

<b>Pecoraro v Outer Beach Mar., LLC</b>
2016 NY Slip Op 31818(U)
June 27, 2016
Supreme Court, Suffolk County
Docket Number: 12-14744
Judge: Ralph T. Gazzillo
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SHORT FORM ORDER

INDEX No. 12-14744  
CAL. No. 15-00379OT

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 7-21-15 (001)  
MOTION DATE 8-20-15 (002)  
ADJ. DATE 9-17-15  
Mot. Seq. #001-MG;CASEDISP  
#002-MD

-----X  
JAMES PECORARO,  
  
Plaintiff,  
  
- against -  
  
OUTER BEACH MARINE, LLC, JED MEADE,  
FRANK SOLINA and DEBORAH SOLINA,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 42 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17, 18-28; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 29-30, 31-33, 34-35 ; Replying Affidavits and supporting papers 36-40, 41-42 ; Other     ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by defendants Frank Solina and Deborah Solina for an order granting summary judgment in their favor dismissing the complaint and all cross claims as against them is granted; and it is further

**ORDERED** that the motion by defendants Outer Beach Marine, LLC and Edwin D. Meade, Jr. for an order granting summary judgment in their favor dismissing the complaint and for common law

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indemnification over defendants Frank Solina and Deborah Solina is granted to the extent that the complaint is dismissed as against them.

This is an action to recover damages for injuries allegedly sustained by the plaintiff, James Pecoraro, as the result of an accident which occurred on October 2, 2011 on a dock in waters adjoining the premises located at 40 The Bayou, Oak Beach, in the Town of Babylon, County of Suffolk.

Defendants Frank and Deborah Solina now move for summary judgment dismissing the complaint and all cross claims against them, as well as for attorney's fees. In support of the motion, defendants submit, *inter alia*, their attorney's affirmation, the pleadings, the transcripts of the depositions of the plaintiff, Frank Solina, Deborah Solina, and Edwin D. Meade, Jr., a copy of a lease dated December 1, 2009, fourteen photographs, and a copy of the filed note of issue. Defendant's Outer Beach Marine, LLC ("Outer Beach") and Edwin Meade, Jr., incorrectly sued as Jed Meade, also move for summary judgment dismissing the complaint as against them, or granting them common law indemnification over defendants Frank and Deborah Solina. In support of the motion, these defendants submit, *inter alia*, their attorney's affirmation, the pleadings, the transcripts of the depositions of the plaintiff, Frank Solina, Deborah Solina, and Edwin Meade, Jr. In opposition, plaintiff has submitted his attorney's affirmation for each of the motions.

Plaintiff entered into a lease agreement with Frank Solina to rent the property owned by Frank and Deborah Solina at 40 The Bayou ("subject property"), Oak Beach, New York, for a period from December 1, 2009 through November 30, 2010. However, at the time of plaintiff's accident, he was still the sole tenant at the property. Plaintiff testified that he recalled Hurricane Irene in the summer of 2011, and he had advance notice that the storm was coming. His boat, which was docked at the subject property, was damaged by the storm and was unusable. Plaintiff testified that, prior to the storm, he tied the boat to all pilings, the bulkhead and the dock itself. He did not seek advice about securing the boat during a hurricane. He tried to hire a couple of boat haulers to get the boat out, but everybody was busy before the storm. The dock at the subject property was approximately 30 to 50 feet long, he wasn't sure of the exact length. At the end of the dock there was a ramp that led down to a U-shaped floating dock. Prior to the storm, plaintiff had complained to the owners that a metal piece that held two parts of the floating dock together was loose.

