SHORT FORM ORDER

COPY

INDEX No. 04-21374

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER MAYER
Justice of the Supreme Court

MOTION DATE 10-31-07 (# 002)
10-16-07 (# 003)
1-2-08 (# 004)
ADJ. DATE 1/22/08
Mot. Seq. # 002 - MG; # 003 - MD
004 - XMD CASEDISP

KATHY MONTGOMERY,

Plaintiff,

- against -

COUNTY OF SUFFOLK,

Defendant.

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COUNTY OF SUFFOLK,

Third-Party Plaintiff,

- against -

LESSING'S INC.,

Third-Party Defendant.

Upon the reading and filing of the following papers in this matter: (1) Notices of Motion by the defendant/third-party plaintiff County, dated September 24th and 27th, 2007, and supporting papers; (2) Notice of Cross Motion by the plaintiff, dated December 17, 2007, and supporting papers; (3) Affirmations in Opposition by the plaintiff , dated October 19th and December 18th, 2007; and (3) Reply Affirmations by defendant/third-party plaintiff County, dated November 16, 2007 and January 18, 2008, and by plaintiff, dated January 16, 2008; and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motions are decided as follows: it is

ORDERED that the motion by defendant/third-party plaintiff County of Suffolk for summary judgment dismissing the complaint against it is granted; and it is further

ORDERED that the cross motion by plaintiff for leave to serve a supplemental bill of particulars is denied; and it is further

ORDERED that the motion by defendant/third-party plaintiff County of Suffolk for leave to amend the caption is denied, as moot.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Kathy Montgomery in the course of her employment with third-party defendant Lessings, Inc. when on June 26, 2003 she fell while descending the exterior steps at the rear of the kitchen at the Timber Point Country Club which is owned by the County of Suffolk and located in Great River, New York. Pursuant to a licensing agreement between third-party defendant Lessings, Inc. and the defendant County of Suffolk, third-party defendant Lessings, Inc. to operate a restaurant, catering facility and bar concession at the Timber Point Country Club.

Defendant County seeks summary judgment dismissing the complaint on the basis that it bears no liability for plaintiff's accident because the County did not control or maintain the property where plaintiff fell. The County also contends that it had no prior actual or constructive notice of the alleged defective condition of the steps where plaintiff fell.

At her examination before trial plaintiff testified, in pertinent part, that on the day of her accident she was moving cases of beer from the basement cooler in the main clubhouse and other supplies to the club's halfway house in preparation for a golf outing scheduled at the club that day. Her route required her to climb the basement's concrete steps, pass through the kitchen of the clubhouse and to proceed straight out the back door. Upon reaching the back door, she would open the screen door, take a step down onto a platform, walk a few steps across the platform and then descend three steps down to the ground where she had a golf cart waiting to transport the beer and supplies. She had been up and down the exterior steps "may-be 25 times" that day prior to her accident. When the accident occurred she was wearing sneakers and was carrying a case of beer, heavy rolls of both aluminum foil and saran wrap as well as a package of hot dogs all on her right shoulder. As she descended the exterior steps she was looking straight ahead and put her right foot down on the bottom step but "there was nothing there" and she turned her ankle and fell to the ground. The things she was carrying fell on top of her legs and her leg was broken. She further testified that her fall was caused because she stepped down onto the corner of the last step which had been chipped away. She remembered telling two County workers at the club sometime before her accident that someone was going to get hurt on the steps but never notified the County in writing about the steps nor could recall telling her employer about the condition of the steps. In addition, plaintiff testified that another girl had fallen on the same step some months before plaintiff's accident.

The County's representative, Wilfred L. Maxwell, testified at his deposition to the effect that he had been employed by the County at Timber Point Golf Course since 1972, that his present title was that of Superintendent of Suffolk County Golf Courses and that he was responsible for the upkeep of the County's three golf courses which entailed their maintenance and playability, purchasing for the courses and oversight of County personnel. His office was located on the second floor of the Timber Point Country Club clubhouse from which he supervised the three greens-keepers in charge of the three courses and they in turn supervised their employees directly. Mr. Maxwell described the maintenance duties of the County employees at Timber Point as including the cutting of the grass on the courses, picking up litter, cleaning the bathrooms open to the public, and the upkeep of machinery used in these pursuits. Mr. Maxwell also testified that the County's maintenance staff was not responsible for the exterior of the clubhouse including the steps at the rear of the kitchen where the plaintiff fell as the licensing agreement between Lessings, Inc. and the County made Lessings responsible for their maintenance. Nor did the County workers perform any

services like snow and ice removal on these steps in 2003. Mr. Maxwell further testified that he never noticed any chips missing from the steps prior to plaintiff's accident nor was he aware that anyone else had fallen on these steps.

Third-party defendant Lessings, Inc's representative, Michael Lessings, testified at his deposition, to the effect that he is the Executive Vice President of Lessings, Inc. and that his duties include supervising the catering division of that corporation. He believed that Lessings, Inc.'s licensing agreement with the County required Lessings, Inc. to maintain the fifty foot area around the clubhouse including the exterior steps at rear of the kitchen where plaintiff fell. Mr. Lessings also testified that Lessings, Inc. had replaced these steps in 2000. He said that the steps were routinely used to bring food and beverage deliveries into the clubhouse and that the delivery men's hand trucks sometimes scraped the top of the steps taking chips out of them. He did not recall, however, receiving any complaints about the steps in 2002 or 2003 nor did the County request any such repairs. Mr. Lessings further testified that it was not Lessings, Inc.'s policy to notify, or otherwise file any paper with the County, regarding any accidents in the catering hall or on the exterior steps.

The relevant provisions of the Licensing Agreement between the defendant County and the third-party defendant Lessings, Inc. provides that, "[a]ll buildings, space, equipment and supplies covered by the license and use by the Licensee in the conduct of the concession, including the grounds up to one hundred feet (100') around the entire clubhouse, except in front of the golf professional shop, shall be maintained, replaced and kept in repair by the Licensee" (Para. K subd 8, pg 14). The terms of the agreement also provide that the third-party defendant Lessings assumed all risks in the operation and maintenance of the facilities and was solely responsible for the all injuries and accidents to persons and property and agreed to indemnify and hold harmless the County (Para. J pg. 12). The agreement further provides that the third-party defendant Lessings was required to procure general liability insurance naming the County as an additional insured and also to procure workers' compensation and employers' liability insurance (Para. F pp. 9, 10).

An owner or tenant in possession of realty owes a duty to maintain the property in a reasonably safe condition (***Siegel v Hofstra University,*** 154 AD2d 449, 545 NYS2d 935 [1989]) "It has been uniformly held that control is the test which measures generally the responsibility in tort of the owner of real property" (***Ritto v Goldberg,*** 27 NY2d 887, 317 NYS2d 361 [1970]). This principle recognizes that the person in possession and control of the property is best able to identify and prevent any harm to others. Thus, a person who chooses to take possession and control of property is fairly charged with the responsibility of maintaining it and should expect to be held responsible (***Butler v Rafferty,*** 100 NY2d 265, 762 NYS2d 567 [2003]). In contrast, an out-of-possession owner owes no duty to maintain and make repairs upon demised property unless he retains control over the property or is contractually obligated to perform such maintenance and repairs. However, the duty to maintain and repair may be imposed upon the owner by statute (***D'Orlando v Port Authority,*** 250 AD2d 805, 674 NYS2d 382 [1998]). Although reservation of a right of entry may constitute sufficient retention of control to impose liability upon an out-of-possession owner for injuries caused by a dangerous condition which constitutes a violation of duty imposed by statute this exception applies only where a specific statutory violation exists and there is a significant structural or design defect. (***Lowe-Barrett v City of New York,*** 28 AD3d 721, 815 NYS2d 630 [2006]; ***Ingargiola v Waheguru Mgmt,*** 5 AD3d 732, 774 NYS2d 557 [2004]).

Here, the defendant County established its prima facie entitlement to summary judgment dismissing the complaint insofar as it asserted against it by demonstrating that it relinquished control of the licensed premises and that it was not obligated under the terms of the licensing agreement to maintain or repair the licensed premises (*see,* ***Callanan v Crabhouse of Douglaston, Inc.,*** 274 AD2d 536, 712 NYS2d 127[2000]). To defeat summary judgment, plaintiff has to raise a triable issue of fact not only as to whether the County retained a right to enter the premises but also whether the alleged defect constituted a significant structural or design defect which violated a specific statutory safety provision (***Lowe-Barrett v City of New York,*** *supra*).

In opposition, and in support of her cross motion for leave to serve a supplemental bill of particulars, plaintiff submits, *inter alia,* her counsel's affidavit, her own affidavit and a proposed supplemental bill of particulars. Although plaintiff opposes the motion by the defendant County for summary judgment, neither her complaint nor her original bill of particulars alleges a violation by the defendant County of any statutory provision nor the existence of a significant structural or design defect. In his affidavit plaintiff's counsel attributes plaintiff's fall to the absence of handrails on the exterior steps where plaintiff fell making reference to former sections 9 NYCRR §§ 735 and 765 of the New York State Uniform Fire Prevention and Building Code. [1]By her personal affidavit plaintiff contends that the proximate cause of her fall was the absence of the handrails on the exterior staircase where she fell. She avers that if there been a handrail on her right it would have stopped her from falling because she remembers that when her ankle twisted she instinctively reached her arms out and her right hand closed into a fist as if clutching air for support but there was nothing for her to grab onto. Unfortunately, plaintiff provides no expert evidence attesting to the fact that the building code in effect at the time she fell required handrails on the subject staircase, and that the absence of handrails constituted a violation of the applicable code. Plaintiff has thus failed to raise a question of fact in that regard (*see,* ***Mokszki v Pratt,*** 13 AD3d 709, 786 NYS2d 222 [2004]).

Inasmuch as plaintiff's testimony at both the GML § 50-h hearing and at her deposition is consistent in that she testified to the effect that her fall occurred on the bottom step of the staircase while she was balancing a load of supplies on her right shoulder, the Court also concludes that the affidavit submitted by the plaintiff in opposition to the Country's summary judgment motion attributing her fall to the absence of a handrail merely raised a feigned factual issue designed to avoid the consequences of her earlier testimony (***Denicola v Costello,*** 44 AD3d 990, 844 NYS2d 438 [2007]). Since the plaintiff did not claim at her deposition that she would not have fallen if handrails had been in place, *assuming arguendo,* that there was a building code violation, it would be speculative to assume that these claimed violations proximately cause plaintiff's fall (***id.***; *see also,* ***Plowden v Stevens Partners, LLC,*** 45 AD3d 659, 846 NYS2d 238 [2007]; ***Guiterrez v Iannacci,*** 43 AD3d 868, 841 NYS2d 377 [2007]; *compare,* ***Ocasio v Board of Educ. of the City of New York,*** 35 AD3d 825, 827 NYS2d 265 [2006]). Summary judgment is therefore appropriately awarded to the defendant County.

With respect to the plaintiff's request for leave to serve a supplemental bill of particulars, the Court notes that proposed supplemental bill of particulars, dated December 6, 2007, alleges that the plaintiff

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[1]These sections of the Code relating to exterior staircases and the requirements of handrails thereupon were repealed prior to plaintiff's fall (*see,* ***DiGrazia v Lemmon,*** 28 AD3d 926, 813 NYS2d 560 [2006] app den 7 NY3d 706, 837 NYS2d 1).

claims violation of Labor Law § 200 and "Article 9 of the N.Y.C.R.R." The Court notes that the New York Code of Rules and Regulation does not contain a Chapter 9 but that Title 9 of the N.Y.C.R.R is comprised of multiple volumes of the rules and regulations of the State's Executive Department. The Court assumes that plaintiff intended to claim violations of the Building Code of the State of New York as it relates to handrails on exterior staircases. As determined, *infra*, the plaintiff has failed to substantiate the merit of this claim and the granting of leave to supplement the plaintiff's bill of particulars to claim such would not salvage the plaintiff's case, at this juncture.

As for plaintiff's request for leave to allege a claim that the County violated Labor Law § 200, such claim presents a new theory of negligence and thus is appropriately claimed in an amended bill of particulars rather than a supplementary bill of particulars. While leave to supplement or amend a bill of particulars is ordinarily to be freely granted in the absence of prejudice and surprise, when leave to amend is sought on the eve of trial, judicial discretion should be exercised sparingly. Moreover, where there has been inordinate delay in seeking leave to amend the plaintiff must establish a reasonable excuse for the delay, and submit an affidavit to establish the merits of the proposed amendment (***Torres v Educ. Alliance, Inc.,*** 300 AD2d 469, 752 NYS2d 80 [2002]). In addition, the court must examine the underlying merit of the proposed amendment since to do otherwise would be a waste of judicial resources (***Cohen v Ho,*** 38 AD3d 705, 833 NYS2d 542 [2007]; *see also,* ***Delahaye v Saint Anns School,*** 40 AD3d 679, 836 NYS2d 233 [2007]).

In this case, the plaintiff has moved nearly seven months after filing her note of issue and certificate of readiness and after the defendant County moved for summary judgment. Plaintiff has proffered no excuse for delay in seeking leave to amend nor has plaintiff established the merit of proposed amendment. Labor Law § 200 is, of course, the codification of the common-law right of an employee to a safe place to work. The duty of an owner to provide a safe workplace is contingent upon a contractual or other actual authority to control the activity during which the plaintiff's injury was sustained, and prior notice of the unsafe condition. (*see,* ***Lafleur v Power Test Realty Co. Ltd. Partnership,*** 159 AD2d 691, 553 NYS2d 50 [1990]). Additionally for liability to be imposed, the owner must direct and control the manner in which the work is performed, not merely possess general supervisory authority (***Cuartas v Kourkoumelis,*** 265 AD2d 293, 696 NYS2d 475 [1999]). Where, as here, there are no allegations that the County controlled the operation of third-party defendant Lessings' catering business, there is no apparent merit to the proposed amendment and no bar to the grant of summary judgment to the defendant County.

Accordingly, the motion by defendant County for summary judgment is granted and the complaint is dismissed. Plaintiff's cross motion for leave to serve a supplemental bill of particulars is denied. The motion by the defendant County for leave to amend the caption has been rendered academic by the grant of summary judgment to the County and is therefore denied as moot.

Dated: 5/26/08

Peter H. Mayer

PETER H. MAYER, J.S.C.