

Figueroa v Hornblower N.Y. LLC
2018 NY Slip Op 31593(U)
March 6, 2018
Supreme Court, New York County
Docket Number: 153853/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Hon. ROBERT D. KALISH
Justice

PART 29

JACLYN FIGUEROA nee JOSKO, as Administrator of the goods, chattels, and credits which were of PETER FIGUEROA, deceased, individually and as guardian of PEYTON FIGUEROA, infant,

INDEX NO. 153853/2017

MOTION DATE 2/28/18

MOTION SEQ. NO. 001

Plaintiffs,

- v -

HORNBLOWER NEW YORK LLC, Individually and d/b/a
HORNBLOWER CRUISES & EVENTS, HORNBLOWER YACHTS,
LLC, and RAFAELLA D. MARANHAO,

Defendants.

The following papers, numbered 7-19, were read on this motion to dismiss, pursuant to CPLR 3211.

- Notice of Motion—Affidavit in Support—Exhibits A-C—Memorandum of Law—Affidavit of Service | No(s). 7-13
- Affirmation in Opposition—Exhibits A-C—Affidavit of Service | No(s). 15-18
- Reply Memorandum of Law | No(s). 19

Motion pursuant to CPLR 3211 by Defendants Hornblower New York LLC and Hornblower Yachts, LLC to dismiss the complaint in its entirety against said Defendants is granted in part and denied in part as discussed herein.

BACKGROUND

In the instant complaint, Plaintiffs Jaclyn Figueroa and Peyton Figueroa claim that on the evening of May 10, 2014, decedent Peter Figueroa (“Figueroa”) and three other friends—Defendant Rafaella Maranhao, non-party Prince Stoney, and non-party Taleisha Charles—attended an event on Defendant Hornblower’s cruise ship entitled “Rock the Yacht – Saturday Night Party Cruise” which departed from pier 15, New York, NY at 8:30 p.m. that night. (Affirm. in Supp., Ex. A [Complaint] ¶ 27.) Plaintiffs allege, upon information and belief, that the subject vessel remained in waters under the jurisdiction of New York. (*Id.* ¶ 35.)

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Plaintiffs allege that Defendant Maranhao became visibly intoxicated on the cruise but that Defendants' employees continued to serve her alcoholic beverages. (*Id.* ¶ 50.) Plaintiffs further allege that, after returning to port in New York, Defendant Maranhao drove back into New Jersey—as she herself and Figueroa, Stoney, and Charles were all New Jersey residents—and that after entering New Jersey and while driving on the New Jersey Turnpike “at or about milepost 104.0,” Defendant Maranhao “lost control” of the vehicle and “caused the said [vehicle] to overturn.” (*Id.* ¶ 66.) It is alleged that this single-vehicle, “overturned collision” resulted in the deaths of decedent Figueroa and non-party Stoney. (*Id.* ¶ 67; Ex. C [Police Report].)

Plaintiffs allege claims against Defendant Hornblower pursuant to the New York Dram Shop Act – General Obligations Law § 11-101 – and for common law negligence under federal maritime law. Plaintiffs further allege derivative claims based on the loss of decedent Peter Figueroa.

PROCEDURAL HISTORY

On May 4, 2016, a complaint was filed by Taleisha Charles and on behalf of the estate of Prince Stoney (collectively, “Forde Plaintiffs”) against the same Defendants as in the instant case, and the action, *Forde v Hornblower New York, LLC*, No. 153739/2016 was commenced. Defendants subsequently removed the case to federal court, and the Forde Plaintiffs filed a motion to remand the matter back to state court. Thereafter, the instant Plaintiffs intervened in the federal action to oppose the remand and filed a complaint therein against Defendants.

On March 20, 2017, the federal court, sitting in the Southern District of New York, remanded the case, reasoning that it lacked jurisdiction because “an admiralty case may be removed to federal court only if another basis of jurisdiction exists.” (*Forde v Hornblower New York, LLC*, 243 F Supp 3d 461, 464 [SDNY 2017].) In addition, the federal court declined to exercise jurisdiction over the instant Plaintiffs' complaint. Thereafter, the instant Plaintiffs filed their complaint on April 26, 2017 in New York Supreme Court.¹

¹ The Forde Plaintiffs are currently litigating their claims in Part 47, under Index No. 153739/2016. On December 1, 2017, the court sitting in Part 47 denied the Forde Plaintiffs' motion to consolidate and reasoned:

ARGUMENTS

On the instant motion, Defendants argue that pursuant to this state's borrowing statute, CPLR 202, New Jersey's two-year statute of limitations applies to Plaintiffs' Dram Shop claim; and as such, Plaintiffs' Dram Shop claim must be dismissed as untimely filed by eleven months. Defendants also argue that Plaintiffs' maritime negligence claim must be dismissed as maritime law does not apply to the facts of the instant case.

Plaintiffs' argue that, pursuant to CPLR 203 (f), their Dram Shop Act claim is timely because the Court should view Plaintiffs' claims as reverting back to claims filed in the separate Forde Plaintiffs' action, under Index No. 153739/2016, on May 4, 2016, pursuant to CPLR 203 (f). Plaintiffs further argue that the requisite connection to maritime law does exist, and as such they should be allowed to proceed with their negligence claim under maritime law. In addition, Plaintiffs argue that because Defendants sought to remove a related action to federal court, Defendants are estopped from arguing that maritime law does not apply.

DISCUSSION

I. Plaintiffs' "Dram Shop" Cause of Action is Time-Barred.

New York's borrowing statute, as codified under CPLR 202, states as follows:

"An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except

"Defendants have demonstrated that consolidation of these matters will prejudice their statute of limitations defense in the second action. Also, Defendants have established that there are different issues of law and fact regarding the two actions despite arising from the same car accident."

(*Forde v. Hornblower New York LLC*, 2017 WL 6268249 [Sup Ct, NY County December 7, 2017].)

that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.”

CPLR 202 was designed to “provide the certainty of uniform application to litigants” and to prevent nonresidents from shopping in New York for a favorable statute of limitations. (*Glob. Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528-30 [1999].)

It is settled law that, for purposes of CPLR 202, a cause of action “accrues at the time and in the place of the injury.” (*Id.* at 529.)² Here, the injury—Figueroa’s death at the scene of the car wreck—occurred in New Jersey, and everyone inside the car wreckage was a resident of New Jersey. New Jersey has a two-year statute of limitations on actions for personal injury. (NJ Stat Ann 2A:14-2.)

Nonetheless, Plaintiffs argue that their causes of action under New York’s Dram Shop Act are timely because this Court should, pursuant to CPLR 203 (f), view said causes of action as reverting back to claims filed in the separate Forde Plaintiffs’ action, under Index No. 153739/2016, on May 4, 2016.

CPLR 203 (f) states as follows:

“*Claim in amended pleading.* A claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading.”

(Emphasis added.) This subsection specifically refers to claims that are asserted in amended pleadings—not claims raised by other parties.

Plaintiffs’ reliance on *Key Intern. Mfg., Inc. v Morse/Diesel, Inc.* is misplaced as the Appellate Division, Second Department expressly stated that the case was not intended to be used for the proposition that Plaintiffs advocate:

² “Because earlier iterations of the borrowing statute predate the substantive choice-of-law “interest analysis” test used in tort cases . . . [this doctrine is] inapplicable to the question of statutory construction presented by CPLR 202.” (*Glob. Fin. Corp.*, 93 NY2d at 529.)

“We emphasize, however, that the rule permitting the claim of a newly joined plaintiff to relate back to the earlier claim of a preexisting plaintiff, does not necessarily extend beyond those situations, such as this case, where the substance of the claims of the newly joined plaintiff and those of existing plaintiff are virtually identical, where the ad damnum clause is thus the same in the proposed amended complaint as in the original complaint, and where the newly joined plaintiff is closely related to the original plaintiff. *We do not suggest that an entirely separate plaintiff may be joined in a pending action, in order to assert an otherwise time-barred claim pursuant to the relation back provisions of CPLR 203(e) where to do so would increase the measure of liability to which the defendants are exposed.*”

(142 AD2d 448, 458–59 [2d Dept 1988] [emphasis added].) Accordingly, this Court finds that the instant complaint does not relate back to the complaint in the separate action *Forde v. Hornblower New York LLC*, Index No. 153739/2016, and, therefore, Plaintiffs’ cause of action under New York’s Dram Shop Act is barred, as the relevant two-year statute of limitations, under New Jersey law, must be applied to this claim.

II. Plaintiff States a Cause of Action for Negligence Under Federal Maritime Law.

“At common law, one who provided intoxicating liquor was not liable for injuries caused by the drinker, who was held solely responsible.” (*D’Amico v Christie*, 71 NY2d 76, 83 [1987].) The Dram Shop Act, as codified in General Obligations Law § 11-101, created a statutory exception to this common law rule, whereby a party that is injured by an intoxicated person has a cause of action against “any person who shall, by unlawful selling to or unlawfully assisting in procuring liquor for such intoxicated person, have caused or contributed to such intoxication.” (General Obligations Law § 11-101.)

Because Plaintiffs failed to timely prosecute their Dram Shop claim, this Court must now consider whether the instant case may proceed based on a theory of negligence under federal maritime law, which has a three-year statute of limitations pursuant to 46 USC § 30106. As such, this Court is potentially faced

with two questions: 1) whether federal maritime jurisdiction exists over this action; and, if so, 2) whether Plaintiffs state a cause of action sounding in negligence, under federal maritime law, based on injuries allegedly proximately caused by the overserving of Defendant Maranhao while on navigable waters.

As a general rule, federal courts do not have exclusive jurisdiction to hear and determine cases involving the application of federal maritime law, and such cases may be heard in state courts exercising in personam jurisdiction over the controversy. (*Lewis v Lewis & Clark Mar., Inc.*, 531 US 438, 455 [2001], citing *Romero v Intl. Term. Operating Co.*, 358 US 354, 371–72 [1959].) However, in adjudicating maritime claims, state courts “must apply Federal law to secure a single and uniform body of maritime law.” (*Lerner v Karageorgis Lines, Inc.*, 66 NY2d 479, 484–85 [1985] [internal quotation marks omitted].) As such, state courts apply “a so-called ‘reverse-*Erie*’ doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.” (*O’Hara v Bayliner*, 89 NY2d 636, 646 [1997], quoting *Offshore Logistics, Inc. v Tallentire*, 477 US 207, 223 [1986].) In applying and interpreting federal maritime law, courts of this state are bound to follow federal precedent when there is a controlling Supreme Court decision or when there is a relevant “uniform Federal rule, albeit one established by lower Federal courts.” (*Alvez v Am. Export Lines, Inc.*, 46 NY2d 634, 639 [1979], *affd*, 446 US 274 [1980].)

Notwithstanding the aforesaid rules, “[w]ith respect to maritime torts, a state ‘may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation.’” (*Durando v City of New York*, 105 AD3d 692, 695 [2d Dept 2013], quoting *Just v Chambers*, 312 US 383, 388 [1941].)

Of course, before a court begins the task of interpreting the aforesaid web of federal and state law, a court must determine whether a complaint states a cause of action sounding in maritime law. In *Jerome B. Grubart, Inc. v Great Lakes Dredge & Dock Co.*, the United States Supreme Court stated:

“[To invoke maritime jurisdiction,] a tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the

location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must assess the general features of the type of incident involved, to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.”

(513 US 527, 534 [1995] [internal quotation marks and citations omitted].) Under *Grubart*'s connection test, the assessment of whether the subject incident has a potentially disruptive impact on maritime commerce “turns [] on a description of the incident at an intermediate level of possible generality.” (*Id.* at 538, citing *Sisson v Ruby*, 497 US 358, 363 [1990].)³

Over the last two decades, federal courts have applied the above *Grubart* test to cases where an individual consumes alcohol on board a ship and then causes injuries (to himself or others) on land.⁴ The results have been mixed.⁵ (*Vollmar v*

³ In *Sisson*—which involved a fire that erupted in the area of a washer/dryer unit onboard a pleasure yacht—the United States Supreme Court stated that “a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity.” (497 US at 363.)

⁴ There are also several noteworthy cases preceding *Grubart* that analyze alcohol-related injuries in the maritime context.

In *Duluth Superior Excursions, Inc. v Makela*, the plaintiff was struck by a vehicle whose motorist who had just disembarked from a three-hour “booze cruise” on the defendant’s vessel. The Eighth Circuit ruled that federal maritime law applied, reasoning “that the sequence of causal events alleged in this case started on board the vessel and ended on land, calling into play the Admiralty Extension Act.” (623 F2d 1251, 1254 [8th Cir 1980].)

In *Meyer v Carnival Cruise Lines, Inc.*, the eighteen-year-old plaintiff allegedly fell over a midship stairway bannister, which she and her nineteen-year-old friend were sliding down. Immediately prior to her fall, the plaintiff and her friend had been drinking together at the defendant vessel’s bar and casino. There was no dispute that the court had maritime jurisdiction since the accident occurred on navigable waters off the coast of Mexico. However, the United States Court for the Northern District of California declined an invitation by the plaintiff to “fashion a federal maritime dram shop rule” and instead found that California’s existing dram shop statute would apply. (1994 WL 832006, at *4 [ND Cal Dec. 29, 1994].)

⁵ Other state courts have also examined admiralty law’s application to cases where onboard consumption of alcohol allegedly results in injuries on land.

O.C. Seacrets, Inc., 831 F Supp 2d 862, 870 [D Md 2011] [“It appears that federal trial courts have disagreed on whether there is a maritime dram shop law.”]

In *Thier v Lykes Bros., Inc.*, the ship’s chief officer consumed several alcoholic beverages onboard his vessel and then proceeded to drive the plaintiff cadet to dinner. (900 F Supp 864, 866-69 [SD Tex 1995].) On the way to dinner, the chief officer lost control of the vehicle, and the plaintiff cadet suffered injuries in the ensuing single-car collision.

After conducting a non-jury trial, the court found that both the plaintiff cadet and his chief officer were Jones Act seamen acting with the scope of their employment and that:

“The Defendants were negligent in operating a ‘floating dram shop’ and allowing a party atmosphere to prevail onboard wherein ship’s officers frequently had girlfriends and guests onboard together with a regularly stocked store of party supplies including alcoholic beverages.”

(*Id.* at 870.) In addition, noting the Defendants’ challenge to its subject matter jurisdiction, the court found that it had jurisdiction because the plaintiff cadet and the chief officer were Jones Act seamen and, separately, because the nature of the tort sounded in maritime law:

In *Horak v Argosy Gaming Co.*, a jury found that the decedent died in a single-car collision after “becoming very inebriated” aboard a riverboat casino. (648 NW2d 137, 141 [Iowa 2002].) On appeal, the defendant riverboat argued that the trial court erred in refusing to apply federal maritime law instead of Iowa’s Dram Shop Statute. (*Id.* at 140.) The Iowa Supreme Court affirmed, reasoning that “we are convinced that the ‘humane and liberal character’ of admiralty law . . . compels the application of the more beneficent” Iowa Dram Shop statute. (*Id.* at 147.)

In *Schlumberger Technology Corp. v Arthey*, the two plaintiffs were traveling along the highway on motorcycles when they were struck by an intoxicated driver who had just left a work-related event where he allegedly consumed alcohol aboard a small fishing boat earlier. (435 SW3d 250, 252 [Tex 2014].) The plaintiffs asserted a claim under federal maritime law against the defendant company, which hosted the event, arguing that the defendant “negligently allowed [the driver] to drink excessively.” (*Id.*) The Texas Supreme Court held that maritime law did not apply, reasoning that “[d]rinking while fishing, if not a time-honored tradition, is certainly common enough that, if it posed more than a fanciful risk to commercial shipping, reports of disruptions to commerce would abound.” (*Id.* at 256-57.) Judgment was rendered in favor of the defendant business entity that organized the event because “[u]nder Texas law, a social host has no duty to prevent someone from drinking and driving.” (*Id.* at 251.)

“The Court has concluded that negligence on the part of Lykes and [the chief officer] occurred onboard the vessel and it cannot be disputed that this vessel negligence caused damage and injury to be done or consummated on land. Accordingly, this Court has subject matter jurisdiction *irrespective of* whether either the Plaintiff or [the chief officer] were within the course and scope of their employment and irrespective of whether they were Jones Act seamen.”

(*Thier v Lykes Bros., Inc.*, 900 F Supp 864, 878 [SD Tex 1995] [emphasis added], citing *Duluth Superior Excursions, Inc. v Makela*, 623 F2d 1251 [8th Cir. 1980].)

In *Young v Players Lake Charles, L.L.C.*, the plaintiffs were traveling on a highway in Louisiana when their car was struck by an intoxicated motorist. (47 F Supp 2d 832, 833 [SD Tex 1999].) The intoxicated motorist had a blood alcohol level of .259 and had “undisputedly been drinking for several hours” onboard the defendants’ riverboat casino, where he received eleven “comps” from the casino to purchase drinks while he gambled. (*Id.*)

As the United States District Court for the Southern District of Texas explained, “because Louisiana law completely insulates providers of alcohol from liability for the actions of those to whom they sell or serve alcohol[,]” the plaintiffs could only recover if the law of another jurisdiction applied.⁶ (*Id.* at 834.)

Applying *Grubart’s* analysis, the *Young* court first found that the location test was satisfied because “the serving of copious amounts of alcohol on the casino boat, occurred on navigable waters.” (*Id.* at 834.) The *Young* court then found that the subject incident also satisfied the connection test:

“At an intermediate level of generality, then, this incident can be described as a potentially negligent condition affecting passengers aboard the vessel. It is not difficult to imagine a slightly different scenario from the case at bar in which an intoxicated passenger falls down a stairway or into the water. Such an incident could lead to a disruption as rescue crews attempt to locate and

⁶ The plaintiffs, who were all residents of Texas, argued that federal maritime law applied to their negligence claim; and that if maritime law did not apply, then Texas law should apply. (*Id.*)

save the passenger or search for his body. With respect to the second issue under the nexus prong, there likewise appears to exist a substantial relationship to traditional maritime activity. The PLAYERS III is a mobile riverboat casino fully and presently capable of, and actually, traveling on navigable waters. In this respect, it is similar to cruise and sightseeing vessels that regularly transport passengers over navigable waters. Courts have consistently stated that torts on such vessels satisfy the traditional maritime activity requirement.”

(*Id.* at 835.) With regard to the scope of duty pertaining to onboard alcohol consumption, “[a]ccording to the fundamental principles of negligence law, which the general maritime law has adopted, plaintiffs are owed a duty of ordinary care.” (*Id.* at 837.) As such, the Young court reasoned, Louisiana’s statute—that insulated casinos and taverns on land—did not apply where the alcohol consumption occurred on navigable waters. (*Id.*)

In *Bay Casino, LLC v M/V Royal Empress*, the plaintiffs were driving on a Florida highway when their vehicle was struck by an intoxicated motorist. (199 FRD 464, 465 [EDNY 1999].) The motorist was allegedly served liquor to the point of inebriation while he was on a gambling day cruise aboard the defendant’s vessel. (*Id.*)

Applying *Grubart’s* analysis, the United States District Court for the Eastern District of New York found that the alleged facts—the provision of “large amounts of alcohol” to an underaged patron on navigable waters—satisfied the location test. (*Id.* at 466.) The *Bay Casino* court also found that the alleged facts satisfied the connection test:

“[T]he general features of the accident alleged—alcohol-related injury to a third party by a passenger on the gambling cruise—may well have a disruptive effect on maritime commerce. The popularity of gambling ‘cruises to nowhere’ demonstrates an increasing potential that incidents like that alleged here will be faced both on land and on ship by vessel owners and operators. Finally, there is a ‘substantial relationship to traditional maritime activity’ as courts have recognized that torts aboard entertainment

vessels, including cruise ships, sightseeing ships, and casino boats satisfy the traditional maritime activity requirement.”

(*Id.* [citing *Young*].) The *Bay Casino* court noted that there was a dispute about what substantive law should apply and that the defendants argued that there is no federal maritime dram shop rule. (*Id.* at 466-67.) The court however found that alleged facts were similar to those in *Young* and further found that *Young* court’s reasoning in applying a negligence standard was persuasive. (*Id.* at 467.)

