

Malone v Picasso Way Owners, Inc.

2008 NY Slip Op 30160(U)

January 3, 2008

Supreme Court, Suffolk County

Docket Number: 0025582/2004

Judge: John J.J. Jones

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SHORT FORM ORDER

INDEX NO.: 0025583/2004

SUBMIT DATE: 10/10/2007

MTN. SEQ.#: 001; 002; 003

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 SUFFOLK COUNTY

Present:

HON. JOHN J.J. JONES, JR.
Justice

MOTION DATE: 7/11/2007

MOTION NO.: 001 - MD

002;003 - XMG

-----X

LAURA MALONE,

Plaintiff,

-against-

PICASSO WAY OWNERS, INC. FAIRFIELD
PROPERTIES, INC., LAKE POINTE ASSOCIATION,
INC. and TOTAL COMMUNITY MANAGEMENT,
INC.,

Defendants.

-----X

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X

LAURA MALONE,

Plaintiff,

-against-

LAKE POINTE ASSOCIATES, LLC and LAWN
RAIDERS, INC.,

Defendants.

-----X

ACTION NO. 1

Index No.: 0025583/2004

ACTION NO. 2

Index No.: 007655/2007

Upon the following papers numbered 1 to 31 read on this motion and cross-motion for summary judgment and cross-motion to consolidate; Notice of Motion/Order to Show Cause and supporting papers 1-10; Notice of Cross Motion and supporting papers 11-17; 18-23; Answering Affidavits and supporting papers 24-25; Replying Affidavits and supporting papers 26-31; Other _____; it is

ORDERED that this motion by defendant, Fairfield Properties, Inc., for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint of plaintiff, Laura Malone, is denied, as said defendant failed to demonstrate its entitlement to the relief sought; and it is further

ORDERED that the separate motion by Picasso Way Owners, Inc., Lake Pointe Association, Inc., and Total Community Management, Inc., deemed herein to be a cross-motion, for an order granting summary judgment in their favor on the ground that they do not own or maintain the property on which plaintiff claims to have sustained her accident is granted and the action is severed and shall otherwise proceed against the remaining defendant; and it is further

ORDERED that the cross-motion by plaintiff for an order consolidating Action No. 1 and Action No. 2 is granted, and the actions shall be consolidated into a single action bearing index number 04-25583, the parties shall exchange discovery with any party so demanding, and the caption be amended to reflect such consolidation accordingly.

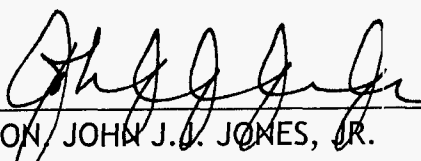
Plaintiff commenced this action to recover damages for personal injuries allegedly sustained on February 5, 2004 at approximately 4:30 AM when she slipped and fell in the parking lot of an apartment complex located at or near 298/299 Lake Pointe Drive, Lake Pointe Estates, Middle Island, NY. Plaintiff testified at her deposition that it had snowed on and off all day on February 4, 2004, and there was an accumulation of snow of more than 5 inches, possibly more than 12 inches. On February 5, 2004 at approximately 4:30 AM as plaintiff was walking her son's dog, she slipped on ice and fell in the parking lot. She admitted that she had seen ice before she fell, but she described the area in which she fell as very dark. It was plaintiff's testimony that the entire parking lot was a sheet of ice at the time of the accident.

The witness who appeared and gave testimony at a deposition on behalf of the defendant Fairfield Properties, Inc., was Angelo Cecere, who testified that he was employed as the property manager for "Fairfield Properties," whose offices are located at 66 Commack Road, Commack, NY. Among the properties managed by Fairfield Properties is the property owned by Lake Point Associates, LLC, whose properties include Lake Point Drive. It was his testimony that Lake Pointe Associates, LLC contracted with Lawn Raiders, Inc. to provide snow removal services, and such agreement had been modified through the years so that snow removal was undertaken on an "on-call" basis.

Defendant Fairfield Properties, Inc. moved for an order granting summary judgment in its favor on the ground that it did not own the property on which the accident occurred. Defendant asserts that Fairfield Properties, Inc. is a corporation with its principal office in Connecticut that neither owns nor maintains the accident location, while Fairfield Properties is a trade name for NHB Management Company, LLC, the entity that manages the apartment complex. Fairfield Properties, however, has defended the action and participated in pre-trial proceedings. Furthermore, when Mr. Cacere was questioned about the corporate nature of Fairfield Properties at his deposition, he indicated that he did not know the legal status of his employer and he was asked, but could not answer, whether Fairfield Properties is owned by another company. Under the circumstances of this case, it is clear that Fairfield Properties had notice of the lawsuit and the nature of the claims against it, and it will not be prejudiced if the summons and complaint are amended to reflect its proper name. Under CPLR 305(c), an amendment to correct a misnomer will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant provided that the intended but misnamed defendant was fairly apprised that it was the party the action was intended to affect and would not be prejudiced by allowing the amendment (*see Holster v Ross*, ___ AD3d ___, 2007 NY AppDivLEXIS 11846 [2d Dept 2007]), citing *Simpson v Kenston Warehousing Corp.*, 154 AD2d 526, 527, 546 NYS2d 148; *Kingalarm Distribs. v Video Insights Corp.*, 274 AD2d 416, 417, 711 NYS2d 781; *Perin v McKenzie*, 266 AD2d 269, 270, 698 NYS2d 41; *Sahinis v Brunswick Hosp. Ctr.*, 264 AD2d 474, 694 NYS2d 450).

DATED:

3 January '08



 HON. JOHN J. JONES, JR.
 J.S.C.

CHECK ONE: FINAL DISPOSITION

[X] NON-FINAL DISPOSITION

TO:

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Lake Points Association, Inc. and

Total Community Management, Inc.

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Mineola, NY 11501

RUBIN, FIORELLA & FRIEDMAN, LLP

By: Leila Cardo, Esq.

Attys. for Defendant in Action 1

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LAKE POINTE ASSOCIATES, LLC

Defendant *Pro Se* in Action 2

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Commack, NY 11725

RUSSO, KARL, WIDMAIER & CORDANO, PLLC

Attys. for Defendant in Action 2

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