STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

MARGOT PHILLIPS and JOSEPH PHILLIPS,

Plaintiffs,

-against-

MARTHA L. LEPOW, BARRY ZWACK, and JOHN DOE 1-10 intended to be any other responsible tortfeasor,

Defendants.

**DECISION and ORDER**
**INDEX NO. 2384-06**
**RJI NO. 01-07-089448**

Supreme Court Albany County All Purpose Term, August 12, 2008
Assigned to Justice Joseph C. Teresi

**APPEARANCES:**

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**TERESI, J.:**

Upon leaving Dr. Lepow's home on December 18, 2003, Margot Phillips slipped and fell. The broken ankle she sustained from the fall required surgery. Thereafter, she commenced this

personal injury action, with her husband derivatively, against Dr. Lepow, as the property owner, and later against Mr. Zwack, as the individual Dr. Lepow hired to maintain the premises.

Discovery in this action is now complete and both defendants bring motions for summary judgment. In the alternative both defendants move to preclude plaintiffs' expert witnesses from testifying at trial. Plaintiffs oppose the summary judgment motions and cross move for an extension of time to file expert disclosure responses.

SUMMARY JUDGMENT STANDARD

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." (Napierski v. Finn, 229 AD2d 869, 870 [3d Dept. 1996]). All evidence must be viewed in the light most favorable to the opponent of the motion. (Amidon v. Yankee Trails, Inc., 17 AD3d 835 [3d Dept. 2005]; Crosland v. New York City Transit Auth., 68 NY2d 165 [1986]).

On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a mater of law. (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 [1988]). "[A]n affidavit by an individual without personal knowledge of the facts does not establish the proponent's prima facie burden." (JMD Holding Corp. v. Congress Financial Corp., 4 NY3d 373, 384-85 [2005]). . While the submission of an attorney's affidavit, with attachments containing testimony of individuals with "personal knowledge", is not fatal to the proponent's motion for summary judgment (Olan v. Farrell Lines Inc., 64 NY2d 1092 [1985]), the motion must still be supported by a "person having knowledge of the facts" or other "admissible proof". (CPLR §3212(b) and Alvarez v. Prospect Hospital, supra). Moreover, a movant fails to meet their burden by "pointing

to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. (Antonucci v. Emeco Industries, Inc., 223 AD2d 913, 914 [3d Dept.1996]).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. (Zuckerman v. City of New York, 49 NY2d 557 [1980]). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." (Id. at 562).

DEFENDANT LEPOW MOTION FOR SUMMARY JUDGMENT

Defendant Lepow brings her motion for summary judgment on the premise that the record contains insufficient evidence of her negligence and as such the plaintiffs' complaint should be dismissed. Because Defendant Lepow failed to affirmatively demonstrate her entitlement to judgment as a matter of law, her motion is denied.

In this action, Dr. Lepow as the landowner, has "the threshold burden when seeking summary judgment of establishing that [she] maintained the premises in a reasonably safe condition and neither created nor had actual or constructive notice of the allegedly dangerous condition." (Candelario v. Watervliet Housing Authority, 46 AD3d 1073, 1074 [3d Dept. 2007]). "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... to discover and remedy it." (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]). As such, Dr. Lepow, has the burden of demonstrating, as a matter of law, the absence of "constructive notice", which on this record she has failed to do. (Boucher v. Watervliet Shores Associates, 24

AD3d 855, 856 [3d Dept. 2005]).

Dr. Lepow does not support her motion with an affidavit, but rather relies upon her own deposition testimony, and that of plaintiffs, of Mr. Zwack and of Rev. Loux. Dr. Lepow's deposition testimony demonstrates her failure to personally inspect the area where Ms. Phillips fell at any time on December 18, 2003. Rather, she testified that the "night" before, while located across her yard in the "driveway", she observed that the area "seemed to be clear". Such observation was not quantified as to how well she could observe the actual location of Ms. Phillips' fall. She testified that she did not walk to, or on, the are where Ms. Phillips fell either the day of, or the night before, the fall. The record is silent as to when, prior to Ms. Phillips fall, Dr. Lepow specifically inspected the location.

Dr. Lepow also testified that "the night before" Ms. Phillips fell she called Mr. Zwack requesting that he "clear the snow from earlier in the week" on December 18, 2003. She stated that even though Mr. Zwack was at the premise on December 15 and 16, 2003 to clear snow and ice from her property, she wanted him to do the same on December 18, 2003. This was due to her having guests at her home on that day. Dr. Lepow, however, did not personally observe Mr. Zwack perform any of the tasks she requested he perform on December 18, 2003.

Mr. Zwack's deposition testimony is, by his own admission, not based upon his personal recollection of the time period surrounding Ms. Phillips fall. His testimony is replete with statements denying a recollection of December 18, 2003 or of any portion of that week. At his deposition, he could not remember the work he performed, or failed to perform, at Dr. Lepow's residence. Moreover, despite Mr. Zwack stating that he keeps personal time sheets of his work, and has them dating back to 2001, he cannot find his time sheets for the two week period

surrounding Ms. Phillips' fall.

On this record, Defendant Lepow failed to establish her entitlement to judgment, as a matter of law. Her motion fails because it is not supported by the allegations of a person with personal knowledge or other affirmative proof that demonstrates the absence of "constructive notice".

Accordingly, Defendant Lepow's motion for summary judgment is denied.

DEFENDANT ZWACK MOTION FOR SUMMARY JUDGMENT

Defendant Zwack moves for summary judgment of plaintiffs' claim against him and also for summary judgment of Dr. Lepow's contribution and indemnification claims against him. Defendant Zwack's motion for summary judgment is premised upon his claim that he owed no duty to the plaintiffs and as such cannot be held liable for the claimed injury. However, because Defendant Zwack did not prove, as a matter of law, that he owed no duty of care to plaintiffs, his motion is denied.

Generally, contractual obligations will impose no duty of care upon the contracting parties towards noncontracting third parties. However, a contractual obligation will give rise to a duty to noncontracting third parties in "three, limited situations: (1) where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk; (2) where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation; and (3) when the promisor has entirely displaced the other party's duty to safely maintain the premises". Moran v. City of Schenectady, 47 A.D.3d 1001, 1002 [3d Dept. 2008][quoting Wyant v. Professional Furnishing & equip., Inc., 31 AD3d 952, 953 [2006]; see Espinal, supra).

Addressing the first prong, this record fails to demonstrate, with the allegations of an individual with personal knowledge or other competent proof, that defendant Zwack did not engage in acts which created "an unreasonable risk of harm to others". Defendant Zwack offers no affidavit to support his motion, but rather relies upon his attorneys affidavit and the deposition testimony taken during discovery herein. As set forth above, Mr. Zwack's deposition testimony does not provide the Court with allegations, based upon his "personal knowledge" of his own acts on and before December 18, 2003. Throughout his testimony, Mr. Zwack is candid about his not remembering December 18, 2003, or the week prior thereto. He specifically answered "not per se, no" when asked if he had a recollection of going to Dr. Lepow's home on December 18, 2003. As such, Mr. Zwack's testimony does not provide the requisite "personal knowledge" necessary to support his motion for summary judgment.

Likewise, Dr. Lepow's testimony fails to provide the requisite "personal knowledge" necessary to allege that Mr. Zwack did not create an "unreasonable risk". Again, as set forth above, Dr. Lepow did not observe Mr. Zwack at her home on December 18, 2003 nor can she confirm, with her own personal knowledge, that he was even at her residence and did not create an "unreasonable risk". There is no other documentary or other "admissible proof" to support Mr. Zwack's motion. Accordingly, Mr. Zwack's motion for summary judgment dismissing plaintiffs' complaint against him is denied because he failed to demonstrate that he did not create an "unreasonable risk" when performing his contractual duties.

Mr. Zwack's motion for summary judgment of Dr. Lepow's indemnity and contribution claims are also denied, as they are similarly not supported by sufficient proof.

"One is entitled to implied indemnification where he or she has committed no wrong but

is held vicariously liable for the wrongdoing of another." (Finch, Pruyn & Co. v Wilson Control Servs., 239 A.D.2d 814 [3d Dept. 1997], see also State of N.Y. Facilities Development Corp. v. Kallman & McKinnell, 121 AD2d 805 [3d Dept. 1986]). Here, one of plaintiffs' claims against Dr. Lepow sounds in negligent maintenance of her property. Both Defendants Zwack and Lepow acknowledge the existence of their contractual agreement for Mr. Zwack to remove snow and ice from the premises, even if there is a dispute as to the extent of that agreement. In the event that plaintiffs prevail on their negligent maintenance claim against Dr. Lepow, it would be on a vicarious liability theory due to Defendant Zwack. "Equitable principles would warrant a recovery in indemnity notwithstanding a separate finding of negligence against [Dr. Lepow] premised upon another theory of liability." (Phillips v. Young Men's Christian Assn., 215 AD2d 825, 827 [3d Dept. 1995]). Accordingly, Defendant Zwack's motion is denied. Accordingly, Defendant Zwack's motion for summary judgment of Dr. Lepow's indemnification claim must fail.

"To sustain [a] claim for contribution, the [claimant must] show that defendant owed it a duty of reasonable care independent of its contractual obligations... or that a duty was owed plaintiff as an injured party and that a breach of this duty contributed to the alleged injuries." (Id.) Defendant Zwack, as the movant for summary judgment has the burden to demonstrate, as a matter of law, the failure of Dr. Lepow's contribution claim with affirmative proof. (Antonucci, supra). As set forth above, Defendant Zwack failed to demonstrate that he owed Ms. Phillips no duty, because he did not prove that he did not create an "unreasonable risk" in the performance of his contractual duties. Accordingly, Defendant Zwack's motion for summary judgment of Dr. Lepow's contribution claim must also fail.

MOTIONS TO PRECLUDE PLAINTIFFS' EXPERT DISCLOSURE

Expert disclosure is governed by CPLR § 3101(d). Compliance with CPLR § 3101(d) requires timely disclosure of expert witnesses, but sets no specific time limitations. The Third Judicial District has imposed a time limitation through their Expert Disclosure Rule requiring that:

> "Except as otherwise directed by the Court, a party who has the burden of proof on a claim, cause of action, damage or defense shall serve its response to an expert demand pursuant to CPLR 3101(d) on or before the filing of the Note of Issue. Such party has until the filing of the Note of Issue to serve such response regardless of how early the demand is made. Any opposing party shall serve its answering response pursuant to CPLR 3101(d) within 60 days after the filing of the Note of Issue. Any amended or supplemental expert disclosure shall be allowed only with the permission of the Court."

Where there is "prejudice and a willful failure to disclose", preclusion will be appropriate. (Mead v. Rajadhyax Dental Group, 34 AD3d 1139, 1141 [3d Dept. 2006]). However, this Court has broad discretion to excuse untimely disclosure, and will consider whether the untimely disclosure was intentional or creates prejudice. (Washington v. Albany Housing Authority, 297 AD2d 426 [3d Dept. 2002]). The Appellate Division - Third Department has held that even where a party disclosed their expert's report four months before the scheduled trial, it was not an abuse of discretion to allow the untimely discovery. (Silverberg v. Community General Hosp., 290 AD2d 788 [3d Dept. 2002]).

Here, on February 20, 2008, this Court reaffirmed the previously scheduled jury trial date certain for October 20, 2008. Plaintiffs were directed to file a Note of Issue by February 26,

2008 and to file their expert disclosure responses no later than April 29, 2008. Defendants' were also directed to file their expert disclosure by July 1, 2008.

Due to the Plaintiffs' failure to file a Note of Issue in compliance with the above, and in an exercise of this Court's discretion, on June 27, 2008 plaintiffs were granted until July 7, 2008 to file their note of issue. It appears that plaintiffs complied with such directive. However, plaintiffs had not filed their expert disclosure prior to that time. From the affirmations of the attorneys for both Defendants Zwack and Lepow, it appears that they did not receive plaintiffs' expert disclosure response until, on or about, July 10, 2008. Plaintiffs' counsel fails to provide an affidavit of service for such disclosure or affirm the date of service. As such, the Court finds that the plaintiffs failed to comply with this Court's Order of February 20, 2008 or the Third Judicial District's Expert Disclosure Rule.

However, considering the extension previously granted to the plaintiffs to file their Note of Issue by July 7, 2008, and the Third Judicial District's Expert Disclosure Rule that allows Expert Disclosure up until the filing of the Note of Issue, it appears that the defendants received plaintiffs' expert disclosure (July 10, 2008) only three days late.

Considering that the Appellate Division - Third Department has "encouraged trial courts to look to less than draconian measures" than preclusion (Mead, supra) this Court finds that a more appropriate course might be the imposition of a monetary sanction against plaintiffs counsel that would deter future non compliance with the court rules and provide a measure of compensation to defendants for being forced to make the motion for expert disclosure mandated by the Third District Rule. But the Court defers to do that at this time.

Moreover, there is nothing in the record before the Court which suggests that the

defendant's delay was wilful or intentional. Plaintiffs claim that the late disclosure was due to a serious health condition of their expert, and acknowledge that they should have sought an extension of time to serve their expert disclosure on that basis.

Likewise, neither defendant has suffered substantial prejudice due to the late disclosure. It appears that defendant Lepow has already retained an expert to oppose plaintiffs' expert. Defendant Zwack had over three months from the date he received plaintiffs' expert response to the jury trial date certain (compare Silverman, supra [four months before trial was insufficient prejudice]) and still has almost two months to the commencement of the trial herein to obtain an expert. Moreover, Defendant Zwack is hereby granted an extension of thirty days, from the date of this Decision and Order, to file its final expert response.

This case is scheduled for a day certain trial on October 20, 2008. Due to the age of the case (2 years) no postponements of the trial will be granted. Any witnesses not available for Trial shall be videotaped or deposed at their convenience. Counsel shall be prepared to timely start the trial.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiffs. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: August 26, 2008
Albany, New York

JOSEPH C. TERESI, J.S.C.

**PAPERS CONSIDERED:**

1. Notice of Motion, dated June 3, 2008, Affirmation in Support of Motion for Summary Judgment of Todd C. Roberts, dated June 3, 2008, with Exhibits "A" - "O";
2. Notice of Cross Motion, dated July 23, 2008, Affirmation of Christopher Flint, dated July 23, 2008, with attached Exhibits "A" - "G", and accompanying Memorandum of Law in Opposition to Defendant Zwack's Motion for Summary Judgment and in Support of Defendant Lepow's Cross-Motion for Summary Judgment of Christopher Flint, undated;
3. Notice of Cross-Motion, undated, and Affirmation of Frank Mahady, dated July 25, 2008 with unnumbered exhibits.
4. Notice of Cross Motion, dated July 31, 2008, with Affirmation in Further Support of Motion for Summary Judgment and in Support of Cross-Motion to Preclude of Todd C. Roberts, dated July 31, 2008, with attached Exhibits "P" - "S";
5. Affirmation in Opposition of Todd C. Roberts, dated August 5, 2008.
6. Affirmation in Opposition of Frank Mahady, dated August 8, 2007.