Crear v Omega Protein, Inc. did not involve alcohol related injuries, but instead involved onboard injuries to the plaintiff Crear when the stern pipe on the defendant’s vessel came loose and struck the plaintiff in the head. (2002 WL 1941447 [ED La Aug. 21, 2002].) Among other injuries, Crear claimed that the accident caused him to suffer from mental illness. As the United States District Court for the Eastern District of Louisiana explained “[t]his relatively routine Jones Act case became complicated when, [roughly a year after the accident], Crear killed his grandmother by striking her multiple times with a hatchet at her home in Moss Point, Mississippi.” (*Id.* at *1.) Eight of the grandmother’s children then filed claims alleging that “the actions of the defendant in causing Crear’s head injury and in failing to supply him with prompt and proper treatment caused his insanity which resulted in his grandmother’s death.” (*Id.*)⁷ The defendant sought to dismiss the claims related to the grandmother’s death, arguing, among other reasons, that said claims were not recoverable under maritime law.

The *Crear* court denied the motion to dismiss, finding that the grandmother’s death—“while far removed in time and space from the ‘injury-causing event’”—may have been proximately caused by negligence on the defendant’s vessel. (*Id.* at *4.) In so finding, the *Crear* court analogized the facts before it to the “recent spate of ‘dram shop’ cases, involving passengers who are served excessive amounts of alcohol on vessels, often ‘floating casinos,’ and after disembarking are involved in ‘on shore’ automobile accidents.” (*Id.*, citing *Young* and *Bay Casino*.)

⁷ At the criminal trial for the murder of his grandmother, a Mississippi jury found Crear “not guilty due to insanity.” (*Id.* at *1.)

In *White v Sabatino*, the defendant Sabatino allegedly operated a vehicle while intoxicated and became involved in a two-car collision, resulting in the death of the other driver. (526 F Supp 2d 1143, 1148 [D Haw 2007].) Prior to the accident Sabatino allegedly became intoxicated from being overserved with alcoholic beverages while she was a passenger on board the co-defendant's cruise vessel. (*Id.*)

On a motion to dismiss challenging the Court's maritime jurisdiction, the United States District Court for the District of Hawaii found that its maritime jurisdiction applied. The *White* court found that *Grubart's* location test was satisfied because the overserving occurred on navigable waters. In addition, the first prong of the connection test was satisfied because:

"The ability to serve alcohol on cruise ships and tours as well as the manner that the alcohol served and marketed affects the commercial activities of maritime cruise operators because drunk passengers can disrupt cruise operations in many ways. A drunk passenger has a higher likelihood of becoming injured or inflicting injury aboard the ship, falling overboard, or generally interfering in the operation of the vessel."

(*Id.* at 1154.) In addition, the second prong of the connection test was satisfied "because operating cruise ship tours for profit are related to traditional maritime activities of transporting persons on navigable waters for commercial purposes." (*Id.* at 1156 [internal quotation marks and emendation omitted].)

In *Mazurkiewicz v Queen of Heart Cruises, Inc.*, the plaintiffs were allegedly assaulted near the dock after disembarking from the defendant's vessel. (2007 WL 4591674, at *1 [EDNY Dec. 28, 2007].) The plaintiffs alleged claims under common law negligence and New York's Dram Shop law. (*Id.*)

The United States District Court for the Eastern District of New York initially found that it had "admiralty jurisdiction over this matter because plaintiffs alleged injuries sustained as a result of unknown individuals being negligently served alcohol aboard Queen of Hearts' vessel." (*Id.*, citing *Bay Casino*.) However, the Court granted the defendant vessel summary judgment on plaintiffs' negligence claim because "it is undisputed that the assault occurred after plaintiffs

disembarked”, and, as such, the defendant vessel “owed no common law duty to plaintiffs.” (*Id.*, citing *Hayes v City of New York*, 34 AD3d 208, 209 [1st Dept 2006].) On the other hand, the *Mazurkiewicz* court allowed plaintiff’s Dram Shop claim to go forward, finding triable issues of fact concerning whether the vessel defendant served alcohol to the perpetrators of the assault when they were in a visibly intoxicated state. (*Id.*)

The alleged facts in *Vollmar v O.C. Seacrets, Inc.* were essentially the reverse of the facts in *Young*. (831 F Supp 2d 862 [D Md 2011].) In *Vollmar*, the defendant boat owner moored his vessel in the bay and then took a water taxi to the defendant resort onshore. (*Id.* at 865.) At the resort, the defendant boat owner “excessively consumed alcohol and became visibly intoxicated.” (*Id.*) Thereafter, the defendant boat owner took the same water taxi back to his vessel, along with the plaintiff. (*Id.*) The defendant boat owner then lost control of his vessel and collided with the cement pilings of a bridge, injuring the plaintiff. (*Id.*) The plaintiff alleged claims against the defendant resort under federal maritime law for negligence and “Maritime Dram Shop Liability.”

Examining *Young*, *Bay Casino* and *Meyer*, the United States District Court for the District of Maryland dismissed the claims against the defendant resort, reasoning that in the aforesaid cases the consumption of alcoholic beverages occurred aboard a vessel—whereas the defendant boat owner became intoxicated on land.

In *Tandon v Captain's Cove Marina of Bridgeport, Inc.*—which the Defendants rely heavily upon—the defendant vessel owners took several passengers on a “social trip” to the defendant marina, where they went to a restaurant for “food and drinks.” (752 F3d 239, 241 [2d Cir 2014].) While at the defendant marina, passengers of the defendant vessel owners got into a verbal altercation with the plaintiffs who were leaving the marina via a separate vessel. Thereafter, both vessels docked on a permanent “floating dock” that was accessible only by water but was “connected by pilings to the harbor floor.” (*Id.* at 248.) At said dock, the passengers from the two vessels got into a fist-fight, wherein one of the plaintiffs allegedly fell unconscious into the water and suffered asphyxia-related injuries. The plaintiffs asserted claims under theories of negligence,

“reckless dispensing of liquor,” and pursuant to the Connecticut Dram Shop Act. (*Id.* at 242.)

On appeal of a petition to limit liability, the United States Court of Appeals for the Second Circuit affirmed denial of the petition, holding that “federal admiralty jurisdiction does not reach the claims at issue here, because this type of incident does not have a potentially disruptive effect on maritime commerce.” The Second Circuit further reasoned:

“First, a fistfight on and around a dock cannot immediately disrupt navigation. Unlike a sinking plane, a collision between vessels, or a collision between a vessel and an underwater structure, it does not create any obstruction to the free passage of commercial ships along navigable waterways. Nor can it lead to a disruption in the course of the waterway itself. Second, a fistfight on a dock cannot immediately damage nearby commercial vessels. The fire considered in *Sisson* threatened the safety of all other boats nearby; a fistfight threatens only its participants. As the district court correctly pointed out, a fight is unlikely to spread the entire length of a dock, as a fire would, and, therefore, there is little risk that a fight would make the marina inaccessible or impact other boats.”

(*Id.* at 249–50 [internal quotation marks, citations, and emendation omitted].)⁸

Applying *Grubart* analysis to the alleged facts, it is clear that maritime jurisdiction applies to the instant case. The overserving of Defendant Maranhao is alleged to have occurred on navigable waters, so the location test is satisfied. In addition, on an intermediate level of generality, the alleged conduct can be described as the overserving of intoxicated passengers on board a vessel. With regard to the first prong of the connection test, as the court in *Young* explained, “[i]t is not difficult to imagine a slightly different scenario from the case at bar in which an intoxicated passenger falls down a stairway or into the water.” (47 F Supp 2d at 835.) The ensuing rescue or recovery effort could easily snarl traffic on the waterway. (*Id.*) The second prong of the connection test is also satisfied

⁸ The Second Circuit also found that because the subject dock was connected to the harbor floor, it was “technically land, through a connection at the bottom of the sea.” (*Id.* at 248, quoting *United States v Evans*, 195 US 361, 367, 25 S Ct 46, 48, 49 L Ed 236 [1904].)

