

Donnellan v Village of Nyack
2017 NY Slip Op 32968(U)
May 17, 2017
Supreme Court, Rockland County
Docket Number: 030469/14
Judge: Gerald E. Loehr
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To commence the statutory time period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
GERALD (JERRY) DONNELLAN,

Plaintiff,

DECISION AND ORDER

Index No.: 030469/14

-against-

VILLAGE OF NYACK and VILLAGE OF NYACK
PARKING AUTHORITY,

Defendants.
-----X

LOEHR, J.

The following papers numbered 1-10 were read on Defendants' motion to bar Plaintiff's expert and for summary judgment dismissing the Complaint and Plaintiff's motion¹ for summary judgment.

Papers Numbered

Notice of Motion - Affirmations - Affidavit - Exhibits	1
Memorandum of Law in Support	2
Supplemental Memorandum of Law in Support	3
Defendants' Statement of Facts	4
Affirmation in Opposition - Exhibits	5
Memorandum of Law in Opposition	6

¹ While Plaintiff prays for such relief in his opposition papers, he has not filed a notice of motion therefor.

Supplemental Memorandum of Law in Opposition	7
Plaintiff's Statement of Facts	8
Reply Affirmation - Exhibits	9
Reply Memorandum of Law	10

Upon the foregoing papers, in October 1997, Plaintiff purchased a two to three story houseboat which was moored in a 20 by 40 slip at Defendants' marina, attached by lines to one or more pilings. Plaintiff and Defendants entered into a series of Dockage and Mooring Contracts with respect to the houseboat, the last of which covered the period from November 20, 2007 through October 20, 2012. While the parties were apparently negotiating an extension or renewal, that had not happened when, on October 29-30, the houseboat was totally destroyed by Hurricane Sandy. Plaintiff apparently made a claim therefor to his insurance company which was denied based upon the act of God exclusion. This action, commenced on January 27, 2014, ensued. It was removed to federal court on March 3, 2014, based on admiralty jurisdiction, and remanded on June 6, 2016 for a lack of federal jurisdiction. In the interim, the parties had made the foregoing motions.

In the Complaint, the Plaintiff asserts three causes of action: gross negligence, money had and received and prima facie tort. The title of the First Cause of Action notwithstanding, it is clear, based on the facts alleged, that Plaintiff's first claim is for negligence: that the Defendants failed to properly maintain the marina, including the pilings, in a safe suitable condition, resulting in the destruction of the houseboat when a rotten piling failed when hurricane Sandy hit. The Second and Third Cause of Action are based on the allegations that Defendants did not own the marina and lied about same to get Plaintiff to pay them mooring fees to which they were not entitled. As Defendant clearly owned the land adjacent to the navigable waterway where the houseboat was moored, Defendants had the legal right to operate the marina and therefore to charge Plaintiff rent to moor the houseboat there (*Kearns v Thilburg*, 76 AD3d 705, 707 [2d Dept 2010]). Accordingly, the Second and Third Causes of Action are dismissed.

As to the First Cause of Action (negligence), Defendants moved for summary judgment upon the expert report of Bartley J. Eckhardt, P.E., who opined, essentially, that the hurricane winds were such as tore the houseboat apart so that the only thing that could have saved the houseboat from destruction was if Plaintiff had moved it to a safer mooring prior to the arrival of

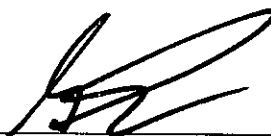
the storm. Plaintiff's responded to this by noting that the Eckhardt Report was inadmissible as not affirmed as well as by submitting his own expert Report. In their Reply papers, Eckardt affirmed his Report, whereupon Plaintiff objected that Defendants could not make out their prima facie entitlement to summary judgment in their Reply papers. While generally true, the exception is where, as here, the evidence is submitted in response to the opposition (*Citimortgage, Inc. v Espinal*, 134 AD3d 876, 879 [2d Dept 2015]); and that is particularly true here where the "new" material is the same Report previously submitted, now just affirmed: Plaintiff could hardly be surprised and in fact responded. So, based on the Eckhardt Report, Defendants established that the proximate cause of the destruction of the houseboat was the storm and not the failure of the moorings. In response, the Plaintiff's expert opined that it was the failure of a piling. This is a question of fact that requires a trial.²

Accordingly, all motions are denied except to the extent granted herein. The parties shall appear for a pre-trial conference on May 31, 2017 at 10am.

This constitutes the decision and order of the Court.

² The parties also dispute as to how many pilings the houseboat was moored to and whether the last mooring contract was still in effect and the consequence if it were on the date of the storm. The mooring contract required the Plaintiff to have "HULL . . . INSURANCE IN EFFECT DURING THE TIME THE BOAT IS AT THE NYACK MARINA, herein known as the Village. The Village, its agents and employees are not responsible for damage caused by fire, theft, storm, ice, acts of God" As the contract expired prior to the occurrence, there is a question of fact as to whether the parties intended to be bound by its terms while they negotiated a renewal. Be that as it may, the continued efficacy of the contract is immaterial. If, as Defendants contend, the loss was caused by an act of God – hurricane Sandy – inasmuch as a party is not responsible for a loss caused by an act of God unless he has assumed the risk (*Elliott and Stewart v Rossell and Lewis*, 10 Johns 1 [Sup Ct, 1813]; 17 NYJUR2d § 312; 1 AMUR2d § 15; see also *Wm. G. Roe & Company v Armour & Company*, 414 Fed 862 [5th Cir 1069]), and no one is asserting the Defendants assumed the risk of loss in the contract, it is immaterial.

Dated: New City, New York
May **17**, 2017



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J.S.C.

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