

**Bawany v Circle Line-Statue of Liberty Ferry, Inc.**

2011 NY Slip Op 31516(U)

May 24, 2011

Supreme Court, New York County

Docket Number: 109281/07

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

LUBNA BAWANY,  
Plaintiff,

INDEX NO. 109281/07

- v -

MOTION DATE \_\_\_\_\_

CIRCLE LINE-STATUE OF LIBERTY  
FERRY, INC., NEW YORK WATERWAYS,  
INC., and NEW YORK WATERWAYS  
TOURS, LLC.

MOTION SEQ. NO. **FILED 03**

MOTION CAL. NO. \_\_\_\_\_  
**JUN 08 2011**

Defendants.

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this defendant(s) motion for an order and judgement on summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Replying Affidavits (Reply Memo) \_\_\_\_\_

PAPERS NUMBERED

1  
2, 3  
4

Cross-Motion:  Yes  No

In this action for personal injury, plaintiff Lubna Bawany alleges that on July 5, 2006, at approximately 5:00 PM, while disembarking the Miss Ellis Island, a ferry vehicle owned and operated by defendant Circle Line-Statute of Liberty Ferry, Inc. ("Circle Line"), she suffered serious injury to her left foot. Plaintiff alleges that, due to the negligence, recklessness, and carelessness of the defendant Circle Line, her left foot became caught and lodged under the edge of a gangplank, and was crushed. Plaintiff further alleges that defendants Port Imperial Ferry Corp. d/b/a New York Waterway (sued herein as New York Waterways, Inc.) and New York Waterways Tours, LLC., (collectively "Waterway") contributed to the accident by operating a vessel at an unsafe speed and in close proximity to the Miss Ellis Island, such that the Miss Ellis Island suddenly shifted from water wave activity, causing the plaintiff's foot to be crushed. The accident occurred at the Battery Park Terminal, Slip 5, located in New York County, State of New York.

On or about April 9, 2008, plaintiff commenced this action to recover damages for personal injuries allegedly suffered as a result of the subject accident. Circle Line and Waterway each interposed an answer and asserted cross-claims against each other. The parties completed discovery and a Note of Issue was filed on May 14, 2010. Defendant Waterway now moves for an order pursuant to CPLR 3212, granting summary judgment dismissing the complaint. The plaintiff and Circle Line both oppose the motion.

Waterway submits the affidavit of Alan J. Warren ("Warren"), the Director of Ferry Operations for Port Imperial Ferry Corp. Warren avers that Waterway's policies as of the date of the alleged incident dictated that ferry operators were to operate the ferries at least 1000 feet from shoreline during normal runs. If the ferries came closer than that, it would be because of the presence of other vessels, and the Waterway operators were then to reduce their vessels' speed. Warren further states that his "review of the schedules of New York Waterways for that time period [of July, 2006] reflects that our vessels would have been transiting past the Battery Park terminal area (the location of Slip 5) one vessel every ten minutes back on July 5, 2006 at approximately 5:00 p.m." (Affidavit of Alan J. Warren at 2).<sup>1</sup> Waterway maintains that Warren's affidavit establishes that, at most, one Waterway vessel would have been in the area at the time of the alleged incident, and it could not have created the subject wake condition.

Circle Line opposes, and submits the affidavit of Peter Giblin ("Giblin"), the captain of the Miss Ellis Island on the date of the subject incident. Giblin's affidavit references an incident report, prepared by Giblin, that states, "Heavy Fast Ferry Activity at Time" (Waterway's Motion, Exhibit F). Giblin avers that the term "fast ferry" refers specifically to Waterway vessels, and notes that he stated as such in his deposition. He states that "I

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<sup>1</sup> Warren also makes several statements to the effect that there had been no prior complaints regarding Waterway's vessels. However, notice is irrelevant here, as plaintiff's theory of liability is that a Waterway vessel actively created a wake condition.

saw these New York Waterway's vessels myself and as I said at page 96 of my deposition, 'if I wrote it in, then I saw them.' I also said at page 136 that the entry regarding the fast ferry activity was based on what I actually observed" (Giblin Affidavit, Circle Line's Affirmation in Opposition, Exhibit A at 2). Giblin avers further that the Miss Ellis Island was moving more than normal, as noted in Giblin's deposition at page 137, and he believes that this movement was a result of wake action from the Waterway vessels. Finally, Giblin states that he was unable to identify which specific Waterway vessels were present at the time of the subject incident, because "[t]heir names are often printed in small letters," but that he is familiar with the colors of Waterway vessels (Giblin Affidavit at 2).

Circle Line maintains that Giblin's deposition and affidavit establish a triable issue of fact that prevents granting summary judgment in Waterway's favor. Circle Line also cites federal case law for the proposition that "damage produced from swells constitutes prima facie evidence of liability on the part of the vessel that caused the swell" (Circle Line's Affirmation in Opposition at 4, quoting *Great American Insurance Company v Tug Cissie Reinauer*, 933 Fsupp 1205, 1212 [SDNY 1996], *et al*).

Plaintiff also submits opposition, contending that Warren's affidavit is insufficient as a prima facie showing of entitlement to summary judgment, as Warren stated in deposition that he had no personal knowledge of whether any Waterway vessels came within 1000 feet of the Battery terminal on the date of the subject incident. Warren also stated at deposition that he had no system to monitor the distance of Waterway vessels from the Battery terminal. Plaintiff also notes that Waterway failed to attach the Waterway schedules referenced in Warren's affidavit, and Waterway's motion also does not provide the names of the vessels that would have been passing by the Battery terminal on the date of the subject incident, let alone the speeds of those vessels. Plaintiff also argues

that Waterway's motion must be denied because Giblin's deposition testimony raises triable issues of fact to overcome any prima facie showing by Waterway.

In its reply, Waterway qualifies the Giblin affidavit as "an attempt to raise a feigned factual issue" that cannot establish a triable issue of fact on a summary judgment motion (Waterway's Reply Affirmation at 2). Waterway maintains that Giblin's affidavit is contradicted by his deposition testimony in that he testified that he did not recall when he had been alerted to the occurrence of the subject incident, that he had no recollection of any wake or roll occurring on the date of the subject incident, and that he had no recollection at the time of the deposition what vessels were in the area at the time of the subject incident.<sup>2</sup>

#### SUMMARY JUDGMENT STANDARD

The standards applicable to summary judgment are well settled. Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of

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<sup>2</sup> Waterway also submits a 3101(d) expert exchange from plaintiff, which indicates that plaintiff's expert intends to testify that the subject incident was caused by Circle Line's failure to establish proper operating procedures. This exchange is irrelevant because the exchange, which contains no expert report at all, let alone a properly sworn report, is inadmissible hearsay. The exchange also does not in any way affect Waterway's prima facie showing of entitlement to summary judgement, and would be irrelevant even if properly admitted.

fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

#### DISCUSSION

Warren's affidavit is deficient for the purposes of establishing prima facie entitlement to summary judgment. Warren's affidavit effectively concedes that a Waterway vessel may have been present, but does not aver that, if Waterway's ferry operators were following Waterway's policies, Waterway's vessels could not possibly create a wake condition such as that alleged.<sup>3</sup> Waterway asks the Court to make this finding of fact, which, if not established by affidavit or other admissible evidence, can only be made by a jury.

Even if Waterway had successfully made a prima facie showing, its motion still would be denied because the deposition and affidavit of Giblin raise a triable issue of fact as to whether Waterway negligently caused a wake that caused or contributed to the alleged injuries. Waterway attacks Giblin's affidavit by contending that the affidavit contradicts Giblin's deposition testimony, which causes the affidavit to lose any probative value (*Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327, 327-28 [1st Dept 2006] ["A

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<sup>3</sup> Warren's affidavit does not address the maximum speeds of Waterway vessels permitted under Waterway policy, at any distance to the shoreline. Even if this information was provided, however, such information by itself would still be insufficient to establish as a fact that such speeds could not possibly result in the alleged wake condition. Waterway submits no evidence to this effect.

party's affidavit that contradicts his prior sworn testimony creates only a feigned issue of fact, and is insufficient to defeat a properly supported motion for summary judgment."]). The Court finds that no such material contradiction exists.

Waterway contends that Giblin "had no recollection at the time of his deposition of what vessels were in the area just prior to Ms. Bawany's accident" (Reply Affirmation at 2). However, Giblin made the referenced statement shortly after being asked, "Do you have a recollection of whether or not there was another vessel in the area *other than the New York Waterways ferry?*" (Giblin Deposition Transcript, page 138, lines 8-11 [emphasis added]). In context, Giblin's statement does not support Waterway's position. Furthermore, Giblin refers, in both his deposition transcript and his affidavit, to the incident report he prepared, and makes clear that his use therein of the term "fast ferries" referred specifically to Waterway's vessels. Regardless of his personal recollection of the subject incident, his credibility, and that of his incident report, raise triable issues of fact.

Waterway also notes that Giblin could not recall how he was notified of the subject incident<sup>4</sup>, but this is not relevant to the question of whether Waterway vessels were present at the time of the subject incident. Finally, Waterway maintains that Giblin had no recollection at the time of this deposition of any wake or roll occurring on the day of plaintiff's incident. While Giblin testified that he had no such recollection, he also testified that "[i]t wasn't one of the violent ones, but the boat was moving a little bit more" (Giblin's Deposition Transcript, page 137, lines 23-25). In any case, Giblin's recollection regarding a wake or roll is not dispositive, as plaintiff has alleged that the Miss Ellis Island and the gangplank were moving up and down at the time of and following the subject incident.

Waterway's remaining arguments have been considered and found unavailing.

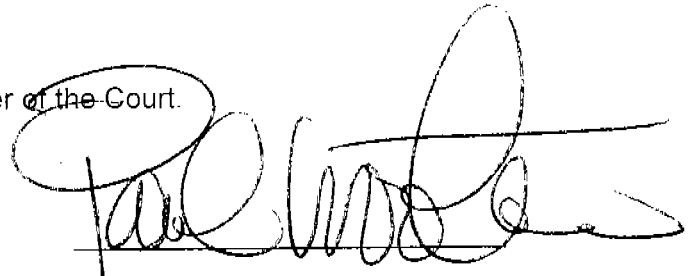
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<sup>4</sup>Waterway inaccurately cites Giblin's transcript, by stating that Giblin could not recall *when* he was notified of the subject incident. The cited portion of the transcript, however, only discusses the question of *how* Giblin was notified, and the timing thereof was not discussed.

Based upon the foregoing arguments and papers, it is

ORDERED, that the motion for summary judgment by Port Imperial Ferry Corp. d/b/a New York Waterway (sued herein as New York Waterways, Inc.) and New York Waterways Tours, LLC is hereby denied.

This constitutes the Decision and Order of the Court.



PAUL WOOTEN J.S.C.

Dated: May 24, 2011

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

**FILED**

JUN 08 2011

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