Plaintiff and his fiance evacuated during the storm. Upon their return, they discovered water damage due to flooding in the residence, and plaintiff's boat was thrown up onto the jetty. The stationary dock was intact, but the ramp was in the water, and the three parts of the floating dock were separated. Plaintiff did repairs to the house, the expense of which was deducted from his rent. He testified that he was aware that his landlord had hired someone to look at the dock, but was not present when any work was done. Mr. Solina kept calling him and asking him what was going on with the dock. There came a time when the ramp was lifted out of the water. The only work plaintiff performed near the dock was removing some debris from the beach. He could not remember the status of the floating docks. According to plaintiff, Mr. Solina encouraged him make sure the ramp was fixed, out of the water, and not rotten. He spoke to Mr. Solina by telephone and informed him that the ramp was out of the water. Plaintiff testified that he told Mr. Solina several times that it was unsafe after the hurricane to go out on the stationary dock.

Although plaintiff could not recall the exact date his accident, he testified it occurred around 4:00 or 5:00 p.m. when he went down to look at the dock. Plaintiff testified that when he went out to the dock, he walked out onto the stationary dock and stopped two or three feet before he got to the ramp, and then he jumped down four to five feet to a floating piece of dock. If he had walked right to where the ramp was, the whole thing would have collapsed. It was a little windy, and he turned around and just held on to a piece that was put up, just to brace himself and look around. As he did, the two-by-four that Mr. Meade put across to secure the ramp came down. Plaintiff testified that when the ramp came down he put his other arm up and he was trying to lift it off him because it was coming down on him. He testified that he heard the sound of something "giving," his spine "kinked" and, then he stepped away and dropped the ramp which fell onto the floating dock. After the accident, he did not see the two-by-four. The two pilings that held the two-by-four and the ramp were still standing after the accident. He testified that, for all he knew, the two-by-four could still be attached to the piling. He never went down to the dock again. Plaintiff testified that he never saw or spoke to Mr. Meade.

Frank Solina testified that in 2011 he and his wife were living in Boyton Beach, Florida. The plaintiff became his tenant at the subject property pursuant to a written lease one year lease. Mr. Solina testified that after the year ended he spoke to plaintiff and they agreed he could stay at the Oak Beach property a month to month basis. Mr. Solina testified that he had built the dock on the property. Ocean Beach Marine built the bulkhead on his property and had installed pilings. Prior to the storm he spoke to plaintiff by telephone and advised him to remove his boat from the water. He testified that plaintiff was reluctant to remove the boat prior to the storm because he had done so previously and the storm never came. Mr. Solina reiterated to plaintiff that he should take the boat out of the water. He spoke to plaintiff again a day or two after Hurricane Irene. Plaintiff informed him that his boat was up on the jetty and that the floating docks were destroyed. Mr. Solina testified that he told plaintiff he was going to have Jed Meade come out and look at the damage. He spoke to Mr. Meade, who agreed to take a look at the dock.

The next time he spoke to Mr. Meade, he was informed as to the amount of damage to the dock. He testified that he told Mr. Meade to do everything he thought necessary to secure the dock. He testified that Mr. Meade later told that he had disconnected the floating docks and got them up on the beach, and that he had taken the ramp out of the water and secured it in an upright position. Mr. Solina testified that he never told plaintiff to fix the ramp or the floating docks, and he believed in that position, no one would walk on it. Mr. Solina testified that he had a telephone conversation with plaintiff, in which he told plaintiff he was holding him responsible for the damage to the floating docks because he left his boat tied up to the floating docks when it should have been removed from the water. Documentation submitted herewith confirms that plaintiff's insurance company paid the Solinas for damage caused to their dock by plaintiff's boat during the storm.

Edwin Meade testified that he was owner and sole shareholder of Outer Beach, which is a marine construction business. Two days after Hurricane Irene, he was hired by Frank Solina to survey the damage to the property and to secure it. Upon inspection, he testified that there was significant damage to the floats, that the ramp was still attached to the stationary deck, and that the bottom of the ramp, which he thought was salvageable, was in the water. Mr. Meade testified that on September 19, 2011, he removed two of the floating docks and brought them onto the shore. After removing the floating docks,

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he raised the ramp out of the water and secured it to two pilings in the event of another storm. He secured the ramp by installing ledger boards, which he described as two two-by-six beams nailed together to the top of the pilings and then nailed to the top of the pilings. The ramp was then secured to the ledger using board ledger lock bolts and nails. Mr. Meade testified that when he finished his work, if someone walked off the end of the ramp, they would have fallen into the water, because the floating dock was not there, but on the beach, tied to another float. Mr Meade explained that “people living around here are, you know, reluctant to go out on a ramp that’s up in the air.”

The Court initially notes that plaintiff’s eleventh hour claim that the defendants’ respective motions are untimely, because they were filed more than 120 days after the filing of the note of issue, is without merit. Counsel for the Solinas has submitted a copy of the note of issue, which indicates a filing date of March 6, 2015. That would make the 120 day deadline for filing a summary judgment motion July 4, 2015. Because that date fell on a holiday and a weekend, the last date the motion could be made was July 6, 2015 (*see* §25-a of the General Construction Law). The motion by the Solinas was made on July 2, 2015, and the motion by Outer Beach and Mr. Meade was made on July 6, 2015. Therefore, both motions were timely made.

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 Hosp.*, 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]). As the court’s function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto, supra; O’Neill v Fishkill, supra*).

“To establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was the proximate cause of injury to the plaintiff” (*Alvino v Lin*, 300 AD2d 421, 751 NYS2d 585 [2d Dept 2002]; *see also Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]; *Conneally v Diocese of Rockville Ctr.*, 116 AD3d 905, 984 NYS2d 127 [2d Dept 2014]; *Rubin v Staten Is. Univ. Hosp.*, 39 AD3d 618, 833 NYS2d 241[2d Dept 2007]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see Nappi v Incorporated Vil. of Lynbrook*, 19 AD3d 565, 566 [2d Dept 2005]; *Dugue v 1818 Newkirk Mgt. Corp.*, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; *see also Ruggiero v City School Dist. of New Rochelle*, 109 AD3d 894, 972 NYS2d 606 [2d Dept 2013]; *Butler v Rafferty*, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). Without evidence of ownership, occupancy, control, or special use of the property upon which the defect is situated, a defendant cannot be held liable for any injuries caused by the defect (*see Ruggiero v City School Dist. of New Rochelle, supra; Mitchell v Icolari*, 108 AD3d 600, 969 NYS2d 503 [2d Dept 3013]; *Cerrato v Rapistan Demag Corp.*, 84 AD3d 714, 716, 921 NYS2d 648 [2d Dept 2011]).

The Solina defendants demonstrated their prima facie entitlement to judgment as a matter of law by establishing that plaintiff was reckless, and that his recklessness was the sole proximate cause of his injuries (see *Wadhwa v Long Is. R.R.*, 13 AD3d 615, 788 NYS2d 148 [2d Dept 2004]; *Lassalle v New York City Tr. Auth.*, 11 AD3d 661, 783 NYS2d 402 [2d Dept 2004]). “Generally, it is for the trier of fact to determine the issue of proximate cause” (*Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]; see *Howard v Poseidon Pools*, 72 NY2d 972, 974, 534 NYS2d 360 [1988]; *Scala v Scala*, 31 AD3d 423, 424, 818 NYS2d 151). “However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts” (*Kalland v Hungry Harbor Assoc., LLC*, *supra* at 889; see *Howard v Poseidon Pools*, *supra*; *Riccio v Kid Fit, Inc.*, 126 AD3d 873, 5 NYS3d 521 [2d Dept 2015]; *Scala v Scala*, *supra*).

An injured party's own reckless and extraordinary conduct can constitute an intervening and superseding event which severs any causal nexus between the occurrence of the accident and any alleged negligence on the part of the defendants (*Lynch v Metropolitan Transp. Auth.*, 82 AD3d 716, 717, 917 NYS2d 685 [2d Dept 2011]). To establish that a plaintiff's conduct was the sole proximate cause of his or her injuries, a defendant must show that the plaintiff engaged in reckless, unforeseeable or extraordinary conduct, i.e. that the plaintiff recognized the danger and chose to disregard it (see *Powers v 31 E 31 LLC*, 123 AD3d 421, 998 NYS2d 23 [1st Dept 2014]; *Alvarez v Colgate Scaffolding & Equip. Corp.*, 68 AD3d 583, 892 NYS2d 50 [1st Dept 2009]; *Brown v Metropolitan Tr. Auth.*, 281 AD2d 159, 721 NYS2d 56 [1st Dept 2001]).

Plaintiff, despite having informed Mr. Solina on several occasions that it was not safe to go onto the stationary dock, went onto such dock, jumped down four or five feet to the floating dock and the attempted to “brace” himself on the ramp, which he alleges then fell, causing his injuries. Plaintiff's reckless actions, ignoring his own warnings, broke any causal chain stemming from the defendants' alleged negligence, and were the superseding cause of the injured plaintiff's harm (see *Sang Woon Lee v Il Mook Choi*, 132 AD3d 969, 970, 18 NYS3d 690 [2d Dept 2015]; see also *Boltax v Joy Day Camp*, 67 NY2d 617, 499 NYS2d 660 [1986]; *Riccio v Kid Fit, Inc.*, 126 AD3d 873, 5 NYS3d 521 [2d Dept 2015]; *Lynch v Metropolitan Transp. Auth.*, *supra*). Plaintiff, in opposition, has failed to raise any issue of fact.

The Solina defendants also seek legal fees from the plaintiff under the terms of the signed lease. The record establishes that Mr Solina spoke with plaintiff and they agreed to continue plaintiff's tenancy on a month to month basis. Since the written lease expired, a month-to-month tenancy on the same terms as those in the original lease is implied, inasmuch as tenants remained in possession after the expiration of the lease and continued to pay rent (see *City of New York v Pennsylvania R.R. Co.*, 37 NY2d 298, 372 NYS2d 56 [1975]; *McClenan v Brancato Iron & Fence Works*, 282 AD2d 722, 724 NYS2d 438 [2d Dept 2001]; *Henderson v Gyrodyne Co, of Am., Inc.*, 123 AD3d 1091, 1 NYS3d 199 [2d Dept 2014]). Paragraph 12 of the lease states, in relevant part:

Landlord is not liable for loss, expense or damage to any person or property unless it is due to Landlord's negligence. Tenant must pay for damages suffered and money spent by Landlord relating to any claim arising from any act or negligence of Tenant.

The Solina defendants have established their lack of negligence in this matter, as well as establishing that this matter arose from plaintiff's own acts and negligence. Therefore, that branch of their motion which seeks legal fees is granted, with damages to be assessed at a hearing to be scheduled by the Court.

Outer Beach Marine and Edwin Meade have also established their entitlement to summary judgment. Mr. Meade, acting on behalf of Frank Solina, secured two of the floating docks to the beach, and raised the ramp out of the water and secured it to two pilings. Liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes (*see Canals v Tilcon New York, Inc.*, 135 AD3d 683, 23 NYS3d 320 [2d Dept 2016]; *Lee v D. Daniels Contracting, Ltd.*, 113 AD3d 824, 978 NYS2d 908 [2d Dept. 2014]; *Pironti v Leary*, 42 AD3d 487, 490, 840 NYS2d 98 [2d Dept 2007]; *Katz v Klagsbrun*, 299 AD2d 317, 318, 750 NYS2d 308 [2d Dept 2002]). Here, such defendants' work in securing the dock did not cause plaintiff's injuries, they merely furnished the condition for the accident. The accident was caused by plaintiff's reckless behavior, which also broke any causal chain between plaintiff and these defendants (*see Sang Woon Lee v Il Mook Choi, supra*). In response, plaintiff has failed to raise any issue of fact.

In light of the foregoing, the motion by Frank Solina and Deborah Solina for summary judgment in their favor dismissing the complaint, and for attorney's fees is granted. The motion by Outer Beach Marine and Edwin Meade for summary judgment in their favor dismissing the complaint and for common law indemnification over defendants Frank Solina and Deborah Salinas is granted to the extent that the complaint is dismissed as against them.

Dated: 4/27/10

  
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A.J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION