SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD F. STOKES
JUDGE

SUSSEX COUNTY COURTHOUSE
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April 26, 2013

Stephen P. Norman, Esquire
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RE: ***Ty Turner v. Association of Owners of Bethany Seaview Condominium***
C.A. No. S11C-12-010 RFS

DATE SUBMITTED: February 25, 2013

Dear Counsel:

This is a personal injury action which plaintiff Ty Turner ("plaintiff") has brought against defendant Association of Owners of Bethany Seaview Condominium ("defendant" or "Association") seeking recovery for damages he allegedly suffered on defendant's property. Plaintiff has filed a motion for partial summary judgment, arguing there are no factual issues as to portions of his case. This is my decision denying the pending motion.

Bethany Seaview Condominium consists of six units and the Association is composed of the owners of the six individual units. Carol Byrne owns Unit 2 at Bethany Seaview

Condominium. The hedges in front of the units are on defendant's common property. Sometimes, individual owners trim the hedges; other times, independent contractors are hired to trim the hedges. In this case, Carol Byrne hired plaintiff to trim the hedges in front of her unit. Even though she hired him, everyone agrees the work was for the benefit of the Association.

Plaintiff undertook the job on June 22, 2011. He set a ladder on a board which was a part of a boardwalk located in the defendant's common area. Plaintiff alleges he fell off the ladder and injured himself. He describes what happened in his deposition testimony as follows:

> Well, I was up on the ladder trimming the top of the hedge and all of a sudden the ladder went wobbly and I turned because the ladder was shaking or wobbling or leaning, whatever, I knew I wasn't going to be able to stand on the ladder so I kind of, like, turned around so I could jump and most of my body landed in the hedge I was trimming and that was pretty much it. And then I discovered that the reason for it was because it was a deck board that wasn't properly fastened and my ladder was on the edge of the board which caused it to see-saw which caused me to fall, to lose my balance and I tried to protect myself.[1]

Plaintiff alleges injury to his foot from this accident. Paul C. Kupcha, M.D., defendant's expert, has submitted a report concluding the injuries were related to the fall from the ladder. However, this conclusion is based upon the assumption that the information plaintiff provided is true and correct. In other words, the causality conclusion is based upon the factual finding that the injuries occurred when plaintiff fell off the ladder.

Plaintiff submitted an engineering report which concludes that if the ladder had been placed on a loose board, then the ladder could have become unstable, thereby causing plaintiff to fall. This report also explains that after the accident, a board was located in front of Unit 2 that had screws in it which differed from those of the other boards. Significant to the report's

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[1]Deposition Testimony Ty Turner dated August 24, 2012 at 41.

conclusion of causality is that plaintiff's ladder was placed on a loose board.

Defendant's designated representative for the taking of deposition testimony was Tom Corrigan.[2] He testified to the following.

> Q. Are there inspections of the boardwalk completed by the Association?
>
> A. No.
>
> Q. Are there any other inspections that are made by anyone else of the boardwalk that you know of?
>
> A. No.
>
> Q. Is the Association responsible for the maintenance and repair of the boardwalk?
>
> A. Yes.
>
> Q. How does the Association make sure that the boardwalk is left in a safe condition?
>
> A. That's really by the physical activity on the boardwalk, the people walking to the beach, walking out of their units, walking into their units. If there were an issue, it would be addressed.
>
> ***
>
> Q. Was the Association aware of the defect alleged in Mr. Turner's complaint?
>
> A. The Association wasn't aware of any defects.

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[2]Super. Ct. Civ. Rule 30(b)(6). This rule provides in pertinent part:

> A party may in the party's notice name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. The organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. The persons so designated shall testify as to matters known or reasonably available to the organization.

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A. To the best of my knowledge, the boardwalk is structurally sound. Every board around unit two is structurally sound and was and has been.

Q. So, the answer here is based upon the fact that, upon your inspection after the injury, the boardwalk appeared sound and the planks were all screwed in?

A. Not only that, but also I received no indication from any of the other owners, directly or through the renters, that there was a structural defect in the boardwalk. There had been no report of that to me so...

Q. But there were no inspections before this incident?

A. No.[3]

Each unit owner who was deposed generally testified that he or she was unaware of any issues concerning the subject boardwalk. They explained that they were up and down the boardwalk on a regular basis, walking on it and sweeping it. Also, they looked at the boardwalk regularly, and none of them ever saw a loose board.

Plaintiff argues he is entitled to summary judgment on the grounds defendant admits it breached its duty to inspect the boardwalk where plaintiff was injured and defendant's own medical expert has concluded a fall from the ladder caused plaintiff's injuries.

The standard for summary judgment is well-established in Delaware. When the moving party supports its summary judgment motion with evidence that no genuine issue of material fact exists, the burden shifts to the non-moving party to establish the existence of issues of material fact in dispute.[4] The Court must view the facts in a light most favorable to the non-moving

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[3]Deposition Testimony of Tom Corrigan dated October 12, 2012 at14-15; 17; and 26.

[4]*Moore v. Sizemore*, 405 A.2d 679, 680-81 (Del. 1979).

party,[5] but uncontroverted evidence in support of summary judgment must be considered as true.[6] If, after viewing the evidence in the light most favorable to the non-moving party, the Court finds no genuine issues of material fact exist, then summary judgment is appropriate.[7] If, however, material issues of fact exist or if the Court determines that it does not have sufficient facts to enable it to apply the law to the facts before it, then summary judgment is inappropriate.[8]

Plaintiff argues that the Supreme Court's decision in the case of *Scott v. Harris ("Scott")*[9] has "refined" this summary judgment standard with the following ruling:

> At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a "genuine" dispute as to those facts .... When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.

In *Scott,* the lower court ignored events portrayed on a videotape and instead, accepted the nonmoving party's completely discredited version of facts. The Supreme Court ruled that the lower court erred by accepting that unbelievable version to defeat a summary judgment motion. Its ruling is akin to the physical facts rule.[10] Basically, the Supreme Court's ruling in *Scott* is that

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[5]*Matas v. Green*, 171 A.2d 916 (Del. Super. 1961).

[6]*Battista v. Chrysler Corp.*, 454 A.2d 286, 290 (Del. Super. 1982).

[7]*New Castle County Council v. State*, 698 A.2d 401, 404 (Del. Super. 1996), *aff'd*, 688 A.2d 888 (Del. 1997).

[8]*Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962).

[9]550 U.S. 372, 380 (2007).

[10]"The statement of this rule ... is that the testimony of witnesses which is positively contradicted by the established physical facts is of no probative value and a jury will not be permitted to rest a verdict thereon." *General Motors Corporation v. Dillon*, 367 A.2d 1020, 1024

a court should not allow absurd or fanciful speculations to defeat a summary judgment motion.

Without determining if *Scott* applies to Delaware's firmly established summary judgment standard,[11] the Court concludes it would be irrelevant to this case; no discredited version of defendant's facts exists which would call *Scott* into play.

I now examine the law governing defendant's duties to plaintiff in this case. As explained in *George v. Sanders Management Corp.*,[12]

> A property owner having business invitees on his premises is obligated to exercise reasonable care to discover a condition which involves an unreasonable risk of harm. This includes an obligation to inspect his premises to discover any such condition and make it reasonably safe. [Footnotes and citations omitted.]

As the Superior Court explained in *Slicer v. Hill*,[13] "The test allows the premises owner an opportunity to correct discovered hazardous conditions."

As is clear from the law set forth above, and this Court's jury instructions,[14] the duty to

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(Del. 1976).

[11]Delaware does not always follow the federal nuances. *See Central Mortg. Co. v. Morgan Stanley Mortg. Capital Holdings LLC*, 27 A.3d 531, 537 (Del. 2011) (Delaware Supreme Court reaffirmed that the governing pleading standard in Delaware to survive a motion to dismiss is reasonable conceivability, not the plausibility standard the United States Supreme Court adopted in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)).

[12]2002 WL 31357918, *3 (Del. Super. Oct. 21, 2002).

[13]2012 WL 1435023, *2 (Del. Super. April 20, 2012).

[14]*Superior Court's Civil Pattern Jury Instructions,* 15.1 and 15.2. 15.1 provides in pertinent part:

> BUSINESS OWNER/LANDOWNER'S DUTY TO PUBLIC/BUSINESS INVITEES
>
> A [business owner/landowner] owes a duty to the public to see that the parts of the premises ordinarily used by customers are kept in a reasonably safe condition.

inspect is tied to the dangerous condition. Thus, the jury must decide whether the condition is dangerous and if so, for how long the dangerous condition existed.

Generally, questions of negligence and proximate cause are reserved for the jury.[15] Only in rare cases will a judge determine those questions as a matter of law.[16] More specifically, whether a dangerous condition existed on the property is dependent upon the facts of each case and, except in a rare situation where that fact is very clear, the question is one of fact which the jury must decide.[17]

> With this duty, the [business owner/landowner] is responsible for injuries that are caused by defects or conditions that the [business owner/landowner] had actual notice of or that could have been discovered by reasonably prudent inspection.

15.2 provides:

> DUTY TO INSPECT AND DISCOVER DANGEROUS CONDITIONS FOR BENEFIT OF INVITEE
>
> [Plaintiff's name] alleges that [defendant's name] failed to reasonably inspect and discover a dangerous condition on the premises.
>
> An owner or occupier who has exclusive control over premises must inspect the premises and discover dangerous conditions that would be apparent to a person conducting a prudent inspection. An invitee is entitled to expect that the owner or occupant will take reasonable care to know the actual condition of the premises and, having discovered the condition, will either make it reasonably safe by repair or warn of the dangerous condition and the risk involved.
>
> If you find that [defendant's name] failed to reasonably inspect the premises, failed to discover a dangerous condition that should have been discovered, or failed to warn of that condition, then you may find [defendant's name] negligent.

[15] *Watson v. Shellhorn & Hill, Inc.*, 221 A.2d 506, 508 (Del. 1966); *Ebersole v. Lowengrub*, 180 A.2d at 468.

[16] *Id.*

[17] *Slicer v. Hill*, *supra*; *Callaway v. Scrivner*, 1991 WL 113437, *3 (Del. Super. June 12, 1991).

Plaintiff argues the Court should rule that defendant breached its duty to inspect the premises and that his injuries were caused by the fall from the ladder.

I address the duty to inspect first.

In this case, there exists sworn testimony of Tom Corrigan, the designated representative, and other property owners that the area was structurally sound. The property owners testified that they did not observe a situation that appeared unusual to them. Whether this testimony is credible is a jury question. Plaintiff argues that the designated representative's testimony ties the property owners to one theory and that the property owners now are presenting a different theory. However, the testimony of the designated representative is consistent with that of the other property owners. *Cf. Saudi Basic Industries Corp. v. Mobil Yanbu Petrochemical Co., Inc.*, 866 A.2d 1, 19-20 (Del. 2005), *cert. den.*, 546 U.S. 936 (2005) (where another witness's testimony contradicted the party's 30(b)(6) representative, the trial court did not abuse its discretion when it did not allow the other witness to testify). This is not a situation where the property owners maintain the designated representative did not know what he was saying. Nor is it a case where a sham affidavit or testimony are presented that are crafted to fabricate a fact question against previously admitted evidence. *See In re Asbestos Litigation*, 2006 WL 3492370, *5 (Del. Super. Nov. 28, 2006). The testimony of all the property owners, including Tom Corrigan, puts into dispute the question of whether defendant had a duty to inspect.

While no inspections were done after approximately 2008/2009 when the boardwalk was stained, the question remains what a careful inspection would have revealed and that question largely arises from the site's condition. What constitutes a reasonable inspection is "'a classic question for the fact finder.'" *Norton v. Food Lion, Inc.*, 2009 WL 1580261, *3 (Del. Super. June

4, 2009), *quoting Burris v. Penn Mart Supermarkets, Inc.*, 2006 WL 2329373 (Del. Super. July 13, 2006). The question is whether it was reasonable, under the circumstances, for a reasonably prudent landowner not to inspect as no problems were reported by the owners in a small association where it might be expected that issues be reported. Because the duty to inspect is inextricably intertwined with the dangerous condition, a judge may not decide the matter. Thus, whether a careful inspection was necessary is a fact question and the fact that no inspections had been done is not decisive on whether the dangerous condition existed for a length of time.

The second issue concerns whether the Court should rule as a matter of law that plaintiff's injuries were caused by the fall from the ladder. The defendant's expert's conclusion was based upon the premise that the accident happened as plaintiff maintains. That premise is based upon a question of credibility. The fact finder, i.e., the jury, determines credibility, not the Court. *Poon v. State*, 880 A.2d 236, 238 (Del. 2005). Thus, plaintiff has not established entitlement to summary judgment on this issue, either.

In light of the foregoing, the motion for summary judgment is denied.

IT IS SO ORDERED.

Very truly yours,

/s/ Richard F. Stokes

Richard F. Stokes

cc: Prothonotary's Office