is precluded from offering witness or expert testimony at the time of trial concerning the condition of the step and ladder.

Dated: 11/30/10

Peter J. Hols
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION