Von Sengbusch v Les Bateux De N.Y., Inc.
2016 NY Slip Op 31229(U)
June 28, 2016
Supreme Court, New York County
Docket Number: 154209/12
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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SABINE VON SENGBUSCH,

Plaintiff

Index No. 154209/12

v

LES BATEUX DE NEW YORK, INC., d/b/a SAILTIME NEW YORK, DOLPHIN SERVICES, LLC, and JOHN DOE,

DECISION AND ORDER

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for breach of contract, arising from the alleged improper maintenance, repair, and management of a sailboat, the defendant Les Bateux De New York, Inc., d/b/a Sailtime New York (Sailtime), a franchisee of a boat chartering and management company, renews its motion for summary judgment dismissing the breach of contract cause of action and all cross claims insofar as asserted against it and on its counterclaim to recover costs and an attorney's fee, which had been denied without prejudice to renewal in an order dated July 11, 2014 (Seq. 010). The defendant Dolphin Services, LLC (Dolphin), which performed repairs on the sailboat, separately moves for summary judgment dismissing the complaint insofar as

asserted against it (Seq. 011). The plaintiff, who owns the boat, opposes the motions. Sailtime's motion is denied, and Dolphin's motion is granted in part and denied in part.

II. BACKGROUND

Yacht owners, such as the plaintiff, are permitted to become "members" of Sailtime, and thereafter deliver their boats to Sailtime for inclusion in Sailtime's fleet, which is docked at Chelsea Piers in Manhattan. Sailtime's other paying members are then permitted to reserve and sail those boats.

The plaintiff enrolled as a member of Sailtime, and agreed to include her boat in Sailtime's fleet. The plaintiff and Sailtime executed a boat management agreement (the agreement), drafted by officials at Sailtime's main office for use by franchisees such as Les Bateux De New York, Inc. Although the agreement requires the boat's owner to secure insurance, the plaintiff's boat was also covered under Sailtime's fleet policy. The agreement, at paragraph 5.3, recites that "[t]he Sailtime Company shall not be responsible for loss or damage to the boat except when the boat is being operated by The Sailtime Company employees or agents." Pursuant to paragraph 6.4, Sailtime agreed to "maintain, or cause to be maintained, the boat in fit and seaworthy condition," and its manager further agreed "to regularly maintain, or cause to be maintained, all safety and environmental equipment." Paragraph 8.4 recites that "[t]he

Manager will confer with Owner in advance of any major maintenance or equipment upgrades necessary to keep the vessel in first class condition." Paragraph 10.3 provides, in relevant part, that Sailtime's manager shall be liable for any damage to a boat caused by his acts or omissions where that damage is over and above that covered by insurance. Paragraph 13.1 provides that

> "upon expiration or earlier termination of this agreement, [Sailtime] will return the boat to Owner in good repair, condition, and working order, ordinary wear and tear excepted, by delivering the boat to Owner at a place either mutually agreed or to the marina where the Manager originally accepted delivery of the boat from Owner."

On October 7, 2010, one of Sailtime's members, while piloting the plaintiff's boat, grounded it on some rocks while entering the Long Island Sound, thereby damaging it. Sailtime's manager, Mathias Chouraki, thereafter took possession of the boat and delivered it to Dolphin for repairs. After Dolphin's work was completed, Chouraki retrieved the boat and, at the plaintiff's request, attempted to sell it on her behalf. When Chouraki could not sell it, the plaintiff retook possession of the boat, and had it surveyed. The plaintiff contends that she then learned that the boat remained heavily damaged and was not properly repaired. She commenced this action against Sailtime and Dolphin, asserting causes of action sounding breach of contract, negligence, and diminution of value against both defendants, a cause of action sounding in contractual indemnity

against Sailtime, and a cause of action sounding in breach of the warranty of fitness for a particular use against Dolphin.

On its initial motion for summary judgment, Sailtime had primarily argued that the agreement "unequivocally insulates it from liability under these circumstances." In the order dated July 11, 2014, however, this court held that

> "the contract terms are not as clear as Sailtime would read them . . . Thus, its papers fail to demonstrate the absence of triable issues of fact and entitlement to judgment as a matter of law. In any event, the plaintiff's opposition papers raise triable issues, inter alia, as to whether Sailtime hired or directed Dolphin to perform the repairs . . ., and whether under the terms of its contract with the plaintiff, which imposes a duty on Sailtime to maintain the boat in 'fit and seaworthy condition,' Sailtime is liable to any extent for the damage and allegedly negligent repair of the boat following its grounding by one of its members."

In a decision and order dated May 5, 2015, the Appellate Division, First Department, modified this court's order by awarding Sailtime summary judgment dismissing the indemnity cause of action and the negligence and diminution of value causes of action insofar as asserted against it. With respect to the breach of contract cause of action asserted against Sailtime, the Appellate Division concluded that "[t]he motion court properly determined that summary judgment is premature because an employee of [that] defendant has not yet been deposed." Von Sengbusch v Les Bateux De N.Y., Inc., 128 AD3d 409, 410 (1st Dept 2015).

III. SAILTIME's RENEWED SUMMARY JUDGMENT MOTION

Chouraki has now been deposed, and Sailtime renews its motion for summary judgment dismissing the breach of contract cause of action and all cross claims insofar as asserted against it, as well as on its counterclaim for an award of costs and an attorney's fee. In support of its renewed motion, Sailtime submits all of the papers that it submitted in support of its initial motion, which include the pleadings, invoices, emails, and its agreement with the plaintiff, as well as an affidavit from Chouraki. It also submits the transcripts of the depositions of Chouraki and Dolphin's principal, Zia Mirjavadi, and bases its renewed motion on the new facts that it claims were developed in the course of those depositions.

Chouraki explained at his deposition that he understood the term "seaworthy condition" to mean that a boat was "safe to sail . . . [u]nder regular maintenance." Chouraki testified that although any Sailtime member who sailed a particular boat was responsible for minor maintenance in connection with that boat, Chouraki was himself obligated to return the plaintiff's boat to her in good repair, condition, and working order, and that structural damage to the hull of the boat was not within the ambit of ordinary wear and tear.

Chouraki further testified that he learned that the plaintiff's boat was involved in an accident on or about October

7, 2010, when a Sailtime member who had been piloting the boat informed Chouraki that he had grounded the boat on rocks while entering the Long Island Sound. Chouraki explained that, although the boat was not taking on water, he directed that member immediately to motor the boat to a marina on the Hudson River in New Jersey. Chouraki averred that, when he personally arrived at that marina approximately one day later, he observed that there was a gash in the keel of the plaintiff's boat "about . . . the size of a fist." He asserted that he "selected a yard to take care of" necessary repairs to the boat and, one week later, provided photos of the damage to Dolphin's Zak Mirjavadi to obtain an estimate of the cost of the repairs. He suggested in his testimony that he had contacted the plaintiff shortly after the accident to inform her that the boat would be delivered to Dolphin for repairs. Chouraki stated that, during the third or fourth week of October, he personally motored the boat from New Jersey to Dolphin's shipyard in Mamaroneck to deliver it to Dolphin. He also asserted that he and the plaintiff together visited Dolphin's shipyard in January, 2011, to ascertain the progress of the repairs, that between mid-February and early March, 2011, Dolphin informed him that repairs were completed, and that he then retrieved the boat and sailed it back to Chelsea Piers. He related that Dolphin invoiced him the sum of $39,726.07 for the repairs, and that he remitted the sum of $37,735.07 to

Dolphin, as that represented the insurance proceeds that he had received from Sailtime's insurer.

Chouraki also testified that, shortly thereafter, the plaintiff sought his assistance in selling the boat, and he located a potential buyer whom he took out for a sail on the boat without incident, but the sale was never consummated. He stated that the plaintiff consequently removed the boat from Sailtime's fleet and, later during the spring of 2011, she sailed the boat from Chelsea Piers to Bristol, Rhode Island, to deliver it to a sailboat broker recommended to her by Chouraki. Chouraki asserted that, after the boat arrived in Rhode Island, a boat surveyor informed him that there was structural damage to the boat despite the repairs undertaken by Dolphin. Chouraki nonetheless maintained that, when he retrieved the boat from Dolphin's shipyard, it "was in perfect condition," although he conceded that the boat had not been fully surveyed until after it was delivered to Rhode Island.

Sailtime argues that it did not breach the agreement because, by retaining Dolphin to repair the boat, it had maintained the boat in fit and seaworthy condition and, at the time it delivered it to the plaintiff, the boat was in good repair, condition, and working order. It further suggests that if any structural damage to the boat were caused by the inadequacy of Dolphin's repairs, the damage only arose by virtue

of the boat's deterioration after Sailtime had ceded possession of the boat. It asserts that it is not an insurer or guarantor of Dolphin's repairs, and to hold it liable would essentially make it such an insurer or guarantor.

In opposition, the plaintiff argues that Sailtime breached its contractual obligations to confer with her prior to retaining a repair company, to maintain the boat in fit and seaworthy condition while in its possession, to assure that repairs were undertaken properly and thoroughly, and to return it to her in good repair, condition, and working order.

In support of her arguments, the plaintiff relies on the parties' deposition transcripts, and submits a copy of the agreement, as well as copies of e-mail communications between Chouraki, boat surveyors, marine claims adjusters, and herself.

The plaintiff contends that she was first apprised of the boat accident one week after it occurred, and only after Sailtime had retained Dolphin to undertake repairs and delivered the boat to it. She also asserts that certain terms in the agreement, such as "fit and seaworthy condition," "good repair, condition, and working order," "ordinary wear and tear," and "first class condition" are necessarily ambiguous and, hence, the finder of fact must resolve whether Sailtime breached the agreement, since her understanding of those terms is broader than Chouraki's interpretation. In addition, the plaintiff contends that, by

retaining Dolphin without her input, and without first conducting a full survey of the boat, Sailtime assumed a duty to assure that the repairs were properly undertaken.

The plaintiff argues that the boat was not fit or seaworthy when in Sailtime's possession, and that it was not returned to her in good repair, condition, and working order since, upon her repossession of the boat, there was significant structural damage that had been left unrepaired or had not been properly repaired in the first instance. In this respect, the plaintiff submits e-mails and reports from her surveyor, prepared in the usual course of his business after she retook possession of the boat, in which he notes the existence of a permanent depression in the hull of the boat all around the aft end of the keel, the separation of the main transverse frame from the hull, displacement of galley joiner work, and stress cracks in the gel coat at the aft-most keel bolt, together constituting "heavy damage" caused by the grounding of the boat by Sailtime's member. She also refers to an e-mail sent by Chouraki to a marine claim adjuster on November 1, 2011, in which Chouraki essentially concedes that the boat was in the condition described by the surveyor, that it had not been properly repaired, and that it was dangerous to have sailed the boat from Rhode Island to Guilford, Connecticut, for the adjuster to conduct the survey.

A. Standards for Summary Judgment

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 issues of fact from the case. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers. See id. Summary judgment must also be denied if the opposing party presents admissible evidence establishing that there is a triable issue of fact. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1st Dept 1992).

B. Breach of Contract

To successfully prosecute a cause of action to recover damages for breach of contract, the plaintiff is required to establish (1) the existence of a contract, (2) the plaintiff's performance under the contract; (3) the defendant's breach of that contract, and (4) resulting damages. See Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 (1st Dept 2010). The

construction of an unambiguous contract is an issue of law, to be decided by the court, as is the issue of whether the terms of the contract are ambiguous in the first instance. NFL Enters. LLC v Comcast Cable Communications, LLC, 51 AD3d 52, 58 (1st Dept 2008). The question of whether an ambiguity exists must be ascertained from the face of an agreement without regard to extrinsic evidence. See Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 84 (1st Dept 2013); Schmidt v Magnetic Head Corp., 97 AD2d 151, 157 (2nd Dept 1983). Where language is ambiguous, however, any ambiguity must be construed against the drafter, here, Sailtime. See Commercial Tenant Servs., Inc. v Northern Leasing Sys., Inc., 131 AD3d 895, 897 (1st Dept 2015), and the court may resort to extrinsic evidence to glean the intent of the parties. See GEM Holdco, LLC v Changing World Tech., L.P., 127 AD3d 598, 598-599 (1st Dept 2015). Since the terms "fit and seaworthy condition," "ordinary wear and tear," and "first class condition" are not defined in the agreement, they are indeed ambiguous and capable of differing definitions and interpretations (see Premium Coal Co. v New Hampshire Fire Ins. Co., 265 App Div 320, 321-322 [1st Dept 1942]), and cannot be construed as a matter of law. See LoFrisco v Winston & Strawn LLP, 42 AD3d 304, 307-308 (1st Dept 2007).

Sailtime nonetheless established its prima facie entitlement to judgment as a matter of law with evidence that it contacted

the plaintiff prior to delivering the boat to Dolphin for repairs and that, regardless of whether the phrase "fit and seaworthy" is broadly or narrowly construed, it maintained the boat in that condition by virtue of securing Dolphin to undertake the repairs. It further demonstrated, prima facie, that it returned the boat to the plaintiff in good repair, condition, and working order, inasmuch as Chouraki sailed the boat without incident on two occasions between the completion of repairs and its return to the plaintiff. In light of the relevant extrinsic evidence, however, including the parties' conflicting testimony as to their understanding (see GEM Holdco, LLC v Changing World Tech., L.P., supra) of the phrase "fit and seaworthy," the court concludes that the plaintiff raised triable issues of fact as to whether (a) the damage to the boat was caused by an "agent" of Sailtime, thus rendering it liable to her (see Jet Setting Service Corp. v Toomey, 91 AD2d 431, 437-438 [1st Dept 1983]), (b) Chouraki conferred with her prior to retaining Dolphin's services to assure that the boat was kept in a first-class condition, (c) Sailtime kept the boat in a fit and seaworthy condition at all relevant times, and (d) Chouraki's acts or omissions caused or contributed to the damage over and above the amount of insurance proceeds. Moreover, although the phrase "good repair, condition, and working order" is not necessarily ambiguous (see Padovano v. Vivian, 217 AD2d 868, 869-870 [3rd Dept 1995]), the plaintiff

also raised a triable issue of fact as to whether the boat was returned to her in good repair, condition, and working order. See Peerless Ins. Co. v Michael Beshara, Inc., 75 AD3d 733, 735 (3rd Dept 2010).

Since the new facts submitted by Sailtime would not change the outcome of its prior motion, its renewed motion for summary judgment dismissing the complaint and all cross claims insofar as asserted against it and on its counterclaim for an award of costs and an attorney's fee must be denied. See CPLR 2221(e).

IV. DOLPHIN'S MOTION FOR SUMMARY JUDGMENT

In support of its motion for summary judgment, Dolphin submits the pleadings, the parties' deposition transcripts, the plaintiff's bill of particulars, and a boat survey report and accompanying correspondence. The plaintiff opposes the motion, relying on all of the papers previously submitted to the court.

Dolphin established its prima facie entitlement to judgment as a matter of law dismissing the breach of contract cause of action insofar as asserted against it by demonstrating that it had not entered into a contract with the plaintiff (see Harris v Seward Park Hous. Corp., supra), the warranty of fitness cause of action by demonstrating that such a cause of action only applies to the sale of goods by manufacturers, sellers, and distributors, and not to bailees, repairers, and mere possessors of personal

property (see UCC § 2-315; Park v Bay Crane, Inc., 49 AD3d 617, 618 [2nd Dept 2008]), and the diminution of value cause of action by demonstrating that New York law does not recognize such a cause of action (see Von Sengbusch v Les Bateux De N.Y., Inc., supra). Since the plaintiff does not address them, Dolphin is entitled to summary judgment dismissing those causes of action insofar as asserted against it.

With respect to the negligence cause of action, Dolphin argues that there is no demonstrated evidence of its negligence sufficient to support such a cause of action. Specifically, it contends that the damage observed by the plaintiff was "additional damage from a soft grounding which occurred after" it made the subject repairs. It alternatively contends that, under the economic loss rule, a negligence cause of action is not available where, as here, the damages sought to be recovered are purportedly of a purely economic nature. The plaintiff responds that, since she admittedly did not enter into a contract with Dolphin, and did not purchase a product manufactured, distributed, or installed by Dolphin, the economic loss rule is inapplicable, and thus presents no bar to that cause of action. The court agrees with the plaintiff.

> "The economic loss rule provides that tort recovery in strict products liability and negligence against a manufacturer is not available to a downstream purchaser where the claimed losses flow from damage to the property that is the subject of the contract and personal injury is not alleged or at issue" (Atlas Air,

Inc. v General Elec. Co., 16 AD3d 444, 445 (2nd Dept 2005); see Bocre Leasing Corp. v General Motors Corp. [Allison Gas Turbine Div.], 84 NY2d 685(1995."

Here, Dolphin was not a manufacturer, distributor, or installer of a product, but merely undertook repairs, and did not enter into a contract with the plaintiff. Hence, the economic loss rule is inapplicable to the instant dispute. See generally Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 137 AD3d 433, 436 (1st Dept 2016). In any event, the plaintiff seeks not only economic loss, but injury to property arising from damage caused by the repair process. A cause of action to recover damages for injury to property arises where a person undertakes a repair, but causes damage to property in the course of its activities. See St. Paul Travelers Cos., Inc. v Joseph Mauro & Son, Inc., 93 AD3d 658, 660 (2nd Dept 2012); Northern Assurance Co. v Nick, 203 AD2d 342, 342-343 (2nd Dept 1994); cf. 126 Newton St., LLC v Allbrand Commercial Windows & Doors, Inc., 121 AD3d 651, 653 (2nd Dept 2014).

Thus, although Dolphin made a prima facie showing of its entitlement to judgment as a matter of law dismissing the negligence cause of action insofar as asserted against it with evidence demonstrating that the damage to the plaintiff's boat was caused by a soft grounding subsequent the date it undertook repairs, the plaintiff raised a triable issue of fact with evidence that a survey performed after she reclaimed possession

of the boat attributed the damages to the grounding that occurred in October, 2010.

For these reasons, that branch of Dolphin's motion which was for summary judgment dismissing the negligence cause of action insofar as asserted against it must be denied.

V. CONCLUSION

Accordingly, it is

ORDERED that the renewed motion of the defendant Les Bateux De New York, Inc., d/b/a Sailtime New York, for summary judgment dismissing the breach of contract cause of action and all counterclaims insofar as asserted against it and on its counterclaim for an award of costs and an attorney's fee (Seq. 010) is denied; and it is further,

ORDERED that those branches of the separate motion of the defendant Dolphin Services, LLC, which were for summary judgment dismissing, insofar as asserted against it, the causes of action alleging breach of contract, breach of the warranty of fitness for a particular use, and diminution of value (Seq. 011) are granted, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: June 28, 2016

Nancy M. Bannon, J.S.C.

HON. NANCY M. BANNON