

**Hagensen v Ferro, Kuba, Mangano, Sklyar, Gacavino
& Lake, P.C.**

2012 NY Slip Op 33548(U)

January 3, 2012

Sup Ct, New York County

Docket Number: 111482/2007

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 111482/2007
HAGENSEN, GEORGETTE
vs.
FERRO, KUBA, MANGANO
SEQUENCE NUMBER : 004
SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

In accordance with the accompanying memorandum decision, it is hereby

ORDERED that the motion of defendant Ferro, Kuba, Mangano, Sklyar, Gacavino & Lake, P.C., pursuant to CPLR 3212, for summary judgment to dismiss plaintiff Georgette Hagensen's complaint is granted solely to the limited extent that plaintiff's second and third causes of action for breach of contract are dismissed, and the motion is otherwise denied. And it is further

ORDERED that the parties shall appear for an in-court conference on February 26, 2013, at Part 35, Room 438, 60 Centre Street, New York, New York, at 10:30 a.m. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within 20 days of this order.

This constitutes the decision and order of the court.

Dated: 1/3/13

[Signature] J.S.C.
HON. CAROL EDMEAD

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

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----x,
GEORGETTE HAGENSEN,

Plaintiff,

Index No.: 111482/2007

-against-

DECISION AND ORDER

FERRO, KUBA, MANGANO, SKLYAR,
GACAVINO & LAKE, P.C.,

Defendant.

-----x
CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

In this malpractice action, defendant Ferro, Kuba, Mangano, Sklyar, Gacavino & Lake, P.C. (“defendant”) moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff Georgette Hagensen’s complaint. Plaintiff opposes the motion.¹

Background Facts

At all relevant times, plaintiff resided as a month-to-month tenant in a two-family house at 57 Ada Drive, Staten Island, New York (the “premises”). Plaintiff alleges that on or about September 18, 2001, she retained defendant law firm to represent her in her personal injury case against the landlord of the premises in connection with the trip and fall incident which occurred in September 2001. In September 2004, defendant, on behalf of plaintiff, commenced the action in the Supreme Court, Richmond County. However, defendant failed to timely serve the summons and complaint upon the landlord of the property prior to the expiration of the Statute of Limitations and the underlying personal injury suit was dismissed on this ground. Thereafter, plaintiff commenced this action against defendant alleging legal malpractice and breach of

¹ Third-party defendants Aetna Central Judicial Services and Tony Donadio join in defendant’s arguments in support of the motion.

contract. Defendant now moves for summary judgment.

In moving for dismissal, defendant argues that plaintiff failed to establish [the requisite element of the malpractice cause of action] that any negligence on the part of defendant was the proximate cause of her asserted damages. Even if properly commenced, plaintiff's underlying action would have been dismissed for a number of reasons. First, plaintiff could not identify the cause of her fall. During her deposition, she stated that she did not observe and did not know what caused her to fall. And in any event, the loose gravel or pebbles, over which plaintiff claims to have tripped while walking in the driveway, were an open and obvious condition, such that the landlord did not have a duty to warn; and pebbles are not an inherently dangerous condition. There was a decorative gravel bed in the center of the driveway and plaintiff daily walked up and down the driveway without falling. Furthermore, plaintiff testified at her deposition that prior to the day of the incident, she sometimes noticed loose rocks/pebbles on the surface of the concrete driveway.

Further, plaintiff's pre-existing poor physical condition was likely the proximate cause of her incident. Plaintiff testified at her deposition that prior to the incident, she underwent two major back surgeries, was walking with the help of a four legged walker, had knees buckling problem and a history of prior falls, in addition to double vision and anxiety.

Furthermore, the defendant in the underlying complaint is an out-of-possession landlord, not responsible for maintaining or repairing the driveway. He did not reside at the premises; did not retain control over the premises and was not contractually obligated to maintain the premises. Plaintiff never signed any lease agreement. Plaintiff assumed the responsibility of maintaining the driveway and sidewalk area. She testified that the landlord told her to clean/maintain the

driveway and the backyard areas, and plaintiff [once] swept loose gravel on the driveway and sidewalk (exhibit C, #14; exhibit D, pp. 52-56; 244-245).

Finally, the remaining two causes of action for breach of contract should be dismissed as they are duplicative of the malpractice claim.

Plaintiff opposes the motion, arguing that in her deposition she specifically identified the loose rocks as the cause of her fall. The landlord was responsible for cleaning and maintaining the driveway. When she moved into the premises in March 2001, the landlord told plaintiff that he would have to hire someone to upkeep the driveway and the apartments (exhibit 2, pp. 51-54). The loose rocks and debris (pieces of cement) on the driveway were not open and obvious as they were less visible when the cars were parked in the driveway.

Plaintiff's pre-existing medical condition has no bearing on the landlord's negligence and only may be relevant to the issue of comparative negligence.²

In reply, defendant argues again that plaintiff could not precisely identify the cause of her fall; the alleged condition was open and obvious; the presence of the car routinely parked in the driveway did not make any of the alleged condition less visible as plaintiff testified that there was clearing for walking behind the car and on the side (exhibit D, p. 47). Further, plaintiff's incident was likely to have been caused by her misstep or loss of balance because of her pre-existing medical condition which required her to use a walker or a cane. However, she was not using either on the day of the incident.

² Additionally, plaintiff argues that the premises violated NYC Building Code as there were three families living in the two-family house; and that defendant failed to produce its witness for deposition.

Discussion

To succeed on a claim for legal malpractice, the plaintiff must show: (1) the negligence of the attorney; (2) that the attorney's negligence was a proximate cause of the loss sustained; and (3) that the plaintiff was damaged as a result of the attorney's actions (*Tydings v Greenfield, Stein & Senior, LLP*, 43 AD3d 680, 682 [1st Dept 2007]; *Bishop v Maurer*, 33 AD3d 497, 498 [1st Dept 2006], *aff'd* 9 NY3d 910 [2007]). In order to prove proximate causation, the plaintiff must establish a "case within a case" – that "but for" the alleged negligence, the plaintiff would have prevailed in the underlying action, or would not have sustained any "ascertainable damages" (*Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

Defendant, as the movant for summary judgment, must present evidence establishing that plaintiff is unable to prove at least one of the elements of the legal malpractice claim (*Ippolito v McCormack, Damiani, Lowe & Mellon*, 265 AD2d 303 [2d Dept 1999]).

At the outset, defendant establishes through testimonial evidence that plaintiff's landlord was an out of possession landlord (*Salazar v Fives 160th LLC*, 91 AD3d 523, 937 NYS2d 38 [1st Dept 2012])[stating that "the terms of the lease and the conduct of the parties, [established] that the owner was an out-of-possession landlord"]. It is axiomatic that an out-of-possession landlord is not liable for injuries that occur on the premises *unless* it retained control of the premises or is contractually obligated to repair the unsafe condition (*see Jackson v US Tennis Ass'n, Inc.*, 294 AD2d 470, 742 NYS2d 37 [2d Dept 2002]; *Carvano v Morgan*, 270 AD2d 222, 223 [2000]). Here, plaintiff's landlord did not reside at the premises and no written lease agreement existed indicating that the landlord was contractually obligated to repair or maintain the premises.

However, plaintiff's testimony that the landlord promised to hire someone to clean up and maintain the premises, including the driveway, raises a triable issue of fact as to whether the landlord *orally agreed* to maintain the property in a safe condition (*Cherubini v Testa* 130 AD2d 380, 515 NYS2d 29 [1st Dept 1987], *citing Putnam v Stout*, 38 NY2d 607, 617–618, 381 NYS2d 848 [1976])[stating that “[c]ontrol of the premises may be established by proof of the landlord's promise, either written or otherwise, to keep certain premises in repair]). Such agreement, if made, would deprive the landlord of his out of possession status. Thus, in light of the existence of the issue of fact as to landlord's duty to maintain the premises, the court cannot conclude as a matter of law that plaintiff's underlying complaint would have been dismissed on this ground.

Furthermore, contrary to defendant's contention, even assuming the alleged dangerous condition of loose rocks were open and obvious, it “does not negate a defendant's duty to maintain his premises in a reasonably safe condition and instead bears on the issue of the plaintiff's comparative negligence (*see Cupo v Karfunkel*, 1 AD3d 48, 52, 767 NYS2d 40 [2d Dept 2003]). The cases cited by defendant for the proposition that rocks/stones were not inherently dangerous are distinguishable,³ as the rocks in such cases were on an *unpaved* driveway or roadway *under construction*, or a *gravel* road. Here, the record indicates that driveway had a concrete or cement surface, with only the central island decorated with rocks or pebbles. Thus, it cannot be said, at this juncture, that the rocks were not inherently dangerous.

Neither does the evidence of plaintiff's pre-existing medical condition warrant the

³ See *Fernandez v Edlund*, 31 AD3d 601 [2d Dept 2006]; *Orlando v Audax Constr. Corp.*, 14 AD3d 500 [2d Dept 2005]; *Delaurentis v Marx Realy & Improvement*, 300 AD2d 343 [2d Dept 2002].

dismissal of the underlying complaint as a matter of law. Plaintiff's deposition testimony and her medical records of prior medical history do not preclude, as a matter of law, the possibility that, in addition to the plaintiff's purported medical condition, there may have been other proximate causes of the injured plaintiff's fall, such as the alleged loose rocks (*see Hyde v Long Island R.R. Co.*, 277 AD2d 425, 717 NYS2d 231 [2d Dept 2000], *citing Derdiarian v Felix Contr. Corp.*, 51 NY2d 308 [1980]). It is well settled that there may be more than one proximate cause of an accident (*Scala v Scala*, 31 AD3d 423, 424-425 [2d Dept 2006]; *Hyde v Long Island R.R. Co.*, 277 AD2d at 426). Thus, at most, such evidence creates an issue of fact as to causation.

In light of the existing issues of fact, the record does not conclusively establish that, in the absence of defendant's malpractice, plaintiff would not have prevailed in her personal injury action.⁴ Therefore, defendant's motion is denied.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion of defendant Ferro, Kuba, Mangano, Sklyar, Gacavino & Lake, P.C., pursuant to CPLR 3212, for summary judgment to dismiss plaintiff Georgette Hagensen's complaint is granted solely to the limited extent that plaintiff's second and third causes of action for breach of contract are dismissed, and the motion is otherwise denied. And it is further

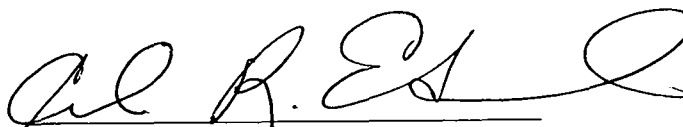
⁴ The court notes that plaintiff does not specifically oppose the dismissal of her second and third causes of action for breach of contract. And in any event, these causes of action, alleging a breach of professional standards by failing to timely serve the complaint in the underlying personal injury action, are dismissed as duplicative of the malpractice claim (*see Rivas v Raymond Schwartzberg & Assoc., PLLC*, 52 AD3d 401, 861 NYS2d 313 [1st Dept 2008][the part of the breach of contract cause of action dismissed as duplicative of the malpractice claim]).

ORDERED that the parties shall appear for an in-court conference on February 26, 2013, at Part 35, Room 438, 60 Centre Street, New York, New York, at 10:30 a.m. And it is further

ORDERED that counsel for defendant shall serve a copy of this order with notice of entry within 20 days of this order.

This constitutes the decision and order of the court.

Dated: January 3, 2012



Hon. Carol. R. Edmead, J.S.C.

CAROL EDMEAD
J.S.C.