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SHORT FORM ORDER

COPY

INDEX No. 06-25511
CAL. No. 10-00897 OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 7-23-10 (# 002)
MOTION DATE 8-19-10 (# 003)
MOTION DATE 9-16-10 (# 004)
ADJ. DATE 10-14-10
Mot. Seq. # 002 - MD
003 - MD
004 - XMD

JOSEPH CALANDRINO and DENISE CALANDRINO, Plaintiffs, - against - TOWN OF BABYLON and DELTA WELL AND PUMP, Defendants.	JAY D. UMANS, ESQ. Attorney for Plaintiffs 90 Merrick Avenue, Fifth Floor East Meadow, New York 11554 DEVITT SPELLMAN BARRETT, LLP Attorney for Defendant Town of Babylon 50 Route 111 Smithtown, New York 11787 JOHN T. RYAN & ASSOCIATES Attorney for Defendant Delta Well & Pump 633 East Main Street, Suite 3 Riverhead, New York 11901

Upon the following papers numbered 1 to 59 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 26 - 35; Notice of Cross Motion and supporting papers 36 - 42; Answering Affidavits and supporting papers 43 - 55; Replying Affidavits and supporting papers 56 - 59; Other__; (and ~~after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purposes of this determination the motion (#002) by defendant Town of Babylon for summary judgment and the motion (#003) by defendant Delta Well and Pump Co., Inc. for summary judgment are consolidated and decided together with the cross-motion (#004) by plaintiffs for summary judgment; and it is further

ORDERED that the motion (#002) by defendant Town of Babylon for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

ORDERED that the motion (#003) by defendant Delta Well and Pump Co., Inc. for summary judgment dismissing the complaint and all cross claims against it is denied; and it is further

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ORDERED that the cross-motion (#004) by plaintiffs for an order granting summary judgment on the issue of liability is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Joseph Calandrino ("plaintiff") on August 28, 2005, between 5:00 p.m. and 5:30 p.m., when he slipped on a swim platform of his boat while docked at Cedar Beach Marina, which is owned and maintained by defendant Town of Babylon ("Town"). The plaintiffs' complaint alleges that the defendants were negligent in failing to properly maintain, manage and control the marina, and in failing to properly install and maintain an artesian well system, including an overflow pipe, thereby creating an unsafe and dangerous condition. The artesian well system was installed by defendant Delta Well and Pump Co., Inc. ("Delta Well") in 1987.

The Town now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it is not negligent and that there is no triable issue of fact as to the Town's liability for the accident. The Town contends that the overflow pipe was open and obvious, and that it owes no duty to protect or warn against an open and obvious condition which is not inherently dangerous. In support, the Town submits, among other things, the pleadings, a bill of particulars, the testimony given by plaintiff at the General Municipal Law § 50-h hearing, and the deposition testimony given by plaintiff, Reginald Elton, the Town's representative, and Robert Devine, a representative of Delta Well.

At the General Municipal Law § 50-h hearing, plaintiff testified to the effect that, on Wednesday, August 24, he brought his boat to Cedar Beach Marina and moored the boat at slip 3, where the overflow pipe was located. After plaintiff and his family arrived at the marina in the evening of Friday, August 26, they slept for two nights on the boat and had spent the weekends in the marina area. In the afternoon of Sunday, August 28, when he began preparing to leave by moving some materials between the boat and his truck, he was standing, for approximately ten minutes, on the swim platform of the boat, which was directly adjacent to the wood dock. At the time, there was a six-inch gap between the platform and the water level of the bay, and the overflow pipe was at about the same level as the platform. Plaintiff testified that, as he was putting some items on the boat, with his back to the overflow pipe, the artesian well pumped water onto the platform, causing him to slip. Plaintiff also testified that, prior to the accident, the platform was dry, and he did not notice water coming from any portion of the platform or the boat area.

At his examination before trial, plaintiff testified to the effect that Cedar Beach Marina had approximately fifty boat slips, and each slip could be named as either "A" or "B," depending on the width and size of the boat. In the evening of Wednesday, August 24, when plaintiff backed his boat into slip 3A and tied it up, the distance between the swim platform of the boat and the dock area was approximately six to eight inches. On Saturday, August 27, between 1:00 p.m. and 2:00 p.m., when plaintiff, for the first time, saw water pumping out of the overflow pipe in the bulkhead, the pipe located three to four inches below the platform was not discharging water onto the platform. Several hours later, at approximately between 5:00 p.m. and 5:30 p.m., plaintiff saw water again coming out of the pipe, which was an inch or two inches below the platform. On Sunday, August 28, at approximately

11:00 a.m., plaintiff saw water coming out of the pipe, which was an inch or two inches below the platform. Within a split second before the accident happened, he, while standing on the platform, was turning and stepping toward the dock to see if there were any items on the dock. Then, his left foot slipped and slid into water. Thereafter, he saw water on the platform and noticed that the water was coming from the pipe in the bulkhead. Prior to his accident, he had used the platform six to eight times on Sunday, August 28, and each and every time he noticed the condition of the platform, which was dry.

At his deposition, Reginald Elton testified to the effect that he was the manager of ocean beaches employed by the Town of Babylon and was working at Cedar Beach Marina from 1999 until 2005. Mr. Elton explained that an artesian well is a deep well with a natural pressure, and that an overflow pipe is used to pump out excess water from the well to the bay. Mr. Elton testified that, when the well broke, he called Delta Well, which came and repaired the well. When a repair was done by Delta Well, all of the well systems, including the overflow pipe were checked and inspected by Delta Well. Mr. Elton also testified that he neither witnessed the subject accident nor had any knowledge as to whether the subject pipe was able to discharge water onto the swim platform of the plaintiff's boat.

At his deposition, Robert Devine testified to the effect that he is the vice president and owner of Delta Well, and that Delta Well entered into a contract with the Town for the construction of the portable water well at Cedar Beach Marina in 1987. Delta Well subcontracted with Benson Contracting to install an overflow pipe in the marina. The specifications for the pipe were drawn by Delta Well and were approved by Greenman-Pedersen, an engineering company hired by the Town. Upon completion of the installation of the pipe, Greenman-Pedersen inspected Benson Contracting's work to see if it was done properly. Mr. Devine explained that the pipe is necessary to keep the well from freezing in winter and testified that Delta Well did not perform any work on the overflow pipe including repair, maintenance or inspection since the time when the well and the pipe were installed in 1987. Mr. Devine also testified that the Town never asked Delta Well or Benson Contracting to repair or inspect the pipe.

While, to prove a *prima facie* case of negligence in a slip/trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see* ***Bradish v Tank Tech Corp.***, 216 AD2d 505, 628 NYS2d 807 [1995]), the defendant, as the movant in this case, is required to make a *prima facie* showing affirmatively establishing the absence of notice as a matter of law (*see* ***Kucera v Waldbaums Supermarkets***, 304 AD2d 531, 758 NYS2d 133 [2003]; ***Dwoskin v Burger King Corp.***, 249 AD2d 358, 671 NYS2d 494 [1998]). The issue of actual or constructive notice is irrelevant where the defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see* ***Weller v Colleges of the Senecas***, 217 AD2d 280, 635 NYS2d 990 [1995]; ***Watson v New York***, 184 AD2d 690, 585 NYS2d 100 [1992]). Moreover, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see* ***Moons v Wade Lupe Constr. Co.,*** 24 AD3d 1005, 805 NYS2d 204 [2005]; ***Fasano v Green-Wood Cemetery***, 21AD3d 446, 799 NYS2d 827 [2005]). The issue of negligence, whether of the plaintiff or defendant, is usually a question of fact (*see* ***Bruni v City of New York***, 2 NY3d 319, 778 NYS2d 757 [2004]). Moreover, while there is no duty to protect or warn against an open and obvious condition, the proof that a dangerous condition is open and obvious does not

preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff's comparative negligence (*see* ***DiVietro v Gould Palisades Corp.***, 4 AD3d 324, 771 NYS2d 527 [2004]; ***Cupo v Karfunkel***, 1 AD3d 48, 767 NYS2d 40 [2003]).

Here, the Town failed to establish its entitlement to judgment as a matter of law. While it is undisputed that the overflow pipe was readily observable and well known to plaintiff prior to the accident, these circumstances merely negated any duty that the Town owed plaintiff to warn of potentially dangerous condition, and they do not, without more, obviate the duty to provide a reasonably safe condition place (*see* ***England v Vacri Constr. Corp.***, 24 AD3d 1122, 807 NYS2d 669 [2005]). There are several questions of fact as to whether an alleged dangerous condition of the pipe existed on the marina so as to create liability on the part of the Town; whether it had actual or constructive notice of the alleged condition; and whether it exercised reasonable care under the circumstances (*see* ***McCummings v New York City Tr. Auth.***, 81 NY2d 923, 597 NYS2d 653 [1993]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]; ***DiVietro v Gould Palisades Corp.***, *supra*). There is also a question of fact as to whether plaintiff was comparatively negligent (*see* ***Bruker v Fischbein***, 2 AD3d 254, 769 NYS2d 34 [2003]).

The Town seeks summary judgment dismissing the complaint against it on the ground that plaintiff assumed the risk inherent in mooring his boat next to the overflow pipe, including the risk associated with discharging water from the pipe, which was an alleged open and obvious condition.

Participants in sporting or recreational events may be held to have consented to those injury-causing events which are the known, apparent or reasonably foreseeable risks of their participation (*see* ***Miskanic v Roller Jam USA***, 71 AD3d 1102, 898 NYS2d 180 [2010]; ***Rosenbaum v Bayis Ne'Emon, Inc.***, 32 AD3d 534, 820 NYS2d 326 [2006]; ***Colucci v Nansen Park, Inc.***, 226 AD2d 336, 640 NYS2d 578 [1996]). The doctrine of assumption of risk, however, will not serve as a bar to liability if the risk is unassumed, concealed, or unreasonably increased (*see* ***Miskanic v Roller Jam USA***, 71 AD3d 1102, 898 NYS2d 180 [2010]; ***Ribaudo v La Salle Inst.***, 45 AD3d 556, 846 NYS2d 209 [2007]; ***Rosenbaum v Bayis Ne'Emon, Inc.***, *supra*). 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 should include whether the condition caused by the defendants' negligence are unique and created a dangerous condition over and above the usual dangers that are inherent in the sport (*see* ***Morgan v State***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Gerry v Commack Union Free School Dist.***, 52 AD3d 467, 860 NYS2d 133 [2008]). Issues of proximate cause are generally fact questions to be decided by a jury (*see generally* ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]; ***Pironti v Leary***, 42 AD3d 487, 840 NYS2d 98 [2007]).

Here, the Town also failed to establish, *prima facie*, that the action is barred by the doctrine of primary assumption of risk. There are questions of fact as to whether the Town unreasonably increased the risk of injury to plaintiff above and beyond the usual dangers inherent in the recreational activity of boating, and whether the Town's alleged negligence was a proximate cause of the subject accident. Accordingly, viewing the evidence in the light most favorable to the non-moving party (*see* ***Negri v Stop***

& Shop, 65 NYS2d 625, 491 NYS2d 151 [1985]), the branch of the motion for summary judgment as to the doctrine of primary assumption of risk is denied.

The Town also seeks summary judgment for contractual indemnification against Delta Well.

A party is entitled to contractual indemnification when the intention to indemnify is clearly implied from the language and purposes of the entire agreement and the surrounding circumstances (*see* ***Centennial Contrs. Enterprises v East New York Renovation Corp.***, 2010 NY Slip Op 9098, 2010 NY App Div Lexis 9201 [2010]; ***Canela v TLH 140 Perry St.***, 47 AD3d 743, 849 NYS2d 658 [2008]). A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor (*see* ***Cava Constr. Co. v Gealtec Remodeling Corp.***, 58 AD3d 660, 871 NYS2d 654 [2009]).

