Castiglione v Waterways at Bay Pointe

2007 NY Slip Op 31218(U)

April 23, 2007

Supreme Court, Suffolk County

Docket Number: 0020946/2003

Judge: Robert W. Doyle

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SHORT FORM ORDER

INDEX No. 03-20946
CAL. No. 06-01516-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 11-9-06
ADJ. DATE 1-12-07
Mot. Seq. # 001 - MG
002 - MG
003 - XMD

EVELYN CASTIGLIONE, as Preliminary Executor of the Estate of LOUIS SCALZI,

Plaintiff,

- against -

THE WATERWAYS AT BAY POINTE and THE WATERWAYS AT BAY POINTE HOMEOWNER'S ASSOCIATION,

Defendants.

WATERWAYS AT BAY POINTE CONDOMINIUM I, II, III and IV s/h/a THE WATERWAYS AT BAY POINTE and WATERWAYS AT BAY POINTE HOMEOWNERS ASSOCIATION,

Third-Party Plaintiffs,

- against -

RJM LAWN SERVICES OF L.I., INC.,

Third-Party Defendant.

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Upon the following papers numbered 1 to 32 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; 11-21 ; Notice of Cross Motion and supporting papers 22 - 28 ; Answering Affidavits and supporting papers 29; 30 ; Replying Affidavits and supporting papers 31; 32 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by third-party defendant RJM Lawn Services of L.I., Inc., (hereinafter referred to as "RJM") for summary judgment (motion sequence #001) and the motion by defendants/third-party plaintiffs Waterways at Bay Pointe Condominium I, II, III, IV s/h/a The Waterways at Bay Pointe and The Waterways at Bay Pointe Homeowner's Association (hereinafter collectively referred to as "Waterways") for summary judgment (motion sequence # 002) and the cross motion by plaintiff Evelyn Castiglione, as

preliminary Executor of the Estate of Louis Scalzi for summary judgment and relief pursuant to CPLR 3126 (motion sequence #003), are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the cross motion by plaintiff for summary judgment and for relief pursuant to CPLR 3126 is denied; and it is further

ORDERED that the motion by Waterways for summary judgment dismissing the complaint and all cross claims against it, is granted; and it is further

ORDERED that the motion by RJM for summary judgment dismissing the third-party complaint and all cross claims against it, is granted.

This is an action to recover damages for personal injuries allegedly sustained by decedent Louis Scalzi, when on January 23, 2001, he slipped and fell on ice at the premises located at 262 River Road, Moriches, New York. Mr. Scalzi died on September 24, 2001 due to a condition unrelated to his alleged injuries herein. Preliminary Letters Testamentary were issued to plaintiff on January 14, 2002. It is alleged that Mr. Scalzi fell in the driveway leading to the garage of his residence. The residence was a condominium unit in the Waterways condominium complex. Snow removal was performed by RJM pursuant to a contract with Waterways. The plaintiff commenced this action against Waterways alleging negligent ownership, operation, management, maintenance and control of the premises; thereafter, Waterways commenced a third-party action against RJM for indemnity and contribution.

Waterways now moves for summary judgment and submits in support thereof, *inter alia*, a copy of: the pleadings; the deposition testimony of Joseph McDonald, its president; the deposition testimony of plaintiff; and the deposition testimony of John Attardi, the vice president of RJM. At her deposition, plaintiff testified to the effect that on the day of Mr. Scalzi's fall, she received a telephone call informing her that Mr. Scalzi had been in an accident, and she then drove to the hospital to see him. Plaintiff further testified that when she arrived at the hospital, Mr. Scalzi told her that he had parked his car, and that he was walking in front of it, and he slipped on the ice in the driveway. Plaintiff stated that Mr. Scalzi's neighbor, Joseph Amodeo, was walking his dog and heard Mr. Scalzi's cry for help, and came to Mr. Scalzi's aid after the fall. Plaintiff also testified that she did not remember speaking to Mr. Amodeo directly, but she thought she remembered that Mr. Amodeo may have said that there is "always ice here." Finally, she testified that she had no idea if Mr. Scalzi ever made a complaint to Waterways or its management company about problems with the snow and ice, and she had no recollection of anyone else making complaint about the snow and ice.

At Joseph McDonald's deposition, he testified that he had been the president of the homeowner's association at Waterways for seven years and that pursuant to its bylaws and declaration, the association is responsible for maintaining the exterior of the homes and the common areas, which includes streets, sidewalks, and driveways. In addition, Mr. McDonald stated that the homeowners association employs Fairfield Properties as its managing agent, as well as one or two permanent maintenance employees who respond to specific requests of the homeowners. He testified that requests from the homeowners for maintenance are put in writing on a special form, although back in 2001, it was probably less formal. He also testified that a homeowner could make, to a limited extent, a verbal request for maintenance. Mr. McDonald explained that: RJM performed snow removal for the homeowners association pursuant to a written contract; after clearing the snow, RJM would apply ice melt, a type of salt, to remove the ice; and ice melt would be

applied to the driveways. He testified to the effect that if there had been a melting and freezing situation, a homeowner could call the managing agent and ask for additional service, and a maintenance employee would apply sand or ice melt. He further testified to the effect that although the homeowner would be asked to come to the office and complete a form, they did not have to come to the office if they were unable. Mr. McDonald stated that the managing agent now keeps a record of a written complaints by homeowners for about a year, but prior thereto, it was for a shorter period of time. He explained that the records are discarded because the association does not have the storage space. He testified that there would be no written records of complaints made by homeowners for the year 2001. Lastly, Mr. McDonald testified to the effect that he could not recall anyone ever complaining about a hazardous ice condition after RJM rendered service prior to the date of Mr. Scalzi's accident, nor could he recall discussions at board meetings regarding complaints about snow removal services.

John Attardi, the vice-president for RJM, testified at his deposition that clearing driveways and distributing ice melt was included in the Waterways contract. He stated that RJM removed snow from the Waterways on January 21, 2001, when approximately seven inches of snow fell. He testified that his men were dispatched to the Waterways in the early morning hours on the 21st and snow removal was finished on that day. He stated that the driveways were cleared by men using shovels and snow blowers, and then after clearing the driveways, the men would put down ice melt. Mr. Attardi also testified that after the snow removal, in accordance with his normal procedure, he would then drive around and inspect the streets, entrances, mailboxes, fire hydrants, driveways, and walkways. He explained that during his inspection, if anything had been missed or any cars were in the way of snow removal, he would make note of it and RJM would come back the next day as a courtesy call. Mr. Attardi stated that RJM did make a courtesy call to the Waterways on January 22nd, and upon such visit, he did notice some snow melting on roofs because the sun was out. He testified to the effect that he mentioned such to the maintenance supervisor at the Waterways, Jerry Gangi, who would handle problems with regard to re-freezing. He stated that it was his regular procedure to meet with Jerry Gangi after a snow removal.

Additionally, Mr. Attardi testified that he was familiar with Mr. Scalzi's address, and that on January 21st he inspected Mr. Scalzi's driveway along with his inspection of all the driveways. He further testified that between January 21, 2001, and the evening of January 23, 2001, RJM did not receive any complaints with respect to the work that had been done on January 21st, and that RJM has in fact never received a complaint about its work. He also stated that RJM's records concerning snow removal have been discarded because at the end of the winter season he removes those pages from his book to get ready for the new landscape season.

Waterways argues that based upon the above-mentioned deposition testimony it is evident that it fulfilled its duties to the residents of the community and particularly to the decedent. It contends that there has been no evidence that any complaints were made by Mr. Scalzi or by anyone else about the snow and ice removal services nor about the condition of the driveway prior to the time of the subject accident. Further, Waterways contends that the evidence establishes that after the snowfall on January 21, 2001, snow and ice removal was undertaken with no evidence that it was performed in an improper fashion or that the methods used made the condition dangerous. Thus, claims Waterways, it cannot be established that it created a dangerous condition or that it had notice of a dangerous condition.

RJM also moves for summary judgment and submits in support thereof, *inter alia*, a copy of the pleadings, its contract with Waterways, as well as the deposition testimony of plaintiff, Mr. McDonald, and

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Mr. Attardi. RJM argues that it is clear from the deposition testimony that it properly performed the snow removal services at Waterways as it was contractually obligated to do. It contends that it plowed the premises two days prior to the date of the accident as a result of the accumulation of more than two inches of snow, pursuant to the contract. It also asserts that it sanded and salted the premises according to the contract. RJM claims that Mr. Attardi personally inspected the premises after plowing was complete according to the contract. It also points out that Mr. Attardi came to the premises the following day and inspected the premises with Jerry Gangi, pursuant to the contract. RJM alleges that it received no subsequent telephone calls or complaints regarding the work performed. It contends that it fulfilled its contractual obligation by diligently performing snow removal at the premises, and that there is nothing in the record to reflect that any negligence on its part for the happening of the accident. Thus, argues RJM, there was no breach of contract; Waterways is not entitled to any indemnification or contribution; and the complaint against it should be dismissed.

Plaintiff now cross-moves for an order pursuant to CPLR 3212 granting her summary judgment and pursuant to CPLR 3126 to strike Waterways' answer, enter judgment in plaintiff's favor, precluding Waterways at trial from offering any evidence as to lack of notice, or in the alternative, ordering at trial a missing evidence charge. In addition, the plaintiff argues in opposition that the existence of material issues of fact requires denial of Waterways' motion for summary judgment. In support of her cross motion and in opposition to Waterways' motion, the plaintiff submits a copy of her deposition, the deposition of Mr. McDonald and Mr. Attardi, the affidavit of Mr. Amodeo, and an incident report dated February 21, 2001.

Initially, plaintiff points to the affidavit of Mr. Amodeo, wherein he states that after he found Mr. Scalzi on the ground, Mr Scalzi told him that "I fell on the ice," and that "[t]here were strips of ice" in Mr. Scalzi's driveway that caused him to slip and fall. Plaintiff also highlights her own deposition testimony wherein she stated that she believed Mr. Amodeo said that "there's always ice." Additionally, plaintiff points to an incident report apparently prepared by Waterways managing agent, dated February 21, 2001, wherein the agent wrote Mr. Scalzi "Parked car in driveway, exited car to open garage door- slipped on ice and fell on right side." The plaintiff argues that such proof creates an issue of fact as to whether Waterways had constructive notice of a recurring icing condition on Mr. Scalzi's driveway.

Next, plaintiff claims that Waterways' motion for summary judgment should be denied based upon CPLR 4519. Plaintiff asserts that this provision precludes interested parties from testifying in their own behalf against the interest of a decedent as to conversations or transactions that they had with a person now dead. The plaintiff maintains that CPLR 4519 precludes Waterways from presenting evidence as to what Mr. Scalzi may not have said or done concerning notice of the icy condition.

Lastly, plaintiff argues that the answer of Waterways should be stricken or that Waterways should be otherwise sanctioned for its spoliation of evidence essential to her claim. Specifically, plaintiff refers to the deposition testimony of Mr. McDonald wherein he stated that the records of complaints for 2001 were purged and destroyed. Additionally, plaintiff points to the deposition testimony of Mr. Attardi wherein he testified that RJM's records concerning snow removal in January, 2001 have been discarded. The plaintiff asserts that by destroying this evidence Waterways has not only deprived the plaintiff of key evidence of actual notice necessary to prove her claim, but also, Waterways is using the absence of those written records to support its motion to dismiss the complaint. She contends that Waterways should not be permitted to use their own destruction of records that may have contained evidence of actual notice as a basis for obtaining summary judgment.

It is well settled that in order for a plaintiff in a slip and fall case to establish a prima facie case of negligence, the plaintiff is required to prove that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of such condition (*see*, ***Golding v Powell & Dempsey, Inc.***, 247 AD2d 510, 669 NYS2d 323 [1998]; ***Kraemer v K-Mart Corporation***, 226 AD2d 590, 641 NYS2d 130 [1996]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (***Gordon v American Museum of Natural History*** , 67 NY2d 836, 837; 501 NYS2d 646, 647 [1986]).

Here, Waterways, by the submission of the deposition the plaintiff, Mr. McDonald, and Mr. Attardi, has made a prima facie showing of entitlement to judgment as a matter of law by establishing that it did not create or have actual or constructive notice of a hazardous icy condition. There is no evidence that any complaints were made concerning the icy condition of the driveway or that Waterways, its employees, or its agent were aware or should have been aware of the icy condition of the driveway (*see*, ***Gam v Pomona Professional Condominium***, 291 AD2d 372, 737 NYS2d 113 [2002]). There is also no evidence that the ice was present for a sufficient length of time to be discovered and remedied (*see*, ***Goodwin v Knolls at Stony Brook Homeowners Association, Inc.***, 251 AD2d 451, 674 NYS2d 411 [1998]). Given the evidence that the driveway was properly cleared of snow, ice melt was applied, and then the driveway was inspected, there is no proof that the icy condition was caused by negligent snow removal (*see*, ***Cardinale v Watervliet Housing Authority***, 302 AD2d 666, 754 NYS2d 728 [2003]; ***Tsivitis v Sivan Associates, LLC.***, 292 AD2d 594, 741 NYS2d 545 [2002]). Waterways has, therefore, met its prima facie burden.

The court notes that since the portion of plaintiff's cross motion which requests summary judgment pursuant to CPLR 3212 is untimely and since no good cause has been shown for its tardiness, the court will simply consider that portion of the plaintiff's cross motion as opposition to Waterways' prima facie demonstration of entitlement to judgment as a matter of law (*see*, ***Rocky Point Drive-In, L.P. v Town of Brookhaven***, 2007 NY Slip Op. 01717, 2007 WL 610409, 2007 NY App Div LEXIS 2281). The plaintiff's equivocal testimony that she "think[s]" she "remember[s]" that Mr. Amodeo "may have" said that,"There is always ice here," is insufficient to raise a triable issue of fact. A general awareness that ice may accumulate or is present is legally insufficient to constitute notice of the specific condition which caused the injury (***Baumgartner v Prudential Insurance Company of America***, 251 AD2d 358, 674 NYS2d 84 [1998]; ***Cardinale v Watervliet Housing Authority***, *supra*). Moreover, Mr. Amodeo's statement that there were strips of ice in Mr. Scalzi's driveway is insufficient to defeat the Waterways motion in the absence of evidence as to the origin of the ice upon which Mr. Scalzi fell (***Yannotti v Four Brothers Homes at Heartland Condominium I***, 24 AD3d 659, 808 NYS2d 363 [2005]). Further, the fact that an incident report was filed with Waterways managing agent almost a month after Mr. Scalzi's fall is insufficient to show Waterways had actual notice of a recurring condition (*see*, ***Smith v Funnel Equities, Inc.***, 282 AD2d 445, 723 NYS2d 194 [2001]).

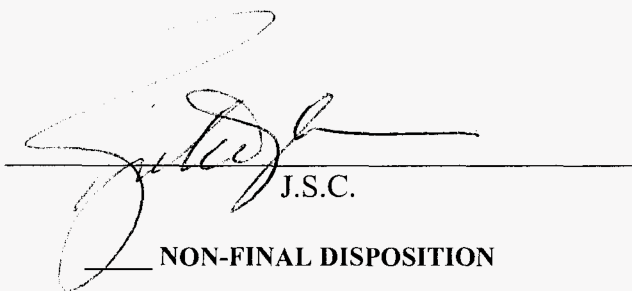
Additionally, the court finds the plaintiff's claim that CPLR 4519 precludes Waterways from presenting evidence as to lack of notice, to be without merit. Although the plaintiff fails to specify whose testimony should be precluded, the court assumes that she is referring to the testimony of Waterways' president, Mr. McDonald, as to lack of prior complaints about ice or snow. CPLR 4519 (commonly known as "the Dead Man's" statute) precludes a party or person interested in the underlying event from offering testimony concerning a personal transaction or communication with a decedent (*see*, ***In re Estate of***

Rosenblum, 284 AD2d 820, 727 NYS2d 193 [2001]; *lv denied* 97 NY2d 604). The party claiming that a witness is a person "interested in the event" has the burden of proving that such witness's testimony is subject to this statutory exclusion (***Stay v Horath***, 177 AD2d 897, 576 NYS2d 908 [1991]). In addition, "[t]he true test of the interest of a witness is that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote or contingent [citation omitted]" (***Friedrich v Martin***, 294 NY 588, 595 [1945], quoting ***Talbot v Laubheim***, 188 NY 421, 426). Here, the plaintiff has not shown that Mr. McDonald's interest is "present, certain, and vested," and thus, it would be improper to exclude his deposition testimony as to lack of prior complaints (*see*, ***Stay v Horath***, *supra*; ***In re Kladneve's Estate***, 133 Misc 766, 234 NYS 246 [1929], *affd* 228 AD 772). Therefore, the plaintiff has failed to demonstrate the existence of a triable issue of fact.

The plaintiff's cross motion pursuant to CPLR 3126 to strike Waterways' answer, to enter judgment in her favor, to preclude Waterways from offering any evidence as to lack of notice, and for a missing witness charge, must be denied. With regard to the issue of spoliation, it is well settled that sanctions may be imposed upon a party who negligently loses or intentionally destroys key evidence (***Kelley v Empire Roller Skating Rink, Inc.***, 34 AD3d 533, 827 NYS2d 70 [2006]). The determination of spoliation sanction lies within the broad discretion of the court (***Dennis v City of New York***, 18 AD3d 599, 795 NYS2d 615 [2005]). In the present case, the court notes that neither the complaint nor the verified bill of particulars allege that Waterways had actual notice of the icy condition based upon prior complaints, written or verbal. However, even considering the plaintiff's unpleaded claim of actual notice based upon prior complaints, the plaintiff has failed to demonstrate that the destruction of records dealing with complaints was the result of intentional or negligent spoliation. Although Waterways was notified of the incident in February, 2001, there is no proof that the decedent advised Waterways that he intended to file a suit against it or that the decedent requested Waterways to preserve the records concerning prior complaints. In the absence of a pending law suit or notice of a specific claim, a defendant should not be sanctioned for discarding records in good faith and pursuant to its normal custom and practice (*see*, ***Steuhl v Home Therapy Equipment, Inc.***, 23 AD3d 825, 803 NYS2d 791 [2005]; ***Roberts v Consolidated Edison of New York, Inc.***, 273 AD2d 369, 709 NYS2d 204 [2000]).

Accordingly, the part of the plaintiff's cross motion for sanctions pursuant to CPLR 3126 is denied; the Waterways' motion for summary judgment dismissing the complaint is granted; and the part of plaintiff's cross motion for summary judgment is denied. It necessarily follows that, inasmuch as the Waterways' third-party action against RJM only asserts claims for contribution and indemnification, the dismissal of the complaint against Waterways also mandates a dismissal of the third-party action against RJM (*see*, ***Zehnick v Meadowbrook II Associates***, 20 AD3d 793, 799 NYS2d 604 [2005]; *lv dismissed in part, denied in part* 5 NY3d 873). Therefore, RJM's motion for summary judgment dismissing the third-party complaint against it is granted.

Dated: APR 2 3 2007



J.S.C.

X FINAL DISPOSITION ____ NON-FINAL DISPOSITION