

**Razavi v Clam Bake Catering, LLC.**

2018 NY Slip Op 32693(U)

October 17, 2018

Supreme Court, New York County

Docket Number: 156380/2013

Judge: James E. d'Auguste

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 55

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FATIMA RAZAVI,

Plaintiff,

-against-

CLAM BAKE CATERING, LLC., BRYAN MATTSO, THE HAMPTON CLAM BAKE AND CATERING CO., INC., 283 PANTIGO FOOD CORP., 283 PANTIGO ROAD, LLC, MARC MILLER, ERIC MILLER, LAURENCE RIZZO a/k/a LARRY RIZZO, BEVERLY BROEKER and STEPHEN DENARO,

Defendants.  
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**DECISION AND ORDER**

Index No.: 156380/2013

Mot. Seq. Nos. 005, 006

**Hon. James E. d'Auguste**

This Court hereby consolidates Motion Sequence Nos. 005 and 006 for disposition.

In Motion Sequence No. 005, defendant Bryan Mattson (“Mattson”) moves, pursuant to CPLR 3212(a), for summary judgment, dismissing the complaint against him. In Motion Sequence No. 006, defendants 283 Pantigo Road, LLC (“Pantigo Road”), Marc Miller, Eric Miller, Beverly Broeker (“Broeker”), and Stephen Denaro (“Denaro”) (collectively, the “Individual Hampton defendants”) move, pursuant to CPLR 3212, for summary judgment, dismissing the complaint and all cross-claims asserted against them.<sup>1</sup>

**Factual and Procedural History**

The instant action is to recover damages for personal injuries allegedly sustained by plaintiff Fatima Razavi (“Razavi”) on July 6, 2013, when, while at a clam bake (the “party”) held at Atlantic Beach, a public beach in East Hampton, New York (the “premises”), she was burned by coals or embers that had allegedly been buried in the sand.

<sup>1</sup> While the Individual Hampton defendants seek the dismissal of all cross-claims asserted against them, a review of the answers filed in this action reveals that no cross-claims have been filed as against each of the Individual Hampton defendants. See NYSCEF Doc. Nos. 86, 88.

On July 6, 2013, Mattson was hosting the party where the accident allegedly occurred. He hired defendant Clam Bake Catering, LLC, which does business as The Hampton Clam Bake and Catering Co., Inc. ("Hampton Clam Bake"), (collectively, "Clam Bake") as the caterer of the party. Eric Miller was the owner of Clam Bake, and his brother Marc was Mattson's contact person.<sup>2</sup> Broeker was the catering captain at the party, and Denaro was the sous chef. Defendant Pantigo Road, also owned by Eric Miller, was created to purchase a building located at 283 Pantigo Road in East Hampton, New York. Clam Bake utilized the kitchen at 283 Pantigo Road to prepare food for its clam bake parties.

### **Plaintiff's Deposition Testimony**

Razavi testified that, on July 6, 2013, she had been invited to the party by an acquaintance, Rob Torti. NYSCEF Doc. No. 90, Tr. 52:25-54:21. When she arrived at the premises, with five other people, at approximately 7:00 p.m., she saw several food preparation tents, a bar that was serving alcohol, and tables on the beach, near the shoreline. *Id.* at Tr. 58:5-7, 60:24-61:15, 62:1-13. A beach bonfire was also set up to the left of the tables. *Id.* at Tr. 6:1-10.

Razavi testified that the alleged accident occurred at around 11:30 p.m. *Id.* at Tr. 65:3-5. Specifically, she stated, in pertinent part, the following:

My friend said, Let's go look at the bonfire. . . . It was about ten feet away from the bonfire. I had shoes on. I put my foot in the sand. It started to hurt, and I started screaming and crying. And that's when he came, and he said he had put stuff from the fire in the sand and the hole.

*Id.* at Tr. 82:16-83:5. Razavi later clarified that the "he" whom she was referring to was the Clam Bake worker who had been tending to the bonfire, specifically Laurence "Larry" Rizzo ("Rizzo"). *Id.* at Tr. 85:5-25; NYSCEF Doc. No. 147, at 2, ¶ 2. At her deposition, when asked

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<sup>2</sup> Eric Miller is also the owner of non-moving defendant 283 Pantigo Food Corp. ("Pantigo Food").

what caused her injury, she stated that “[t]he fire attendant guy from the clam bake company said there was stuff from the fire. He didn’t tell me what it was,” referring to Rizzo. NYSCEF Doc. No. 90, at Tr. 67:8-12. She further stated that she “wasn’t close to the bonfire. [She] wasn’t close to the thing where the cooking was made . . . . [She] just put [her] foot somewhere not even close to it. It was like ten feet away from the bonfire.” *Id.* at Tr. 67:13-21. However, she also testified that her accident occurred as soon as she came “very close” to the bonfire, within ten feet of it. *Id.* at Tr. 72:21-73:7, 83:9-14.

Further, Razavi indicated that she visited the bar at the party and that she did not go over to the bonfire prior to her alleged accident. *Id.* at Tr. 80:8-17. Specifically she testified that she only had two drinks the entire time she was at the party, one drink approximately an hour or half hour before her injury and one drink after, and she did not recall having any other alcoholic drinks that night. *Id.* at Tr. 80:18-81:20. Razavi also testified that she was wearing sandals that exposed the top of her foot to the party, which she never took off and was wearing at the time of her injury. *Id.* at Tr. 87:9-88:21. She further stated that she burned her foot when she was walking and stepped in the sand, submerging her entire foot in the sand for approximately three seconds. *Id.* at Tr. 89:5-10, 90:25-91:8, 94:10-12. Razavi testified that at the time of her injury, when she was about ten feet away from the bonfire, there was an older man on the right side of the bonfire, the side closer to her, but he did not say anything to her. *Id.* at Tr. 91:9-23, 93:11-13. In describing the pain she experienced, Razavi stated the following:

My entire foot just started to hurt. And something was in the sand, so it scorched my right leg. And I started screaming and -- I don’t remember what I was saying, but I was screaming. And [the man standing next to the fire] came over . . . [a]nd he said, I put stuff from the fire. And these people started coming, the first aid team.

*Id.* at Tr. 93:25-94:9. She also stated that when the man tending to the fire came over, “[h]e apologized. And he was like, [o]h, my God, I’m sorry. I put stuff in the fire over here

underneath the sand.” *Id.* at Tr. 94:13-25. Razavi did not recall that man saying anything else to her and that no other person spoke to her to tell her that there was anything resembling hot coals or embers in the sand. *Id.* at Tr. 97:5-21.

**Deposition Testimony of Bryan Mattson**

Mattson testified that he was the host of the party on July 6, 2013. NYSCEF Doc. No. 91, Tr. 8:23-25. He hired Clam Bake to prepare, organize, and run the party. *Id.* at Tr. 9:10-14. Marc Miller was his contact at Clam Bake. *Id.* at Tr. 9:23-10:3. Marc obtained all the necessary permits for the party’s location and bonfire, but Mattson never reviewed the permits. *Id.* at Tr. 42:10-20, 44:22-46:10, 47:24-49:6. However, Mattson did agree with Clam Bake to host a party for seventy-five (75) guests. *Id.* at Tr. 27:10-21. Despite not having a specific guest list, Mattson limited the party to only the people who he invited and their guests. *Id.* at Tr. 27:22-33:17; 49:12-51:5. He even testified that this was a private party. *Id.* at Tr. 82:12-15. Mattson also testified that the set up included a white tent and several tables, with white tablecloths, as well as a bonfire. *Id.* at Tr. 51:16-52:2; 53:17-55:5.

Mattson arranged some aspects of the party himself. Specifically, he hired a disc jockey to play music and he purchased the alcohol for the party, though the bartenders were provided by Clam Bake. *Id.* at Tr. 35:15-19, 39:14-40:22, 62:19-24; 80:3-5. However, Mattson testified that he was not involved in maintaining the bonfire in any way. *Id.* at Tr. 90:24-92:12; 96:22-98:21. He also testified that he did not receive any instructions regarding the bonfire from Clam Bake or its workers. *Id.* at Tr. 92:13-95:2.

**Deposition Testimony of Eric Miller**

Eric Miller testified that he was the co-owner of Clam Bake, which was created to purchase Hampton Clam Bake, and both entities were operated out of a building located at 283 Pantigo Road in East Hampton, New York. NYSCEF Doc. No. 92, at Tr. 10:19-11:6, 15:19-  
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16:6; 39:24-16. Hampton Clam Bake, however, has since been dissolved. *Id.* at Tr. 20:8-24:23. Eric also operated two other companies from that location: Pantigo Food and Pantigo Road. *Id.* at 26:10-27:16. Pantigo Road was created for the sole purpose of purchasing the building from which Pantigo Food and Clam Bake operated. *Id.* at Tr. 26:18-27:13. Pantigo Road has since been dissolved and the building located at 283 Pantigo Road was sold. *Id.* at Tr. 27:17-28:19. He also testified that Mattson's party was conducted only by Hampton Clam Bake as the corporate entity. *Id.* at Tr. 31:9-13.

Eric testified that he was Clam Bake's chef and in charge of production. *Id.* at Tr. 56:3-8. On July 6, 2013, the date of the alleged incident, Eric remained in the 283 Pantigo Road kitchen. *Id.* at Tr. 56:9-14. He was "not an on-site person" and stated that he was not at the party. *Id.* at Tr. 56:19-57:2, 143:10-22. He testified that his brother Marc Miller was an independent contractor who provided event planning and catering sales services to Clam Bake and that he was never responsible for setting up the event nor did he have any "day-of" responsibilities. *Id.* at Tr. 57:6-58:6, 110:16-22. Specifically, Marc did not work events on the beach. *Id.* at Tr. 112:9-20. He further testified that the kitchen staff were the only employees of Clam Bake, but the people who went out to events, such as the party at issue, were independent contractors. *Id.* at Tr. 106:22-107:7. All of the individuals who worked at events, even kitchen staff, were considered independent contractors for payment purposes and worked at the direction of Clam Bake. *Id.* at Tr. 114:3-116:2. Eric further testified that individuals employed by Clam Bake participated in hands-on training in conducting clam bakes and beach bonfires. *Id.* at Tr. 67:8-68:17. In the first year after he purchased Clam Bake, Eric would go out to a couple events to check them out. *Id.* at Tr. 69:10-70:6.

Importantly, there were always two captains at each event—a kitchen captain, who is the chef of the event, and a floor captain, who would be in charge of set up and maintenance—who

were trained in the procedures for creating, maintaining, and extinguishing bonfires. *Id.* at Tr. 118:7-120:9. Both captains were in charge of “overseeing the entire event . . . [i]ncluding the bonfires.” *Id.* at Tr. 119:8-15. Eric also testified that the captains were responsible for determining whether the persons designated to actually create, maintain, and extinguish the bonfires were properly trained and to supervise them, as well as provide training as to Clam Bake’s standard procedures and equipment used on the day of the event. *Id.* at Tr. 129:18-132:3. On July 6, 2013, at the party, the captains for the event were Denaro, the chef, and Broeker, the supervisor. *Id.* at Tr. 156:3-11. Further, on that date, Rizzo, the driver, was the one individual designated to create, maintain, and extinguish the bonfire under Denaro’s and Broeker’s supervision. *Id.* at Tr. 156:21-157:6, 159:10-24. Eric also testified that this was a senior group with the entire team being qualified to be captains. *Id.* at Tr. 159:10-24.

Eric testified that the bonfire is always “set downwind of the clients, away from the clients, and put into the metal receptacle, which is the top of a wheelbarrow, with two or three pieces of wood” and that “the bonfire is restricted to the [ ] receptacle, the metal receptacle that it’s in.” *Id.* at Tr. 87:6-21. He further testified that there was not really any maintenance of the bonfires “other than just adding a log occasionally to keep . . . it burning. But never excessively high and never excessively low.” *Id.* at Tr. 87:22-88:6.

With respect to extinguishing bonfires, Eric testified that every Clam Bake trailer “is outfitted with a steel garbage can with a top. So if and when there are any embers that need to be removed, they go into an isolated steel drum, which is behind the kitchen area, not accessible to clients ever.” *Id.* at Tr. 94:12-96:10. Then, after the event, once the guests have left, the steel drum is dragged down toward the ocean and the contents of the drum is doused with water and then removed, so that nothing is left on the beach. *Id.; id.* at Tr. 97:16-98:3. He further stated:

Sometimes you do bury. And when things are buried, they’re dug away from the clients. Nowhere near the clients, ever. And they’re

then -- and this is after the clients are gone. And then all the water from the coolers and [ ] all the water we bring with us to the thing - every trailer by the Department of Health code has . . . gallons and gallons and gallons of fresh water . . . it's completely doused in ice and water and not left unattended at that point. [N]ever would there be a burning ember left anywhere in the circle of clients during the course of an event. A number one rule.

*Id.* at Tr. 94:12-96:10. He further testified that the steel drums are typically dragged to the ocean, “[b]ut if there’s some mitigating circumstance, high wind or something like that, you may decide to . . . bury and douse. After. And I’m going to keep saying that. Because it never ever would happen when there’s a client there.” *Id.* at Tr. 97:6-15. Specifically, “[a]t the point when you’re ready to extinguish it, . . . where [the drum is] standing create a hole in the sand or push it in . . . . It is behind where the fire or the coals might have . . . been. It’s dug and doused with sixty gallon coolers filled with ice water and all potable water that we have.” *Id.* at Tr. 100:15-101:16. He testified that any buried coals would be at least ten (10) feet away from the bonfire site. *Id.* at Tr. 101:23-25. Before the coals were covered with sand, Clam Bake’s policy would be to check that the embers were not hot with one’s hand. *Id.* at Tr. 102:14-103:14.

Moreover, Eric was informed by Marc that standard procedures were used on the date of the party, and also that only Clam Bake staff would handle the operations with respect to the bonfire. *Id.* at Tr. 163:13-21, 177:25-178:6. Marc also told Eric that Razavi “had consumed quite a bit of alcohol and continued to consume alcohol after she burned herself.” *Id.* at Tr. 233:5-13.

#### **Deposition Testimony of Marc Miller**

Marc Miller testified that he was an employee of Pantigo Food starting in 2013 and that he “sold catering events” for Hamptons Clam Bake. NYSCEF Doc. No. 93, at Tr. 27:24-28:17. He also testified that he sold catering events for Clam Bake, but he did not receive compensation and was not an independent contractor. *Id.* at Tr. 29:13-31:12. He further testified that he did



not have any financial interest in any of the above corporate entities and did not have any knowledge as to the corporate structure. *Id.* at Tr. 33:19-34:20, 39:3-24, 42:21-43:13. His duties included “planning, operating, effectuating and selling clam bakes,” as well as booking catering events, preparing documents for banquet orders, obtaining permits for events when necessary, and ensuring that events “went off on time” and “were effectuated and operated.” *Id.* at Tr. 20:3-8, 43:18-25. Marc also testified that it was his practice to visit as many events as possible to say hello to the client and see how the event was going, but not much more beyond that. *Id.* at Tr. 44:2-18.

Marc obtained the mass gathering permit for the party in his name, as that was Hampton Clam Bake’s “custom and practice” at the time. *Id.* at Tr. 119:8-121:24, 127:24-129:4, 130:2-131:20. He also testified that he never had any licensing or training with respect to beach fires or fire safety. *Id.* at Tr. 12:4-13:2. However, Marc made clear that the metal containers in which the bonfires were set up by Hampton Clam Bake were in compliance with the East Hampton fire code (Section 141, Part 19). *Id.* at Tr. 77:23-78:12. He also maintains that he did not direct any staff at the party to do anything with respect to the bonfire at the party, but he did confirm that Danaro, Broeker, and Rizzo were working at the party. *Id.* at Tr. 124:11-18, 126:10-13.

Marc briefly visited the party at some point that night around 9:00 p.m. *Id.* at Tr. 138:18-24, 157:7-15. He later, at the end of July, learned that someone had been burned at one of their events. *Id.* at Tr. 142:24-143:19. When he spoke to Danaro after learning of the injury, Danaro informed him that the person who had been injured “was rather intoxicated” and after first aid was administered, “she continued to go drinking. She stayed at the party and drank more . . . Beverly [Broeker] corroborated she was very drunk.” *Id.* at Tr. 145:6-22.

**Deposition Testimony of Laurence Rizzo**

Laurence Rizzo testified that he was a trailer driver for Hampton Clam Bake since June 2013 through Labor Day of that year. NYSCEF Doc. No. 94, at Tr. 12:11-14, 15:9-19, 16:22-17:12. On his first day of work, Rizzo received instructions as to what his job as a trailer driver entailed. *Id.* at Tr. 26:3-7. Specifically, his duties included “[b]ring[ing] the trailer on the beach, set up, unload[ing] the trailer, set[ting] up the stuff, empty[ing] the pails and bring[ing] everything back to the shop” located on Pantigo Road in East Hampton. *Id.* at Tr. 26:24-27:4. The set up that Rizzo performed consisted of setting up tables, grills, lights, and tents. *Id.* at Tr. 27:9-16. He was also responsible for emptying garbage pails at events. *Id.* at Tr. 27:25-28:6. On the first day that Rizzo reported for work, he was instructed by Gary, one of the cooks, to start setting up—Gary told Rizzo, at the beach, where he wanted the grill positioned and where to put the tent, as well as how to fasten the tent, and how many tables to set up around the grill. *Id.* at Tr. 25:17-23, 29:9-21, 33:22-34:2. and unloading Clam Bake’s trailer and setting up the party.

Rizzo was not trained with respect to building, maintaining, or extinguishing beach bonfires or grills; but, he testified that it was his job on the evening of the party to monitor the bonfire. *Id.* at Tr. 9:18-10:19, 33:22-34:2, 45:6-11, 46:23-48:15, 61:13-63:21, 91:12-17, 97:25-98:18, 99:4-12. Despite it being his job to maintain the bonfire at the party, as far as whether to add another log to the fire, he went to other areas at the event and monitored the fire from afar. *Id.* at Tr. 99:4-100:2. Rizzo stated that he figured out on his own how to set up bonfires by putting the wood he was provided with into the metal container. *Id.* at Tr. 45:12-17. He also testified that he set up the charcoal grills that were used, that the cook determined how many grills were used and how much charcoal was needed. *Id.* at Tr. 34:3-36:24. Rizzo did, however, receive instruction regarding “the extinguishing of the grill fires and the removal of the embers

and the remains of the charcoal fire.” *Id.* at Tr. 37:15-38:19. With respect to extinguishing grill fires, Rizzo was instructed “[t]o put it in a retaining bucket and put ice water on it,” he would then “put it in the back of [the] truck,” and “[b]ring it back to the shop where the trailers are,” which was located on Pantigo Road. *Id.* at Tr. 38:6-19. He testified that he was never told to bury the remains of grill fires, particularly the embers, in the sand at the beach after the event ended and that he did not remember receiving other instruction regarding extinguishing grill fires or removing and disposing of such remains. *Id.* at Tr. 39:3-12. Rizzo also testified that at least on one occasion, he disposed of the remains of the grill fire prior to the end of the event. *Id.* at Tr. 41:12-42:2. At his deposition, Rizzo identified the buckets that were provided for the purpose of removing embers from the charcoal grills used to cook the food, as well as the bonfire. *Id.* at Tr. 50:20-52:23.

With respect to extinguishing a beach bonfire, Rizzo was instructed to “[e]xtinguish the fire with the ice that [was] saved from the party, and on the sand below the pit, put the embers in the container, put ice and water in that, [and] refill the hole.” *Id.* at Tr. 52:24-55:10. He clarified by explaining that when the fire was initially set up, the metal tray in which the logs were put for the bonfire was put into the sand so that the edge of the tray was level with the sand, causing a small pit to be dug in the sand. *Id.* at Tr. 53:14-56:17. He also explained that icy water was poured on the sand under the metal tray once it was removed to extinguish the sand. *Id.* He would then “fill the hole with sand to level it off so nobody trip[ped].” *Id.* Then, “[t]he embers went into [the] bucket and then [he] poured more icy water in that [bucket] and that [bucket] would go into [his] truck.” *Id.*

On July 6, 2013, Rizzo specifically recalled instructing Razavi to move away from the fire because she was walking too close to it, approximately one foot away, and was “staggering about” like she was in “a drunken stupor.” *Id.* at Tr. 102:12-111:25. When Rizzo asked Razavi

“to stay clear of the fire, please,” she was with three other people who were also walking towards the bonfire, but were farther away, approximately five feet from the fire. *Id.* When Rizzo gave this instruction, he was standing right next to the fire. *Id.* at Tr. 115:12-116:3. After he observed Razavi and the three other people move several steps from the fire, he returned to the work he was involved in by the charcoal grills. *Id.* at Tr. 118:14-120:14. He did not speak to Razavi again that night. *Id.* at Tr. 120:15-18. Approximately an hour later, Rizzo learned that Razavi had been injured when he walked back over to the bonfire and saw her sitting on the beach approximately five feet from the bonfire, with the same three people and Stephen Denaro, and she was crying. *Id.* at Tr. 120:22-123:5. He testified that when he walked over to the bonfire, it was dwindling and he was getting ready to put out the bonfire. *Id.* at Tr. 123:6-9. Rizzo does not recall if he removed all the embers or coals from the charcoal grills that night, but he did testify that he did not bury them in the sand. *Id.* at Tr. 116:4-118:13.

**Deposition Testimony of Stephen Denaro**

Stephen Denaro testified that he was an employee of Pantigo Food who also performed catering work as a sous chef for Clam Bake and Hampton Clam Bake. NYSCEF Doc. No. 95, at Tr. 10:25-18:6, 20:5-20. Denaro’s job duties and responsibilities consisted of assisting in cooking foods at events. *Id.* at Tr. 20:21-24, 22:12-16. Specifically, he “would help prep things in the kitchen, [he] would keep the yard clean, [he] would go pick up beverages, pick up charcoal, pick up linens, move the trailers around sometimes. Make sure there were things in the warehouse to pack the trailers. [M]ow the lawn, weed the little patch out front,” as well as perform catering at parties. *Id.* at Tr. 23:10-24:8. At events, he would work as the chef or the sous chef. *Id.* at Tr. 26:19-22. At an event, a chef’s and a sous chef’s responsibility was “the food and solely the food . . . [They] just worry about the kitchen, . . . just cooking the food, plattering it up, . . . just strictly food and nothing else,” and he had no responsibilities with

respect to anything else at an event such as the set up, bonfires, disc jockey, bar, or anything else.

*Id.* at Tr. 26:23-27:20.

Denaro testified that the only fire training he had was with respect to his boat captain license and that he has had “zero fire training for bonfires,” which includes no training for the supervision and monitoring of bonfires, as it was not his job, and no formal training with respect to cooking using grills. *Id.* at Tr. 8:11-10:3, 51:22-52:3. He did not recall whether he received instructions regarding extinguishing grills and removing the embers and remains of the fire in general and on July 6, 2013. *Id.* at Tr. 45:8-46:17. Nor did he recall whether he received any training with respect to his job duties from Eric Miller, Marc Miller, or anyone else associated with Pantigo Food. *Id.* at Tr. 20:25-23:2.

Denaro further testified that he was working at the party on July 6, 2013 as part of his employment with Pantigo Food at which a female guest was injured. *Id.* at Tr. 27:21-28:25. Denaro learned that a guest was injured because someone told him that towards the end of the party when he was in the kitchen area, which was set up under the tent and behind the trailer. *Id.* at Tr. 29:5-30:22, 39:7-23. He was unsure whether all the cooking had been completed at that point. *Id.* at Tr. 39:24-40:10. After he learned that a woman had been burned, he got the first aid kit from the trailer, went over to her, and tried to ask her what was wrong. *Id.* at Tr. 52:23-55:25. Denaro testified that the woman “appeared extremely, extremely intoxicated, she stunk of liquor. . . . I tried to get her to create a full sentence, but she couldn’t because she was so intoxicated. [S]he couldn’t sit up straight because she was so intoxicated, she was over all visibly extremely, extremely very drunk in every way possible.” *Id.* He eventually got her to identify the area that was hurting, though he could not see any burn, and applied burn ointment. *Id.* He then asked the man who was with her if he would be responsible for her, the man said yes, and he took the first aid kit and went back to his duties. *Id.* He testified that he did not remember her wearing

sandals when he went over to attend to her. *Id.* at Tr. 57:20-58:11. He did not remember whether the bonfire was lit at that point. *Id.* at Tr. 61:4-10. About two or three weeks later, he had a conversation with Marc Miller and informed him that someone received a burn at the party. *Id.* at Tr. 69:12-20.

Additionally, Denaro testified that he knew Rizzo, but did not remember if Rizzo set anything up at the party. *Id.* at Tr. 35:23-37:8. He also had no recollection of whether there was a bonfire at the party or whether any guest or individual was in the area of the bonfire. *Id.* at Tr. 38:19-39:6. He did, however, state that charcoal grills were used at the party. *Id.* at Tr. 46:18-20. Denaro further testified that no particular individual was responsible for removing and extinguishing the bonfire and charcoal embers from the grills, “it could be anyone within the kitchen.” *Id.* at Tr. 40:11-16. Denaro was unsure whether Rizzo had the aforementioned responsibilities. *Id.* at Tr. 40:17-41:4. On approximately one hundred other occasions, Denaro himself had extinguished a grill fire and removed the embers or remains of the fire, and other times he had observed other Hampton Clam Bake sous chefs extinguish grill fires. *Id.* at Tr. 47:12-49:18. When Denaro extinguished such fires, as he did not have instruction, he used common sense—he would “let the fire burn out until it is not burning anymore, and [was] done with it. . . . [I]t is not something that [one] need[s] instruction for. It is relatively common sense.” *Id.* at Tr. 49:19-50:10. He described, in detail, how he would extinguish a grill fire and remove its embers and remains:

[Y]ou take the grate off the grill, the grill grate, you have a coal bucket and you scoop the coals into it. You make sure you put two or three bags of ice in the bottom of the coal bucket. And at this time the coals are . . . essentially shot, they were essentially burned out. You take a shovel, put the barrel right next to the grill, so if any falls out of it, it is going to fall into the bucket. . . . You shovel carefully and make sure that you get every single coal and ember from the grill into the bucket and none ever hits the ground. When it is done, take another two or three bags of ice and put it on top of the coals, close the lid, there is a handle that you can lock the lid

with and then you put a couple of bags of ice on top of that again . . . . You take it, put it in the back of the truck immediately.

*Id.* at Tr. 50:11-51:13. He was never told that there were occasions on which he could bury the remains of the grill fires in the sand. *Id.* at Tr. 51:14-21.

The night of the party, Todd Hellier and Gary Chiappa were also working as sous chefs in the kitchen and it was possible that either Hellier, Chiappa, or Denaro himself could have been involved in extinguishing the grills used for cooking and removing the charcoal. *Id.* at Tr. 44:25-7. Denaro also remembered that Broeker was the captain at the party, but did not know what her responsibilities were. *Id.* at Tr. 44:1-8. Broeker was not his supervisor at the party and further stated that “[t]here is not necessarily a supervisor . . . . Everybody knows what they need to do and they all take on the duties that they were responsible for. It doesn’t necessarily need to be a supervisor supervising [them].” *Id.* at Tr. 44: 9-18. Furthermore, Denaro testified that he only met Mattson once during the party, and that Mattson did not direct his work in any way. *Id.* at Tr. 74:20-75:16.

#### **Deposition Testimony of Beverly Broeker**

Beverley Broeker testified that on July 6, 2013, she worked for Hampton Clam Bake as an employee, not an independent contractor. NYSCEF Doc. No. 96, at Tr. 8:21-23, 12:1-13:19, 63:16-22. She first began working for Hampton Clam Bake in 2008 or 2009 up through 2015, except for the years of 2011 and 2014. *Id.* at Tr. 9:11-20. Broeker either worked as a server, captain, or bartender at events. *Id.* at Tr. 20:10-15. Her duties as a captain included setting up the event, setting up buffet tables, setting up the bar, directing “the front of the house staff where things are going to go and be placed,” communicating with the host or hostess of the event regarding timing of food or set up of the buffet, and breaking down the event set up. *Id.* at Tr. 20:16-20, 22:24-23:10. She also answered phones, on occasion, at the location at 283 Pantigo Road. *Id.* at Tr. 24:10-24. Broeker also testified that neither Eric Miller nor Marc Miller gave

her any instructions, directions, procedures, or rules to utilize as a captain at clam bakes. *Id.* at Tr. 21:25-22:6. These clam bakes involved grills to cook the food and bonfires. *Id.* at Tr. 23:11-24. Broeker testified that she never participated in any simulated clam bake or viewed any such instruction. *Id.* at Tr. 23:25-24:9.

With respect to any supervisory capacity, Broeker “supervised the servers in the front of the house as well as the bartenders.” *Id.* at Tr. 25:11-23. While she did not have supervisory responsibilities for the Hampton Clam Bake driver, she testified that aside from loading up the trailers from 283 Pantigo Road and driving to the location, the driver “was in charge of . . . the bonfire and he would help out with tiki torches and he helped out mostly with the kitchen, whatever they needed.” *Id.* at Tr. 25:24-27:9. The only discussion Broeker would have with the driver, in her capacity as a captain, was where to put the bonfire. *Id.* at Tr. 27:10-18. Broeker also testified that she never monitored or supervised any aspect of a bonfire at a clam bake, nor did she supervise anyone with respect to disposing of or extinguishing the remains of a bonfire, but she did observe individuals committing such an act. *Id.* at Tr. 27:19-28:19. She also did not have supervisory responsibility for any aspect of the charcoal grills used at clam bakes. *Id.* at Tr. 28:20-29:6. Broeker also testified that she was not responsible for supervising the chef or the cooks; Marc Miller, in his capacity as catering director, would supervise the chef and Broeker would work under him as a captain, and the chef would supervise the sous chefs and set up and extinguish the grills. *Id.* at Tr. 30:11-31:22, 33:17-34:10. Broeker testified that Marc was responsible for organizing the clam bakes—he would set up the menu, what the client needed on the beach, what plates would be ordered, he would speak with the client, he would also staff events and decide who was working which event, as well as how many people were needed. *Id.* at Tr. 32:12-33:12.



Broeker testified that she worked as a captain at the party. *Id.* at Tr. 35:20-24. She testified that Rizzo was the trailer driver for the party, but this was the only time she worked with him. *Id.* at Tr. 39:7-40:15. Broeker has no specific recollection of whether Rizzo did anything with respect to the bonfire or the grills, or of whether she observed anyone making or creating grill fires. *Id.* at Tr. 40:16-41:12, 45:10-19. Broeker only learned that someone had been injured at the party approximately three days later when Marc Miller called her. *Id.* at Tr. 47:10-50:3. She also testified that she never filled out any sort of accident report. *Id.* at Tr. 50:14-17. Broeker testified that she left after a full breakdown of the party was done and all the guests had left, but that she was only responsible for breaking down the tables and the area where the guests were and had nothing to do with the kitchen or the chef and their duties, specifically nothing to do with the extinguishing of fires and removal of coals or embers. *Id.* at Tr. 51:8-59:19.

While Hampton Clam Bake provided the bartender, Mattson provided the liquor. *Id.* at Tr. 54:20-56:18. There was no restriction on how much guests could drink and Mattson did not have anyone supervising alcohol consumption. *Id.* In addition, Broeker testified that her interaction with Mattson was limited to asking what time he wanted food to be served; he did not have any influence on how the party was run by Hampton Clam Bake. *Id.* at Tr. 76:10-14.

### **The Permit**

The “Mass Gathering Permit” for the party (the “permit”) was obtained by Marc Miller.

It lists him as the “Applicant/Sponsor” and has the following conditions:

1. The applicant consents and agrees to abide by any and all ordinances of the Town of East Hampton . . .
2. The issuance of this permit is not a waiver for any activity prohibited by law, and compliance with all provisions of the East Hampton Town Code, as well as applicable State and Federal Law, is required.

NYSCEF Doc. No. 133.

### Discussion

“[T]he 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986) (internal citations omitted). Once a prima facie entitlement to judgment has been established, in order to defeat the motion, the opposing party must “assemble, lay bare, and reveal his [or her] proofs in order to show his [or her] defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions.” *Genger v. Genger*, 123 A.D.3d 445, 447 (1st Dep’t 2014) (third alteration in original) (quoting *Schiraldi v. U.S. Min. Prods.*, 194 A.D.2d 482, 483 (1st Dep’t 1993)). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978).

#### I. The Negligence Claims as Against Mattson (Mot. Seq. No. 005)

“In order to prevail on a negligence claim, ‘a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom.’” *Pasternack v. Lab. Corp. of Am. Holdings*, 27 N.Y.3d 817, 825 (2016). Here, Mattson moves for summary judgment dismissing the complaint as against him on the ground that he did not owe a duty of care towards Razavi. Specifically, he argues that he was merely the host of the party, which was held on a public beach, and that he did not direct or control the manner in which Clam Bake operated the party.

“Liability for a dangerous condition is generally predicated on either ownership, control or a special use of the property.” *Lopez v. Allied Amusement Shows, Inc.*, 83 A.D.3d 519, 519 (1st Dep’t 2011). In order to establish liability for a dangerous condition, it must be

demonstrated that “the defendant created the alleged hazardous condition or that the defendant had actual or constructive notice of the defective condition and failed to correct it.” *Mitchell v. City of New York*, 29 A.D.3d 372, 374 (1st Dep’t 2006) (quoting *Leo v. Mt. St. Michael Acad.*, 272 A.D.2d 145, 146 (1st Dep’t 2000)). Liability may also be imposed for injuries that occurred “in an area under defendant’s control, where defendant had the opportunity to supervise the intoxicated guest.” *D’Amico v. Christie*, 71 N.Y.2d 76, 85 (1987). In this instance, Mattson argues that he cannot be found liable under a premises liability theory because he did not own or control the premises.

Initially, since the premises consist of a public beach, Mattson cannot be considered an owner for the purposes of premises liability. However, in this instance, there is a question of whether the special use doctrine applies. The purpose of the special use doctrine is to impose liability upon a, typically adjacent, “occupier of land for injuries arising out of circumstances where ‘permission [has been] given, by a municipal authority, to interfere with a street [or public area] solely for private use and convenience in no way connected with the public use.’” *Kaufman v. Silver*, 90 N.Y.2d 204, 207 (1997) (first alteration in original) (quoting *Clifford v. Dam*, 81 N.Y. 52, 56-57 (1880)). “Consequently, where [said individual] ‘derives a special benefit from that [public property] unrelated to the public use,’ the person obtaining the benefit is ‘required to maintain’ the used property in a reasonably safe condition to avoid injury to others.” *Id.* (second alteration in original) (emphasis omitted) (quoting *Poirier v. City of Schenectady*, 85 N.Y.2d 310, 315 (1995)). Imposition of the duty is premised on access and ability to exercise control over the property designated for a special use. *Id.* at 208. Further, the Appellate Division, First Department has stated: “Notably, in order to be held liable under a special use theory, even partial control of the instrumentality by the special user is sufficient to impose liability.” *Petty v. Dumont*, 77 A.D.3d 466, 469-70 (1st Dep’t 2010).

Here, Mattson may be potentially liable for Razavi's alleged injuries under a theory of special use because the bonfire was "installed at [his] behest or for [his] benefit." *Id.* at 469 (emphasis in original) (quoting *Kaufman*, 90 N.Y.2d at 207). The facts indicate that Mattson had at least some control over the premises where the party was located because he contracted with Clam Bake to set up a private beach bonfire and to procure the necessary permits for the party on his behalf. The set up consisted of a tent and white tables that would indicate a private party to public beach goers. Mattson also made clear in his deposition testimony that the attendees of his party were limited to his guests and those individuals whom his guests invited. Additionally, Mattson procured entertainment in the form of a disc jockey for his guests. Thus, not only were the premises specifically procured for Mattson so as to indicate some indicia of control, the bonfire itself was set up for his own benefit and the benefit of his guests. There is also the question of whether Razavi was intoxicated and, if so, Mattson may be liable as he would have owed a duty to Razavi because he purchased the alcohol for the party and had some control over the premises. As these facts preclude a grant of summary judgment as against Mattson, the Court need not consider potential liability under other legal theories at this juncture. Accordingly, Mattson's motion for summary judgment (Mot. Seq. No. 005) is denied.

## **II. The Negligence Claims as Against the Individual Hampton Defendants and Pantigo Road (Mot. Seq. No. 006)**

The Individual Hampton Defendants and Pantigo Road move for summary judgment dismissing the complaint on the ground that they did not breach any duty to Razavi.

### **A. Pantigo Road**

Pantigo Road argues that, as the owner of the building where Clam Bake had its permanent kitchen, it was not involved with the party and, therefore, it did not owe any duty to Razavi. Razavi opposes this branch of the motion to the extent that Pantigo Road, as an entity, is commingled with Clam Bake and Hampton Clam Bake. However, it is evident from the record

that Pantigo Road was not involved with running Mattson’s party as its sole purpose for existing was to own the property located at 283 Pantigo Road. Since Pantigo Road was not involved with the party, has since been dissolved, and no longer owns the property located at 283 Pantigo Road, it is not liable for Razavi’s injuries. Accordingly, that branch of the Individual Hampton defendants’ motion seeking summary judgment for Pantigo Road is granted and the complaint is dismissed as against it.

B. Marc Miller

Marc Miller argues he did not owe a duty to Razavi, and thus that duty was not breached, as he had no connection to the events that allegedly caused her accident. Specifically, he testified that his duties on behalf of Hampton Clam Bake were limited to booking the events, conveying information to the kitchen staff, and acquiring any necessary permits for events. In addition, he testified that he was not present during the majority of the party and only briefly attended the party to meet the client, Mattson, and that the party was being run properly. He did not direct or supervise the workers at the party, nor did he control the means of their work.

Razavi argues that because Marc Miller secured the permit in his own name, he owed her a duty of care and would be personally liable for all injuries that occurred during the party due to the violation of any statute, including the Fire Code of New York State (“NYS Fire Code”).<sup>3</sup>

Razavi cites no legal authority for this position. While it is true that “[t]he purpose of a permit is

<sup>3</sup> While Razavi refers to Sections 307.1 and 307.5 of the NYS Fire Code in her opposition papers to Mot. Seq. No. 006 (NYSCEF Doc. No. 135) and contends that Marc Miller failed to comply with said code sections, any violation of the referred to sections would not result in an imposition of liability for the injuries allegedly suffered herein. Chapter 3 of the NYS Fire Code, entitled “Open Burning and Recreational Fires,” contains Section 307.1, which states: “General. A person shall not kindle or maintain or authorized to be kindled or maintained any open burning unless conducted and approved in accordance with this section,” and Section 307.5, which states: “Attendance. Open burning, bonfires or recreational fires shall be constantly attended until the fire is extinguished. A minimum of one portable fire extinguisher complying with Section 906 with a minimum 4-A rating or other approved on-site fire-extinguishing equipment, such as dirt, sand, water barrel, garden hose or water truck, shall be available for immediate utilization.”

defeated if a [person] receiving such a permit may wash his hands of responsibility for negligent performance of the work or failure to comply with the conditions upon which the permit was issued" (*Doyle v. Union Ry. Co. of N.Y.*, 276 N.Y. 453, 458 (1938)), the sections of the NYS Fire Code cited by Razavi does not subject Marc to liability in this instance. Testimony from multiple defendants indicate that an individual was designated to attend to the bonfire and that "approved on-site fire-extinguishing equipment, such as dirt, sand, water barrel, garden hose or water truck" was available and was normally used by Hampton Clam Bake workers as part of their procedure for extinguishing grill fires and bonfires. Nonetheless, Marc had no direct responsibilities with respect to supervising grill fires or bonfires, nor did he have any direct supervisory capacity over an individual with such responsibilities. Whether the fire was properly attended to by the individual who had such responsibilities is a question of fact for the jury to decide. Further, to the extent he was able, Marc ensured that NYS Fire Code approved devices were used at the party.

In addition, Razavi has failed to raise a question of fact as to whether Marc Miller, in his personal capacity, created or had actual or constructive knowledge of the allegedly dangerous condition that caused her injury. *See Mitchell*, 29 A.D.3d at 374. As stated above, Marc indicated that he arrived at the party for a short period of time about halfway through the party. As such, he could not have any actual or constructive knowledge as to what the condition of the beach was at the beginning of the party or of the allegedly dangerous condition that purportedly caused Razavi's injury since he left the party approximately an hour and a half or two hours prior to her injury and would not have had an opportunity to remedy said condition. *Id.* Accordingly, Marc Miller is entitled to summary judgment and the complaint is dismissed as against him.

C. Stephen Denaro and Beverly Broeker

Denaro and Broeker both argue that neither of them are liable, in their individual capacities, to Razavi for the injuries she allegedly sustained because they were not involved in the creation, supervision, maintenance, or extinguishing of the bonfire. In addition, they argue that neither of them had supervisory authority over the bonfire.

In opposition, Razavi argues that Denaro and Broeker had supervisory authority over Rizzo, so that both were, effectively, vicariously liable for Rizzo's allegedly negligent acts. In support of this position, Razavi relies on Eric Miller's testimony wherein he stated that both captains, meaning Denaro and Broeker, were in charge of "overseeing the entire event . . . [i]ncluding the bonfires" (NYSCEF Doc. No. 92, at Tr. 119:8-15), and confirmed that Denaro and Broeker supervised and provided training and instruction to Rizzo on behalf of Hampton Clam Bake" (*id.* at Tr. 209:12-19).

Here, it appears that Denaro and Broeker were employees of Hampton Clam Bake and Rizzo was an independent contractor of Hampton Clam Bake. Though Razavi claims that Denaro and Broeker supervised Rizzo, it is unclear from their respective deposition testimonies whether either of them provided any instruction to Rizzo—Broeker specifically states that the party was the first time that she worked with Rizzo and Denaro was unsure of Rizzo's responsibilities. In this instance, it is apparent that neither Denaro nor Broeker exercised sufficient control over Rizzo's work with respect to the creating, supervising, maintaining, or extinguishing of bonfires to raise a genuine issue of material fact as to whether they were vicariously liable for Rizzo's actions. *Marino v. Vega*, 12 A.D.3d 329, 330 (1st Dep't 2004). The fact that Denaro, as the chef, had general supervisory control over the kitchen, which included extinguishing grill fires, and that Broeker, as the captain, had general supervisory control over the set up of the event is "nothing more than the most general supervisory control,

and could not be the basis for imposing liability . . . for the acts of the independent contractor,”  
Rizzo. *Id.*

Irrespective of whether Denaro and Broeker were employees or independent contractors, neither can be held vicariously liable for Rizzo’s actions. First, if Denaro and Broeker were instead co-employees with supervisory authority over Rizzo, they would not be liable for Rizzo’s actions because “the common law does not impose vicarious liability upon co-employees even where one is a supervisor.” *Connell v. Hayden*, 83 A.D.2d 30, 58 (2d Dep’t 1981). Second, if Denaro, Broeker, and Rizzo were all independent contractors, working together in a common undertaking on behalf of Hampton Clam Bake, “the doctrine of respondeat superior does not impose vicarious liability upon co-employees, even where one is acting in a supervisory capacity.” *Parris v. Eastside Hotel Assocs., L.P.*, 293 A.D.2d 659 (2d Dep’t 2002).

Further, the record contains no evidence that Denaro or Broeker personally created, supervised, maintained, or extinguished the bonfire, and Razavi has not raised a question of fact as to this issue. As such, “[t]here is no evidence of any independent tortious conduct on the part of the[se] defendant[s] [and] as the record demonstrates[,] all of [their] actions were within the scope and course of [his and her respective] employment.” *Id.*

Finally, Razavi argues that summary judgment cannot be granted to Denaro because a question of fact exists as to whether her injuries may have been caused by the improper burial of coals from the charcoal grill, rather than embers from the bonfire, which was one of Denaro’s direct responsibilities. However, not only is this argument unsupported by the record, but this theory of liability was improperly raised for the first time in Razavi’s moving papers and thus will not be considered by this Court. Nonetheless, the record does not contain any evidence to indicate that Denaro, or any other Hampton Clam Bake worker at the party, took hot coals or embers and buried them in the sand. Denaro testified that he never buried coals or embers in the



sand. In addition, he testified that he extinguished those coals with ice water and scooped them into a metal container before removing them from the site of an event, and this only transpired once the guests had left.

For the reasons stated above, Denaro and Broecker are entitled to summary judgment and the complaint is dismissed as against them.

D. Eric Miller

Eric Miller argues that he is not personally liable for Razavi’s alleged injuries because he is a corporate officer of Clam Bake and he can only be personally liable for the negligence of his corporation if he actually participated in the wrongful conduct—burying the hot coals or embers in the sand. *Aguirre v. Paul*, 54 A.D.3d 302, 304 (2d Dep’t 2008). As discussed *supra*, Razavi was allegedly injured when she placed her foot in the sand at the premises and came into contact with a hot coal or ember that had purportedly been buried by a Hampton Clam Bake worker. It is uncontested that Eric was neither present for the party nor did he personally oversee or direct any aspect of the operation of the party. As there is no evidence that Eric participated in the allegedly injurious conduct—placing the hot embers or coals in the sand—he has met his prima facie burden for summary judgment, dismissing the complaint against him.

In opposition, Razavi has failed to raise a genuine issue of material fact that would suggest that Eric Miller should be held personally liable for her accident. Specifically, Razavi’s argument that Eric should be held personally liable for improperly training and supervising Rizzo is unavailing. A necessary element of a cause of action for negligent supervision requires proof that the defendant “knew or should have known of a propensity [of the employee] to engage in the conduct alleged to have caused injury.” *Rodriguez v. New York City Transit Auth.*, 95 A.D.3d 412, 413 (1st Dep’t 2012). There is no evidence submitted by Razavi to support this position. In addition, Razavi’s claim that Eric Miller personally instructed Rizzo to bury hot

coals or embers in the sand is, likewise, unsupported. Rizzo specifically testified that he was never told to bury hot coals or embers in the sand and that he did not do so on the night of the party.

Finally, Razavi's argument that the Court should pierce Clam Bake's corporate veil in order to personally impose liability on Eric Miller is similarly unsupported by any facts or case law. Accordingly, Eric Miller is entitled to summary judgment and the complaint is dismissed as against him.

The Court has considered the parties' remaining arguments and finds them to be unpersuasive.

For the foregoing reasons, it is hereby

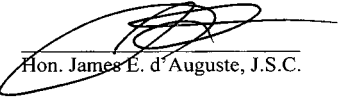
**ORDERED** that the motion by defendant Bryan Mattson (Mot. Seq. No. 005), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against him is denied; and it is further,

**ORDERED** that the motion by defendants 283 Pantigo Road, LLC, Marc Miller, Eric Miller, Stephen Denaro, and Beverly Broecker (Mot. Seq. No. 006), pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them, is granted and the Clerk is directed to enter judgment accordingly; and it is further,

**ORDERED** that the remainder of this action is severed and shall continue; and it is further,

**ORDERED** that the remaining parties shall appear for a status conference in **Part 55** at the Courthouse located at **80 Centre Street, Room 122** on **December 11, 2018** at **10:00 a.m.**

Dated: October 17, 2018



Hon. James E. d'Auguste, J.S.C.