

**Minafo v Gandolfo**

2011 NY Slip Op 33330(U)

August 26, 2011

Supreme Court, Richmond County

Docket Number: 101103/09

Judge: John A. Fusco

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF RICHMOND

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JOSEPH MINAFO AND GRACE MINAFO,

Plaintiff(s),

-against-

LINDA M. GANDOLFO, PICTURE PERFECT  
LANDSCAPING and PROPERTY MANAGEMENT  
and COLONIAL SQUARE HOMEOWNERS  
ASSOCIATION,

Defendant(s)

-----X

DCM Part 4

Present:  
Hon. John A. Fusco

**DECISION AND ORDER**

Index No.: 101103/09

Motion No.: 003  
004

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The following pages numbered 1 to 9 were used on this 3<sup>rd</sup> day of June, 2011:

**Papers  
Numbered**

Notice of Cross- Motion by Defendant(s) Picture Perfect Landscaping and  
Property Management with supporting Papers and Exhibits  
(dated April 7, 2011)..... 1

Notice of Cross- Motion and Memorandum of Law by Defendant(s) Colonial  
Square Homeowners Association with supporting Papers and Exhibits  
(dated April 28, 2011).....2, 3

Affirmation in Opposition by Plaintiff(s) with Exhibits  
(dated May 20, 2011).....4

Reply Affirmation by Defendant(s) Picture Perfect Landscaping  
and Property Management  
(dated May 26, 2011).....5

Reply Affirmation by Defendant(s) Linda M. Gandolfo  
(dated May 26, 2011).....6

Reply Affirmation by Defendant(s) Picture Perfect Landscaping  
and Property Management  
(dated May 26, 2011).....7

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Reply Affirmation by Defendant(s) Linda M. Gandolfo  
(dated June 1, 2011).....8

Reply Affirmation by Defendant(s) Colonial Square Homeowners Association  
(dated June 2, 2011).....9

Upon the foregoing papers, the motion of defendant Picture Perfect Landscaping and Property Management is granted and the motion of defendant Colonial Square Homeowners Association is denied.

Plaintiff brought this action to recover for personal injuries resulting from a slip and fall on ice that occurred on January 29, 2009, within defendant Colonial Square Homeowners Association's ("Colonial Square") property, in front of defendant Linda M. Gandolfo's ("Gandolfo") home, 24 A Franklin Lane, in the Borough of Richmond.<sup>1</sup> Picture Perfect Landscaping and Property Management ("Picture Perfect") was contracted by Colonial Square to remove snow and ice for the Colonial Square development. Defendants Picture Perfect and Property Management and Colonial Square move pursuant to CPLR § 3212 for an order granting them summary judgment on the issue of liability. Defendant Colonial Square claims that plaintiff has failed to establish that it created or exacerbated a hazardous or dangerous condition, or had actual and, or constructive notice of a specific recurring icy condition, no issue of fact as to liability remains to be tried. Defendant Picture Perfect primarily claims that it owed no duty to plaintiff and summary judgment is warranted.

Under CPLR § 3212, summary judgment is appropriate where there are no genuine issues of material fact to be resolved at trial. Summary judgment expedites the litigation of civil cases by eliminating from the trial calendar claims, which can be properly resolved as a matter of law (*Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 [1974]).

### **I. PICTURE PERFECT'S MOTION FOR SUMMARY JUDGMENT**

There exists "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has

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<sup>1</sup> Plaintiff Grace Minafo has a derivative suit only.

entirely displaced the other party's duty to maintain the premises safely" (*Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136, 140, 746 N.Y.S.2d 120, 123 [2002]; citing *H.R. Moch Comp. Inc., v. Rensselaer Water Comp.*, 247 N.Y. 160 [1928]; *Eaves Brooks Costume Comp. Inc. v. Y.B.H. Realty Corp. et al.*, 76 N.Y.2d 220, 557 N.Y.S.2d 286 [1990]; *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, N.Y.S.2d 817 [1994]).

In support of their motion, defendant Picture Perfect attached the snow removal contract for the winter of 2008 through 2009, and snow removal invoices from that winter. The contract between Picture Perfect and Colonial Square states, "Calcium Chloride application to all sidewalks is \$800.00 and will be applied during all snowfall, and, or cold rain," and "[n]o prior phone call from Colonial Square Condominiums Board will be taken or is needed in the event of snow or cold rain." The contract also states Picture Perfect would only perform snow removal if there was three to six inches of snowfall or more (Picture Perfect Cross-Motion Ex. A). Defendant Picture Perfect alleges that this contract was not the type of comprehensive and exclusive property management contract that displaced the owner's duty to safely maintain the premises similar to that in *Espinal* at 141.

