Ferrari v Bob's Canoe Rental, Inc.
2014 NY Slip Op 32209(U)
July 31, 2014
SupSup Ct, Suffolk County
Docket Number: 09-6690
Judge: Denise F. Molia
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[* 1]

SHORT FORM ORDER

COPY

INDEX No. 09-6690
CAL No. 11-01996OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 2-15-12
ADJ. DATE 5-02-14
Mot. Seq. # 003 - MG; CASEDISP
004 - MD

---X

KATHLEEN FERRARI, as Administratrix of the Estate of DENNIS FERRARI, and KATHLEEN FERRARI, Individually.

Plaintiffs,

- against -

BOB'S CANOE RENTAL, INC.,

Defendant.

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Upon the following papers numbered 1 to 49 read on these motions for summary judgment and to dismiss ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 21, 38 - 49 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 22 - 34 ; Replying Affidavits and supporting papers 35 - 37 ; Other memorandum of law 3 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted, and it is further

ORDERED that the motion by the defendant for an order pursuant to CPLR 1021 dismissing the complaint for failure to substitute a representative on behalf of the decedent Dennis Ferrari is denied as academic.

This action was commenced to recover damages for personal injuries allegedly sustained by the plaintiff Kathleen Ferrari, and her husband, the decedent Dennis Ferrari, when they were exposed to the elements after becoming stranded at low tide while canoeing on the Nissequogue River in Suffolk County, New York. The Ferraris had rented the canoe used by them that day from the defendant. In the complaint, the Ferraris allege, among other things, that the defendant was negligent in permitting them to rent the canoe and launch so close in time to low tide, and in advising them that it was safe to begin their canoe trip when the defendant knew or should have known it was unsafe to do so.

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The following facts involving this incident are undisputed. The Ferraris rented a canoe from the defendant on October 27, 2008, intending to make a one-way trip on the Nissequogue River from a launching site located in a park in Smithtown, New York to a park in Kings Park, New York. Both sites were used by the defendant in its business of renting canoes to the public. The defendant's employee, Geoffrey Lawrence, met the Ferraris, both signed the defendant's release of liability form, and Dennis Ferrari signed a written lease agreement for the canoe.

The defendant now moves for summary judgment on the grounds that the Ferraris assumed the risk of their activities and that the defendant did not breach a duty of care. In support of the motion, the defendant submits, among other things, the pleadings, the deposition transcripts of the parties, the deposition transcripts of three nonparty witnesses, and an affidavit from an expert. 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 issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (***Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.***, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

At his deposition, Dennis Ferrari testified that he had canoed approximately 12 times when he was younger and a Boy Scout, and that, before this incident, he had canoed as an adult on the Nissequogue River two times. He indicated that his first trip took four to four and one-half hours to travel the length of the river, and that his second trip took five hours to complete. He stated that he rented canoes for those trips, that he "believes" they were rented from the defendant, and that the rental company "schedule[s] you around the tides." Dennis Ferrari further testified that he called the defendant the day before this trip to rent a canoe, that he believes that he was told it would be high tide for his trip at either 9:00 or 10:00 a.m, and that he was aware that low tide was generally six hours after high tide. He stated that he himself checked the time of high tide in the local newspaper, and that he does so "every day, because I do a lot of fishing." He indicated that, on the day of this incident, he awoke at 7:30 or 8:00 a.m. and had breakfast, that he packed a lunch with wine and vodka, that he left his home at 9:30 a.m. to travel to Smithtown to rent the canoe, and that no one from the defendant was there when he arrived at approximately 10:00 a.m. He declared that neither he or his wife had cell phones, that they waited approximately one hour and then contacted the defendant by pay phone, and that he was told to travel to the mouth of the river in Kings Park. Dennis Ferrari further testified that he arrived at Kings Park at 11:30 or 11:45 a.m., that "there was somebody waiting there," and "by this time, I'm thinking that its getting a little late, and I asked him if it was going to be a problem." He stated that the person then drove them back to Smithtown, that they arrived "probably close to 12:30," and "I just asked if we had enough time to make it down river. He said, yeah, it won't be a problem." He indicated that he and his wife launched the canoe a little after 12:30, that both were paddling the canoe, and that they did not eat or drink anything before they "got stuck" at approximately 4:30 p.m. Dennis Ferrari further testified that, for the approximately four hours before they were stranded, he and his wife were paddling

"leisurely, because the river ... takes you," and that he noticed the tide "going out fast" approximately 20 minutes before they got stuck in the mud. He indicated that he and his wife paddled "maybe a couple of hundred yards" in that last 20 minutes, that, "as the water started to go out," he tried to paddle closer to the shore, and that they became stranded near the Smithtown Landing Country Club. He stated that the Country Club was approximately three or four miles from the launch site in Smithtown and more than halfway to Kings Park, that he did not have any difficulties with the canoe before he and his wife were stranded, and that, after they were stuck, he got out of the canoe to attempt to pull it to shore. He was unsuccessful and re-entered the canoe. He declared that the sun went down at approximately 5:00 or 5:30 p.m., and that he and his wife were not rescued for hours after they were stranded.

At her deposition, Kathleen Ferrari testified that she had never been canoeing before, that her husband told her that he had canoed on the Nissequogue River twice before, and that he rented a canoe and said that they had to be at Smithtown at either 9:00 or 10:00 a.m. on the day of this incident. She stated that they waited approximately 15 minutes for someone from the defendant to show up, that they called from a pay phone, and that they were told that they had to go to Kings Park. She indicated that they met the man in Kings Park at approximately 11:00 a.m., that her husband asked if they were getting out too late and if it was safe, that the man said that they were fine, and the man told them to leave their car so that he could drive them back to Smithtown. Kathleen Ferrari further testified that, because they were approximately 20 minutes away from Smithtown, her husband kept asking about the tides and told the man that "we're not going to be actually going out until 11:30," and that the man kept assuring him that it was safe. She stated that they launched from Smithtown at approximately 12:00 p.m., that they paddled at "quite a pace" because her husband was "concerned that we kept moving," and that when her husband mentioned that tide was changing fast they were almost at the end of their trip. She indicated that she and her husband did not have any alcohol to drink until well after they were stranded and in order to combat the cold, and that it took hours before they were rescued.

Geoffrey Lawrence (Lawrence) was deposed on March 7, 2011, and testified that he was a seasonal full-time employee of the defendant in 2008, that he canoed the Nissequogue River daily that year, and that the length of the river from Smithtown to Kings Park is five and one-half miles. He stated that the defendant always launches its canoes from Smithtown, and that the average time to complete the trip to Kings Park at a moderate rate of paddling is two and one-half hours. He indicated that high tide was at approximately 10:30 a.m. on October 27, 2008, that low tide was at 4:30 p.m., and that the time for return of canoes was 4:30 p.m., as it is always at the time of low tide. Lawrence further testified that the Ferraris signed the releases and lease agreement in his truck at Kings Park, that he gave them general instructions, and that Dennis Ferrari said he was experienced, he had done this before, and he knew where he was going. He stated that he recalled Dennis Ferrari asking if they still had time to launch, and that, generally, the latest time that he would rent a canoe to someone, depending on the tide and time of sunset, would be 2:00 p.m. He indicated that he advised Dennis Ferrari that they could not be in later than 4:30 p.m. that day, that he did not know of any other incidents where someone was stranded on the river, and that he waited in Kings Park for the Ferraris after they launched. He declared that he became anxious when the Ferraris did not arrive at 4:30 p.m., that he went looking for them in his truck, and that he found them stranded near the Smithtown Landing Country Club.

Nonparty witness Ann Schumacher was deposed on September 3, 2010, and testified that she was employed by the Smithtown Fire Department as an EMT-B in 2008, that she was also a registered nurse, and that she had training in hypothermia and intoxication. She stated that she and her crew responded to an emergency call on October 27, 2008, that this was the first time she had been called to rescue someone stuck on the Nissequogue River, and that she completed a patient care record regarding Dennis Ferrari. She indicated that Dennis Ferrari did not appear intoxicated, that she did not smell alcohol on his breath, and that he was not slurring his speech.

At his deposition, nonparty witness Edward Springer (Springer) testified that he was employed by the Smithtown Fire Department as an EMT-Critical Care in 2008, that he responded to an emergency call on October 27, 2008, and that he completed a care record regarding Kathleen Ferrari that date. He indicated that he recorded her blood pressure as 80/60, that she was hypothermic, and that her pupils were normal. He stated that if she was intoxicated her pupils would be "different [than] normal," and that he did not smell alcohol on her breath. Springer further testified that he has rented canoes on the Nissequogue River, that he was verbally told when high tide would be, and that he was aware that low tide is six hours later. He stated that "he believed" it took him three hours to complete a trip on the river, and that the Smithtown Landing Country Club is a little more than halfway to the end of the river.

Nonparty witness Greg Krockta (Krockta) was deposed on September 1, 2011, and testified that he was fishing on the Nissequogue River on the day of this incident, that he observed a man and a woman in a canoe, and that the woman was slumped over and looked "ill or something." He stated that the man was paddling the canoe, that the woman was not paddling, and that the man was yelling at the woman to "get up and paddle." He indicated that he did not know if the couple that he saw are "the same two people [involved in this lawsuit]," that he thinks that the two were the only "male and female combination" that he saw that day, and that he believes that he could identify the couple if shown photographs. Krockta further testified that he lives near the river less than one mile from the launching area, that he often fishes and boats on the river, and that it would take a novice approximately two hours to get from the Smithtown ... launching area to the end of the river."

In an affidavit dated December 8, 2011, the defendant's expert witness, David Smith (Smith), swears that he is a retired commander with the United States Coast Guard and, among other things, a member of the National Safe Boating Council. He states that he has reviewed the complaint and bill of particulars, the depositions of the Ferraris, Lawrence and Krockta, and the tidal data for the Nissequogue River. He indicates that he inspected the river on June 14, 2011, when he paddled a canoe from the Smithtown launch site to the vicinity of the Smithtown Landing Country Club. Smith further swears that he chose the June date because the tidal times were substantially the same as on the date of this incident, that he was provided a 17-foot aluminum canoe, and that he took a companion but that "he was the sole paddler of the canoe at all times." He states that he was 73 years old at the time, and that the combined weight of he and his companion was 426 pounds. He indicates that his review of the Ferraris depositions reveals that their combined weight was 302 pounds, and that Dennis Ferrari was 49 years old on the day of this incident. Smith further swears that he launched his canoe at 11:38 a.m., encountered a headwind of 5-10 miles per hour, and arrived at the Smithtown Landing Country Club at 1:03 p.m. having covered a distance of 3.2 miles in 1 hour and 25 minutes. He states that he estimates that he would have completed the 5 ½ miles from Smithtown to Kings Park in 2 hours and 26 minutes. Smith

opines that, with a reasonable degree of boating and aquatic safety certainty, the Ferraris had "ample time to complete the course of the Nissequogue River well before the onset of low tide" on the date of this incident.

As a general rule, a plaintiff who voluntarily participates in a sporting or recreational event is held to have consented to those commonly-appreciated risks that are inherent in, and arise out of, the nature of the sport generally and flow from participation therein (*see* ***Morgan v State of New York***, 90 NY2d 471, 662 NYS2d 421 [1997]; ***Mendoza v Village of Greenport***, 52 AD3d 788, 861 NYS2d 738 [2d Dept 2008]; ***Paone v County of Suffolk***, 251 AD2d 563, 674 NYS2d 761 [2d Dept 1998]), including the injury-causing events which are the known, apparent, or reasonably foreseeable risks of the participation (*see* ***Cotty v Town of Southampton***, 64 AD3d 251, 880 NYS2d 656 [2d Dept 2009]; ***Rosebaum v Bayis Ne'Emon Inc.***, 32 AD3d 534, 820 NYS2d 326 [2d Dept 2006]). In addition, the plaintiff's awareness of risk is to be assessed against the background of the skill and experience of the particular plaintiff (*see* ***Maddox v City of New York***, 66 NY2d 270, 496 NYS2d 726 [1985]; ***Kremerov v Forest View Nursing Home, Inc.***, 24 AD3d 618, 808 NYS2d 329 [2d Dept 2000] Dept 2005]; ***Gahan v Mineola Union Free School Dist.***, 241 AD2d 439, 660 NYS2d 144 [2d Dept 1997]). If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty" (***Turcotte v Fell***, 68 NY2d 432, 510 NYS2d 49 [1986]). Stated otherwise, the duty of the defendant is to protect the plaintiff from injuries arising out of unassumed, concealed, or unreasonably increased risks (*see* ***Manoly v City of New York***, 29 AD3d 649, 816 NYS2d 499 [2d Dept 2006]; ***Lapinski v Hunter Mountain Ski Bowl***, 306 AD2d 320, 760 NYS2d 549 [2d Dept 2003]; ***Pascucci v Town of Oyster Bay***, 186 AD2d 725, 588 NYS2d 663 [2d Dept 1992]).

Here, the defendant has established that Dennis Ferrari was an experienced canoeist, with experience regarding the tides on the Nissequogue River, and with knowledge about the risk involved in canoeing at low tide. Dennis Ferrari testified that he had specific knowledge that low tide would occur at approximately 4:30 p.m. that date, and he indicated that it was his experience that a trip on the river could take five hours. Nonetheless, he decided to launch the rented canoe as late as 12:30 p.m., and apparently urged his wife to paddle at "quite a pace" to ensure that they accounted for the tides. It is determined that getting stranded at low tide, whether in a river or on a sand bar near a beach, is an inherent risk in canoeing and arises out of the nature of the sport. Accordingly, the defendant has established its prima facie entitlement to summary judgment on the ground that the Ferraris assumed the risk of canoeing on the river.

In addition, it is undisputed that, prior to their commencing their trip on the river, the Ferraris signed a release of liability form which states, in part:

> 2. I KNOWINGLY AND FULLY ASSUME ALL SUCH RISKS, both known and unknown, EVEN IF ARISING FROM THE NEGLIGENCE OF THE RELEASES or others, and assume full responsibility for my participation; and
>
> * * *

> 4. I, for myself and on behalf of my heirs ... HEREBY RELEASE, INDEMNIFY, AND HOLD HARMLESS THE Bob's Canoe Rental, Inc. ... WITH RESPECT TO ANY AND ALL INJURY, DISABILITY, DEATH, or loss or damage to person or property associated with my presence or participation, WHETHER ARISING FROM THE NEGLIGENCE OF THE RELEASEES OR OTHERWISE, to the fullest extent of the law.

Exculpatory provisions in a contract, including a release or a covenant not to sue, are generally enforced although they are disfavored by the law and closely scrutinized by the courts (***Lago v Krollage***,78 NY2d 95, 571 NYS2d 689 [1991]). Thus, the language of the exculpatory agreement must express the intention of the parties in unequivocal terms in order to relieve a defendant from liability for negligence (***Lago v Krollage***, *id.*; ***Gross v Sweet***, 49 NY2d 102, 424 NYS2d 365 [1979]). It must appear absolutely clear that the agreement extends to negligence or other fault of the party (***Gross v Sweet***, *id.*, ***Van Dyke Prods. v Eastman Kodak Co.***, 12 NY2d 301, 239 NYS2d 337 [1963], ***Ciofalo v Vic Tanney Gyms***, 10 NY2d 294, 220 NYS2d 962 [1961]). "That does not mean that the word 'negligence' must be employed for courts to give effect to an exculpatory agreement; however, words conveying a similar import must appear" (***Gross v Sweet***, *supra*). Here, the defendant has established its prima facie entitlement to summary judgment on the ground that the Ferraris are bound by the release of liability herein.

Having established its entitlement to summary judgment dismissing the complaint, it is incumbent upon the plaintiff to produce evidence in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, *supra*; ***Rebecchi v Whitmore***, *supra*; ***O'Neill v Fishkill***, *supra*). In opposition to the defendant's motion, the plaintiff submits, among other things, four newspaper articles, the pleadings and bill of particulars, the deposition transcripts of the parties, and the affirmation of her attorney. The newspaper articles relied on by the plaintiff are plainly inadmissible and they have not been considered by the Court in making this determination (***Young v Fleary***, 226 AD2d 454, 640 NYS2d 593 [2nd Dept 1996] [newspaper articles submitted on summary judgment motion constitute inadmissible hearsay]; *see also* ***P & N Tiffany Props. Inc. v Maron***, 16 AD3d 395, 790 NYS2d 396 [2d Dept 2005]; ***Platovsky v City of New York***, 275 AD2d 699, 713 NYS2d 358 [2d Dept 2000]).

In his affirmation, counsel for the plaintiff contends that the defendant had a duty to warn the Ferraris that it was essential that they complete their trip on the river "well before the 4:30 low tide," and that the Ferraris justifiably relied on the defendant's material misrepresentation that it was safe to leave as late as they did that day. The affidavit of an attorney who has no personal knowledge of the facts is insufficient to raise an issue of fact on a motion for summary judgment (***Sanbria v Paduch***, 61 AD3d 839, 876 NYS2d 874 [2d Dept 2009]; ***Warrington v Ryder Truck Rental, Inc.***, 35 AD3d 455, 826 NYS2d 152 [2d Dept 2006]; ***9394, LLC v Farris***, 10 AD3d 708, 782 NYS2d 281 [2d Dept 2004]; ***Deronde Prods., Inc. v. Steve Gen. Contr., Inc.***, 302 AD2d 989, 755 NYS2d 152 [4th Dept 2003]). The plaintiff has not submitted any evidence that individuals canoeing on the Nissequogue River must fully complete the trip "well before" low tide, or that the Ferraris could not have completed their trip on the river having left as late as 12:30. In addition, the plaintiff has not submitted any evidence why it took approximately four hours to traverse a little more than halfway on their trip, or to rebut the

testimony of Lawrence and the nonparty witnesses, as well as the opinion of the defendant's expert, that the entire trip takes three hours or less to complete, paddling at a moderate rate.

The plaintiff's remaining contention sounds in negligent misrepresentation. In order to prevail on her claim, the plaintiff must establish that the defendant had a "duty to use reasonable care to impart correct information due to a special relationship existing between the parties, that the information provided by plaintiff was incorrect or false, and that the plaintiff reasonably relied upon the information provided (***J.A.O. Acquisition Corp. v Stavitsky***, 8 NY3d 144, 831 NYS2d 364 [2007]; ***MatlinPatterson ATA Holdings LLC v Federal Express Corp.***, 87 AD3d 836, 929 NYS2d 571 [1st Dept 2011]; ***Fleet Bank v Pine Knoll Corp.***, 290 AD2d 792, 736 NYS2d 737 [3d Dept 2002]; *see also* ***Fresh Direct, LLC v Blue Martini Software***, 7 AD3d 487, 776 NYS2d 301 [2d Dept 2004]; ***Grammar v Turits***, 271 AD2d 644, 706 NYS2d 453 [2d Dept 2000]). As noted above, the plaintiff has failed to submit any evidence that the information provided by Lawrence was incorrect or false. In addition, the testimony of Dennis Ferrari and Kathleen Ferrari establishes that they did not reasonably rely on Lawrence's general statement that it was safe to leave as late as 12:30 p.m. that day. Dennis Ferrari testified as to his knowledge that low tide was at 4:30 p.m. that day, and that, according to him, the trip could take five hours. Kathleen Ferrari testified that her husband was concerned that they paddle at more than a moderate pace. Despite this, the plaintiff has failed to submit any evidence why they were only able to traverse a little more than halfway on their trip before becoming stranded, and how Lawrence's general statements mislead them.

In addition, despite the fact that this is not a wrongful death case, counsel for the plaintiff also contends that the Ferraris are entitled to every inference that can reasonably be drawn from the evidence in determining whether a prima facie case of negligence is made as against the defendant (*see* ***Noseworthy v City of New York***, 298 NY 76, 80, 80 NE2d 744 [1948]). Setting aside the issue whether the doctrine is applicable herein, even with the reduced burden of proof thereunder, the plaintiff is required to submit proof from which the defendant's negligence may be inferred (*see* ***Sanchez-Santiago v Call-A-Head Corp.***, 95AD3d 1292, 945 NYS2d 716 [2d Dept 2012]; ***Barbaruolo v DiFede***, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]; ***Martone v Shields***, 71 AD3d 840, 899 NYS2d 249 [2d Dept 2010], and the plaintiff is not absolved from demonstrating the existence of a triable issue of fact to avoid summary judgment (***Albinowski v Hoffman***, 56 AD3d 401, 868 NYS2d 76 [2d Dept 2008]; ***Blanco v Oliveri***, 304 AD2d 599, 600, 758 NYS2d 376 [2d Dept 2003]). In any event, the subject doctrine is not applicable under the circumstance herein as the defendant's knowledge as to the cause of the decedent's accident is no greater than that of the plaintiff (***Knudsen v Mamaroneck Post No. 90, Dept. of N.Y. - Am. Legion, Inc.***, 94 AD3d 1058, 942 NYS2d 800 [2d Dept 2012]; ***Zalot v Zieba***, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]; ***Martone v Shields***, *supra*; ***Kuravskaya v Samjo Realty Corp.***, 281 AD2d 518, 721 NYS2d 836 [2d Dept 2001]).

Finally, the plaintiff has not submitted any evidence to dispute the efficacy of the signed release of liability, and does not address the issue in her opposition to the defendant's motion. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (*see* ***McNamee Constr. Corp. v City of New Rochelle***, 29 AD3d 544, 817 NYS2d 295 [2d Dept 2006]; ***Welden v Rivera***, 301 AD2d 934, 754 NYS2d 698 (3d Dept 2003]; ***Hajderlli v Wiljohn 59 LLC***, 24 Misc3d 1242A, 2009 NY Slip Op 51849U [Sup Ct, Bronx County

2009]). Accordingly, the defendant's motion for summary judgment dismissing the complaint is granted.

The Court now turns to the defendant's motion for an order pursuant to CPLR 1021 dismissing the complaint for failure to substitute a representative on behalf of the decedent Dennis Ferrari. The computerized records maintained by the Court indicate that the parties entered into a stipulation to amend the caption to reflect Kathleen Ferrari's appointment as the executrix of the estate of Dennis Ferrari. Said stipulation was so-ordered by the undersigned on October 17, 2013, and recorded with the Clerk of the Court on October 21, 2013. Accordingly, the defendant's motion is denied as academic.

Dated: 7-31-14

Hon. Daniel R. Molia
A.J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION