Landisi v Bridgeport & Port Jefferson Steamboat Co.
2015 NY Slip Op 32638(U)
September 28, 2015
Supreme Court, Nassau County
Docket Number: 602593/12
Judge: F. Dana Winslow

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

THOMAS LANDISI and MARY CLAIRE DUMAS-LANDISI,

Plaintiffs,

-against-

MOTION SEQ. NO.: 001, 002
MOTION DATE: 8/21/15

THE BRIDGEPORT & PORT JEFFERSON STEAMBOAT COMPANY,

INDEX NO.: 602593/12

Defendants.

The following papers having been read on the motion (numbered 1-5):

Notice of Motion.....1
Notice of Cross Motion.....2
Affirmation in Opposition.....3
Reply Affirmation.....4
Memorandum of Law.....5

This motion by the defendant The Bridgeport & Port Jefferson Steamboat Company (" the ferry company ") for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint against it is determined as provided herein.

This cross-motion by the plaintiffs for an order pursuant to CPLR 3043 (c) granting them leave to amend their Bill of Particulars is determined as provided herein.

The plaintiffs in this action seek to recover for personal injuries that the plaintiff Thomas Landsi ("plaintiff") suffered as the result of a trip and fall he experienced on a vessel owned by the defendant ferry company on March 25, 2012. The plaintiff's wife Mary Claire Dumas-Landsi seeks to recover for loss of consortium. The ferry company seeks dismissal of the complaint. It maintains that the undisputed facts of this case demonstrate that the door sill which the plaintiff tripped over was readily observable and not inherently dangerous as a matter of law and so therefore, there are no grounds for imposing liability.

The facts pertinent to the determination of this motion are as follows:

The plaintiff, his wife and her parents attended a wedding in Bridgeport, Connecticut on March 24, 2012. The following morning, the plaintiff drove all of them to the ferry port in Bridgeport. After driving the car on to the ferry's deck, the plaintiff, his wife and her parents proceeded to the ferry's passenger cabin where they sat there for a short while. The plaintiff then proceeded to the ferry's cocktail lounge. To get to the cocktail lounge, the plaintiff had to pass through a large metal door. The door had a large window which enabled passengers to see between the cocktail lounge and the passenger cabin's hallway. The door was white and had a blue sign with white print on both sides. On one side, it stated "COCKTAIL LOUNGE" and on the other side, it stated "TO MAIN CABIN." There was also a yellow sign on both sides of the door with "WATCH YOUR STEP" printed in black. The door remained in a closed position and had to be opened in order to pass from the passenger cabin hallway to the cocktail lounge and visa versa. The plaintiff passed through the doorway from the passenger cabin hallway to the cocktail lounge without incident. However, on his was back to the passenger cabin, the plaintiff tripped over the door sill and sustained injuries. The ferry company's accident report identifies the cause of the plaintiff's fall as "caught left foot on yellow door saddle."

The door sill ran the length of the doorway and was composed of two sections, a thicker bottom section which measured 3/4"tall and an upper thinner section which also measured 3/4" inch, totaling 1 ½" in height. The sill was approximately five inches wide. It was painted yellow in contrast to the area surrounding it. It is not disputed that the raised sill was not observable when the door was closed and that the door was in fact closed when the plaintiff began going back and forth between the two areas: In order to observe the sill and be aware of its height, the door had to be open. The plaintiff testified at his examination-before-trial and has attested in connection with these motions that while there was nothing affecting his view of the raised sill once the door was open, he did not see it until after he fell because he was looking straight ahead through the door's window. The plaintiffs alleges that the door sill was an inherently dangerous condition in that it was hidden and concealed and that it constituted a trap or nuisance.

He maintains that he "was injured aboard a ship upon navigable waters. It was there that the conduct of which he complained occurred. The legal rights and liabilities arising from that conduct [are] therefore within the full reach of the

admiralty jurisdiction and measurable by the standards of maritime law." Kermarec v Compagnie Generale Transatlantique, 358 US 625, 628 (1959). "Under maritime law, a shipowner has a duty to exercise reasonable care to those aboard the vessel who are not members of the crew" (*Luther v Carnival Corp.*, 2015 WL 1727697 [United Sates District Court SD FLA 2015], citing *Kermarec v Compagnie Generale Transatlantique*, supra at 630). "Under general principles of negligence law ... a shipowner must exercise reasonable care to maintain its premises in a safe condition considering (1) the possibility of injury to passengers, (2) the seriousness of potential injuries and (3) the burden of avoiding the risk of harm" (*Bracone v Bridgeport and Prot Jefferson Steamboat Company*, 2009 WL 724041 [United Sates District Court D Conn 2009], citing *United States v Carroll Towing Co., Inc.*, 159 F2d 169, 173 [2d Cir 1947]). To establish negligence under maritime law, a plaintiff must prove the same elements as under the common law, i.e., that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm. Chaparro v. Carnival Corp., 693 F3d 1333, 1336 (11th Cir.2012). "[A] shipowner may be liable for harm caused by a condition whose danger was obvious if the shipowner was negligent in not correcting it" (*Bracone v Bridgeport and Port Jefferson Steamboat Company*, supra, citing *Napoli v Hellenic Lines, Ltd.*, 536 F2d 505, 508–09 [2d Cir 1976]). As a corollary, liability does not lie when the condition given rise to the plaintiff's injury was open and obvious. Bracone v Bridgeport and Port Jefferson Steamboat Company, supra.

In support of its argument, the ferry company has submitted a list of nearly 50 cases which apply the State's common law which absolves a defendant of liability for a dangerous condition on property when it is open and obvious and is not inherently dangerous. It has not analyzed a single one and shown it to be applicable to the facts in this case.* In addition, it has submitted photographs of the door way from the vantage point of the passenger cabin to the cocktail lounge and visa versa, in which the door is closed and open.

Suffice it to say that even applying maritime law under which the ferry company would be absolved of liability if the condition that caused the plaintiff's fall was open and obvious (without a finding that it was NOT inherently dangerous), the defendant ferry company has not established its entitlement to summary relief.

*Under New York State law, in order to absolve a party in control of property of liability for negligence where a defective condition on their property is alleged to

have caused injury, in addition to being open and obvious, the condition must not have been inherently dangerous. Cupo v Karfunkel, 1 AD3d 48, 52 [2d Dept 2003], citing *Gibbons v Lido & Point Lookout Fire Dist.*, 293 AD2d 646 [2d Dept 2002] [cement parking block on floor of a firehouse]; *Connor v Taylor Rental Ctr.*, 278 AD2d 270 [2d Dept 2000] [forklift in a marked stall in a parking lot]; *Plessias v Scalia Home for Funerals*, 271 AD2d 423 [2d Dept 2000] [concrete parking divider]; *Maravalli v Home Depot U.S.A.*, 266 AD2d 437 [2d Dept 1999] [sink vanity on the floor of the store aisle]). "In such circumstances, the condition which caused the accident cannot fairly be attributed to any negligent maintenance of the property" (Cupo v Karfunkel, supra at 52). Research has not found any such requirement under maritime law. There has been no testimony which establishes that the elevated sill was open and obvious to the passengers, in particular since it was only visible when the door was open at which point a passenger would be about to cross it. Nor do the photographs that have been submitted illustrate its open and obvious character as a matter of law. The defendant ferry company's motion is **denied.**

Assuming, arguendo, that the defendant ferry company has established its entitlement to summary judgment dismissing the complaint against it, the plaintiffs have established the existence of a material issue of fact as to whether the condition that caused the plaintiff's fall was open and obvious. Again, the elevated sill was not visible until the door was open at which time passengers would ordinarily be about to cross the threshold. And, there was a window in the door inviting passengers to look straight ahead as they transversed from one room to the other.

The plaintiffs seek leave to amend their Bill of Particulars to advance an additional theory of liability: That the door sill violated the applicable code, statutes or principles.

"While leave to amend a bill of particulars is ordinarily freely given, where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the [claim] or the original bill is made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious" (*Schreiber-Cross v State*, 57 AD3d 881, 884 [2d Dept 2013], citing CPLR 3025[b]; *Cohen v Ho*, 38 AD3d 705 [2d Dept 2007]; *Lissak v. Cerabona*, 10 AD3d 308, 309–310 [1st Dept 2004]; *Rosse–Glickman v Beth Israel Med. Ctr.-Kings Highway Div.*, 309 AD2d 846 [2d Dept 2003]; *Kassis v Teacher's Ins. & Annuity Assn.*, 258 AD2d 271 [1st Dept 1999]; *Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 398–399 [2d Dept 1995]).

The plaintiffs have submitted the affidavit of expert Thomas R. Parisi, P.E., in support of their application. Having reviewed the pertinent records of this case, inspecting the vessel and reviewing "documents deemed professionally reliable within the engineering field," he opines as follows:

Parisi opines that Part 1196 of Part 33 of the Code of Federal Regulations ("CFR"), the Architectural and Transportation Barriers Compliance Board, permits the threshold of the subject doorway to be .5 inches high maximum unless it is an existing or altered threshold which may be no more than .75 inches maximum and have a beveled edge on each side with a slope not steeper than 1:2. Thus, Parisi opines that the subject threshold exceeded that permitted and failed to comply with the Federal regulation. He also opines that the threshold violates the New York State Building Code which he opines applies because the door is a typical door that is found in a building and is not necessarily limited to passenger boat vessels. He represents that thresholds in doorways are limited to .75 in height for sliding doors serving dwelling units or .5 for other doors and that raised thresholds and floor level changes that are greater than .25 inches at doorways must be beveled with a slope not greater than one unit vertical in two units horizontal (a 50% slope). He opines that the subject door also exceeded this limitation and violated the New York State Building Code.

Parisi explains that upon his examination of the vessel on September 14, 2014, he found the following:

The door's threshold was not uniform in height across the length of the threshold. While looking south, it measured 1.25", 1.5" at the center and 1.75" on the right side. In addition, it was a step door threshold that was not beveled. It far exceeds the 3/4" limitation set forth in the Federal Register. He opines that it is accordingly a tripping hazard.

He further opines that the door threshold geometry was not tapered or ramped thereby further creating a tripping hazard. He opines to a reasonable degree of engineering certainty that it should be constructed in floor ramps to lessen the door threshold height so it would not be a tripping hazard.

In addition, he opines that when the door is fully open, it closes too quickly to allow a person time to pass through it, especially if complicated by any kind of

walking aid. He opines that the speed at which the door closes violates American National Standards I.

In conclusion, he opines to a reasonable degree of engineering certainty that "the door threshold has uneven measurements varying between 1.125" and 1.175" which far exceed the 3/4" height limitation." He further opines that "the door threshold was not beveled on each end, thus creating a tripping hazard." Finally, he opines that the door closes "too quickly thus further complicating a person from negotiating the transition from the hallway to the lounge causing an additional hazard." He opines that the defective design, in particular the sill's excessive height, was a chief underlying cause for the plaintiff's fall.

In opposition to the plaintiffs' motion, the defendant ferry company objects on grounds of delay however it has not cited to a scintilla of prejudice. It has submitted the affidavit of Andrew D. Lebet, a naval architect and partner in a Naval Architecture and Marine Engineering firm which specializes in the design of United States Coast Guard certified passenger vessels. He has reviewed Parisi's Report, his affidavit, photographs of the subject vessel and the documents and diagrams produced by the shipyard which constructed the subject vessel. He explains that the inspection and design requirements set forth in Subchapter H of Part 46 of the CFR applies to passenger vessels like the P.T. Barnum on which the plaintiff was traveling when he had his accident. He opines that the vessel was designed to comply with that Code's requirements and more specifically, that the door in question does so, also. He explains that the door is installed in a fire rated bulk head designated as A-60, which requires the door to be built to an A-15 fire rating. He explains that those regulations serve to contain shipboard fire incidents allowing the vessel to essentially act as its own fire refuge platform. He opines that the door and its installation are of a type commonly used in the design and construction of similar Subchapter H vessels similar to the P.T.Barnum and is consistent with customary practice and usage in the mariner passenger vessel industry. He further explains that when installed on passenger vessels, these type of doors' sills commonly vary in height "due to camber and/or shear characteristics. Sills that are 1 ½" high are not uncommon [as] they help to prevent smoke from escaping underneath the door." He opines that "the subject door- including the sill/threshold- is in full and complete compliance with the requirements of 46 CFR Subchapter H."

Lebet opines that the New York State Building Code does not apply to the vessel as the United States Coast Guard has complete and exclusive jurisdiction over

the design and the inspection of the subject vessel under Subchapter H. He similarly opines that the American National Standards I applicable to the closing speed of doors does not apply either for the very same reason. In fact, he explains that "it is not at all surprising that the subject door has a faster closing speed than land based doors. The unique requirements of shipboard installations recognize and account for the fact that doors must be able to close while the ship is listing, rolling and/or pitching, which requires a different design criteria than land based standards." He notes that 46 CFR 72.05-25.b.9 (ii) requires that doors be able to close against a 3 ½ degree list.

He similarly discounts Parisi's reliance on Part 1196, Sec. 402.51 of 33 CFR as inapplicable to the subject vessel. He notes that it was not incorporated into the document until 15 months after the plaintiff's accident and has never been implemented. In any event, it applies to the new construction of passenger vessels or additions or alterations to existing ones and not to the one at hand.

As for Parisi's position that ship's doorways should never require passengers to transverse anything higher than 3/4", he notes that Subchapter H mandates that some doors have coamings of at least six inches. See 46 CFR 171.122. He concludes that the subject door and its sill comply fully with the only applicable Code.

The United States Supreme Court has held that Coast Guard regulations preempt the field, even to the extent of rendering OSHA inapplicable but only when preemption has been made clear. Chao v Mallard Bay Drilling, 534 US 235,243 (2002); United Sates v Massachusetts, 493 F3d 1,3 (1st Cir 2007). Nevertheless, 46 CFR § 107.115 effective September 29, 2008 provides that both the "American National Standards Institute Standards (ANSIS) [and the] American Society of Mechanical Engineers (ASME) International" standards are "incorporated by reference" seemingly into Title 46 of the Code of Federal Regulations. Watterson v Mallard Bay, Inc., 649 So2d 431 (La App 3rd Cir), writ denied 650 So2d 241 (La Sup Court 1995), cert denied 515 US 1118 (1995). In any event, even if not directly applicable, the ferry company's alleged violation of that regulation as well as the State Building Code may be admissible as some evidence of negligence. See, Huron Cement Co. V Detroit, 362 US 440, 441 (local fire code enforcable against federally inspected and certified vessel); Layman v Lahaina Divers, Inc., 23 FSupp3d 1170 (District Court D Hawaii 2014); Street of Ships, Inc. v O'Hagan, 89 Misc2d 655, 655-656 (Sup Court New York County 1977) (United Sates Coast Guard certified vessel being used as a restaurant still subject to local building code).

In conclusion, the defendant's motion for summary judgment dismissing the complaint is **denied**. In view of the complete lack of prejudice, the plaintiffs' motion to amend its Bill of Particulars is **granted** despite the delay. However, the court notes again that the admissibility of evidence in support of the newly advanced theories will be determined at trial.

This constitutes the Order of the Court.

Dated: September 28, 2015

J.S.C.