Short Form Order

Index No. 03-1447

SUPREME COURT-STATE OF NEW YORK

TRIAL SPECIAL TERM, PART 5 SUFFOLK COUNTY

P R E S E N T:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE: 7-19-07
MOT. Seq. #001 – SJ – MG
#002X – SJ – MG
#003X – SJ – MG
#004X – SJ – MG

X

EVELYN M. SCALISE and JOSEPH A. SCALISE,

Plaintiffs,

-against-

OAK ISLAND BEACH ASSOCIATION, INC., GUS COLETTI, JOHN BRUNKARD, KEITH CONLON, THOMAS CANNING and FRANK SOLINA,

Defendants.

X

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Upon the following papers numbered 1 to __ read on this motion and cross-motions for summary judgment: Notice of Motion/~~Order to Show Cause~~ and supporting papers 1 ; Notice of Cross Motion and supporting papers 2 - 4 ; Answering Affidavits and supporting papers 5 ; Replying Affidavits and supporting papers 6 - 8 ; Other 9 -Affirmation in further Support; (and after hearing counsel in support and opposed to the motion); it is,

ORDERED that this motion by defendant Keith Conlon s/h/a Keith Colon for summary judgment dismissing the complaint along with any and all cross claims, and these three cross motions by defendant John Brunkard, defendant Thomas Cannings and defendant Gustave Coletti s/h/a Gus Coletti for the same relief are considered by the Court and are determined as follows:

This is an action commenced by plaintiffs seeking recovery for personal injuries sustained by plaintiff Evelyn M. Scalise on January 28, 2002 when she tripped and fell on a portion of property owned by defendant Oak Island Beach Association, Inc. upon which a boardwalk was being

constructed. Each of the moving defendants are individuals who, according to plaintiffs, were homeowner/members of the Oak Island Beach Association and who allegedly had performed work on the boardwalk. Plaintiffs allege that on the day in question, construction had begun on a boardwalk over an area upon which there had only been grass and sand and that no notice had been given to anyone that such construction was to take place. Moreover, plaintiffs allege that no warnings were place around or near the new construction that would have alerted them to the existence of the dangerous condition. While running along the path around 8:00 p.m. on the evening in question, plaintiff Evelyn M. Scalise came in contact with the new boardwalk and fell to the ground.

In support of his motion, defendant Keith Conlon acknowledges that he was a resident of Oak Island Beach and a member of the Association's road committee. However, he contends that he did not perform any work on the boardwalk in question until the day after plaintiff's accident. To support his claim, defendant submits to the Court his own deposition testimony, and the deposition testimony of co-defendants Gus Coletti and John Brunkard in which they each acknowledge that defendant's work in constructing this boardwalk did not begin until the day after the accident.

In opposition to defendant's motion, plaintiffs only point to the deposition testimony of Gus Coletti wherein he states that he thought he remembered that defendant Keith Conlon had performed work on the boardwalk on the day of the accident.

The law is well-settled that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see*, Andre v. Pomeroy, 35 NY2d 361, 362 NYS2d 131; Benincasa v. Garrubo, 141 AD2d 636, 529 NYS2d 797). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (Pantote Big Alpha Foods, Inc. v. Schefman, 121 AD2d 295, 503 NYS2d 58). The courts have repeatedly held that in order to obtain summary judgment, movant must establish its claims or defenses sufficiently to warrant a court's directing judgment in its favor as a matter of law (Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966, 525 NYS2d 793 *citing* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595; Friends of Animals v. Associated Fur Mfrs., 46 NY2d 1065, 416 NYS2d 790). The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact upon which the opposing claim rests (Gilbert Frank Corp. v. Federal Insurance Co., *supra*).

