

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: 6-12-08
MOT. Seq. #005 – SJ – MG

 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.

PLAINTIFFS' ATTY:
SIBEN & SIBEN
90 East Main Street
Bay Shore, New York 11706

DEFENDANTS' ATTYS:
NASHAK & ANDREOTTA
1979 Marcus Avenue, Suite 220
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P.O. Box 9028
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Upon the following papers numbered 1 to 2 read on this motion for summary judgment: Notice of Motion/~~Order to Show Cause~~ and supporting papers 1; Notice of Cross Motion and supporting papers___; Answering Affidavits and supporting papers 2; Replying Affidavits and supporting papers___; Other ___; (and after hearing counsel in support and opposed to the motion); it is,

ORDERED that this motion by defendant Frank Solina for summary judgment dismissing the complaint along with any and all cross claims, is considered by the Court and is 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. According to plaintiffs, defendant was a homeowner/member of the Oak Island Beach Association who allegedly had performed work on the boardwalk in question on the day that plaintiff Evelyn Scalise sustained her injuries. In support of their claim against defendant, 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. Plaintiffs further allege that this portion of the boardwalk was adjacent to defendant Solina's property and that he performed work on the boardwalk not as a member of the Association but for his own personal benefit. 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 Solina acknowledges that he was a resident of Oak Island Beach and a member of the Association's road committee. However, he contends that he performed work on the boardwalk only for the benefit of the Association and as a volunteer member of the Association's Road Committee. To support his claim, defendant submits to the Court his own deposition testimony, and the deposition testimony of former co-defendant Gus Coletti in which they each set forth that they were working on the boardwalk as members of the Road Committee, on a voluntary basis, as part of a plan to replace and repair the existing boardwalk on the Association property. He argues that he performed this work only as part of an ongoing project for the benefit of the Association and derived no personal benefit from it.

In opposition to defendant's motion, plaintiffs argue that defendant Solina was not acting on behalf of the Association when he was installing this section of the boardwalk but was, rather, working for his own benefit by installing the boardwalk in an area adjacent to his own home. However, as plaintiffs candidly note in their own affidavit in opposition to defendant's motion "the area in question was a common path used by residents of the Oak Island Beach Association."

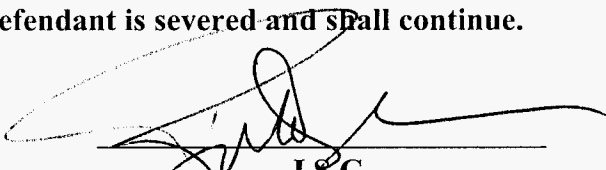
The law is well-settled that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see, Andre v. Pomeroy*, 35 N.Y. 2d 361, 362 N.Y.S. 2d 131; *Benincasa v. Garrubo*, 141 A.D. 2d 636, 529 N.Y.S. 2d 797). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v. Schefman*, 121 A.D. 2d 295, 503 N.Y.S. 2d 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 N.Y. 2d 966, 525 N.Y.S. 2d 793 *citing Zuckerman v. City of New York*, 49 N.Y. 2d 557, 427 N.Y.S. 2d 595; *Friends of Animals v. Associated Fur Mfrs.*, 46 N.Y. 2d 1065, 416 N.Y.S. 2d 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*).

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 Solina 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 motion by defendant Frank Solina for summary judgment dismissing the complaint and any and all cross claims against him is granted.

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

Dated: FEBRUARY 25, 2009


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.