“because operating cruise ship tours for profit are related to traditional maritime activities of transporting persons on navigable waters for commercial purposes.” (*White*, 526 F Supp 2d at 1156 [internal quotation marks and emendation omitted].)

In addition, Defendants’ reliance on *Tandon* is misplaced. Although one might infer that alcohol consumption may have played a role in bringing about the subject physical altercation—based on the underlying claims in that case—there is no mention of whether the alcohol was consumed aboard navigable waters as opposed to on land while the parties were at the marina. In addition, the Second Circuit does not mention any of the aforesaid cases that deal with onboard alcohol consumption.

However, based on the above cases, there does not appear to be a uniform rule from the federal courts on whether vessel owners have a common law duty, under federal maritime law, to prevent on-land injuries that may result from onboard consumption of alcohol.⁹ Indeed, the federal court that heard the motion to remand in this case found that “there is some question of whether tortious acts alleged in this case bear a significant relationship to traditional maritime activity.” (*Forde v Hornblower New York, LLC*, 243 F Supp 3d 461, 469 [SDNY 2017].)

Nonetheless, this Court will give deference to what appears to be a majority rule among federal courts: that when a plaintiff’s injuries on land were proximately caused by an individual being overserved alcohol while on navigable waters, that plaintiff states a cause of action sounding in negligence under federal maritime law. This decision to give deference to the majority rule in the federal courts is further buttressed by dicta from the Appellate Division, First Department in *Hayes v City of New York*. (34 AD3d 208, 209 [1st Dept 2006].) In declining to apply federal maritime law to an on-shore fist-fight that occurred shortly after the cruise ship passengers disembarked in Manhattan, the majority in *Hayes* wrote:

⁹ See also *Varner v Celebration Cruise Operator, Inc.*, 2016 WL 7508258, at *5 (SD Fla Sept. 30, 2016) (“The Court finds that there is no consistent or uniform body of federal maritime common law imposing liability or restricting liability on sellers of alcohol for injuries resulting from those sales.”); *Vollmar v O.C. Seacrets, Inc.*, 831 F Supp 2d 862, 870 (D Md 2011) (“It appears that federal trial courts have disagreed on whether there is a maritime dram shop law.”); *Christiansen v Christiansen*, 152 P3d 1144, 1147 (Alaska 2007) (holding that there was no “controlling federal rule” imposing liability on an unlicensed social host in case involving intoxication related drowning).

“The dissent's reliance on cases involving the serving of alcohol on vessels is misplaced since there is no indication here, apart from the fact that alcohol was served during the dinner cruise, that alcohol in any way contributed to either of the two altercations or the assault. Further, the dissent's attempt to analogize drunk driving cases with the instant injury, which was the result of an intentional act directed to one particular person, is unpersuasive.”

(34 AD3d 208, 209 [1st Dept 2006].)

As such, the Court finds that Plaintiffs sufficiently allege a claim for negligence under federal maritime law.¹⁰

¹⁰ Because this Court finds that Plaintiffs sufficiently allege a cause of action for negligence under federal maritime law, this Court does not address Plaintiffs' argument that Defendants were estopped from moving for dismissal of said cause of action.

CONCLUSION

Accordingly, it is hereby

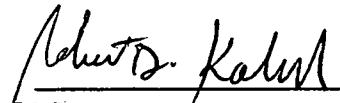
ORDERED that the instant motion by Defendants Hornblower New York LLC and Hornblower Yachts, LLC to dismiss the complaint in its entirety against said Defendants is granted in part to the extent that the complaint's second cause of action, for alleged violations of New York State Alcoholic Beverage Control Law § 117-a and General Obligations Law § 11-101, is dismissed; and it is further

ORDERED that the instant motion is otherwise denied; and it is further

ORDERED that the parties are to appear for a status conference before this Court at 71 Thomas Street, Room 104 on May 1, 2018 at 9:30 AM.

The foregoing constitutes the decision and order of the Court.

Dated: March 6, 2018
New York, New York

 J.S.C.
HON. ROBERT D. KALISH
J.S.C.

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED NON-FINAL DISPOSITION
- GRANTED DENIED GRANTED IN PART OTHER
- SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE