Barbash v Clarke
2019 NY Slip Op 34327(U)
October 2, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 601427/2017E
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Janet Barbash,

Plaintiff,

-against-

Stephen Clarke, individually and d/b/a Greenport Yacht & Shipbuilding Company,

Defendants.

Stephen Clarke, individually and d/b/a Greenport Yacht & Shipbuilding Company,

Defendant/Third-Party Plaintiff,

-against-

Arthur Feld,

Third-Party Defendant.

Index No.: 601427/2017E

Attorneys [See Rider Annexed]

Motion Sequence No.: 004; MD
Motion Date: 2/26/19
Submitted: 3/20/19

Motion Sequence No.: 005; MD
Motion Date: 3/18/19
Submitted: 3/20/19

Motion Sequence No.: 006; MD
Motion Date: 3/20/19
Submitted: 3/20/19

Upon the **E-file document list** numbered 51 to 98 read on the application of defendant Stephen Clarke, individually and d/b/a Greenport Yacht & Shipbuilding Company for an order vacating the note of issue and compelling plaintiff to provide full responses to defendant's third notice for discovery and inspection dated January 17, 2019 (Motion Sequence 004), on the application by plaintiff Janet Barbash for an order granting her summary judgment on the issue of liability (Motion Sequence 005), and on the application by defendant Stephen Clarke, individually and d/b/a Greenport Yacht & Shipbuilding Company for an order granting him partial summary judgment dismissing plaintiff's complaint and related relief (Motion Sequence 006); it is

ORDERED that the respective motions (Motion Sequences 004, 005, and 006) are consolidated for purposes of a determination herein; and it is further

ORDERED that the motion by defendant/third-party plaintiff Stephen Clarke, individually and d/b/a Greenport Yacht & Shipbuilding Company for an order vacating the note of issue and compelling plaintiff to respond to discovery is denied; and it is further

ORDERED that motion by plaintiff Janet Barbash for summary judgment in her favor is denied; and it is further

ORDERED that motion by defendant/third-party plaintiff Stephen Clarke, individually and d/b/a Greenport Yacht & Shipbuilding Company for an order granting him summary judgment dismissing the complaint is denied.

Through the filing of a summons and complaint on January 24, 2017, plaintiff Janet Barbash commenced this action seeking money damages for the alleged negligence of defendant /third-party plaintiff Stephen Clarke ("defendant" or "Clarke") d/b/a Greenport Yacht & Shipbuilding Company that resulted in property damages to plaintiff's yacht named "My Way." The complaint alleges that on July 29, 2016 employees and/or agents of defendant were working on the plaintiff's yacht when an explosion and fire occurred causing substantial property damage to the yacht. Issue was joined on April 19, 2017 by the service of an answer with counterclaims. Plaintiff served her reply to the counterclaims on May 15, 2017. It is not disputed that employees of defendant were performing work on the yacht when the fire began. Defendant asserts a third-party claim against third-party defendant Arthur Feld ("Feld"), the brother-in-law of plaintiff, seeking indemnification. It is alleged by defendant that Feld used and maintained the yacht and requested defendant's employees to pump the yacht's bilges, that Feld did not prevent gasoline from entering the yacht, and that Feld failed to warn defendant and his employees that such gasoline was improperly contained. Defendant also asserts counterclaims against plaintiff seeking payment for the storage of the yacht.

At the compliance conference held on January 16, 2019, the parties entered into a so-ordered stipulation permitting defendant to serve supplemental discovery demands by January 30, 2019, to which plaintiff was to provide responses before filing the note of issue. On January 17, 2019, counsel for defendant served a third notice for discovery and inspection upon plaintiff which demanded the production of any documents, correspondence, e-mails, text messages, memoranda, notes, reports, or other documents exchanged between plaintiff and Feld concerning the claims and defenses made in this case. A response to defendant's demands dated January 22, 2019 was served on behalf of plaintiff. The response states, among other things, that plaintiff objects to family conversations or interactions as being irrelevant and immaterial. It also states that plaintiff objects to all documents that are privileged and prepared in anticipation of litigation.

Defendant now moves for an order vacating the note of issue and compelling plaintiff to respond to the third notice for discovery and inspection. Specifically, defendant contends that Feld was provided with correspondence from his counsel, which was then forwarded to plaintiff.

Defendant further argues that the letter is relevant to this case and that plaintiff has failed to produce same.

Plaintiff opposes the motion, arguing that the letter is protected by the attorney-client privilege and not discoverable. While plaintiff acknowledges that the privilege can be waived when there is a voluntary disclosure to a third person, plaintiff contends that the parties have a common interest and thus, the letter remains privileged. Feld also opposes the motion, arguing that the correspondence constitutes attorney work-product and is not discoverable. Specifically, it is argued that the letter contains an analysis of what Feld's counsel believed would unfold at trial and how that outcome should be taken into consideration when contemplating settlement. Counsel for Feld further argues that the letter is protected by the attorney-client privilege. In support of his motion, Feld submits his own sworn affidavit, wherein he avers that he has never shared the letter from his attorney nor discussed its contents with any third-party.

Plaintiff moves for summary judgment in her favor, arguing that the doctrine of res ipsa loquitur applies in this case and that the yacht was in the exclusive possession and control of defendant. In support of the motion, plaintiff submits copies of the pleadings, transcripts of the parties' deposition testimony, reports from Occupational Safety and Health Administration (OSHA), and a damage loss report of John Lowe.

Defendant cross-moves for summary judgment dismissing the complaint against him and for summary judgment in his favor as to his counterclaim. Defendant also opposes plaintiff's motion for summary judgment. Defendant argues that there is no genuine dispute that a fuel leak caused the subject fire and that he had no duty to plaintiff, as the yacht was merely stored at the yard. In support of the cross motion and in opposition to plaintiff's motion, defendant submits copies of the pleadings, transcripts of the parties' deposition testimony, and affidavits of defendant's employees.

At his examination before trial, defendant testified that he is the owner of Greenport Yacht & Shipbuilding Company and that the subject yacht was being stored at his boatyard at the time of the incident. He testified that third-party defendant winterized the boat and that neither he nor his employees did work on the boat. He testified that third-party defendant said that he would do all the work on the boat and only requested that the boat be hauled to the yard, power-washed, and placed on blocks. He testified that a few days before the incident when Feld asked him to pump water out of the boat, he did not mention that there were gas fumes. He also testified that Feld informed him that the boat cover was off, which he already knew, as it came off within a few weeks of Feld putting it on. Defendant further testified that a few days before the incident, he instructed his employees to pump water out of the boat and to use chemical cleaners to clean the scum line. Defendant testified that two electric bilge pumps were used to pump water out of the engine room. He testified that his employees told him while they were pumping water, there was a flash throughout the engine area and a fire was ignited. He testified that after the fire, OSHA conducted an inspection and issued violations for using a receptacle outlet without a ground fault circuit interrupter protector, and for using a pump energized to an extension cord which was missing a ground pin. Defendant testified that the violations were unrelated to the cause of the fire, as the ground lug that was missing was not

a current carrying conductor. He explained that because there was no current flowing through it, there would not have been a spark, but he did not know what ignited the fire. He testified that he believes an internal spark inside the pump may have caused the fire.

At his examination before trial, Feld testified that he sold the subject boat to plaintiff, his sister-in-law, in 2013, but that he continued to use and maintain the boat. He testified that he started storing the boat at defendant's boatyard in the winter of 2013 for $1,200, which included hauling and blocking the boat. He testified that he would winterize the boat before storing it, which included pumping antifreeze through the engines, disconnecting the batteries, and placing a canvass cover over the boat. He testified that defendant was not responsible for maintaining the boat during the winter, but that he was told that defendant's employees would walk around the boatyard to "check on things." He testified that in August of 2016, he asked his friend, Joseph Ambrose ("Ambrose"), to show the boat to a prospective buyer while he was away in Florida. He testified that Ambrose contacted him and told him that the cover of the boat was off, that there was water in the boat, and that there was a smell of gasoline fumes. He further testified that when he winterized the yacht in the Fall of 2013, there were no leaks in the fuel system at that time.

At his examination before trial, Ambrose testified that in August of 2016, Feld asked him to show the boat to a prospective buyer. He testified that when he arrived at the boat, he observed that the cover was in disrepair and only remnants of it remained. He testified that when he opened the door to the boat, he observed "a film on the two lower decks" and water in the boat. He explained that he believed the film to be gasoline as he also smelled gasoline fumes. He testified that he contacted third-party defendant to tell him the situation, but did not speak to any employees at the boatyard.

At his examination before trial, John Lombardi testified that he accompanied Ambrose to the boat in August of 2016 and observed the canvass ripped from the boat due to wind. He testified that he smelled gasoline and did not enter the boat.

George Van Etten ("Van Etten"), an employee of Greenport Yacht & Shipbuilding Company, avers in his sworn affidavit that he is a fireman with 28 years of experience. He alleges that he was aboard the yacht on July 28 and July 29, 2016, and that it was open and vented. He further alleges that on July 28, 2016, there was approximately three to four feet of water inside the yacht and that it went over the top of the engines, covering approximately eight feet of the bottom of each of the yacht's two gas tanks. He alleges that he did not smell gasoline fumes aboard the yacht and did not see gasoline in the yacht's bilge water. He further alleges that no one told him that there was a smell of fumes on the yacht prior to the fire. He avers that on the day of the fire, the workers used a pump, with a suction hose and discharge hose, and moved the suction hose around the bilge to remove water while the pump remained above water. He alleges that during de-watering near the empty battery boxes, it appeared that additional water, possibly rain water, flowed from the aft section of the yacht. He alleges that a flash occurred at that time. He further alleges that it was later discovered that one of the deck drains on the yacht was broken, permitting water to enter its interior.

The sworn affidavits of Thomas Bernhardt III and Susano Jimenez, also employees of Greenport Yacht & Shipbuilding Company, are virtually identical to the sworn affidavit of Van Etten.

In regards to defendant's motion to vacate the note of issue and compel discovery from plaintiff, it is well established that parties to litigation are entitled to "full disclosure of all evidence material and necessary in the prosecution or defense of an action, regardless of the burden of proof" (CPLR 3101[a]). This provision has been liberally construed to require disclosure "of any facts bearing on the controversy which will assist [the parties'] preparation for trial by sharpening the issues and reducing delay and prolixity" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403, 406, 288 NYS2d 449 [1968]). "If there is any possibility that the information is sought in good faith for possible use as evidence-in-chief or in rebuttal or for cross-examination, it should be considered 'evidence material . . . in the prosecution or defense'" (***Allen v Crowell-Collier Publ. Co.***, 21 NY2d 403,407, 288 NYS2d 449, *quoting* ***Matter of Comstock***, 21 AD2d 843, 844, 250 NYS2d 753 [4th Dept 1964]). Nonetheless, litigants do not have carte blanche to demand production of any documents or other tangible items that they speculate might contain useful information (*see* ***Breytman v Olinville Realty, LLC***, 99 AD3d 651, 952 NYS2d 205 [2d Dept 2012]; ***Geffner v Mercy Med. Ctr.***, 83 AD3d 998, 922 NYS2d 470 [2d Dept 2011]; ***Foster v Herbert Slepoy Corp.***, 74 AD3d 1139, 902 NYS2d 426 [2d Dept 2010]; ***Gilman & Ciocia, Inc. v Walsh***, 45 AD3d 531, 845 NYS2d 124 [2d Dept 2007]), and a party will not be compelled to comply with disclosure demands that are unduly burdensome, lack specificity, seek privileged material or irrelevant information, or are otherwise improper (*see* ***Ural v Encompass Ins. Co. of Am.***, 97 AD3d 562, 948 NYS2d 621 [2d Dept 2012]; ***Accent Collections, Inc. v Cappelli Enters., Inc.***, 84 AD3d 1283, 924 NYS2d 545 [2d Dept 2011]; ***Gonzalez v International Bus. Machs. Corp.***, 236 AD2d 363, 654 NYS2d 327 [2d Dept 1997]; ***Crazytown Furniture v Brooklyn Union Gas Co.***, 150 AD2d 420 [2d Dept 1989]).

Moreover, CPLR 3101 (c) creates an absolute privilege for the work-product of an attorney (***Spectrum Sys. Intl. Corp. v Chemical Bank***, 78 NY2d 371, 376, 575 NYS2d 809). Although "designed to permit the attorney to communicate freely and candidly with his [or her] client uninhibited by any concern that his [or her] communications will be available to his [or her] client's adversaries" (***Beasock v Dioguardi Enters.***, 117 AD2d 1016, 1016, 499 NYS2d 560 [4th Dept 1986]), the attorney work-product privilege is narrowly construed to include only that material prepared in an attorney's professional capacity and which necessarily involved his or her learning and professional skills (*see* ***Bloss v Ford Motor Co.***, 126 AD2d 804, 510 NYS2d 304 [3d Dept 1987]; ***Hoffman v Ro-San Manor***, 73 AD2d 207, 425 NYS2d 619 [1st Dept 1980]). Thus, the attorney work-product doctrine essentially shields from disclosure written materials involving "interviews, statements, memoranda, correspondence, briefs, mental impressions, and personal beliefs" produced by an attorney (***Hickman v Taylor***, 329 US 495, 511, 67 S Ct 385 [1947]; *see* ***Corcoran v Peat, Marwick, Mitchell & Co.***, 151 AD2d 443, 542 NYS2d 642 [1st Dept 1989]).

Here, it is undisputed that the letter sought by defendant's counsel is a letter which counsel for third-party defendant Feld presented to his client and concerns third-party Feld's exposure in this case and the risks associated with proceeding to trial. This letter, allegedly given to plaintiff by Feld

is protected from disclosure by the work-product privilege (*see* ***Ambac Assur. Corp. v DLJ Mtge. Capital, Inc.***, 92 AD3d 451, 939 NYS2d 333 [1st Dept 2012]). Contrary to the assertion of defendant's counsel, even if is determined that Feld shared the letter with plaintiff, the work-product privilege has not been waived (*see* ***People v Kozlowski***, 11 NY3d 223, 869 NYS2d 848 [2008]; ***Bluebird Partners, L.P. v First Fid. Bank, N.A.***, 248 AD2d 219, 671 NYS2d 7 [1st Dept 1998]). Moreover, the letter prepared by Feld's attorney, which relates to trial strategy, is not relevant to the issues in dispute in this case. Accordingly, defendant's motion to vacate the note of issue and to compel further discovery from plaintiff is denied.

With regard to motions for summary judgment, it is well established that 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 then 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 [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 [2001]; ***O'Neill v Town of Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

Here, triable issues of fact remain as to what caused the subject fire and whose conduct was the proximate cause of the fire. Res ipsa loquitur allows for an inference of negligence to be drawn regarding a defendant's actions based upon the happening of an event where the plaintiff can establish that the event is of a type which would not ordinarily happen in the absence of someone's negligence, was caused by an agent or instrumentality exclusively within the defendant's control, and was not due to any voluntary action or contribution on the plaintiff's behalf (*see* ***Kambat v St. Francis Hosp.***, 89 NY2d 489, 655 NYS2d 844 [1997]; ***Dermatossian v New York City Transportation Authority***, 67 NY2d 219, 501 NYS2d 784 [1986]; ***Prosser and Keeton, Torts*** § 39 at 248-251). In the instant matter, plaintiff failed to establish that the yacht was under defendant's exclusive control (*see* ***Pintor v 122 Water Realty, LLC***, 90 AD3d 449, 933 NYS2d 679 [2d Dept 2011]; ***Sowa v S.J.N.H. Realty Corp.***, 21 AD3d 893, 800 NYS2d 749 [2d Dept 2005]). While the yacht was stored at defendant's boatyard, others had access to the boat, including Feld, who maintained it. In addition, plaintiff failed to submit sufficient evidence to demonstrate that the actions of Feld did not contribute to the happening of the accident. Thus, plaintiff's motion for summary judgment in her favor is denied.

The motion by defendant for summary judgment in his favor is also denied. Defendant contends that it is undisputed that the fire was caused by a fuel leak and that Feld was responsible for maintaining the yacht. He further argues that the yacht was merely stored at his boat yard and that he did not have notice or a duty to discover the fuel leak. However, defendant failed to establish that the conduct of his employees while removing water from the yacht did not contribute to the fire.

Moreover, while defendant testified that Feld did not inform him that there were possible gas fumes on the yacht, Feld testified that he told defendant that there were gas fumes present. Thus, the conflicting deposition testimony as to whether defendant and his employees had notice of gas fumes on the yacht prior to the incident raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Ahr v Karolewski***, 48 AD3d 719, 853 NYS2d 172 [2d Dept 2008]; ***Gordan v Honig***, 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). Furthermore, contrary to defendant's contentions, the unsigned but certified deposition transcripts, which were submitted in support of plaintiff's motion for summary judgment, were admissible under CPLR 3116(a), as the transcripts were submitted by the party deponent himself and, therefore, were adopted as accurate (*see* ***Rodriguez v Ryder Truck, Inc.***, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; ***Ashif v Won Ok Lee***, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008]).

Dated: 10/2/2019

HON. WILLIAM B. REBOLINI, J.S.C.

_______ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

RIDER

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