Here, the Town failed to establish its entitlement to summary judgment for contractual indemnification against Delta Well since a question of fact exists with respect to whether Delta Well breached the contract by failing to perform one or more of the services for which it was retained (*see* ***Peycke v Newport Media Acquisition II***, 17 AD3d 338, 793 NYS2d 92 [2005]; ***Baratta v Home Depot USA***, 303 AD2d 434, 756 NYS2d 605 [2003]). Moreover, as discussed hereinabove, there is a triable issue of fact as to the Town's liability for the accident. These questions of fact preclude the granting of the Town's request for summary judgment for contractual indemnification against Delta Well.

Delta Well moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it was not negligent in causing plaintiff's injuries since it neither designed nor installed the subject overflow pipe. Delta Well contends that the presence of the pipe was open and obvious and was known to plaintiff prior to the accident, and that there was no obligation to warn against a condition that can be readily observed by the reasonable use of one's senses. In support, Delta Well submits, among other things, the pleadings, a bill of particulars, the incomplete copy of the deposition testimony given by plaintiff and Robert Devine, Delta Well's representative.

While one who hires an independent contractor is not liable for the independent contractor's negligent acts because the employer has no right to control the manner in which the work is to be done (*see* ***Santiago v Spinuzza***, 48 AD3d 1257, 851 NYS2d 322 [2008]; ***Goodwin v Comcast Corp.***, 42 AD3d 322, 840 NYS2d 781 [2007]; ***Dente v Staten Island Univ. Hosp.***, 252 AD2d 534, 675 NYS2d 621 [1998]), the employer is answerable for its own negligence (*see* ***Cassel v City of New York***, 167 AD831, 153 NYS 410 [1915]). Moreover, the employer may also be held liable as a joint wrongdoer if its own misconduct concurred with that of the independent contractor in producing the injury complained of (*see* ***Parson v New York Breweries Co.***, 208 NY 337, 101 NE 879 [1913]).

Here, Delta Well failed to establish its entitlement to judgment as a matter of law. Plaintiffs allege, in their bill of particulars, that Delta Well was negligent in failing to properly install and maintain an artesian well system including an overflow pipe. It is undisputed that Delta Well installed the artesian well, and that Benson Contracting installed the pipe. While Mr. Elton testified that when Delta Well repaired the well it also checked and inspected all of the well systems, including the subject

overflow pipe, Mr. Devine testified that Delta Well never performed any work on the overflow pipe, including repair, maintenance or inspection, since the well and the pipe were installed in 1987. There are several questions of fact as to whether Delta Well's alleged negligence was a proximate cause of the subject accident and whether Delta Well maintained or inspected the overflow pipe. There is also a question of fact as to whether Delta Well exercised reasonable care under the circumstances. Moreover, as discussed hereinabove, the fact that the open condition of the pipe was readily observable and well known to plaintiff prior to the accident may be relevant to the issue of plaintiff's comparative negligence, but it does not negate the duty of defendants to keep their premises reasonably safe (*see* ***Lauricella v Friol***, 46 AD3d 1459, 847 NYS2d 494 [2007]; ***England v Vacri Constr. Corp.***, *supra*). Thus, Delta Well's motion for summary judgment is denied.

Plaintiffs cross-move for summary judgment (# 004) in their favor on the issue of liability on the ground that defendants' negligence was the proximate cause of plaintiff's injury, and that plaintiff was free from comparative negligence.

Here, plaintiffs' cross-motion must be denied as procedurally defective for failure to submit a complete copy of the pleadings, that is, the complaint and the answers of defendants (*see* CPLR 3212 [b]; ***Wider v Heller***, 24 AD3d 433 [2005]; ***Gallagher v TDS Telecom***, 280 AD2d 991 [2001]; ***Mathiesen v Mead***, 168 AD2d 736 [1990]). The pleadings submitted with another party's motion or cross motion cannot be incorporated by reference (*see* CPLR 3212 [b]). In any event, even assuming that all of the papers submitted on the motions by defendants were referred and incorporated, the cross-motion by plaintiffs is denied inasmuch as there is a triable issue of fact as to whether plaintiff was comparatively negligent.

Accordingly, the motions by the Town and Delta Well and plaintiffs' cross-motion are denied.

Dated: January 4, 2011

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION