

Lapolla v Ditchik

2019 NY Slip Op 34839(U)

August 13, 2019

Supreme Court, Nassau County

Docket Number: Index No. 604652/15

Judge: Jeffrey S. Brown

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SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X		TRIAL/IAS PART 11
MICHAEL LAPOLLA		
	Plaintiff,	INDEX # 604652/15
-against-		Mot. Seq. 2
		Mot. Date 4.23.19
		Submit Date 7.15.19
ANDREW DITCHIK and AMANDA DITCHIK,		
	Defendants.	
-----X		

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The following papers were read on this motion:	Documents Numbered
Notice of Motion/Cross Motion, Affidavits (Affirmations), Exhibits Annexed.....	20
Answering Affidavit	32
Reply Affidavit.....	45
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Defendants move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint.

Before this court is a personal injury action arising from injuries plaintiff sustained while working as an aquarium technician at defendant's home. In support of this motion defendants submit the deposition transcripts of the plaintiff Michael Lapolla, defendant Andrew Ditchik and non-party Darian Odabasi.

Plaintiff testified that he has expertise in large reef aquariums. Sometime in 2009 he was involved in the installation of a 150 gallon reef aquarium at the defendants' home. At some time after the installation of the tank, "living material" was brought in. This can occur approximately two weeks to a month after the initial installation. Prior to the incident, plaintiff had serviced the tank. This would include cleaning the glass, cleaning the sand, cleaning up algae within the tank, water changes and feeding the fish and coral. Algae is a plant and coral is an animal or

invertebrate. His training and education with respect to invertebrates came from conversations at the store, where he trained.

There were five different coral types placed in the tank. One of the corals was palythoa zoanthids. It is a very common coral and it is something that plaintiff worked with on numerous occasions. He is familiar with installing this type of coral but never had any training with respect to the danger of palythoa. Plaintiff never inquired of his co-workers regarding any danger that was involved with handling this type of material and had no idea that this coral was dangerous. The first time he learned of the danger was after he was poisoned.

On July 23, 2012 he went to the defendants' home. He was told that he had to go there and "exterminate" the corals. The normal practice would be to remove the coral and take it back to the store. However the defendant, Dr. Ditchik, did not want the plaintiff to remove the rocks from the aquarium. He took a wire brush and scraped algae off the rocks in the aquarium. He testified that he was told that he could not scrape the palythoa in the tank. He had to remove it from the aquarium and scrape it in a bucket. This was the first time he eradicated coral. He had removed a lot of the palythoa and scraped them in a "tote" container. Some of the larger pieces of coral were cleaned in the basement sink. It was done as a suggestion from Dr. Ditchik. He also told the plaintiff to use hot water to clean the coral. However, he did not tell plaintiff what materials to use. The plaintiff then used hot water to clean the coral. The plaintiff then subsequently became sick.

Defendant Andrew Ditchik testified that the initial installation of the tank was in 2009 and it was done by Darian Odabasi's company. About one month after the installation, the fish and coral were put in the tank. Between 2009 and 2012, more fish and coral were added. He was not aware of the type of coral that was in the tank between 2009 and 2012. Further, before July 23, 2012, he was not aware of the potential toxic characteristics of palythoa. He was not aware of the toxicity until he received a subsequent phone call from Darian. After the event Darian told him that palythoa is more toxic than other corals. He also was told that plaintiff, who ended up coming to service the tank, did not know much about this coral.

The reason for the service call was that the coral had overgrown and he wanted it removed from the tank. He was unaware as to whether he provided plaintiff with any tools or instructions with respect to the coral. He did not think that he told plaintiff to use the slop sink. He was not told before July 23, 2012 that palythoa was dangerous. He had no knowledge as to why the coral was cleaned at his house on that date.

Mr. Odabasi testified that in 1996 he purchased an aquarium service business, which business included selling fish and coral. It was at that time that he began to learn about coral and different types of fish. In 2009, he opened Aquarium Design Network New York, Inc. Mike Lapolla began working with him in 2007. He was an aquarium maintenance technician. He received no formal training. He first met Andrew Ditchik in 2009, who asked him to set up a reef tank.

Darian does not tell his employees to clean the coral before bringing it back to the store. Rather, whatever they take back they sell. The store would swap out with another piece of coral. They only clean algae off of rocks. He only learned that plaintiff had removed the coral when he learned that he was thinking of going to the hospital. Mr. Odabasi had no idea why plaintiff remained at defendants' residence and cleaned the coral with boiling water when he could have just brought the rocks back to the store.

It was not until after the incident that Mr. Odabasi did research on the internet with respect to palytoxin.

In opposition to this motion plaintiff submits the same three depositions. Plaintiff also submits an affidavit from Rick Skiba, a co-employee of plaintiff. Rick Skiba states that he has more than 40 years experience in the care and maintenance of aquariums. He states that coral is an animal, a living being. Rock is culled from the ocean and placed in tanks as a base of animals to live in and grow on. It was the coral that released toxins that poisoned the plaintiff.

Mr. Skiba states that approximately one week before the poisoning, defendant Dr. Ditchik came to the shop where he complained of an overgrowth of coral polyps in his tank which he wanted removed. Dr. Ditchik attempted to remove some of the polyps himself, but having scrubbed them himself some of his fish died. At that time Rick Skiba explained to Dr. Ditchik that many polyps which naturally occur on rock give off toxins when stressed and some polyps release more than others. Dr. Ditchik requested that someone examine the tank and Mr. Skiba did so. He expressed surprise that all of the fish and corals in the tank were not dead.

All polyps contain some amounts of palytoxins which are a defense mechanism. The polyps growing in defendants' tank were not an ordinary type. They were the most dangerous type and they contain and release large amounts of the deadliest toxins. This was explained to both Dr. Ditchik and Darian Odabasi well in advance of plaintiff's service call on July 23, 2012. Mr. Skiba indicates that he clearly and strenuously warned Dr. Ditchik about the highly toxic nature of these polyps. He explained to Dr. Ditchik what precautions would be necessary in order to clean these polyps: wear gloves and safety goggles, take the polyps out of the tank and place them in a large bucket of water, scrape with a wire brush, rinse, scrape and rinse again prior to returning the rock back to the aquarium. He also warned Dr. Ditchik to keep children and pets away from the water in the bucket. Dr. Ditchik did not want to do the job himself. Rather, he would contact Darian Odabasi to arrange for someone from the shop to do the job.

After the visit to the home and return to the shop, Mr. Skiba advised Mr. Odabasi of the situation and all of the necessary precautions including the use of goggles, gloves, and scraper. He specifically asked who was going to do the job. Mr. Odabasi said that it would be Rick's son Philip. Rick Skiba spoke to Philip about the necessary precautions.

The job was scheduled for Monday on his day off. He later learned that Darian had sent the plaintiff Mike instead of Philip. Mike had no instructions and was unable to get him on the phone.

Mr. Skiba reaffirmed that he personally explained to Dr. Ditchik the dangers of exposure to this toxin. Further, he had a long conversation with Darian Odabasi about the palytoxin danger prior to Mike going to defendants' home to clean the tank.

In reply, Dr. Ditchik states in an affirmation that the first time he learned of any danger is when he called Darian Odabasi on or about the date of the exposure. He denies that Rick Skiba advised him one week before the accident of the danger and special handling of this type of coral.

Non-party Darian Odabasi states by affidavit that at no time did Rick Skiba advise him that any living material contained within the tank was dangerous and toxic. He was not aware of any danger until after the date of the injury.

“It is well established that ‘the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.’ (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]; *see also William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475-476 [2013]; CPLR 3212[b]). Once the movant makes the proper showing, ‘the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action’ (*Alvarez*, 68 N.Y.2d at 324). The ‘facts must be viewed in the light most favorable to the non-moving party’ (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal quotation marks omitted]). However, bald, conclusory assertions or speculation and ‘[a] shadowy semblance of an issue’ are insufficient to defeat summary judgment (*S.J. Capelin Assoc. v. Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]), as are merely conclusory claims (*Putrino v. Buffalo Athletic Club*, 82 N.Y.2d 779, 781 [1993]).”

(*Stonehill Capital Management, LLC v. Bank of the West*, 28 N.Y.3d 439 [2016]; *see also Fairlane Financial Corp. v. Longspaugh*, 144 AD3d 858 [2d Dept 2016]; *Phillip v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]).

A defendant may be held liable for a dangerous condition on its premises upon a showing that the defendant had actual or constructive notice of the condition. Thus, “[o]n a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law’ (*Goldman v. Waldbaum, Inc.*, 248 A.D.2d 436, 669 N.Y.S.2d 669).” (*Raju v. Cortlandt Town Ctr.*, 38 AD3d 874, 874 [2d Dept. 2007]). In this case, the defendants made a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issues of fact. However, the affidavit submitted by Rick Skiba demonstrated proof in admissible form sufficient to establish the existence of material issues of fact as to whether defendant Andrew Ditchik had notice of the dangerous condition of the coral polyps which as a result require a trial of the action.

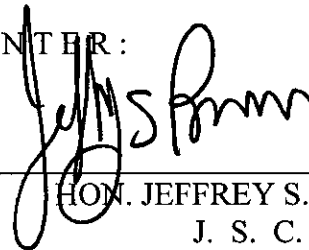
The court's function on a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility but merely to determine whether such issues exist. (*Green v. Quincy Amusements, Inc.*, 108 AD3d 591, 592 [2d Dept. 2013]). In this case the affidavits raise sharp issue of fact as to whether or not defendants had notice of the dangerous condition. Thus, the credibility issues must await the trier of facts.

Defendants' motion for summary judgment, therefore, is **denied**.

This constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
August 13, 2019

ENTER:



HON. JEFFREY S. BROWN
J. S. C.

ENTERED

AUG 15 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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