Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

COPY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 29395/2003

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MOTION DATE: 12/07/2006

ANITA A. DIGENNARO and GERALD L. DIGENNARO,

MOT. NO.: 004 MD
005 MOT D

Plaintiffs,

- against -

SMITH HAVEN CENTER ASSOCIATES, LLC, M.S. MANAGEMENTS ASSOCIATES, INC., CONTROL BUILDING SERVICES, INC. and CONTROL ENVIRONMENTAL SERVICES, INC.,

Defendants.

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PLAINTIFF'S ATTORNEY:
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DEFENDANTS' ATTORNEYS:
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SOKOL, BEHOT & FIORENZO
By: Roy D. Goldberg, Esq.
Aty. for Deft. Control Environmental Svces, Inc.
433 Hackensack Avenue
Hackensack, New Jersey 07601

Upon the following papers numbered 1 to 8 read on this motion for summary judgment and cross-motion to strike answer of defendants: Notice of Motion and Affirmation 1 to 13 and supporting papers; Affirmation in Support 14 to 27 and supporting papers; Notice of Cross-motion and Affirmation in Support 28 to 47 and supporting papers; it is

ORDERED that the motion (motion sequence no. 004) of defendants SMITH HAVEN CENTER ASSOCIATES, LLC, M.S. MANAGEMENT ASSOCIATES, INC. and CONTROL BUILDING SERVICES, INC. for an order pursuant to CPLR R. 3212 granting summary judgment to defendants dismissing plaintiffs' complaint and all cross-claims is denied with leave to renew upon the completion of discovery; and it is further

ORDERED that the cross-motion (motion sequence no. 005) of plaintiffs for an order pursuant to CPLR §3126 striking the answer of defendants or, in the alternative, precluding said defendants from testifying at the time of the trial of this action on the ground that defendants willfully failed to comply with the preliminary conference order and discovery demands and appear for examination before trial, or compelling defendants to comply with the preliminary conference order and discovery demands and appear for examinations before trial, is determined as follows[1]

[1] Pursuant to a stipulation dated October 26, 2006, plaintiffs' cross-motion is withdrawn as against defendant CONTROL ENVIRONMENTAL SERVICES, INC.

This action arises out of the claim that plaintiff ANITA A. DIGENNARO (the claim of her husband, co-plaintiff GERALD L. DIGENNARO, being merely derivative) tripped and fell in the parking lot of the Smith Haven Mall. Defendant now moves for summary judgment dismissing plaintiffs' complaint, relying solely on the affirmation of defendants' counsel dated August 30, 2006, and the deposition testimony of the plaintiffs, taken July 27, 2006.

As the movants, it is defendants' burden to establish, *prima facie*, by proof in admissible form, that they neither caused nor contributed to the allegedly dangerous condition that caused plaintiff's fall, or that they had neither actual nor constructive notice of the condition. *Jones-Barnes v. Congregation Agudat Achim*, 12 A.D.3d 875, 784 N.Y.S.2d 731 (3d Dept. 2004). Defendants' submissions fail to meet that burden.

The affirmation of defendants' counsel is without evidentiary value, as it is not based on personal knowledge of the facts. *Feratovic v. Lun Wah, Inc.*, 284 A.D.2d 368, 725 N.Y.S.2d 892 (2d Dept. 2001). Moreover, the unsigned transcript of plaintiffs' deposition testimony is inadmissible, as the submissions establish that defendants failed to submit the transcript to the plaintiffs for their review in accordance with CPLR R. 3116(a). *Santos v. Intown Associate*s, 17 A.D.3d 564, 793 N.Y.S.2d 477 (2d Dept. 2005). Although it appears that a copy of the transcript was mailed to plaintiffs on September 6, 2006, defendants interposed this motion on September 7, 2006, the following day, before the expiration of the 60-day period provided by the statute for the witnesses to review the transcript and make any necessary corrections.

Even if the transcript was admissible, however, the submissions do not establish defendants' *prima facie* entitlement to summary judgment dismissing plaintiffs' complaint. Plaintiff testified at her deposition that she was traversing an unpaved "walkway" or "pathway" between some bushes on a dirt- and mulch-filled landscaped median on her way from the parking lot to the shopping mall entrance. She testified that she "hit something with [her right] foot," causing her to fall face-first into the roadway. Plaintiff testified that she did not see what caused her to fall at any time prior to the accident, but believes it to have been a "stump" attached to a bush within the median. Plaintiff testified that the "stump" was pointed out to her by an unidentified couple who helped her to her feet and escorted her to the shopping mall where she sought medical assistance. Plaintiff was able to identify the precise location of her fall from photographs taken by her husband the following day, and specifically identified the "stump" (which her husband described as looking more like a tree root) as being the obstacle that her right foot made contact with. Plaintiff further testified that the median was regularly used as a walkway or shortcut between the parking lot and the mall by herself and other mall patrons.

Contrary to defendants' assertions, plaintiffs' deposition testimony does not establish that plaintiff is "merely speculating" as to the cause of her fall. The circumstances surrounding plaintiff's fall support a "natural and reasonable inference" that the stump or root that is visible in the photographs precipitated plaintiff's fall. *Lucio v. Pisanello*, 227 A.D.2d 390, 642 N.Y.S.2d 325 (2d Dept.1996). Moreover, the fact that the landscaped median where plaintiff's accident occurred may not have been a paved pathway is not fatal to plaintiffs' claims if defendants knew, as plaintiff claimed, that the median was regularly traversed by people who used it as a shortcut from the parking lot to the mall, thus giving rise to an obligation to maintain it in a reasonably safe condition. *Robinson v. Albany Housing Authority*, 289 A.D.2d 828, 734 N.Y.S.2d 360 (3d Dept. 2001); *Weller v. Colleges of the Senecas*, 217 A.D.2d 280, 635 N.Y.S.2d 990 (4th Dept. 1995).

Defendants have proffered no affidavits from any person with knowledge of the facts to establish the absence of liability on the part of the defendants. Accordingly, the motion for summary judgment is denied.

With respect to plaintiffs' cross-motion, the Court is unable to conclude from the plaintiffs' submissions that defendants' failure to complete discovery is willful so as to warrant the extreme sanction of striking defendants' answer. *Zouev v. City of New York*, 32 A.D.3d 850, 821 N.Y.S.2d 620 (2d Dept. 2006). As noted by defendants, the interposition of a motion for summary judgment stays discovery. CPLR R. 3214(b). Moreover, it appears that in response to plaintiffs' cross-motion, the moving defendants have produced documents responsive to plaintiffs' combined demands. Accordingly, plaintiffs' cross-motion is granted only to the extent that defendants are directed to appear for depositions, at a date and time mutually agreeable to the parties and their counsel, but in any event no later than April 25, 2007. Any remaining discovery issues are referred to the compliance conference presently scheduled to be held before the undersigned on April 26, 2007, at 9:30 a.m.

Defendants are granted leave to renew their motion for summary judgment, if they be so advised, upon the completion of discovery herein.

Plaintiffs are directed to serve a copy of this order, with notice of entry thereof, on defendants.

Date: March 19, 2007

HON. PAUL J. BAISLEY, JR.
J.S.C.