Here, defendant Conlon has come forward with evidence in the form of his own deposition testimony and that of several of his co-defendants which establish, prima facie, that he had no involvement in the construction of the boardwalk prior to the incident in question. By doing so, he met his burden of establishing his prima facie entitlement to the relief he is seeking. The burden thereupon shifted to plaintiffs to come forward with proof, in admissible form, sufficient to raise a triable issue of fact. Plaintiffs have not met that burden of proof.

The sole evidence offered by plaintiffs is certain equivocal deposition testimony by defendant Gus Coletti, which is clearly insufficient to meet plaintiffs' burden. It must be noted that in opposing a motion for summary judgment, mere conclusions, expressions of hope or

unsubstantiated allegations are insufficient to raise a triable issue of fact (*see*, Amatulli v.Delhi Construction Corporation, 77 NY2d 525, 569 NYS2d 337; Rebecchi v. Whitmore, 172 AD2d 600, 568 NYS2d 423; New York National Bank v. Harris, 182 AD2d 680, 582 NYS2d 278).

Accordingly, the motion by defendant Conlon for an order granting him summary judgment dismissing the complaint and any and all cross claims against him is granted.

For the same reasons, the cross motions by defendants John Brunkard (motion sequence no. 2) and Thomas Cannings (motion sequence no. 3) must also be granted. Both defendants have come forward with prima facie proof that they had no involvement in the construction of the boardwalk prior to plaintiff's injury. In opposition to their cross motions, plaintiffs do not appear to contest any issue raised by the defendants in support of their motions and, in fact, do not oppose the granting of the requested relief.

Accordingly, the cross motions by defendants John Brunkard and Thomas Cannings for summary judgment dismissing the complaint and any and all cross claims against them are granted.

Defendant Gus Coletti also moves for summary judgment. In support of his motion, he argues that while he worked on installing the boardwalk prior to plaintiffs' accident, he did so only as part of an ongoing project for the benefit of the Association and derived no personal benefit from it. According to defendant, although he was the vice president of the Association at the time, he is immune from any liability on that basis since the Association was a not-for-profit corporation. Under the Not-For-Profit Corporation Law, an officer can only be liable for acts performed which constitute gross negligence or which were intended to do harm to a person. Finally, defendant argues that the boardwalk had been laid out in the open and was not covered or hidden in any way. Defendant notes that there is no responsibility to warn someone of a condition that is open and obvious and that, nonetheless, after completing work on the boardwalk on the day of plaintiff's injury, a barrier was put up at either end of the boardwalk to warn people of its existence.

In opposition to defendant Coletti's motion, plaintiffs argue that a person who creates a dangerous condition which causes a foreseeable risk to others can be held liable which such a condition causes injury to others. Plaintiffs contend that defendant's failure to warn others that such a condition was being created or to post any warnings of its existence is negligence. According to plaintiffs, the absence of any attempt by defendant to warn others that this previously open pathway was being filled with a newly constructed boardwalk created a dangerous condition which caused plaintiff's injury.

While it does appear that there is a question of fact regarding the creation of this condition and whether appropriate steps were taken to warn of its existence, it does not appear that defendant Coletti can be personally liable for any such negligence, should it be found. Defendant was performing work on the boardwalk as part of the road committee of the defendant Association. This committee had commenced work on this boardwalk project the prior Fall in furtherance of an announced project of the committee. The actions taken by defendant and others were in furtherance of the work to be performed by the Association to improve the common areas. There is no evidence to suggest that defendant was performing this work on his own or for his own benefit.

Rather, it was being done as part of an ongoing project to benefit all of the members of the Association.[1]

Accordingly, the cross motion by defendant Gustave Coletti s/h/a Gus Coletti for summary judgment dismissing the complaint and any and all cross claims against him is granted.

The action against the remaining defendants is severed and shall continue.

Dated: SEPTEMBER 18, 2007

J.S.C.

___ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION

____ DO NOT SCAN

[1] It should also be noted that defendant Coletti may not be found personally liable for his actions as a vice president of the Association since there is no evidence to suggest that his actions were grossly negligent or that they intended to do anyone harm.