

**Podlaski v Long Is. Paneling Ctr. of
Centereach, Inc.**

2007 NY Slip Op 34251(U)

December 26, 2007

Supreme Court, Suffolk County

Docket Number: 0023092/2001

Judge: Robert W. Doyle

Republished from New York State Unified Court
System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Podlaski v Long Island

Index No. 01-23092

Page No. 2

into a hole in front of a furniture store on 2410/2418 Middle Country Road, Centereach, New York, leased by defendant Casco Sleep World and Dinettes, Inc. ("Casco Sleep") and owned by defendant Long Island Paneling Center, Inc. s/h/a Long Island Paneling Center of Centereach, Inc. ("Long Island Paneling"), which had its own retail store adjacent to the furniture store. Prior to the accident, Long Island Paneling entered into an oral contract for expansion of its building with defendant ARG Concrete Corp. ("ARG Concrete"). ARG Concrete had performed its work specified in the proposal submitted to Long Island Paneling, including removing and replacing the old existing sidewalks. Plaintiffs allege that defendants were negligent in, among other things, creating a dangerous condition by leaving a hole on the premises; failing to maintain the premises in a reasonably safe condition; and failing to warn plaintiff as to the dangerous and hazardous condition.

Long Island Paneling now moves for summary judgment dismissing the complaint and all cross claims against it on the ground that plaintiffs have failed to prove that it was negligent. Long Island Paneling alleges that it neither created the dangerous condition nor had actual or constructive notice of the condition. Long Island Paneling also alleges that it is not liable for the negligent acts of its independent contractor ARG Concrete where Long Island Paneling did not supervise, direct or control the work of ARG Concrete. In support, Long Island Paneling submits, *inter alia*, the pleadings, a bill of particulars, the deposition testimony given by plaintiff, Long Island Paneling's representatives, Robert Sternberg and Robert Lewis, and ARG Concrete's representative, Alfredo Goncalves, taken on October 20, 2004.

At her examination before trial, plaintiff testified to the effect that, at approximately 6:00 p.m. on the day of the accident, she drove a minivan in which her mother and two little children were passengers and parked the vehicle in the parking lot in front of Casco Sleep. After exiting her vehicle, she walked on the sidewalk towards the front door of Casco Sleep and, when she got to the front door, she tried to open the door and failed. After she saw a sign indicating that the store was closed at 5:30 p.m., she walked back to her vehicle and told her mother that the store was closed. Thereafter, she was going back to the store to "look in the window." She stepped up on the sidewalk, 15 feet right from the front door and walked on the sidewalk to get to the window. After walking across the sidewalk, she "got onto the dirt area" and was "looking in the window." She continued to stop and move down towards the front door, looking in the window. After the last stop, she turned her body to return to her vehicle. At the time, she was still on the dirt area and was going "straight at the sidewalk." She took one step with her right foot which came into contact with dirt. Prior to the incident, she looked down at the area and saw that it was level with the surrounding dirt. At that time, she did not see "any holes or depressions" in the area. When she was stepping with her left foot, her right foot remained at that spot where she stepped down, and she "dropped into [a] hole."

At his deposition, Robert Sternberg testified to the effect that he is a principal and the vice-president of Long Island Paneling, and it owns the subject property, where Casco Sleep is located. Prior to the subject accident, Long Island Paneling made a decision to expand the building for its west side, including building additional space. Mr. Sternberg consulted with Hawkins, Webb and Jaeger, an architect, which formulated a site plan for the expansion, and hired contractors – a "concrete guy," a "steel guy," an electrician and a guy to do the sprinkler. Mr. Sternberg testified that he played a role in scheduling the contractors and that, while the construction was being done, he was at the construction site "quite often" to see that "everything was okay." ARG Concrete was hired by Mr. Sternberg and was the first contractor who performed work at the expansion site. During the excavation process, Mr. Sternberg

did not give any type of instruction or advice to ARG Concrete. As part of the expansion, the sidewalk was expanded or lengthened by ARG Concrete. The sidewalk that runs along the front of the building was all removed and replaced. The flower beds in front of Casco Sleep, which existed prior to the expansion, were also “expanded down to the end of the building.” The expansion project was done in three to six months, including the sidewalk extension. Upon completion of the expansion, Casco Sleep occupied the expanded area. Mr. Sternberg finally testified that ARG Concrete did not advise Mr. Sternberg that, during the course of its installation of the sidewalk, it “encountered holes or depressions in the ground.”

At his deposition, Robert Lewis testified to the effect that he is a building and facilities manager of Long Island Paneling. He was working for Long Island Paneling when it expanded its New Hyde Park store in 1997 or 1998. In the expansion, his role was “clean[ing] up between contractors and calling up for scheduling.” He was also involved in the expansion in dispute on the Centereach store, and his role was “similar to the role [he] played at the New Hyde Park expansion.” He visited the work site on a daily basis and stayed there for approximately half an hour unless he was need to do something. His job was to “make sure everything was running smoothly.” He neither was authorized nor did he “perform inspection to determine if [contractors’] work has being done properly.” Mr. Lewis testified that, prior to the subject expansion, the expanded area was an asphalt parking lot and that, as part of the expansion, the old walkway was removed and the new walkway was replaced by ARG Concrete. He did not observe “any digging or excavation being performed along the front of the expansion for the walkway.” He also did not observe any holes in the flower beds area from the time the sidewalk was poured until the time of the accident.

At his October 20, 2004 deposition, Alfredo Goncalves testified to the effect that he is the president of ARG Concrete and it is engaged in the business of excavating and installing curbs, sidewalks, aprons, foundation, footing and flooring. ARG Concrete previously worked for Long Island Paneling for constructing a retaining wall in its New Hyde Park store. In 2000, Mr. Goncalves was contacted by Mr. Sternberg, and they discussed the expansion of the Centereach store. Thereafter, Mr. Goncalves provided Mr. Sternberg with a proposal which was essentially the estimate of the expansion cost, and the proposal was accepted. The proposal included the excavation work, concrete footings, foundation and floor with regard to the expansion as well as removing and replacing the old existing parking lot and sidewalks. Approximately two or three weeks thereafter, ARG Concrete started to perform its work specified in the proposal. No one from Long Island Paneling, including Mr. Sternberg, gave Mr. Goncalves any instruction on how to perform the work at the expansion site.

While, to prove a prima facie case of negligence in a trip and fall case, a plaintiff is required to show that the defendant created the condition which caused the accident or that the defendant had actual or constructive notice of the condition (*see, Bradish v Tank Tech Corp.*, 216 AD2d 505, 628 NYS2d 807 [1995]), the defendant, as the movant in this case, is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law (*see, Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 758 NYS2d 133 [2003]; *Dwoskin v Burger King Corp.*, 249 AD2d 358, 671 NYS2d 494 [1998]). Liability can be predicated only upon failure of the defendant to remedy the danger after actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.* 84 NY2d 967, 622 NYS2d 493 [1994]). Moreover, the issue of actual or constructive notice is irrelevant where defendant had a duty to conduct reasonable inspections of the premises and failed to do so (*see, Weller v Colleges of the Senecas*,

Podlaski v Long Island

Index No. 01-23092

Page No. 4

217 AD2d 280, 635 NYS2d 990 [1995]; *Watson v New York*, 184 AD2d 690, 585 NYS2d 100 [1992]). Furthermore, whether a dangerous condition exists on real property so as to create liability on the part of the landowner depends on the peculiar facts and circumstances of each case and is generally a question of fact for the jury (*see, Moons v Wade Lupe Constr. Co.*, 24 AD3d 1005, 805 NYS2d 204 [2005]; *Fasano v Green-Wood Cemetery*, 21AD3d 446, 799 NYS2d 827 [2005]).

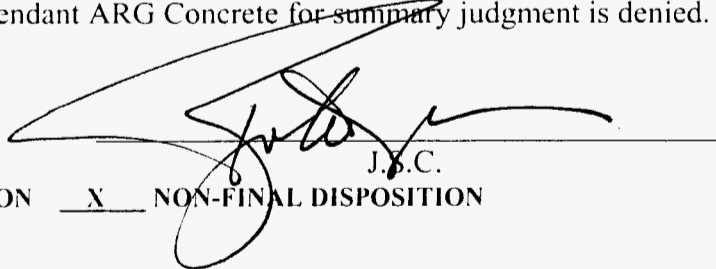
Here, Long Island Paneling failed to establish its entitlement to judgment as a matter of law. The adduced evidence indicates that Long Island Paneling neither performed any work which was related to the expansion nor provided ARG Concrete any instruction as to how to perform the work. The adduced evidence also indicates that plaintiff and Mr. Lewis did not observe the hole in the flower beds area, which plaintiff fell into, prior to the accident. Nevertheless, viewing the evidence in the light most favorable to plaintiff, as the nonmoving party, there is a question of fact as to whether Long Island Paneling maintained its properties in a reasonably safe condition and properly performed inspection upon completion of the expansion (*see, McCummings v New York City Tr. Auth.*, 81 NY2d 923, 597 NYS2d 653 [1993]; *Basso v Miller*, 40 NY2d 233, 386 NYS2d 564 [1976]; *Sherry v North Colonie Cent. School Dist.*, 39 AD3d 986, 833 NYS2d 746 [2007]). Accordingly, the motion by defendant Long Island Paneling for summary judgment dismissing the complaint against it is denied.

ARG Concrete cross-moves for summary judgment dismissing the complaint and all cross claims against it on the ground that plaintiffs have failed to prove that it was negligent. Plaintiffs and Long Island Paneling oppose the cross motion as being untimely under CPLR 3212 (a).

Here, as plaintiffs and Long Island Paneling correctly point out, ARG Concrete's cross motion for summary judgment is untimely inasmuch as it was not served within 120 days of the filing of the note of issue, that is, March 3, 2007 (*see, CPLR 3212 [a]*). Instead, the affirmation of service of the cross motion is dated April 26, 2007, 54 days after the deadline to file the cross motion for summary judgment. ARG Concrete's counsel has provided no explanation or "good cause" for serving the cross motion 54 days late, and thus, the Court has no discretion to entertain it on the merits (*see, Brill v City of New York*, 2 NY3d 648, 781 NYS2d 261 [2004]; *Thompson v Leben Home for Adults*, 17 AD3d 347, 792 NYS2d 597 [2005]). Moreover, while a cross motion for summary judgment made after the expiration of the statutory 120-days period, as here, may be considered by the court, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion, this Court finds that the relief sought by the motion by Long Island Paneling and the cross motion by ARG Concrete was not "nearly identical" (*see, Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2005]). Furthermore, ARG Concrete's cross motion must be denied as procedurally defective for failure to submit a complete copy of the pleadings, that is, the complaint and the answers of defendants (*see, CPLR 3212 [b]; Wider v Heller*, 24 AD3d 433, 805 NYS2d 130 [2005]; *Gallagher v TDS Telecom*, 280 AD2d 991, 720 NYS2d 422 [2001]; *Mathiesen v Mead*, 168 AD2d 736, 563 NYS2d 887 [1990]). The pleadings submitted with another party's motion or cross motion cannot be incorporated by reference (*see, CPLR 3212 [b]*). Therefore, the cross motion by defendant ARG Concrete for summary judgment is denied.

DEC 26 2007

Dated: _____



J.S.C.

____ FINAL DISPOSITION NON-FINAL DISPOSITION