SHORT FORM ORDER

INDEX No. 12-34556
CAL. No. 17-00040OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 3-31-17 (003, 004)
ADJ. DATE 7-7-17
Mot. Seq. # 003 - MD
004 - MotD; CASEDISP

---X

BRIAN REILLY,

Plaintiff,

- against -

PATCHOGUE PROPERTIES, INC.,

Defendant.

---X

PATCHOGUE PROPERTIES, INC.,

Third-Party Plaintiff,

- against -

MATTHEW HANSEN

Third-Party Defendant.

---X

ALONSO KRANGLE, LLP
Attorney for Plaintiff Reilly
445 Broad Hollow Road, Suite 205
Melville, New York 11747

MIRANDA SAMBURSKY, SLONE, SKLARIN VERVENIOTIS, LLP
Attorney for Defendant/Third-Party Plaintiff
Patchogue Properties, Inc.
240 Mineola Blvd.
Mineola, New York 11501

MORGAN MELHUISH ABRUTYN
Attorney for Third-Party Defendants
39 Broadway, 17th Floor
New York, New York 10006

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the third-party defendant Matthew Hansen, dated February 23, 2017, and supporting papers (including Memorandum of Law dated

February 22, 2017); (2) Notice of Motion by the defendant and third-party plaintiff Patchogue Properties, Inc., dated March 10, 2017, supporting papers; (3) Affirmation in Opposition by the plaintiff, dated May 15, 2017, and supporting papers; (4) Affirmation in Opposition by Patchogue Properties, Inc., dated, May 12, 2017, and supporting papers; (5) Affirmation in Opposition by Matthew Hansen, dated April 25, 2017, and supporting papers; (6) Reply Affirmation by Patchogue Properties, Inc., dated July 6, 2017, and supporting papers; (7) Reply Affirmation by Matthew Hansen, dated June, 23, 2017, and supporting papers; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion (#003) by third-party defendant Matthew Hansen and the motion (#004) by defendant Patchogue Properties, Inc., are consolidated for the purposes of this determination; and it is

ORDERED that the motion (#004) by defendant Patchogue Properties, Inc. is determined as follows; and it is further

ORDERED that the motion (#003) by third-party defendant Matthew Hansen for summary judgment dismissing the third-party complaint against him is denied, as moot.

This is an action to recover damages sustained by plaintiff Brian Reilly as a result of an accident that occurred on July 7, 2012. The accident allegedly occurred while plaintiff was attending an engagement party for his cousin, third-party defendant Matthew Hansen, at the Patchogue Shores Community Center, which is owned and operated by defendant Patchogue Properties, Inc. Plaintiff was injured when he dove into shallow water from a bulkhead or dock. The complaint alleges that defendant Patchogue Properties was negligent in failing to warn of the existence of shallow water by posting proper "no swimming" and "no diving" signs. Thereafter, defendant Patchogue Properties commenced a third-party action against Matthew Hansen seeking contribution and indemnification. Specifically, Patchogue Properties alleges that Hansen, having entered into a contract for the use of the Community Center, agreed to indemnify and defend it from all claims arising out of the use of the property by him and his guests.

Patchogue Properties now moves for summary judgment dismissing the complaint against it, arguing that it did not have a statutory obligation to post any warnings, and that plaintiff's reckless conduct was the sole proximate cause of the incident. Patchogue Properties also moves for summary judgment in its favor for contractual indemnification against Hansen, arguing the rental agreement includes such a provision. In support of its motion, Patchogue Properties submit, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, the community center rental agreement, the police accident report, photographs of the subject premises, an affidavit of Daniel Hogan, and a letter from Nancy Pierson.

Plaintiff opposes the motion, arguing that Patchogue Properties had a statutory duty and a common law duty to provide warnings against diving in the subject area. In opposition, plaintiff submits, among other things, his own affidavit and affidavits of Terry Savage, Ann Marie Confessore, and David Steward Smith; photographs of the area where the accident occurred; an affirmation of Dr. Kelly Johnson-Arbor, and a transcript of the deposition testimony of Nancy Pierson.

Third-party defendant Hansen moves for summary judgment dismissing the third-party complaint against him, arguing that the Dram Shop Act is inapplicable under the circumstances. As to the claim for contractual indemnification, Hansen contends that it is void and that the rental agreement does not obligate him to indemnify Patchogue Properties for liability arising out of its ownership and maintenance of its property. In support of his motion, Hansen submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, the police accident report, photographs of the subject premises, and the community center rental agreement

At his examination before trial, plaintiff testified that on the day of the accident, he was attending an engagement party for Hansen. He testified that the party was held at the community center owned by Patchogue Properties, and that there was a park area and beach on the premises. He testified that he consumed about six beers during the six to seven hours at the party. He testified that there were various games during the party, and that he participated in an egg toss competition with his girlfriend, Terry Savage. He testified that after they were eliminated from the game, he had egg and lemonade on his clothing. He testified that while Terry went to the bathroom to clean herself off, he decided to go for a swim. He testified that he jogged on to the bulkhead and dove into the water. He testified that he had six cups of beer during the party, but did not feel that he was drunk and that he had decided to dive into the water earlier in the day. He further testified that he could not see the depth of the water and that the water appeared deeper than it was as there was a boat channel and a "pier sticking out in the water." He testified that he did not observe anyone else dive into the water, but saw people swimming.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

New York State Department of Health Code Part 6, Subpart 6-2, governing bathing beaches, states in relevant part that such beaches are required to have "[c]learly visible depth markings" at all platforms, piers, floats and similar facilities," and that warning signs stating "No Diving" shall be provided where water depths are less than eight feet. However, certain bathing beaches are exempt from such requirement under subpart 6-2.3(a)(2), which excludes beaches "owned and operated by a condominium...or an incorporated or unincorporated property association, all of whose members own residential property in a fixed or defined geographical area with deeded rights to use...provided such bathing beach is used exclusively by members of the condominium, cooperative apartment project or corporation or association and their family and friends."

Here, Patchogue Properties has established that the subject premises was excluded from the requirements of the aforementioned code. Patchogue Properties submits the deed to the subject premises, its certificate of incorporation and by-laws, and a letter from Nancy Pierson, Senior Public Health Sanitarian for the Bureau of Marine Resources for the Suffolk County Department of Health Services, stating the subject premises meets the criteria for a homeowner owned and operated facility, which is exempt from the requirements of the code. In opposition to defendant's motion, plaintiff argues that Patchogue Properties is not exempt, pointing to the testimony of William Leonhardt, President of Patchogue Properties, where he states that a marina is a part of the community and pays an assessment like a homeowner, while the code states that all members own residential property. Plaintiff further argues that Leonhardt testified that the beach is accessible to pedestrians while the code states that to be excluded, the bathing beach is used exclusively by members of the corporation and their family and friends. However, the mere fact that a marina pays an assessment and that people other than members of the corporation and their family and friends are able to access the beach is insufficient to raise an issue as to whether Patchogue Properties is excluded from the code. Furthermore, in reply to plaintiff's opposition, Patchogue Properties submits a list of exempt bathing beaches in Suffolk County from the Department of Health Services which includes the subject premises.

As to the assertion that Patchogue Properties breached its common law duty to plaintiff by failing to install warnings not to dive at the subject premises, Patchogue Properties has established that plaintiff was the sole proximate cause of his injuries. It has been held that summary judgment is appropriate, "notwithstanding that a defendant's negligence might have been a causative factor in the accident where the reckless conduct of the plaintiff constituted an unforeseeable superseding event, sufficient to break the causal chain and thus [absolving] the defendant of liability" (***Kriz v Schum,*** 75 NY2d 25, 35, 550 NYS2d 584 [1989]; *see* ***Boltax v Joy Day Camp***, 67 NY2d 617, 499 NYS2d 660 [1986]; ***Derdiarian v Felix Contr. Corp.***, 51 NY2d, 434 NYS2d 166 [1980]). Moreover, a defendant owes no duty to protect a person from the consequences of his or her own voluntary intoxication (*see* ***Filiberto v Herk's Tavern, Inc.***, 259 AD2d 917, 686 NYS2d 886 [3d Dept 1999]; ***Allen v County of Westchester***, 109 AD2d 475, 492 NYS2d 772 [2d Dept 1985]). Plaintiff's voluntary consumption of alcohol and reckless act of diving into water without first determining its depth constituted an unforeseeable superseding event absolving Patchogue Properties of liability (*see* ***Sardella v Hei Hotels #101 Inc.***, 277 AD2d 302, 715 NYS2d 748 [2d Dept 2000]; ***Mortis v Dittl***, 715 NYS2d 182, 275 AD2d 940 [4th Dept 2000]). The evidence reveals that plaintiff had about six cups of beer while he was at the party, and the hospital records indicate that he had a blood alcohol concentration (BAC) of 0.13%. Patchogue Properties submits an affidavit of Dr. Eric Fine, who states that at a BAC of 0.13%, alcohol intoxication was a contributing factor in the subject accident. He states that with that level of BAC, plaintiff's judgment, attention and control would be significantly diminished, his inhibitions decreased, and he would be mildly euphoric with a false sense of self-confidence. He states that plaintiff would have been much more likely to manifest risk-taking behavior at that level of intoxication. He further states that all these functions of the brain would have been impaired even without the presence of obvious signs of intoxication.

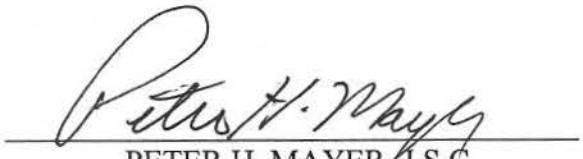
In opposition, plaintiff failed to raise a triable issue of fact. Plaintiff submits testimony of various witnesses, who state that he did not exhibit signs of intoxication. Plaintiff also submits an affirmation of Dr. Kelly Johnson-Arbor, who states that plaintiff's BAC of 0.128% would be consistent with some level of impairment, as BAC greater than 0.08% are associated with impairments in complex reaction time,

perceptual judgment, balance, coordination, and visual perception. She further states that a simple blood alcohol level does not necessarily indicate the actual level of impairment and physiologic impairment is dependent on an individual's tolerance to the effects of ethanol. While Dr. Johnson-Arbor states that there is no medical basis to conclude that plaintiff's dive into the water was caused by his intoxication or impairment, she does not dispute that plaintiff had some level of impairment at the time of the incident. Furthermore, plaintiff contends that he had decided to dive in earlier in the day, which appears to be an attempt to demonstrate that he was in a lesser impaired state at the time. However, it is unclear when he made that decision and what state of intoxication if any he was at that point, leaving the Court to speculate as to his level of intoxication.

In addition, the affidavit of Smith, who is purportedly an expert in aquatic safety, is insufficient to raise a triable issue of fact. While Smith states that the failure to provide warning signs by Patchogue Properites was in violation of industry standards and recommendations, he does not set forth and explain the industry standard. Finally, Smith is not permitted to offer an opinion as to whether Patchogue Properties is subject to the New York State Department of Health Code.

Accordingly, the application by Patchogue Properties for summary judgment is granted and the complaint is dismissed. In view of this determination, the third-party complaint is dismissed as academic and Hansen's motion is denied, as moot. Finally, the portion of Patchogue Properties' motion arguing that it is entitled to full defense of the action is denied. Hansen is not an insurer, and his duty to defend is no broader than his duty to indemnify (*see* ***Brasch v Yonkers Constr. Co.***, 306 AD2d 508, 762 NYS2d 626 [2d Dept 2003]).

Dated: January 10, 2018



PETER H. MAYER, J.S.C.