SHORT FORM ORDER

INDEX No. 11-38702
CAL No. 13-01142OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 12-3-13
ADJ. DATE 12-17-13
Mot. Seq. #001 - MG; CASEDISP

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PAUL KEMP and JANICE KEMP,

Plaintiffs,

- against -

TOWN OF BROOKHAVEN,

Defendant.

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BROOKHAVEN TOWN ATTORNEY
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant, dated October 16, 2013, and supporting papers; (2) Affirmation in Opposition by the plaintiffs , dated November 24, 2013, and supporting papers; (3) Reply Affirmation by the defendant, dated December 13, 2013, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion by defendant Town of Brookhaven for summary judgment in its favor is granted.

Plaintiff Paul Kemp commenced this action to recover damages for personal injuries he allegedly sustained on June 30, 2011, when he slipped and fell while walking on a public boat-launching ramp at the Port Jefferson Marina, which is owned and operated by defendant Town of Brookhaven. Plaintiff's wife, Janice Kemp, brought a derivative claim for loss of services. By their bill of particulars, plaintiffs allege, in relevant part, that algae and other vegetation on the surface of the boat ramp created a dangerous condition, that plaintiff's fall was caused by such

condition, and that the Town was negligent, among other things, in failing to remove algae that had accumulated on the ramp, in failing to provide notice of the slippery condition on the ramp, and in failing to provide a safe means of passage on the ramp.

The Town now moves for summary judgment dismissing the complaint, arguing that it cannot be held liable for plaintiff's injuries, because such injuries were caused by a risk he voluntarily assumed in connection with the activity of powerboating, namely, the presence of algae on the surface of a boat-launching ramp. In support of its motion, the Town submits copies of the pleadings, the notice of claim served by plaintiff, and the transcripts of plaintiff's testimony at a 50-h hearing and at an examination before trial. Plaintiffs oppose the motion, arguing triable issues exist as to whether the Town unreasonably increased the risk of harm by permitting an accumulation of algae to exist on the subject boat ramp, and as to whether plaintiff was engaged in a sporting activity within the scope of the primary assumption of risk doctine. In opposition, plaintiffs submit a copy of the bill of particulars, a transcript of the deposition testimony of Joyce Brown, an employee of the Town's Parks Department who supervises the Town's marinas and docks, and photographs of the subject boat ramp taken by plaintiff shortly after the accident.

It is axiomatic that to prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that such breach was a proximate cause of the his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Miglino v Bally Total Fitness of Greater N.Y.***, 92 AD3d 148, 937 NYS2d 63 [2d Dept 2011]). A duty of reasonable care owed by the tortfeasor to the plaintiff is essential to any recovery in negligence (***Eiseman v State of New York***, 70 NY2d 175, 187, 518 NYS2d 608 [1987]; *see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393). Although juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (***Church v Callanan Indus.***, 99 NY2d 104, 110-111, 752 NYS2d 254 [2002]; ***Darby v Compagnie Natl. Air France***, 96 NY2d 343, 347, 728 NYS2d 731 [2001]).

A property owner or possessor has a duty to maintain its property in a reasonably safe condition (*see* ***Peralta v Henriquez***, 100 NY2d 139, 760 NYS2d 741 [2003]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). To impose liability based on a failure to keep premises in a reasonably safe condition, a plaintiff must show the existence of a dangerous or defective condition on the property, that such condition caused his or her injuries, and that the defendant created the condition or had actual or constructive notice of it (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]; ***Winder v Executive Cleaning Servs., LLC***, 91 AD3d 865, 936 NYS2d 687 [2d Dept], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]; ***Bolloli v Waldbaum, Inc.***, 71 AD3d 618, 896 NYS2d 400 [2d Dept 2010]; ***Barland v Cryder House***, 203 AD2d 405, 610 NYS2d 554 [2d Dept], *lv denied* 84 AD3d 947, 621 NYS2d 511 [1994]). The owner or possessor of real property, however, is not an insurer of the safety of

people on its property (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Donohue v Seaman's Furniture Corp.***, 270 AD2d 451, 705 NYS2d 291 [2d Dept 2000]; ***Novikova v Greenbriar Owners Corp.***, 258 AD2d 149, 694 NYS2d 445 [2d Dept 1999]), and has no duty to warn or to protect against an open or obvious condition that is "inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it" (***Groom v Village of Sea Cliff***, 50 AD3d 1094, 1094, 857 NYS2d 646 [2d Dept 2008]; *see* ***Progressive Northeastern Ins. Co. v Town of Oyster Bay***, 40 AD3d 612, 835 NYS2d 406 [2d Dept 2007]; ***Stanton v Town of Oyster Bay***, 2 AD3d 835, 769 NYS2d 383 [2d Dept 2003], *lv denied* 3 NY3d 604, 784 NYS2d 7 [2004]; ***Nardi v Crowley Mar. Assoc.***, 292 AD2d 577, 741 NYS2d 246 [2d Dept 2002]).

Furthermore, it is well settled that by engaging in a sport or a recreational activity, a participant consents "to those commonly appreciated risks which are inherent in and arise out of the nature of the sport [or activity] and flow from such participation" (***Morgan v State of New York***, 90 NY2d 471, 484-486, 662 NYS2d 421 [1997]; *see* ***Anand v Kapoor***, 15 NY3d 946, 917 NYS2d 86 [2010]; ***Cruz v Longwood Cent. School Dist.***, 110 AD3d 757, 973 NYS2d 260 [2d Dept 2013]; ***Mussara v Mega Funworks, Inc.***, 100 AD3d 185, 952 NYS2d 568 [2d Dept 2012]; ***Mendoza v Village of Greenport***, 52 AD3d 788, 861 NYS2d 738 [2d Dept 2008]; ***Joseph v New York Racing Assn.***, 28 AD3d 105, 809 NYS2d 526 [2d Dept 2006]). The primary assumption of risk doctrine is not an absolute defense to liability, but a measure of the duty of care owed by the defendant (***Custodi v Town of Amherst***, 20 NY3d 83, 87, 957 NYS2d 268 [2012]; ***Turcotte v Fell***, 68 NY2d 432, 439, 510 NYS2d 49 [1986]; ***Taylor v Massapequa Intl. Little League***, 261 AD2d 396, 397, 689 NYS2d 523 [2d Dept 1999]; *see* ***Trupia v Lake George Cent. School Dist.***, 14 NY3d 392, 901 NYS2d 127 [2010]). As explained by the Court of Appeals in the ***Trupia*** case, "by freely assuming a known risk, a plaintiff commensurately negates any duty [of care] on the part of the defendant to safeguard him or her from the risk" (***Trupia v Lake George Cent. School Dist.***, 14 NY3d 392, 395, 901 NYS2d 127). Thus, under the primary assumption of risk doctrine, a person who engages in an athletic or recreational activity will be barred from recovering damages for injuries sustained during a such activity if it is established that the injury-causing conduct, event or condition was known, apparent or reasonably foreseeable (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421; ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [1989]; ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49; ***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]).

Nevertheless, a negligence claim will not be dismissed if the defendant's negligent action or inaction "created a dangerous condition over and above the usual dangers" inherent in the sport or recreational activity (***Owen v R.J.S. Safety Equip.***, 79 NY2d 967, 970, 582 NYS2d 998 [1992]; *see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421; ***Rosenbaum v Bayis Ne'Emon, Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]). In assessing the risks assumed by a plaintiff when he or she elected to participate in the sport or recreational activity, and the duty of care owed by the owner or operator of the property used for such activity, a court must

consider the skill and experience of the particular plaintiff (***Morgan v State of New York***, 90 NY2d 471, 486, 662 NYS2d 421; ***Maddox v City of New York***, 66 NY2d 270, 278, 496 NYS2d 726; ***Fenty v Seven Meadows Farms, Inc.***, 108 AD3d 588, 589, 969 NYS2d 506 [2d Dept 2013]), as well as the nature of the defendant's conduct (*see e.g.* ***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [plaintiff does not assume risk of reckless or intentional conduct]; ***Benitez v New York City Bd. of Educ.***, 73 NY2d 650, 543 NYS2d 29 [plaintiff does not assume concealed or unreasonably increased risks]). "[I]f the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" to make the conditions as safe as they appear to be (***Turcotte v Fell***, 68 NY2d 432, 439, 510 NYS2d 49).

The Town's submissions are sufficient to establish a prima facie case that plaintiff, an experienced boater, voluntarily assumed the risk he might slip on the algae present on the surface of the boat ramp (*see* ***Best v Town of Islip***, 265 AD3d 357, 696 NYS2d 228 [2d Dept 1999]; *see also* ***Joseph v New York Racing Assn.***, 28 AD3d 105, 809 NYS2d 526; *cf.* ***Schiff v State of New York***, 31 AD3d 526, 818 NYS2d 597 [2d Dept 2006]). The submissions also show that the algae growth was a condition inherent to the nature of the property that reasonably should be anticipated by people using the ramp and, therefore, did not create an unreasonably dangerous condition at the marina for which the Town may be held liable (*see* ***Fox v Central Park Boathouse, LLC***, 71 AD3d 598, 897 NYS2d 713 [1st Dept 2010]; ***Groom v Village of Sea Cliff***, 50 AD3d 1094, 857 NYS2d 646; ***Stanton v Town of Oyster Bay***, 2 AD3d 835, 769 NYS2d 383; ***Nardi v Crowley Mar. Assoc.***, 292 AD2d 577, 741 NYS2d 246). At his 50-h hearing and his examination before trial, plaintiff testified that on the day of his accident he trailered his powerboat to the Port Jefferson Marina and, at approximately 11:00 a.m., launched the boat into the water using a public concrete ramp designated as ramp 3. He testified that he had owned his power boat since 2004, and that he had used ramp 3 at the marina at least 100 times without incident prior to his accident. Plaintiff testified that, upon returning to the marina at approximately 4:00 p.m., when the tide was low, he tied the boat to a floating dock located alongside the ramp, walked from the dock to the parking lot to retrieve his pick-up truck and boat trailer, and then drove back to the ramp. He testified he backed the truck with the attached trailer onto the ramp, driving down just far enough so that the tires of the trailer were underneath the water, and then stopped and exited from the driver's side. Plaintiff testified that, intending to load the boat back onto the trailer, he walked down the ramp to attach the winch hook to the bow eye. He testified that as he arrived at the winch area of the trailer, his left foot slipped out from underneath him and he fell to the ground. He further testified that while the surface of the ramp is textured to provide traction, green algae was growing on it in the area where he fell, that it was common for algae to be present on the ramp, and that he saw algae on the surface of the ramp, growing from where his truck was parked down to the water line, before the accident, when he exited the truck and walked back to the boat trailer.

Plaintiffs failed to submit evidence raising a triable issue of fact. In opposition to the motion, plaintiffs argue the deposition testimony given by Joyce Brown that Town employees did

not regularly clean algae growing on the surface of the boat ramp, and that she did not know when the ramp was last cleaned before plaintiff's accident, raises a triable issue as to whether the Town unreasonably increased the danger for boaters using the ramp. However, as mentioned above, the Town has no duty to warn or protect against the algae condition, which was open and obvious, inherent in the nature of the marina, and known to plaintiff (*see* ***Groom v Village of Sea Cliff***, 50 AD3d 1094, 857 NYS2d 646; ***Progressive Northeastern Ins. Co. v Town of Oyster Bay***, 40 AD3d 612, 835 NYS2d 406; ***Stanton v Town of Oyster Bay***, 2 AD3d 835, 769 NYS2d 383; ***Nardi v Crowley Mar. Assoc.***, 292 AD2d 577, 741 NYS2d 246), and no evidence was offered showing it unreasonably increased the risk of injury to boaters (*see* ***Gerry v Commack Union Free School Dist.***, 52 AD3d 467, 860 NYS2d 133 [2d Dept 2008]; ***Rivera v Glen Oaks Vil. Owners, Inc.***, 41 AD3d 817, 839 NYS2d 183 [2d Dept 2007]). The argument that the primary assumption of risk doctrine does not apply in this action, because plaintiff, having returned to the marina and tied his boat up at the floating dock, was no longer engaged in the recreational activity of boating when he slipped is rejected, as is the argument that plaintiff did not assume the risk of slipping on algae when using the boat ramp (*see* ***Best v Town of Islip***, 265 AD2d 357, 696 NYS2d 228; *see also* ***Wilck v Country Pointe at Dix Hills Homeowners Assn., Inc.***, 111 AD3d 822, 975 NYS2d 145 [2d Dept 2013]; ***Mondelli v County of Nassau***, 49 AD3d 826, 854 NYS2d 224 [2d Dept 2008]; ***LaFond v Star Time Dance & Performing Arts Ctr.***, 279 AD2d 509, 719 NYS2d 273 [2d Dept 2001]).

Dated: 4/25/14

PETER H. MAYER, J.S.C.