

**SHORT FORM ORDER**

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

**PRESENT: HON. DANIEL MARTIN**  
**Acting Supreme Court Justice**

**TRIAL/IAS, PART 30**  
**NASSAU COUNTY**

**DAYRON FORY.**

**Plaintiff.**

*- against -*

**Sequence No.: 005 & 006**

**Index No.: 016117/06**

**XXX**

**PADDY MCGEES, CRABBY JOE'S, INC., CRABBY JOE'S, INC. D/B/A PADDY MCGEES AND JOHN DOES 1-10 NAMES BEING UNKNOWN AT PRESENT BUT DESIGNATED AS EMPLOYEES OF PADDY MCGEES, CRABBY JOE'S INC. AND CRABBY JOE'S, INC. D/B/A PADDY MCGEES and 465 REMSEN REALTY, INC.**

**Defendants.**

**The following named papers have been read on this motion:**

	<b>Papers Numbered</b>
<b>Notice of Motions and Affidavits Annexed</b>	<b>X</b>
<b>Order to Show Cause and Affidavits Annexed</b>	
<b>Answering Affidavits</b>	<b>X</b>
<b>Replying Affidavits</b>	<b>X</b>

The defendant 465 Remsen Realty, Inc.'s (hereinafter "Remsen") moves for summary judgment dismissing the complaint as asserted against this defendant. Defendants Paddy McGees's and Crabby Joe's, Inc. d/b/a Paddy McGee's (hereinafter "Paddy") cross moves for summary judgment dismissing the complaint. For the reasons stated herein, both the motion and cross-motion are granted.

The instant matter is based upon an incident wherein plaintiff, while a patron at the restaurant establishment located at 6 Waterview Road, Island Park, New York, dove from a railing at the restaurant into a body of water which allegedly caused him to suffer severe and crippling personal injuries. Defendant Remsen owns the property at which the establishment is located and defendants Paddy operate the restaurant/bar at that location.

Defendant Remsen moves for summary judgment dismissing the complaint on the bases that: 1) it owed plaintiff no duty of care; 2) it may not be held negligent because it had nothing to do with the management and operation of the establishment; and 3) the incident was solely the

result of plaintiff's reckless behavior.

Defendant Paddy cross moves for summary judgment dismissing the complaint as asserted against this defendant upon the grounds that 1) plaintiff's reckless conduct was the sole cause of his injuries; 2) they did not breach a duty to plaintiff because his actions were not reasonably foreseeable and they had no duty to warn of an obvious danger nor a duty to protect plaintiff from his own reckless conduct; and 3) plaintiff's actions were a superseding, intervening act which absolved Paddy's of liability.

A party moving for summary judgment must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party opposing a summary judgment motion must demonstrate a triable issue of fact through admissible evidence. *Id.*

The court shall first consider the one element that is common to both motions, whether the sole proximate cause of plaintiff's injuries was his own reckless behavior. In support of their respective motions, defendants point to plaintiff's deposition transcript wherein he testified that:

- 1) on the night of the accident he had consumed one or two beers prior to arriving at the bar and two or three Long Island Iced Teas and a shot of tequila while at Paddy McGees;
  - 2) while at the bar plaintiff climbed a three to four foot high fence and rail;
  - 3) he elected to dive into the body of water that was adjacent to the area in which he was located;
  - 4) he thought the water was "very deep";
  - 5) he was a good swimmer who had received swimming and diving instruction from a lifeguard; and
  - 6) he could appreciate the difference between deep and shallow water and the risk inherent in diving into shallow water;
- (See, plaintiff's deposition transcript, pp. 18-19, 20, 22, 25-26, 49-55, 59-62, 99).

Further, three employees of the bar with security duties testified that there had never been a prior incident of a patron jumping or diving into the water adjacent to the deck or rail. (See, deposition transcripts of Ryan Levine, p. 35; Bowa Kim, pp. 32-33; Ryan Patrick Marlowe, pp. 43-45).

The defendant's claim where, as here, they have demonstrated that it is plaintiff's own reckless conduct which caused him to suffer his injuries, such conduct will be considered an unforeseeable, superseding event which will relieve defendants of liability. See, Lionarons v. General Electric Co., 215 A.D.2d 851 (3<sup>rd</sup> Dep't 1995). The defendants also assert that where, as here, the plaintiff dives head first into water of an unknown depth, at night and after the consumption of alcoholic beverages the court will find that plaintiff acted in a reckless manner with disregard for his own safety and such conduct will be deemed a superceding proximate cause of the injuries sustained. See, Butler v. Marshall, 243 A.D.2d 971 (3<sup>rd</sup> Dep't 1997). See, also, Mortis v. Dittl, 275 A.D.2d 940 (3<sup>rd</sup> Dep't 2000); Rowell v. Town of Hempstead, 186 A.D.2d 553 (2<sup>nd</sup> Dep't 1992).

In opposition, the plaintiff asserts that defendants have failed to demonstrate that plaintiff's own reckless conduct was the proximate cause of the accident. Plaintiff cites a line of cases in which the Court of Appeals and the Appellate Division, Second Department have held that the fact that the plaintiff did not know the depth of the water could cause a trier of fact to conclude that the plaintiff's conduct was not the sole proximate cause of his injuries. See, Kriz v. Schum, 75 N.Y.2d 25 (1989); Mason v. Anderson, 300 A.D.2d 551 (2<sup>nd</sup> Dep't 2002); Brown v. City of New York, 246 A.D.2d 568 (2<sup>nd</sup> Dep't 1998); Johnson v. Cherry Grove Island Management, Inc., 175 A.D.2d 827 (2<sup>nd</sup> Dep't 1991).

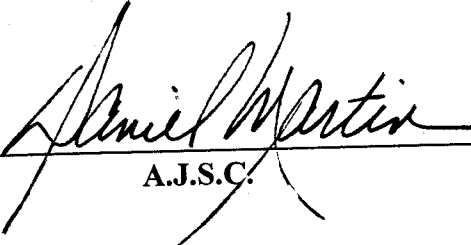
At the outset, the holding in Kriz v. Schum, supra., a case upon which plaintiff relies heavily for the above stated position, involved a situation in which a plaintiff dove from the top of a pool slide into a pool of which the plaintiff had no knowledge as to its depth. The court therein specifically recognized that where the defendant establishes plaintiff's reckless and unforeseeable use of a swimming pool (such as diving into a portion of the pool which plaintiff knew was shallow), a defendant would be entitled to summary judgment dismissing the complaint. Where, however, a plaintiff uses a pool in a manner that is reasonably foreseeable by diving into it without knowing the depth, an issue of fact may exist as to whether it was the defendant-pool owner's failure to warn of the shallow depth that caused the accident. Kriz v. Schum, supra.

The instant matter is distinguishable because the plaintiff did not use a swimming pool or any area where swimming or bathing would reasonably be anticipated. There is no dispute that Paddy's was a bar and restaurant and not a facility for swimming and there is no proof that there was ever any swimming or diving in this particular area. In Testaverde v. Lyman, 17 A.D.3d 574 (2<sup>nd</sup> Dep't 2005) the plaintiff, while at a party, went to the second floor of a house with an intent to jump from the balcony rail into the nearby swimming pool, never inquired as to the pool's depth, slipped and fell into the pool, suffering injuries. The court therein held that the use of the railing as a platform was reckless; as the railing was not intended for use as a platform to dive into waters whose depth is unknown. In the instant case, the defendants have successfully established that the plaintiff's conduct was entirely unforeseeable and in fact creates an even more compelling circumstance than in Testaverde v. Lyman, supra. Unlike the swimming pool cases, upon which plaintiff relies, the unprecedented use of a ledge or a rail to dive into a body of water not usually used for swimming is not foreseeable. Moreover the depth of the waters herein are unknown, not easily ascertainable, and subject to change due to the tide and is another circumstance which may be weighed against the plaintiff. See, Olsen v. Town of Richfield, 81 N.Y.2d 1024, 599 N.Y.S.2d 912. Such circumstances are indicative of recklessness on the part of plaintiff. These circumstances, therefore, impose no duty upon the tenant or the property owner to post warnings or to secure the premises from what had heretofore been aberrant and unanticipated conduct. CF, Kriz v. Schum, supra. See Butler v. Marshall, supra. Johnson v. Harrington, 215 A.D.2d 857, 626 N.Y.S.2d 324, lv denied, 87 N.Y.2d 802, 638 N.Y.S.2d 425. See, Tkeshelashvili v. State, \_\_\_ N.Y.S.2d \_\_\_ Slip copy 2008 WL 4602521 (Table) (NY Ct of Claims September 17, 2008).

Based upon the foregoing, the court concludes that defendants have demonstrated that it was plaintiff's own reckless conduct that was the sole proximate cause of his injuries and

plaintiff has failed to demonstrate an issue of fact to the contrary. Accordingly, the motion and cross-motion are both hereby granted and the complaint is hereby dismissed. All other issues raised by the motion and cross-motion are no longer relevant to the determination of those applications and are rendered moot.

So Ordered.

  
A.J.S.C.

**Dated:** March 16, 2009

**ENTERED**  
MAR 24 2009  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE