

Joseph v Circle Line - Sightseeing Yachts, Inc.

2019 NY Slip Op 31738(U)

June 19, 2019

Supreme Court, New York County

Docket Number: 154699/16

Judge: Lynn R. Kotler

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8**

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LORNA JOSEPH,

DECISION/ORDER
INDEX No.: 154699/16

Plaintiff(s),

-against-

CIRCLE LINE - SIGHTSEEING YACHTS, INC.,
et al.,

Present:
Hon. Lynn R. Kotler, J.S.C.

Defendant(s).

-----X

Hi, hi we're your weather girls
Ah-huh
And have we got news for you
You better listen
Get ready, all you lonely girls
And leave those umbrellas at home
Alright

"It's Raining Men" by The Weather Girls

This is a personal injury action arising from a slip and fall on a boat owned by defendant Circle Line – Sightseeing Yachts, Inc. ("Circle Line") on which defendant Get Punished LLC ("GP LLC") was having an event. Circle Line moves for summary judgment (CPLR § 3212). Defendants Sharay Hayes ("Hayes") and GP LLC (together with Hayes, the "Hayes Defendants") cross-move for summary judgment dismissing plaintiff's claims and Circle Line's cross-claims. Plaintiff opposes the motion and cross-motion and Circle Line opposes the cross-motion. Defendants Robert Vasquez and LatinClubs.com have defaulted in appearing in this action.

Issue has been joined and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. For the reasons that follow, the motion and cross-motion are denied.

Many of the relevant facts are in dispute. The court will highlight those disputes as follows. On the evening of July 12, 2013, plaintiff was on the boat with friends at an all-male dance review. Plaintiff claims that it was raining that night. Plaintiff has provided the affidavit of Steven Roberts, a forensic meteorologist, who asserts that it rained frequently on the date of plaintiff's accident.

There were approximately 300 guests and 50 male dancers on the boat that night. Plaintiff testified at her deposition that she sat for approximately three to four hours at the back of the boat. Towards the end of the event, plaintiff and her friend Anna decided to use the bathroom before they left the boat. They were directed by a "gentleman" wearing "a bluish uniform" to a bathroom downstairs. Anna descended the staircase first, and then as plaintiff attempted to go down, she slipped and fell to the bottom of the stairs.

Plaintiff claims that she slipped due to oil and water. Plaintiff stated during her deposition that she observed that there was rain water on the deck and that the deck/stairs were slippery due to baby oil. Plaintiff explained:

Q. Did you see anything wrong with the steps?

A. It was all slippery.

Q. When did you see that?

A. From when we reach half of the ship where they was dancing the most, it was slippery from oil.

Q. But my question to you is when did you first see that?

A. From when we was walking.

Q. So you saw that it was slippery –

A. Yeah, and we start tiptoeing because we didn't want to fall.

Q. My question to you is when did you first see it?

A. When we was walking to the bathroom.

Q. Okay, so were you at the top of the stairs?

- A. No, we didn't get to the stairs yet when it was slippery. It was slippery from half of where they was dancing to the bathroom part. Because that's where they was dressing. In the bathroom down there they was doing -- changing their clothes down there. That's why there was oil on their skin and the ladies was oiling them all in that section.

...

As to what caused her to slip and fall, plaintiff testified:

- Q. And do you know what it was?
- A. It was oil and water.
- Q. How do you know that?
- A. Because it was raining and that's where the ladies was oiling them right there too.
- Q. The ladies were oiling them?
- A. Yes. The women in the show, they would come out and let them rub their body.

In opposition to the motion and cross-motion, plaintiff has submitted to the court sworn affidavits from her friends who were on the boat with her, Anna Singletary and Sofia Mix, which support her factual claims about the accident and the condition of the boat.

On the night of plaintiff's accident, the boat had been chartered pursuant to a document entitled "Charter Party Agreement" dated January 18, 2013. The document provides that for \$5,500.00, the boat would be chartered by LatinClubs.com c/o Mr. Robert Vasquez subject to the terms and conditions of the Charter Party Agreement. It is undisputed that the Charter Party Agreement was signed by Hayes simply as "charterer" on behalf of Latinclubs.com. Hayes paid the fee with a credit card issued to GP LLC.

Circle Line has provided the affidavit of Louis Gorbea, its Director of Event Planning in July 2013, who signed the Charter Party Agreement on behalf of Circle Line. Gorbea states, *inter alia*, that at no time did Hayes represent to him that he was signing the Charter Party Agreement on behalf of another person or entity.

The Charter Party Agreement provides in relevant part:

6. . . . Charterer also agrees that it will be responsible for cleaning and maintaining all areas where passengers consume food and/or beverage so as to avoid risk of injury to Passengers and Charterer will instruct the Passengers to promptly clean-up any spilled food or beverages. Charterer hereby acknowledges and agrees that it is the Charterer's responsibility to maintain the decks of the vessel in a clean and dry condition during the Charter.

* * * * *

17. Indemnification. CHARTERER AGREES TO FULLY PROTECT, INDEMNIFY AND HOLD HARMLESS CIRCLE LINE, ITS OFFICERS, SERVANTS, AGENTS AND EMPLOYEES, THE VESSEL, ITS MASTER, OFFICERS AND CREW FROM AND AGAINST EACH AND EVERY CLAIM, DEMAND, CAUSE OF ACTION AND LIABILITY, COST EXPENSE (INCLUDING BUT NOT LIMITED TO, REASONABLE ATTORNEYS FEES AND EXPENSES WHICH CIRCLE LINE MAY INCUR EITHER AS A RESULT AN ACTION BETWEEN THE PARTIES HERETO OR BETWEEN CIRCLE LINE AND ANY THIRD PARTY OR OTHERWISE), DAMAGE OR LOSS WHICH CIRCLE LINE MAY SUFFER ON ACCOUNT OD PERSONAL INJURY, DEATH OR PROPERTY DAMAGE ARISING OUT OF OR IN ANY WAY INCIDENTAL TO THE CHARTERER, EVEN IF THE PERSONAL INJURY, DEATH OR PROPERTY DAMAGE ARISES OUT OF CIRCLE LINE'S OWN NEGLIGENCE.

* * * * *

21. Jurisdiction; Governing Law. . . . This Agreement shall be governed and construed in accordance with the general maritime law of the United States.

Hayes is the sole owner of GP LLC as well as one of the dancers on the night of plaintiff's accident. After signing the Charter Party Agreement, Hayes paid for the charter using a corporate credit card issued to GP LLC. Hayes claims that he was acting as an agent for Vasquez and LatinClubs.com when he entered into the agreement. Hayes testified at his deposition that he made the payment to Circle Line on behalf of Vasquez "as a favor because [Vasquez] said there was a sense of urgency for payment to be made and he couldn't make it there." Hayes never communicated with Circle Line that he did not intend to be bound by the Charter Party Agreement and admits that he was unaware whether Circle Line was aware that there was an agreement between himself and Mr. Vasquez:

- Q. You testified earlier that you thought this hire payment was a business expense, correct?
- A. Yes.
- Q. And that was a business expense of Get Punished LLC?
- A. Yes.
- Q. So, square with me. If it's a business expense for Get Punished LLC, then why don't you believe that you are the charterer?
- A. Well, no. See, my agreement with Mr. Vasquez is that he gets a prepaid percentage of my sales. So, that \$5500 is his percentage of my earnings for the event. Now, if he tells me to delegate that -- his portion of my sales to that -- in a form of a payment to the boat, then I am just asking for what I am going to do. But that \$5500 is a portion of my sales. So, if my total amount of sales is \$12,000 and I have to give him \$5500 of it, then I see that as an expense of my business because that's not revenue that I made.
- Q. But Circle Line is not aware of that agreement, are they?
- A. This is an agreement with me and Mr. Vasquez.
- Q. So, Circle Line is not aware of that agreement, correct?
- A. I don't know what Circle Line is aware of. I don't know what Robert Vasquez and Louis talk about. I am not privy to that information so I can't answer that question.

About signing the agreement, Hayes testified:

- Q. Were you under duress when you signed this agreement?
- A. When I signed this agreement, I actually thought it was part of the sales receipt. I had no idea it was a contract. I had absolutely positively had no idea it was a contract. When I got a copy of this, this was the most foreign thing I've ever seen. Because I got pretty much my credit card slip coming out and I signed my credit card slip and this was kind of pushed ahead of me and said, "Hey, give this a sign." And then I contacted Robert and said, "Hey, they had me sign some other agreement, some papers" and he was like "Yeah, yeah, yeah. Don't worry about it. It's part of the process." I had no idea to what extent this was. I thought it was more of a payment receipt than anything.
- Q. Were you under duress When you signed this agreement; yes or no?
- A. No. It was a very casual transaction.

As for the condition of the boat itself, Hayes testified that he used the stairs on which plaintiff fell numerous times before her accident and they were “normal” and dry. Hayes also disputes plaintiff’s claims about the dancers applying oil to their bodies or that audience members were allowed to do so.

Circle Line produced William Smith, a deckhand, and Joseph Volini, the boat captain who were both on the boat the night that plaintiff was injured. They testified that they did not observe any of the dancers use oil during the charter and the disputed plaintiff’s description of the condition of the boat on the night of her accident.

In her complaint, plaintiff has asserted one cause of action for negligence against all the defendants and two separate causes of action to pierce the corporate veil against the individual defendants, Vasquez and Hayes. In its answer, Circle Line has asserted cross-claims against the Hayes Defendants seeking common law contribution and common law and contractual indemnification.

Parties’ arguments

Circle Line advances three arguments in support of its motion: that plaintiff cannot establish what caused her accident as a matter of law and that there is no evidence that Circle Line had notice of the alleged dangerous condition or that it acted unreasonably.

The Hayes Defendants seek summary judgment on plaintiff’s claims on the grounds that plaintiff cannot establish that their acts were a proximate cause of the accident and that they also did not have notice. As for Circle Line’s cross-claim, the Hayes Defendants argue that they do not have to indemnify Circle Line because Hayes signed the agreement in his capacity as an agent for Vasquez and LatinClubs.com. The Hayes Defendants further argue that Circle Line is not entitled to implied indemnification because Circle Line did not actually delegate responsibility to clean the vessel during the event to them. Finally, the Hayes Defendants rely

upon GOL § 5-322 and maintain that the indemnification clause in the underlying agreement is void and unenforceable.

Meanwhile, plaintiff generally argues that the movants have failed to meet their burdens on this motion. Plaintiff's counsel contends that even if they did, there are sharply disputed issues which preclude summary judgment. Plaintiff maintains that the court should pierce the corporate veil of GP LLC based upon Hayes' failure to provide any documentation which would refute the logical conclusions from his testimony. Plaintiff's counsel also invites the court to look at video clips from GP LLC's website as proof of what their events look like. The court declines to do so, since such videos are not properly before the court.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, there is no dispute that plaintiff's accident occurred while the boat was on open waters. Therefore, federal maritime law applies. As to her negligence claim, traditional principles apply to the cause of action (see *In re Cornfield*, 365 FSupp2d 271 [EDNY 2004]).

The court rejects movants' argument that plaintiff's testimony regarding what caused her to fall is too speculative to survive summary judgment. A jury could credit plaintiff's testimony and find that the slippery, greasy condition that she allegedly observed on the boat generally was caused by the dancers applying baby oil to themselves in the bathroom at the bottom of the steps plaintiff fell on, the dancers' practice of letting other passengers apply baby oil to their bodies on the main deck while they dance, which in turn was further exacerbated by rain water on the deck which plaintiff observed prior to her accident. Such a finding would not merely be based upon speculation as defendants contend.

To the extent that Hayes and other witnesses dispute whether baby oil was used and plaintiff's claims regarding the condition of the boat deck/stairs, such testimony does not mandate summary judgment in defendants' favor. Rather, it merely highlights triable issues of fact and goes to credibility which is ordinarily the province of a jury at trial. This is especially so, when the other witnesses to whom defendants point to are interested.

Circle Line's notice argument also fails. Assuming *arguendo* that Circle Line met its burden on this point and a jury credit's plaintiff's account of the events, a reasonable factfinder could conclude on this record that Circle Line knew or should have known that the company it chartered the boat to would use oil which could cause a dangerous condition on a boat in the middle of the water. Further, Circle Line's arguments on this point miss the mark, since it is Circle Line who bears the burden as the party seeking summary judgment. Circle Line, as owner of the boat, under maritime law, has the duty to provide passengers on its vessel with reasonable care under the circumstances (*Rainey v. Paquet Cruises*, 709 F2d 169 [2d Cir 1983]). As plaintiff correctly points out, Circle Line has failed to come forward with sufficient

evidence about the measures it took to safeguard, clean or maintain the boat on the night of plaintiff's accident so as to warrant summary judgment in its favor on this point.

Finally, Circle Line argues that there is no evidence that it breached any duty owed to plaintiff. The court disagrees. This is not a case where plaintiff merely slipped because the ground was wet. Rather, Circle Line offered a charter to a company that allegedly caused the dangerous condition complained of. Certainly, Circle Line has not established that its actions were not unreasonable as a matter of law, i.e. by pointing to testimony that Circle Line did not know or could not reasonable learn that GP LLC would recklessly use baby oil and create a slippery condition on the boat. Further, a reasonable factfinder could conclude that with such knowledge, Circle Line should have taken further precautions to prevent and/or mitigate the slippery condition, i.e. mop the deck/stairs, cordon off specific areas for the dancers, or ensure that the charterer was performing its cleaning and maintenance functions.

Accordingly, for all these reasons, Circle Line's motion is denied.

The court now turns to the cross-motion. The Hayes Defendants first argue that plaintiff cannot demonstrate that their actions were the proximate cause of the accident. This argument impermissibly shifts movants' burden to plaintiff. Rather, movants must show that their acts were not the proximate cause of the slippery condition which caused plaintiff's accident. Assuming that movants demonstrated entitlement to judgment as a matter of law on the issue of proximate cause, plaintiff's own testimony raises a triable issue of fact on this point for all the reasons already stated.

Next, movants argue that plaintiff's claims against Hayes should be severed and dismissed. Plaintiff seeks to hold Hayes personally liable under a piercing the corporate veil theory. Plaintiff's counsel points to the fact that Hayes is the president and sole shareholder of GP LLC and claims that he holds no meetings and keeps no records other than receipts. Plaintiff also asserts that GP LLC failed to obtain liability insurance. Further, plaintiff's counsel

maintains that Hayes abuses the corporate form by using its corporate credit card and bank accounts to pay his living expenses. In this way, plaintiff claims that Hayes siphoned the income and assets from GP LLC for his own personal use leaving GP LLC with insufficient capital to pay its financial responsibilities.

Piercing the corporate veil is an equitable doctrine designed to prevent fraud. When applied, an owner can be held liable for a corporation's acts and obligations. Generally, in order to pierce the corporate veil and hold Hayes liable for GP LLC's acts, plaintiff bears the burden of showing that: [1] Hayes exercised complete domination over the corporation with respect to the matter at issue, and [2] that such domination was used to commit a fraud or wrong against the plaintiff which led to plaintiff's injury (*Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). Here, the court finds that plaintiff has sustained her burden and come forward with sufficient proof to establish that Hayes misused GP LLC for his own personal benefit and therefore is not entitled to the protections of the corporate form from liability.

Defendant Hayes clearly testified that he only maintains a bank account and visa card in the name of Get Punished LLC. He himself maintains no personal bank account. When asked "How do you do your checking? How do you pay your bills? How do you live?", Hayes responded: "I find a way." In cross-moving to dismiss plaintiff's claims against him, Hayes has failed to eliminate all triable issues of fact. He has not provided any proof that he did not misuse the corporate form. As plaintiff's counsel points out, Hayes, "supposedly pays taxes but produced no proof". Hayes has not provided any accounts statements for GP LLC which would show that its credit card and bank accounts were only used for business expenses. The court agrees with plaintiff that there is sufficient evidence on this record to support the inference that Hayes "uses the corporate account of Defendant Get Punished to pay his living expenses" so as to survive summary judgment.

Accordingly, the cross-motion for summary judgment dismissing plaintiff's claims against Hayes, individually, is denied.

The balance of the cross-motion seeks summary judgment on the cross-claims. First, the Hayes Defendants' argument based upon GOL § 5-322 is rejected because the charter boat agreement is a maritime contract and is subject to general maritime law. Since GOL § 5-322 conflicts with maritime law instead of supplementing it, the state law is preempted (see i.e. *Durando v. City of New York*, 33 Misc3d 1231[A], 21 [Sup Ct, Kings Co 2011]; see generally *Eriksen v. Long Island Lighting Co.*, 236 AD2d 439 [2d Dept 1997]).

The Hayes Defendants next maintain that they cannot be held liable under the agreement because Hayes signed it in his capacity as an agent for Vasquez and LatinClubs.com. Circle Line argues that there are "significant factual and legal issues regarding whether Mr. Hayes was an agent of a disclosed principal." The Court agrees with Circle Line. Indeed, aside from Hayes' self-serving testimony, there is no proof on this record that Hayes was acting as an agent for Vasquez/LatinClubs.com. It is of no moment that Hayes testified that he didn't read the agreement before he signed it and didn't know what it said, as a parties' feigned ignorance or failure to read is not a basis to invalidate a contract (see i.e. *Martin v. Citibank, N.A.*, 64 AD3d 477 [1st Dept 2009]; *Sofio v. Hughes*, 162 AD2d 518 [2d Dept 1990]).

Equally unavailing is the Hayes Defendants' argument that they did not have access to cleaning supplies and therefore cannot be held liable pursuant to the parties' indemnification agreement. Indeed, Circle Line expressly delegated the responsibility to clean the deck to the charterer, and Hayes himself signed on behalf of the charterer.

Certainly, Hayes has failed to establish that Circle Line itself participated in the wrongdoing as a matter of law (see *17 Vista Fee Associates v. Teachers Ins. And Annuity Ass'n of America*, 259 AD2d 75 [1st Dept 1999] citing *Trustees of Columbia Univ. v. Mitchell/Giurgola Assocs.*, 109 AD2d 449 [1st Dept 1985]. That Circle Line employees would clean up spills or

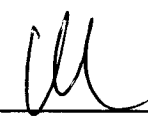
messes that they saw on the deck does not establish that they played a role in baby oil on the main deck or winding up on the stairs, nor is there any specific testimony about how rain water could have infiltrated the boat and caused and/or contributed to the underlying dangerous condition. Similarly, the court rejects the cross-movants' argument that Circle Line expressly assumed the obligation to clean and maintain the decks of the vessel in a dry condition during the Charter. Accordingly, the cross-motion to dismiss the counterclaim for common law indemnification is also denied.

Conclusion

In accordance herewith, it is hereby **ORDERED** that the motion and cross-motion are denied in their entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: New York, New York
6/19/19

So Ordered:

Hon. Lynn R. Kotler, J.S.C.