

Velez v Captain Luna's Marina, Inc.
2013 NY Slip Op 30201(U)
January 30, 2013
Sup Ct, Queens County
Docket Number: 31807/2007
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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JULIO A. VELEZ,

Index No.: 31810/2007

Plaintiff,

Motion Date: 9/13/12

Motion No.: 30,31,32,33, 34

- against -

Motion Seq.: 11,12,13,14,15

CAPTAIN LUNA'S MARINA, INC., CAPTAIN
MIKE, JOHN LUNA, VIVA EMPANADA, BABY
LUNA, SPLASH DRY CLEANING, QUEENS BAY
REALTY CORP., MIKE TANNON, CROSSBAY
FISHING STATION CORP., BENIFICA INC.
d/b/a SPLASH LAUNDROMAT, MLC FISHING,
INC., CLARA DECANDIA AS SURVIVING
JOINT TENANT BY THE ENTIRETY OF JOSEPH
DECANDIA, DECEASED, CLARA C. DECANDIA
REVOCABLE TRUST and ROMA VIEW
CATERING,

Defendants.

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The following papers numbered 1 to 74 read on this motion
by defendants/third-party plaintiffs Clara Decandia, as Surviving
Joint tenant By the Entirety of Joseph Decandia, Deceased, Roma
View Catering, Inc., and Clara C. Decandia Revocable Trust, as
Owner of Property With the Address of 160-05 Cross-Bay Blvd.,
Howard Beach, sued herein as Clara C. Decandia Revocable Trust
(collectively referred to as Decandia and Roma View) for summary
judgment dismissing the complaint and all cross claims and
counterclaims; by separate notice of motion by Benefica, Inc.,
doing business as Splash Laundromat, sued herein as Splash Dry
Cleaning (collectively referred to as Benefica), for leave to
renew a prior motion for summary judgment and upon renewal for
dismissal of the complaint; by separate notice of motion by
defendant Capt. Mike's Marina Corp., sued herein as Captain Mike,
Mike Tannon, and MLC Fishing, Inc. (collectively referred to as
Capt. Mike's) for summary judgment dismissing the complaint; by
separate notice of motion by Viva Empanada for summary judgment

dismissing the complaint and all cross claims; and by separate notice of motion by defendant Clara C. Decandia Revocable Trust, As Owner of 159-45 to 159-49 Cross Bay Blvd., Howard Beach, New York, sued herein as Clara C. Decandia Revocable Trust (Decandia as Owner of 159-45 to 159-49 Cross Bay Blvd.) for summary judgment dismissing the complaint and all cross claims and counterclaims.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits	1-20
Answering Affidavits - Exhibits	21-59
Reply Affidavits	60-74

Upon the foregoing papers it is ordered that the motions are determined as follows:

This is an action to recover for personal injuries plaintiff Julio A. Velez (plaintiff) allegedly sustained on September 22, 2007, when he slipped and fell on an aluminum ramp leading to a floating dock located at 159-35 Cross Bay Boulevard, in the County of Queens. Plaintiff has claimed that he slipped and fell on a slippery, greasy and oily substance while boarding a chartered fishing boat known as the "Capt. Mike." Decandia and Roma View owned and operated the restaurant known as Roma View Catering at the subject premises. Roma View Catering was responsible for containers located at or near the entrance of the aluminum ramp, which were receptacles for used cooking oil. Benefica operated a laundromat known as Splash Laundromat at the subject premises and allegedly leased the ramp and floating dock from its owner, Queens Bay Realty Corp. Benefica then sub-leased the ramp and floating dock to defendant Capt. Mike's Marina Corp. Viva Empanada operated a restaurant adjacent to the subject premises.

The record contains, among other things, plaintiff's deposition testimony, the testimony of Mike Cannon, Jr. (Cannon), a representative of Mike Tannon and MLC Fishing Inc., the testimony and affidavit of Clara Decandia, John Abbaticchio (Abbaticchio), the owner of Capt. Mike's Marina Corp./Captain Mike, Ana Cristina Pinheiro (Pinheiro), the owner of Benefica, and David Nieves (Nieves), the owner of Viva Empanada. It also contains copies of a lease of the ramp and floating dock between the dock's owner, Queens Bay Realty Corp., and Benefica, and a copy of the sub-lease between Benefica and Capt. Mike's Marina

Corp.

Decandia and Roma View have moved for summary judgment dismissing the complaint and all cross claims and counter claims and have argued that they did not have a duty to plaintiff because they did not own, occupy, control or maintain the ramp where plaintiff was injured, and that they did not created the alleged condition or have actual or constructive notice of it. On their motion, Decandia and Roma View have the initial burden of demonstrating the absence of any material issues of fact (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The existence of genuine issues of material fact preclude summary relief (see *Alvarez v Prospect Hosp.*, 68 NY2d at 324). "As a general rule, liability for a dangerous condition on real property must be predicated upon ownership, occupancy, control, or special use of that property" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d 729, 730 [2008]; see *Sanchez v 1710 Broadway, Inc.*, 79 AD3d 845, 846 [2010]). "Liability can be imposed upon a landowner or a lessee who creates a defective condition on the property, or had actual or constructive notice of the allegedly defective condition" (*Gover v Mastic Beach Prop. Owners Assn.*, 57 AD3d at 730; see *Sanchez v 1710 Broadway, Inc.*, 79 AD3d at 846).

Plaintiff testified that he was at the subject premises for a fishing excursion the boat "Capt. Mike", owned by MLC Fishing, Inc. Plaintiff boarded the boat via a ramp and waited for his colleagues to arrive for the trip, he testified that the ramp was slippery at the time he first boarded the boat, and that he observed at least one person slip on the ramp. Plaintiff testified that he disembarked the boat to assist a friend with carrying a cooler onto the boat, that he stepped in a slick and slippery substance on the ground before he stepped onto the ramp, and that, as he walked on the ramp to board the boat while carrying the cooler, he observed that the ramp was in a slippery condition and that he then slipped and fell.

Clara Decandia testified and stated in her affidavit that, she was the owner of property located at 159-49 Cross Bay Blvd., which included a parking lot of the restaurant Roma View Catering, that a trash compacter and receptacle for used cooking oil was situated on the premises approximately 8 to 10 feet from a gate to the floating docks and the ramp where plaintiff fell. Although she testified that the area around the used oil container at the approach to the ramp was clean and in a safe condition, Decandia and Roma View failed to present evidence of when the area was last inspected prior to plaintiff's fall (see *Klerman v Fine Fare Supermarket*, 96 AD3d 907, 908 [2012];

Rodriguez v Hudson View Assoc., LLC, 63 AD3d 1135, 1136 [2009]). Even though Decandia and Roma View have demonstrated that they did not own, occupy, or control the ramp where plaintiff fell, the evidence has also demonstrated that they did own, occupy, control, maintain and make use of the area at and around the entrance to the ramp, and thus, that they had a duty to maintain that area in a reasonably safe condition. In light of the contradictory testimony relied upon by Decandia and Roma View and by plaintiff in opposition to the motion, issues of fact exist, at least, with regard to whether a slick and slippery condition on the premises was created at or around the entrance area of the ramp that may have caused or contributed to plaintiff's fall. Moreover, in light of Cannon's testimony that plaintiff slipped on ice which had spilled out of the cooler he was carrying at the time of the incident, the record contains conflicting evidence regarding the proximate cause of plaintiff's fall. It is also of note that there is an issue of fact as to the actual location of the subject accident, since plaintiff has alleged an address of 159-35 Cross Bay Boulevard in his pleadings and papers, while the parties have proceeded to identify other addresses on Cross Bay Blvd. as the location of the alleged accident. Therefore, Decandia and Roma View are not entitled to the relief sought.

Benefica has moved for leave to renew its prior motion for summary judgment, and upon renewal, to dismiss the complaint. In an order dated September 1, 2011, this court denied Benefica's prior motion for summary judgment with leave to renew following the completion of discovery. As such is now complete and the note of issue has been filed, the court will address Benefica's motion for summary judgment. Benefica has argued that they it did not owe a duty to plaintiff because it did not own, occupy, or control, or make special use of the premises and that they did not create the condition or have had actual or constructive notice of it. Benefica leased the floating docks and ramp from Queens Bay Realty, and Capt. Mike's Marina Corp./John Abbaticchio, Pres., Undertenant sub-leased the floating docks and ramp from Benefica.

The evidence relied upon by Benefica, including the deposition testimony of Ana Cristina Pinheiro, its owner, the lease between Benefica and Queens Bay Realty, and a copy of the sub-lease agreement between Benefica and Capt. Mike's Marina Corp./John Abbaticchio, Pres., Undertenant, have shown that Cannon was responsible, under the sub-lease agreement, to maintain the ramp and dock. The evidence has also shown that Benefica had a duty, as lessee, to occupy and maintain the floating docks and ramp in a reasonably safe condition. Plaintiff testified that the ramp was in a slippery condition and

that he slipped and fell on the ramp. Since the evidence presented by Benefica has failed to otherwise demonstrate when the area was last inspected prior to plaintiff's fall, or whether Pinheiro inspected the ramp, an issue of fact exists, at least, as to whether Benefica had notice of a hazardous condition (see *Klerman v Fine Fare Supermarket*, 96 AD3d at 908; *Rodriguez v Hudson View Assoc., LLC*, 63 AD3d at 1136). Furthermore, Cannon's testimony that plaintiff slipped on spilled ice on the ramp has presented an issue of fact as to the proximate cause of plaintiff's fall, which cannot be resolved on this instant motion. Therefore, Benefica is not entitled to the relief sought.

Capt. Mike's have moved for summary judgment dismissing the complaint and have argued that they did not owe any duty to plaintiff and that they did not create the condition or have notice of it. Pursuant to a sub-lease agreement with Benefica, Capt. Mike's Marina Corp./John Abbaticchio, Pres., Undertenant was responsible for the ramp and floating dock. Abbaticchio testified that the sub-lease agreement included the area from the property's bulkhead to the floating docks and that he purchased and installed the ramp leading to the dock. Abbaticchio further testified that he had walked on the ramp hundreds of times prior to plaintiff's fall and had never observed it in a slippery condition, and he and Cannon testified that they never saw any grease or foreign substance around the containers which were situated at or near the entrance to the ramp. Cannon further testified that he was responsible for the ramp, that it was scrubbed clean with soap and water on a weekly basis, that the ramp was not in a slippery condition, but that plaintiff's fall occurred when ice spilled out of the cooler that plaintiff was carrying and onto the ramp, which caused plaintiff to slip. However, plaintiff testified that the ramp was in a slippery condition, that he observed at least one other person slip on it and that his fall occurred while he was walking on the ramp. Therefore, based upon this conflicting testimony, an issue of fact exists, at least, as to whether a hazardous condition of the ramp caused or contributed to plaintiff's fall. Thus, Capt. Mike's is not entitled to the relief sought.

Viva Empanada has moved for summary judgment dismissing the complaint and all cross claims and has argued that they did not owe a duty to plaintiff and did not create or have notice of the alleged condition which caused plaintiff's fall. Nieves testified that he was the owner of Viva Empanada at the time of the incident, that Viva Empanada did not own, occupy, control, lease or maintain the parking lot area at or around the entrance to the ramp or the ramp itself, and that they did not cause the

alleged slippery condition because Viva Empanada disposed of its used cooking oil in containers at a different location from Roma View Catering's containers. He testified that Viva Empanada's oil storage containers were located approximately 30 to 40 feet away from the gate leading to the ramp where plaintiff fell, that he never observed a leak in Viva Empanada's storage containers, and that Viva Empanada never disposed of garbage in the dumpsters located close to the gate where the entrance to the ramp was located. Cannon also testified that he never observed Viva Empanada's employees create an oily, greasy or slippery condition at the entrance to the ramp or on the ramp and that he never observed them leave any type of debris in the parking lot area. In light of the evidence in the record, Viva Empanada has demonstrated that it did not own, occupy, control or maintain the area where plaintiff has alleged that he stepped in a slippery or oily substance or the ramp where plaintiff ultimately slipped and fell. No triable issue of fact has been raised in opposition. Therefore, Viva Empanada is entitled to the summary relief sought.

Decandia as Owner of 159-45 to 159-49 Cross Bay Blvd. has moved for summary judgment dismissing the complaint and all cross claims and counterclaims and has argued that it owed no duty to plaintiff and that it did not create the condition or have notice of it. Although Decandia as Owner of 159-45 to 159-49 Cross Bay Blvd. has presented evidence that it did not own, occupy, control or maintain the ramp where plaintiff's fall occurred, it has failed to demonstrate that it did not own, occupy, control or maintain the premises at the entrance to the ramp, where plaintiff has alleged he stepped in a slick and oily substance before stepping onto the ramp. In light of the above determination that issues of fact remain, at least, as to the location of the incident, the proximate cause of the incident, and as to whether a slick or slippery condition existed on the premises which caused or contributed to plaintiff's fall, Decandia as Owner of 159-45 to 159-49 Cross Bay Blvd. is not entitled to summary relief on this motion.

Accordingly, the motion by Decandia and Roma View for summary judgment dismissing the complaint and all cross claims and counterclaims is denied. Benefica's motion for summary judgment is denied. Capt. Mike's motion for summary judgment is denied. Viva Empanada's motion for summary judgment dismissing the complaint and all cross claims is granted. Decandia as Owner of 159-45 to 159-49 Cross Bay Blvd.'s motion for summary judgment dismissing the complaint and all cross claims and counterclaims is denied.

Dated: January 30, 2013

ROBERT J. MCDONALD
J.S.C.