

Cancelliere v I.G.A. Membership Corp.

2009 NY Slip Op 30898(U)

April 20, 2009

Supreme Court, New York County

Docket Number: 104221/05

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: _____

PART _____

Index Number : 104221/2005

CANCELLIERE, THOMAS

VS.

I.G.A. MEMBERSHIP

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying memorandum of law and is consolidated with motion seq. 6 and decided in accordance with said motion.

FILED
APR 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/20/09

Cy

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 15

-----X
THOMAS CANCELLIERE,

Plaintiff,

Index No.
104221/05

-against-

I.G.A. MEMBERSHIP CORPORATION D/B/A
THE LINKS AT UNION VALE, YORK BRIDGE
CONCEPTS, and BURTON F. CLARK, INC.,
D/B/A CLARK COMPANIES,

FILED

APR 21 2009

Defendants.

-----X
I.G.A. MEMBERSHIP CORPORATION, D/B/A
THE LINKS AT UNION VALE,

COUNTY CLERK'S OFFICE
NEW YORK

Third-party Plaintiff

T.P. Index No.
590414/06

-against-

YORK BRIDGE CONCEPTS,

Third-party Defendant.

-----X
I.G.A. MEMBERSHIP CORPORATION, D/B/A
THE LINKS AT UNION VALE,

Second Third-party Plaintiff,

S.T.P. Index No.
590681/06

-against-

BURTON F. CLARK, INC., D/B/A CLARK
COMPANIES,

Second Third-party Defendant.

-----X
I.G.A. MEMBERSHIP CORPORATION, D/B/A
THE LINKS AT UNION VALE,

Third Third-party Plaintiff,

-against-

STEPHEN KACHMARCHYK A/K/A STEPHEN KAY
and STEPHEN KAY,

Third Third-party Defendant.

-----X

I.G.A. MEMBERSHIP CORPORATION D/B/A
THE LINKS AT UNION VALE,

Fourth Third-party Plaintiff,

-against-

LANDSCAPE ARCHITECTURE AND ENGINEERING
P.C., A/K/A THE LA GROUP,

Fourth Third-party Defendant.

-----X

WALTER TOLUB, J.,:

Motion Sequence No. 006 and 007 are consolidated for disposition. In Motion Sequence No. 006, second third-party defendant, Burton F. Clark, Inc., d/b/a Clark Companies (Clark) moves, pursuant to CPLR 3212, for summary judgment dismissing the second third-party complaint, together with any cross claims asserted against it. Third third-party defendants Stephen Kachmarchyk, a/k/a Stephen Kay and Stephen Kay (collectively as Kay), and defendant/third-party defendant York Bridge Concepts (York), respectively, cross-move, pursuant to CPLR 3212, for similar relief. In Motion Sequence No. 007, defendant and third and second and third third-party plaintiff, I.G.A. Membership Corporation d/b/a the Links at Union Vale (The Links), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint.

Facts

Plaintiff Thomas Cancelliere commenced the instant action to recover for personal injuries he sustained on August 11, 2002,

while playing golf with three friends. Plaintiff claims he slipped and fell while walking on a wooden bridge (the Bridge) located near the second hole on a golf course owned by defendant the Links. His second shot on hole number 2 landed in the fairway, which required him to cross the Bridge (*id.* at 70-71). He claims that he fell on the Bridge because it was slippery (*id.* at 70). He identified the substance on the surface of the Bridge as, *inter alia*, "black, slimy and shiny mixed with green vegetative growth" that encompassed the entire width of the Bridge, and "a green black condition on the [Bridge]" (*id.*, respectively at 78 & 95).

Plaintiff initially brought the action against The Links, and then amended the complaint to add York, the Bridge manufacturer, and Burton F. Clark, d/b/a Clark Companies (Clark), the general contractor, when the golf course was constructed. The Links subsequently commenced separate third-party actions against York, Clark, Kay, the golf course architect, and Landscape Architecture & Engineering P.C., a/k/a the LA Group, the company that designed the Bridge, for contribution and/or indemnification. Plaintiff's direct claims against York and Clark were later dismissed by this court on statute of limitation grounds (Order and Decision dated 2/1/07).

The movants now move for summary judgment dismissing the complaint and/or the third-party complaints against them,

respectively, as well as any cross claims.

Discussion

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once a prima facie showing has been made, the burden then shifts to the opposing party, who must proffer evidence in admissible form establishing that an issue of fact exists, warranting a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

First, this court address The Links' motion for summary judgment. Initially, The Links proffers an argument, which sounds in an assumption of risk defense. The Links argues that once plaintiff was engaged in the game of golf, the footbridge became an integral part of the golf course, and the condition that allegedly caused plaintiff's fall was a reasonable foreseeable consequence and a risk inherent within the activity of playing golf on a natural golf course. In support of its argument, The Links cites to *Bockelmann v New Paltz Golf Course* (284 AD2d 783 [3rd Dept], lv denied 97 NY2d 602 [2001]) (the *Bockelmann* case), which relied on the assumption of risk doctrine. Under this doctrine, a participant in a sporting event or recreational activity generally "may be held to have

consented, by [his or her] participation, to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation" (*id.* at 784, *supra*, quoting *Turcotte v Fell*, 68 NY2d 432, 439 [1986]).

However, assumption of risk is an affirmative defense which is deemed waived if not specifically pleaded (*see Micallef v Miehle Co.*, 39 NY2d 376 [1976]; *see also, Green v City of New York*, 308 AD2d 408 [1st Dept 2003], *lv denied* 1 NY3d 505 [2004]). A review of The Links' Answer discloses that it did not plead this defense, and its affirmative defense of plaintiff's culpable conduct is insufficient to satisfy a pleading for this defense (*see Charnovesky v City of New York*, 283 AD2d 385 [2d Dept], *lv denied* 96 NY2d 720 [2001]). Thus, this court need not consider the Links' argument sounding in an assumption of risk.

The Links also claims that plaintiff fails to present any evidence, through expert testimony or otherwise, supporting his assertions of negligent design of the Bridge relating to the absence of a handrail and non-skid materials. To establish that neither one of the alleged design defects was required, or within industry standards for the Bridge, The Links relies on the depositions of William Voigt, York's Project Manager, and Mr. Kay, The Links' golf course architect. The Links refers to those excerpts of Mr. Voigt's deposition, wherein he testified that York manufactured and installed golf cart bridges across the

United States (Mr. Voigt's Deposition taken on November 2, 2007, at 13), including all bridges at the subject golf course (*id.* at 15), considered itself an industry leader (*id.* at 27-28), and never installed non-skid materials on the bridges it manufactured (*id.* at 50). Mr. Voigt also testified that York only recommended the use of a handrail where a bridge was four feet or higher (*id.* at 35-36; 40), and here, the Bridge was eight feet wide by three feet high (*id.* at 59).

Although The Links also indicates that it relies on Mr. Kay's deposition, it does not refer to any specific portion thereof. In any event, Mr. Kay testified that he was not qualified to offer an opinion regarding the defect or design of any bridge (Mr. Kay's deposition taken on 2/12/08, at 8), and that he does not design bridges, but rather just recommends the location of them (*id.* at 10).

In opposition, plaintiff submits affidavits by his experts, James Gibbs and William Scott Robinson, who opined that the slippery condition on the Bridge consisting of moss, mildew and/or mold, resulting in plaintiff's accident, was caused by its negligent design and improper maintenance. Mr. Gibbs, a landscape architect, opined, *inter alia*, that The Links and third-parties failed to take steps "to prevent moss, mildew, mold, etc. from occurring by utilizing ongoing maintenance procedures, better choice of materials for the [Bridge] and a

more appropriate design of the [Bridge]," including "the installation of matting and/or non-skid surfaces and sufficient space between the wood planking to prevent the build-up of water which would have created an environment for moss to grow"

(Plaintiff's Exhibit H, Mr. Gibbs affidavit dated 12/8/08, at 5).

He also opined that the failure to schedule and perform routine maintenance of the Bridge to prevent moss, mold, mildew or other growth that causes hazardous conditions is a departure from accepted practice and industry standards in the field of landscape design and architecture (*id.*).

Mr. Robinson, a consultant in, inter alia, preventative maintenance regarding slip/trip and fall incidents occurring at golf courses, opined, inter alia, that the management and designers of the Links, failed to utilize any design alternatives, including the placement of matting or non-ski strips on the deck of the Bridge, to prevent or remove moss growth and allow for further traction, to properly maintain the Bridge in accordance with industry standards, and to properly warn of the presence of moss on the Bridge and the potential for slips and falls given the dangerous conditions and the required use of soft rubber spikes (Plaintiff's Exhibit I, Mr. Robinson's affidavit dated 12/5/08).

Here, plaintiff's experts' affidavits were sufficiently grounded in facts personally known to them, as well as the facts

in the record (see *Altamirano v Door Automation Corp.*, 48 AD3d 308 [1st Dept 2008]), and raise questions of fact as to whether the Bridge was, inter alia, negligently designed as a result of its failure to have non-skid materials, the placement of the wood planks, and the type of materials used, which preclude summary judgment (see *Delgado v New York City Hous. Auth.*, 51 AD3d 570 [1st Dept], lv denied 11 NY3d 706 [2008]). They, however, fail to proffer any opinion or comment as to the absence of a handrail on the Bridge. Therefore, no evidence has been proffered by plaintiff as to the alleged defective design issue regarding the handrail.

The Links further contends that the Links did not receive any prior complaint or notice of the alleged hazardous condition that allegedly caused plaintiff's accident, and thus, plaintiff's negligence claim against it should be dismissed. As noted by the Links, an owner of a premises cannot be held liable for injuries caused by an alleged hazardous condition, unless it is established that the owner either created the alleged hazardous condition or had actual or constructive notice of the condition (see *Mandel v 370 Lexington Ave., LLC*, 32 AD3d 302 [1st Dept 2006]; see also *Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]). In moving for summary judgment dismissing a slip and fall claim, defendant has the burden of establishing lack of actual or constructive notice as a matter of law (see *Giuffrida v*

Metro N. Commuter RR Corp., 279 AD2d 403 [1st Dept 2001]).

Further, where a defendant neither created the condition nor had actual notice, it "must demonstrate the lack of evidence regarding how the alleged condition came into existence, how visible and apparent it was, and for how long a period of time prior to the accident it existed" (*id.* at 404).

In support of its argument of lack of notice, The Links relies on excerpts from the deposition of Christopher Streul, The Links' golf course superintendent, wherein he testified, *inter alia*, that his duties included overseeing all of the golf course maintenance operations (The Links' Exhibit D, Mr. Streul's deposition held on 2/8/07, at 15-16); that he performed inspections of the golf course (*id.* at 31), consisting of, *inter alia*, driving over the Bridge two to three times a week, with a visual inspection lasting approximately 20 seconds (The Links' Exhibit D, Mr. Streul's deposition taken on 2/8/07, at 45-46), and walking over it every couple of weeks (*id.* at 46), and that he never observed algae, slime or mold on the Bridge, or received any complaints concerning the Bridge (*id.* at 51-52). However, he also testified that he did not remember when he had last done an inspection of the Bridge (*id.* at 49), nor had any records of the last inspection he did of the Bridge (*id.* at 50). Additionally, he did not work on the day of plaintiff's accident (*id.* at 90), was advised of the incident approximately 7 to 10 days later by

Kieran Carr, a former golf pro at the Links (*id.*), and did not recall whether, after he was advised of the accident, he inquired from the assistant superintendent, who worked that day (*id.* at 37), or anyone else in his crew whether any inspection had been made on the Bridge on the date of the accident (*id.* at 93-94).

Furthermore, although Mr. Streul testified that he never received any complaints regarding the Bridge (*id.* at 53 & 55), he also stated that the Links' procedure for the golfers to file complaints regarding the golf course consisted of the completion of a form that was given to the necessary person, who he assumed was an individual called Patricia Lloyd (*id.* at 52-53). The Links does not provide any testimony or evidence indicating whether any complaints regarding the Bridge were received by Patricia Lloyd or any other person who, according to the Links' complaint procedure, would receive the written complaints.

Thus, viewing the evidence in a light most favorable to the plaintiff, as the nonmoving party on this summary judgment motion, and giving him all reasonable inferences that can be drawn from the evidence (*see, Negri v Stop and Shop, Inc.*, 65 NY2d 625 [1985]), Mr. Streul's testimony regarding his general inspection procedures fails to satisfy The Links' burden of entitlement to summary judgment on the issue of notice, since there are insufficient details as to the last time the Bridge had been inspected prior to the accident, about the actions of

defendant's staff on the date of the accident (see *Baptiste v 1626 Meat Corp.*, 45 AD3d 259 [1st Dept 2007; see also *Jacques v Richal Enterprises, Inc.*, 300 AD2d 45 [1st Dept 2002]), and about the absence of any notice of the alleged slippery condition on the Bridge (see *Giuffrida v Metro N. Commuter RR Corp.*, 279 AD2d 403, *supra*). In reply, The Links argues that plaintiff fails to proffer arguments in opposition to its lack of notice argument. In light of the Links' failure to make the necessary prima facie showing, it is, however, unnecessary for this court to consider the adequacy of plaintiff's opposing papers (see *Alvarez v Prospect Hospital*, 68 NY2d 320, *supra*).

In view of the foregoing, the Links' motion for summary judgment in its favor is granted only to the extent of dismissing that branch of the plaintiff's defective design claim regarding the absence of a handrail on the Bridge.

York, Kay and Clark also seek summary judgment dismissing the third-party complaints respectively against them by the Links. The record demonstrates that plaintiff claims his accident was caused by poor maintenance of the surface of the Bridge, and design defects due to, *inter alia*, the spacing of the wooden planks and/or the type of material used. As contended by the aforementioned movants, and not disputed by The Links, post-construction maintenance responsibilities in connection with the Bridge were assumed by its golf course superintendent, Mr. Streul

(Streul's deposition, *supra*, at 32-33, 43-46). Thus, the record is devoid of any evidence supporting a basis for imposing liability on the York, Kay or Clark for improper maintenance of the Bridge.

With respect to the defective design claim, York admits that it manufactured the Bridge, and that the drawings used for the Bridge were generated by York (Deposition of William Voight taken on 11/2/07, at 17-18 & 22, respectively), but argues that no defect has been established with its construction or design. However, as previously discussed, there are questions of fact relating to plaintiff's claims of defective design.

Although York's counsel attempts to shift responsibility to Kay for any alleged defects, by claiming that the Bridge was constructed in accordance with the specifications provided by Kay, he fails to proffer any evidence to support such contention. In any event, Mr. Voight testified, on behalf of York, that the specifications contained in the "Golf Course Construction Specifications & Details for The Links at Union Vale" (the Construction Specifications) were from York (Mr. Vought's deposition at 38). This was further confirmed by Kay, during his deposition, wherein he testified that he got the specifications contained in the Construction Specifications from Mr. York, and that he did not make any change or recommendations to them (Kay at 57-58). Additionally, Kay refers to paragraph 1.4.2 of the

contract between him and The Links, and argues that he bore no responsibility for the design or construction of the bridges on the subject golf course, and, thus, any allegation of a design or construction defect cannot be attributable to Kay.

The provision relied on by Kay provides, inter alia, as follows:

We shall have no responsibility for addressing offsite drainage, storm water runoff, pipe sizing, wetland mitigation, bridges or any other related items that may impact the Project or that the state of New York requires to be performed by a registered engineer or other licensed design professional.

(Kay's Exhibit E, Contract between Kay and The Links dated 1/20/98, ¶ 1.4.2, at 2). The law is well settled that the parties' intention should be determined from the language employed within the four corners of the agreement and where the language is clear and unequivocal, interpretation is a matter of law to be determined by the court (*Hartford Acc. & Indem. Co. v Wesolowski*, 33 NY2d 169 [1973]; see also *American Express Bank, Ltd. v Uniroyal, Inc.*, 164 AD2d 275 [1st Dept 1990], lv denied 77 NY2d 807 [1991]). It is clear from the language utilized in this paragraph that Kay was not responsible for the bridges at the subject golf course. Thus, in the absence of any basis for the imposition of liability on Kay for the alleged negligent design of the Bridge, Kay's application for summary judgment dismissing the third-party complaint and cross claims asserted against it is

granted.

However, since there are questions of fact as to whether the Bridge has design defects, York's application for summary judgment dismissing the third-party complaint and any cross claims asserted against it is denied.

Clark also moves for summary judgment, arguing that it was not involved in the design or manufacture of the Bridge. In support of its contention, it primarily relies on the deposition of James Catella, Clark's general manager, wherein he testified that Clark was the general contractor for the golf course project (Clark's Exhibit C, Catella's deposition taken on 2/8/07, at 18); it hired York as the subcontractor (*id.* 27-28), that the Bridge was constructed by York (*id.* at 26), and that Clark was not involved in any design issues (*id.* at 24). In view of the foregoing, Clark sufficiently demonstrates a prima facie showing that it was not involved in the design or manufacture of the Bridge (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, *supra*).

In the absence of any opposition to Clark's application for summary judgment, it is granted.

Accordingly, it is

ORDERED that, in Motion Sequence No. 006, the motion by second third-party defendant, Burton F. Clark, Inc., d/b/a Clark Companies, for summary judgment dismissing the second third-party complaint and all cross claims against it is granted; and it is further

ORDERED that, in Motion Sequence No. 006, the cross-motion by third third-party defendant Stephen Kachmarchyk, a/k/a Stephen Kay and Stephen Kay, for summary judgment dismissing the third third-party defendant complaint and all cross claims against it is granted; and it is further

ORDERED that, in Motion Sequence No. 006, the cross-motion by third-party defendant York Bridge Concepts for summary judgment dismissing the third-party defendant complaint and all cross claims against it is denied; and it is further

ORDERED that, in Motion Sequence No. 007, the motion by defendant, and third-party/second third-party/third third-party defendant I.G.A. Membership Corporation, d/b/a the Links at Union Vale, for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

Counsel for the remaining parties are directed to appear for a pre-trial conference on May 22, 2009 at 11:00AM in room 335 at 60 Centre Street.

Dated: 4/20/09

FILED

APR 21 2009

COUNTY CLERK
NEW YORK

ENTER:

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WALTER B. FOLUB J. S. C.