ROSE LAFLAMME *v.* JOSEPH DALLESSIO, EXECUTOR (ESTATE OF DOMINIC DALLESSIO)

(AC 20554)

Foti, Mihalakos and Hennessy, Js.

Argued February 26—officially released August 14, 2001

Counsel

Michael W. Levy, for the appellant (plaintiff).

John P. Calabrese, for the appellee (defendant).

Opinion

FOTI, J. The plaintiff, Rose LaFlamme, appeals from the judgment rendered by the trial court following the granting of the motion for summary judgment filed by the defendant, Joseph Dallessio. On appeal, the plaintiff claims that the court (1) improperly concluded that the defendant did not owe her a duty of care based on his control of the subject premises and (2) abused its discretion by declining to rule on her request to amend the pleadings. We affirm the judgment of the trial court.

The plaintiff brought a one count complaint for negligence against the defendant in his representative capac-

ity as executor of the estate of Dominic Dallessio (estate). The plaintiff alleged that she sustained injuries as a result of a fall that occurred on premises owned, possessed and controlled by the estate. On November 1, 1999, the defendant moved for summary judgment on the ground that he was not in possession and control of the premises at the time of the plaintiff's accident and, therefore, did not owe a duty of care to the plaintiff. On November 8, 1999, the plaintiff filed a request to amend her complaint by adding a second count against the defendant in his individual capacity. On January 3, 2000, the court heard oral argument on both motions. On February 10, 2000, the court issued a memorandum of decision granting the defendant's motion for summary judgment. The court did not act on the plaintiff's request to amend.

"Our review of a trial court's rendering of summary judgment takes place within certain defined parameters. This court has held that [o]n appeal . . . the burden is on the opposing party to demonstrate that the trial court's decision to grant the movant's summary judgment motion was clearly erroneous. *2830 Whitney Avenue Corp.* v. *Heritage Canal Development Associates, Inc.*, 33 Conn. App. 563, 567, 636 A.2d 1377 (1994). . . . *Crystal Lake Clean Water Preservation Assn.* v. *Ellington*, 53 Conn. App. 142, 147, 728 A.2d 1145, cert. denied, 250 Conn. 920, 738 A.2d 654 (1999). It is appropriate to render summary judgment only where there is no genuine issue of material fact. Summary judgment should be rendered forthwith if the pleadings, affidavits and any other proof submitted show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. . . . In passing on the defendant's motion for summary judgment the trial court was limited to deciding whether an issue of fact existed, but it could not try that issue if it did exist. . . . *Dougherty* v. *Graham*, 161 Conn. 248, 250, 287 A.2d 382 (1971).

"In deciding a motion for summary judgment, the trial court must view the evidence in the light most favorable to the nonmoving party. *Citicorp Mortgage, Inc.* v. *Porto*, 41 Conn. App. 598, 601, 677 A.2d 10 (1996). Simply, the granting of summary judgment is appropriate only if a fair and reasonable person could conclude only one way. *Miller* v. *United Technologies Corp.*, 233 Conn. 732, 751, 660 A.2d 810 (1995)." (Internal quotation marks omitted.) *Raboin* v. *North American Industries, Inc.*, 57 Conn. App. 535, 537–38, 749 A.2d 89, cert. denied, 254 Conn. 910, 759 A.2d 505 (2000).

I

The plaintiff first claims that the court improperly rendered summary judgment because it wrongfully concluded as a matter of law on the basis of the undisputed facts that the defendant did not owe a duty of care to the plaintiff. We disagree.

"Negligence occurs where one under a duty to exercise a certain degree of care to avoid injury to others fails to do so." *Dean* v. *Hershowitz*, 119 Conn. 398, 407–408, 177 A. 262 (1935). "The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994). The issue of whether a duty of care is owed is normally a question of law; *Pion* v. *Southern New England Telephone Co.*, 44 Conn. App. 657, 660, 691 A.2d 1107 (1997); but under some circumstances "the question of duty involves elements of both fact and law." *Raboin* v. *North American Industries, Inc.*, supra, 57 Conn. App. 538.

The defendant submitted a probate decree to the court as evidence that Mary Dallessio was in possession and control of the premises on which the plaintiff sustained her injury. Although that decree gave Mary Dallessio the use of the home, it directed her to "grant the executor, upon reasonable notice by him, reasonable access to the house for the purpose of cleaning the house and listing the house with a broker for sale." On the basis of that evidence concerning the executor's access to the subject property upon notice for limited purposes, the court concluded that the defendant did not owe the plaintiff a duty of care.

The plaintiff claims that a second probate decree demonstrated the existence of a genuine issue of material fact concerning the "possession and control" of the premises. The court did not discuss this second decree in its memorandum of decision, and the plaintiff did not file either a motion for articulation or a motion for rectification with respect to that issue.[1] The plaintiff also relies on her affidavit in which she attested that Mary Dallessio was merely a tenant and that the defendant was responsible for the care and maintenance of the house. The court treated this as a bare assertion and concluded that it was insufficient to demonstrate a disputed issue of fact. Although the moving party must show the nonexistence of any material fact, an opposing party must substantiate its adverse claims by showing that there is a genuine issue of material fact along with the evidence disclosing the existence of such an issue. *Home Ins. Co.* v. *Aetna Life & Casualty Co.*, 235 Conn. 185, 202, 663 A.2d 1001 (1995). The plaintiff has failed to do so.

The plaintiff also argues that the decedent did not specifically devise the subject premises in his will and that General Statutes § 45a-321 (a)[2] created a duty in the defendant as a fiduciary. We need not reach the issue of whether the decedent specifically devised the subject premises in his will because we conclude that the type of duty that § 45a-321 (a) creates would still not have precluded summary judgment in this case.

Our Supreme Court has stated that ''the power of possession, care and control granted to an executor under General Statutes [§ 45a-321] over real estate during the settlement of an estate is given only to protect the rights of creditors. . . . The executor's power is in derogation of the rights of the heirs, and since it is so limited in purpose, it is properly exercised only when the exigencies of the estate so require. Where . . . no allegation is made that the property is needed to meet claims against the estate, there can be no occasion to permit the exercise of the executor's power.'' (Citations omitted; internal quotation marks omitted.) *Claydon* v. *Finizie*, 7 Conn. App. 522, 526, 508 A.2d 845 (1986), quoting *Brill* v. *Ulrey*, 159 Conn. 371, 376, 269 A.2d 262 (1970). The plaintiff, therefore, cannot rely upon § 45a-321 (a) to create a duty on the part of the executor to keep the driveway on the subject premises in repair, as she alleged in her complaint. The executor had neither ''possession, care and control of the decedent's real property'' nor did he owe the plaintiff a duty of care arising out of that section.

We conclude that the court properly determined that the plaintiff failed to submit evidence disclosing the existence of a genuine issue of material fact in regard to her claim that the defendant had possession and control of the premises and, therefore, owed her a duty. The court properly granted the motion for summary judgment.

II

The plaintiff next claims that the court abused its discretion in failing to rule on her pending request to amend her complaint. We disagree.

The record reflects that the plaintiff waited approximately two and one-half years after the incident and after the defendant filed his motion for summary judgment to file her request to amend. The court, in rendering summary judgment, noted that it was aware of the request but would not address it since it ''was filed subsequent to the motion for summary judgment.''

''While our courts have been liberal in permitting amendments; *Johnson* v. *Toscano*, 144 Conn. 582, 587, 136 A.2d 341 (1957); this liberality has limitations. Amendments should be made seasonably. Factors to be considered in passing on a motion to amend are the length of the delay, fairness to the opposing parties and the negligence, if any, of the party offering the amendment. *Cummings* v. *General Motors Corporation*, 146 Conn. 443, 449–50, 151 A.2d 884 (1959). The motion to amend is addressed to the trial court's discretion which may be exercised to restrain the amendment of pleadings so far as necessary to prevent unreasonable delay of the trial. . . . *Beckman* v. *Jalich Homes, Inc.*, 190 Conn. 299, 302–303, 460 A.2d 488 (1983). Whether to allow an amendment is a matter left to the sound

discretion of the trial court. This court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [plaintiff's] burden . . . to demonstrate that the trial court clearly abused its discretion." (Citations omitted; internal quotation marks omitted.) *AirKaman, Inc.* v. *Groppo*, 221 Conn. 751, 766–67, 607 A.2d 410 (1992).

It was well within the court's discretion to grant or deny the plaintiff's request. The court exercised its discretion by first hearing and ruling on the defendant's motion for summary judgment. Having granted the motion and rendered judgment, the court no longer was compelled to act on the plaintiff's request. We are not persuaded that the court abused its discretion by acting on the earlier filed motion.

The judgment is affirmed.

In this opinion HENNESSY, J., concurred.

[1] The second decree, dated April 1, 1997, granted the defendant executor access to the house "to clean and otherwise ready the house for sale." It does not appear that the court considered that decree as having divested Mary Dallessio's exclusive use of the property in any way.

[2] General Statutes § 45a-321 (a) provides: "The fiduciary of a decedent's estate shall, during settlement, have the possession, care and control of the decedent's real property, and all the products and income of such real property during such time shall vest in the fiduciary as personal property, unless such real property has been specifically devised or directions have been given by the decedent's will, which are inconsistent with this section; but the court may order surrender of the possession and control of such real property to the heirs or devisees, or may, during settlement, order distribution of such real property."