In opposition, plaintiffs' attached eleven photographs, taken by plaintiffs' daughter's boyfriend, which attempt to depict walkways within the Colonial Square development, and certified meteorological records for the month of January 2009, from the National Climatic Data Center for Newark, New Jersey. Plaintiff asserts that *Espinal*, 98 N.Y.2d 136 does not apply to the matter herein, because the *Espinal* Court found that a snow removal company owes no duty to the public, which the plaintiff is not a member of in this case. Plaintiff contends that as a member of the association, and one of five who signed the contract between Colonial Square and Picture Perfect, there is privity and a duty between defendant Picture Perfect and himself in his personal capacity. This court disagrees.

Although it is true that plaintiff did sign the contract between Colonial Square and Picture Perfect in his capacity as, this suit is brought in his personal capacity. The duty owed by Picture Perfect was owed to Colonial Square and not to plaintiff, and since plaintiff is able to fit within the

other *Espinal* exceptions, summary judgment is warranted as to plaintiff's claims only.<sup>2</sup>

## II. COLONIAL SQUARE'S MOTION FOR SUMMARY JUDGMENT

Colonial Square, as the collective homeowner of the common grounds, has a common-law duty to maintain its property in a reasonably safe condition so as to prevent foreseeable accidents (*White v. Gabrielli*, 272 A.D.2d 469, 470, 707 N.Y.S.2d 505, 506 [2d Dept. 2000]). Therefore, it had a duty to plaintiff on the date of the accident to maintain a reasonably safe sidewalk. This duty is non-delegable and may not be delegated to agents, employees, or even independent contractors when the duty is to maintain the premises in a safe manner (*Backiel v. Citibank, N.A.*, 299 A.D.2d 504, 505, 751 N.Y.S.2d 492, 494 [2d Dept. 2002]).

“A property owner will be held liable for a slip-and-fall accident involving snow and ice on its property only when it created the dangerous condition which caused the accident or had actual or constructive notice thereof.” (*Id.* at 285.) With regards to 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 [the owner's] employees to discover and remedy it” (*Irizarry v. 15 Mosholu Four, LLC*, 24 A.D.3d 373, 806 N.Y.S.2d 534, 535 [1<sup>st</sup> Dept. 2005]).

In support of their motion, defendant Colonial Square has attached the depositions of Joseph Minafo, Linda Gandolfo, Joel Hamel, and Ernie Bauer, and photographs marked as defendant's Exhibit 1, which depicts the common walkway outside of 24A Franklin Lane. Colonial Square asserts that plaintiff is unable to establish the existence of a dangerous condition prior to his fall on January 29, 2009. Colonial Square further asserts that Joel Hamel of Picture Perfect and Ernie Brauer, a former Colonial Square, inspected the property the morning of the accident and they did not detect any dangerous conditions.

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<sup>2</sup> If summary judgment was not warranted on Colonial Square's motion, Colonial Square would be entitled to maintain its contribution and/or indemnity claims against Picture Perfect (*Roach v. AVR Realty, Co. LLC*, 41 A.D.3d 821, 824, 839 N.Y.S.2d 173, 176 [2d Dept. 2007]).

In opposition, plaintiffs' have attached eleven photographs, taken by plaintiffs' daughter's boyfriend, which depict walkways within the Colonial Square development, and meteorological records for the month of January 2009, from the National Climatic Data Center for Newark, New Jersey. Plaintiffs' aver that Joseph Minafo noticed the area of the common walkway where he fell, was not salted properly, prior to his fall, and caused an icy condition. Furthermore, plaintiff asserts that as a Board Member for Colonial Square, he received complaints about the snow and ice removal in the community. Plaintiff further asserts that when on the morning of the incident, when Mr. Brauer of Colonial Square specifically directed Picture Perfect not to apply salt to the common walkways on January 29, 2009, it allowed the previous day's precipitation to melt and re-freeze. This is sufficient to create a question of fact worthy of the fact finders' determination and thus summary judgment is inappropriate.

### **III. CONCLUSION**

Accordingly, it is hereby

ORDERED, that the motion of summary judgment by defendants Picture Perfect Landscaping and Property Management is granted and all claims against them by plaintiff are dismissed and severed, while all cross-claims by Colonial Square Homeowner's Association will survive; and it is further

ORDERED, that the motion of summary judgment by defendant Colonial Square Homeowner's Association's is denied; and it is further

ORDERED, that the Clerk of the Court shall enter judgment and mark the file accordingly.

Dated: August 26, 2011

E N T E R,

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Hon. John A. Fusco  
Justice of the Supreme Court