

NOT FOR PUBLICATION

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

JUDITH FOUNTAIN,)
)
Plaintiff,)
)
v.)
)
EAST END WATERSPORTS, LTD. d/b/a)
NAUTI NYMPH POWER BOAT RENTALS, and)
CAPTAIN JERRY ROY,)
)
Defendants.

Civ. No. 2000-109

ATTORNEYS:

Jacqueline A. Drew, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Wilfredo A. Geigel, Esq.
St. Croix, U.S.V.I.
For the defendant East End Water Sports, Ltd.

MEMORANDUM

Moore, J.

Before the Court is the motion for summary judgment filed by East End Watersports, Ltd. d/b/a Nauti Nymph Power Boat with respect to plaintiff Judith Fountain's claim of negligence on a *respondeat superior* basis, in which she seeks damages stemming from injuries sustained while on the defendant's boat. For the following reasons, I will grant the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

Judith Fountain ["Fountain" or "plaintiff"] brings this three-count complaint against East End Watersport, Ltd. d/b/a/ Nauti Nymph Power Boat ["East End" or "defendant"] and Captain Jerry Roy ["Roy"] alleging (1) negligence, (2) negligence of a common carrier, and (3) liability under the *respondeat superior* doctrine. Fountain claims that on December 10, 1998, she was on the defendants' boat No. 28 en route from Red Hook, St. Thomas to Tortola, B.V.I. and that Roy was at the helm. Fountain alleges that, approximately fifteen minutes into the voyage, as the boat approached St. John, she protested that the boat was going too fast for the choppy conditions of the water. She states that Roy ignored her warning, and continued at a fast speed. Fountain claims that the boat hit a large wave, causing her to fall. As a result of this fall, Fountain suffered injuries, including a broken back. According to Fountain, Roy left Fountain on St. John, without assisting her in obtaining medical care, and proceeded to Tortola. Fountain alleges that some four hours later, she finally received medical attention in Red Hook.

Fountain is suing Roy for negligence, and in Count III, is suing East End under the theory of *respondeat superior*. Fountain avers that Roy was acting in the course of his agency or employment with East End while he was at the helm of Boat No. 28, and that East End bears equal responsibility for Roy's actions.

East End moves for summary judgment, arguing that Roy "has never been or is an employee, agent or servant of East End" (See Mot. for Summ. J. at 1.) Instead, the defendant insists that David Funderburk ["Funderburk"], Fountain's brother, hired Roy to operate the boat. (See *id.*) In support of this claim, East End points to the agreement signed by Funderburk when he leased the boat, that required that the lessee "operate the vessel in a safe and prudent manner" and "permit the vessel to be operated only by the person designated 'captain' or by a qualified person under the direct personal supervision of such Captain." (See *id.*, Ex. 1.) In addition, East End submits the hiring agreement between Funderburk and Roy, in which it was expressly recognized that

[t]he parties agree that the captain will be working solely and exclusively for the customer, and that no employment, business or other relationship exists between the captain and [East End], and said corporation and its officers . . . shall have no obligations, responsibilities, or liabilities with respect to hiring the captain.

(See *id.* Ex. 2.)

Fountain counters that the defendant's effort to qualify Roy as an independent contractor is "a sham." She avers that the terms under which Roy was hired were made by East End, including how much they were to be paid and when and where they were to report for duty. (See Mem. in Opp'n to Def.'s Mot. for Summ. J.

at 2.) In addition, Fountain asserts that her brother, Funderburk, paid East End, not Roy, the \$95 fee for the Captain's services.¹ (See *id.* at 3; Mot. for Summ. J., Ex. 1.)

East End replies that Fountain's brother, Funderburk, entered into a "bare boat charter" with East End, thus making him, for all practical purposes, the owner of the boat during the trip to Tortola. (Reply to Mem. in Opp. to Mot. for Summ. J. at 1.) Under this doctrine, the defendant avers that plaintiff's brother assumed full possession and control of the vessel.

III. DISCUSSION

A. Summary judgment standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue respecting any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); see also *Sharpe v. West Indian Co.*, 118 F. Supp. 2d 646, 648 (D.V.I. 2000). The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that

¹ Fountain also avers that, somehow, because her brother (who signed the lease agreement) was not on the boat with Roy, the liability clause is ineffective with respect to Fountain. (See Mem. of Law in Opp. to Def.'s Mot. for Summ. J. at 7.) I fail to see the relevance of her argument to the issue whether Roy was employed by East End.

there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. *See Saldana v. Kmart Corp.*, 42 V.I. 358, 360-61, 84 F. Supp. 2d 629, 631-32 (D.V.I. 1999), *aff'd in part and rev'd in part*, 260 F.3d 228 (3d Cir. 2001). Only evidence admissible at trial shall be considered and the Court must draw all reasonable inferences therefrom in favor of the nonmovant. *See id.*

Here, Fountain seeks to hold East End Watersports liable, on a *respondeat superior* basis, for Roy's allegedly negligent behavior while she was a passenger aboard East End's boat. This requires Fountain, first and foremost, to establish that Roy was employed by East End. *See* RESTATEMENT (SECOND) OF AGENCY § 220 (1958) ["RESTATEMENT"] (enumerating factors to be considered in determining the existence of a master-servant relationship).² Fountain, however, fails to offer this Court one iota of evidence showing that this was the case. As proof of Roy's employment by East End, Fountain submits a copy of the agreement between her brother and East End, which indicates merely that \$95 was paid to

² In order to determine whether a master-servant relationship existed for purposes of employer liability, this Court must consider, *inter alia*, (1) the extent of control the defendant exerts over the details of the work employed, (2) whether the defendant supplies the instrumentalities, tools, and the place of work for the person doing the work, and (3) the length of time for which the person is employed. *See* RESTATEMENT § 220(2). Fountain, however, does not provide this Court with any evidence of any employment relationship between Roy and East End.

East End for Roy's services. This fact alone, however, hardly establishes a genuine issue of material fact from which a jury could find for Fountain on this issue. Accordingly, I will grant East End's motion for summary judgment with respect to the *respondeat superior* claim.

IV. CONCLUSION

Because Fountain failed to provide this Court with any evidence establishing a genuine issue of material fact with respect to her *respondeat superior* claim, this Court will grant the defendant's motion for summary judgment with respect to Count III of her complaint. An appropriate order follows.

ENTERED this 14th day of June, 2002.

FOR THE COURT:

_____/s/_____
Thomas K. Moore
District Judge

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ORDER

For the reasons stated in the accompanying Memorandum of even date, it is hereby

ORDERED that the defendant's motion for summary judgment with respect to Count III of the Complaint [docket entry # 35] is hereby **GRANTED**.

ENTERED this 14th day of June, 2002.

FOR THE COURT:

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_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO F. MORALES
Clerk of the Court

By: _____
Deputy Clerk

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