SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

MICHAEL SCHMIDT,

Plaintiff,

- against -

ZBGNIEW WIKIERT, JALCO PLUMBING & HEATING CORP., ALTON TRANSMISSION PARTS, INC., and LOIS M. ROSENBLATT, as Public Administrator for the Estate of LEON KRZEWINA,

Defendants.

Index No.: 10625/2008

Motion Date: 01/25/13

Motion No.: 76

Motion Seq.: 6

- x

The following papers numbered 1 to 15 read on this motion by defendant, the Public Administrator for the Estate of LEON KRZEWINA, for an order pursuant to CPLR 3212 granting summary judgment dismissing all claims against the Estate:

	Papers Numbered
Notices of Motion - Affidavits - Exhibits.....	1 - 5
Affirmation in Opposition - Exhibits.....	6 - 12
Reply Affidavits.....	13 - 15

Upon the foregoing papers it is ordered that the motion is determined as follows:

This is an action to recover damages for personal injuries suffered by the plaintiff in a fire at the residence owned by Leon Krzewina on January 25, 2008. At that time, the plaintiff was employed as a Lieutenant with the New York City Fire Department and was deployed to fight a fire at the Krzewina premises located at 51-13 Gorsline Street, Elmhurst, New York. It is alleged that the plaintiff became trapped on the first floor while fighting the fire and attempted to crank open a casement window in order to get out. When he could not manipulate the

window crank with his gloves on, he removed his gloves and suffered severe burns to both hands requiring hospitalization and numerous skin grafts.

Plaintiff commenced a negligence action by filing a summons and complaint on April 25, 2008, naming Jalco Plumbing and Heating Corp. who was alleged to have negligently caused or contributed to causing the fire by carelessly removing a basement oil tank leaving oil on the basement floor. It is alleged that the oil acted as an accelerant. The complaint also names Leon Krzewina, the owner of the premises who retained Jalco to remove the oil tank. It is further alleged that defendant Zbgniew Wikiert, the owner's stepson, who resided at the premises also contributed to causing the fire as he was burning rubbish in a nearby fireplace while the Jalco employees were removing the oil tank. The complaint also asserts a cause of action pursuant to General Municipal Law § 205(a) and alleges that all of the defendants violated provisions of the New York City Administrative Code which provide standards for the removal of heating oil storage tanks.

By order dated December 18, 2008, this Court appointed Dominic A. Villoni, Esq. as guardian ad litem for defendant Leon Krzewina as said defendant was 86 years of age, suffered from dementia and was residing in a nursing home. On March 8, 2009, Mr. Krzewina died. The matter was automatically stayed pending the appointment of a personal representative for the Estate.

In October 2009, in order to lift the stay, plaintiff sought an order discontinuing the action against Mr. Krzewina without prejudice because there was no living distributee of Mr. Krzewina residing in the United States and it was impractical to proceed against the decedent through a personal representative. Defendant Wikiert opposed the motion alleging that Krzewina was an indispensable party. By order dated November 18, 2009, the court granted the motion to discontinue the action as to Leon Krzewina noting that "it is manifestly obvious that the Estate of Leon Krzewina is a dispensable party."

By so ordered stipulation dated April 8, 2010, Alton Transmission Parts, Inc. was added as a party defendant and Leon Krzewina was removed from the caption. On June 11, 2010 the plaintiff filed a note of issue and certificate of readiness. Thereafter, the Public Administrator was appointed as Administratrix of the Estate of Leon Krzewina.

On January 21, 2011, plaintiff commenced a new action under Index No. 1605/2011 against Lois Rosenblatt, as Public Administrator for the Estate of Leon Krzewina. The complaint alleged that Leon Krzewina negligently burned refuse and debris in an open fireplace and in close proximity to flammable materials including a mattress and violated the Administrative Code by allowing efforts to remove an oil tank without taking steps to prevent oil spilling and without first properly siphoning off and sealing the tank to prevent oil spillage. As the two actions were in different procedural stages the note of issue was vacated in the Trial Scheduling Part on June 21, 2011. By order dated January 18, 2012, Justice Shulman granted an order consolidating the second action with the original action under Index No. 10625/2008.

The Public Administrator now moves for summary judgment dismissing the action against the Estate of Leon Krzewina. In support of the motion movant submits an affirmation from John E. Quinn, Esq., counsel to the Public Administrator, in which he argues that summary judgment should be granted to the Public Administrator because plaintiff's counsel, Richard A. Gilbert, Esq., stated in an affidavit dated November 10, 2009 in support of its prior motion to discontinue the action against Mr. Krzewina, that said defendant, "was not engaged in any activity that caused and/or contributed to the happening of the fire which caused plaintiff's injuries." Gilbert also stated in that affidavit that Jalco Plumbing performed services in a negligent manner and Wikiert was burning refuse in the basement fireplace at the same time the leaking oil tank was being removed.

The Public Administrator asserts that Mr. Krzewina was an 86 year old man suffering from dementia and was mentally incompetent and in severely ill health at the time of the fire, was upstairs and was removed from the building during the fire by his nurse and his social worker. Counsel also asserts that decedent did not hire, supervise, pay or have any dealings with co-defendant Jalco Plumbing. Counsel moves for summary judgment asserting that it is the law of the case based upon this Court's prior decision granting a discontinuance in which it was stated that Mr. Krzewina was not an indispensable party.

Plaintiff's counsel submits copies of the transcripts of the deposition of the plaintiff and defendant Wikiert. Plaintiff, a Lieutenant in the Fire Department, testified on March 5, 2010. He stated that on the date of the fire, January 25, 2008 at approximately 12:00 p.m. he responded to a fire at the defendant's residence. He stated that he entered the premises through the front door. He stated that he was on the first floor

of the house when he determined that because of heavy heat and smoke, the firefighters needed to evacuate the building. He tried to open a casement window to exit but could not open the window using the crank. He took off his gloves and his hands began to burn. He stated that he was able to tell that the fire was petroleum based due to the thickness of the black smoke.

Mr. Wikiert also testified on March 5, 2010. He stated that on the date of the fire, he lived at 51-13 Gorsline Street Elmhurst, New York, with his mother Alfreda Krzewina and his stepfather, Leon Krzewina. He stated that both of his parents passed away subsequent to the date of the fire. He stated that one week prior to the accident, Jalco Plumbing converted the house from oil heat to gas. Mr. Wikiert stated that he arranged the conversion with Jalco and paid a portion of the $5,500.00 cost. He stated that although his father owned the house, he had power of attorney "as far as doing anything around the house." He stated that the oil burner was removed prior to the date of the fire, but the oil tank, which still had oil in it, was removed on the date of the fire. Mr. Wikiert testified that employees of Jalco spilled oil from the tank during the removal process. He stated that he made a complaint to a Jalco employee but they just left the premises. Shortly after they left, he observed that a fire had started on the basement ceiling. He stated that when the fire began his father was upstairs with a nurse and a social worker. He also testified that while the oil tank was being removed, and oil was spilling on the floor, he was burning old bills in a basement fireplace. He testified that before he left the basement to get dirt to cover the oil, he threw a bag of bills in a fire in the fireplace and the bag opened up and somehow, "everything just went crazy out of that."

In opposition, the plaintiff's counsel, Mr. Gilbert states that the motion for summary judgment, based only upon a statement contained in counsel's affirmation in the prior motion to discontinue is insufficient to support the motion. Counsel asserts that on a motion for summary judgment it is defendant's burden to submit evidence in admissible form sufficient to make a prima facie showing of entitlement to judgment as a matter of law, and sufficient to demonstrate the absence of any material issues of fact and until that burden is met, plaintiff is under no burden to make an evidentiary showing to raise a triable issue of fact (citing Tessier v New York City Health & Hosp. Corp., 177 D2d 626 [2d Dept. 1991]).

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a case involving a hazardous condition on the property has the initial burden of making a prima facie showing that it neither created the dangerous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Schnell v Fitzgerald, 95 AD3d 1295 [2d Dept. 2012]; Betz v Daniel Conti, Inc., 69 AD3d 545 [2d Dept. 2010]; Roy v City of New York, 65 AD3d 1030 [2d Dept. [2d Dept. 2009]).

Defendant's claim that counsel's prior statement and this Court's prior ruling granting plaintiff leave to discontinue the action against Krzewina without prejudice on the ground that he was not an indispensable party is the law of the case with regard to the estate's liability for negligence is misplaced.

In order to invoke the doctrine, two requirements must be met: (1) the identical issue must have been necessarily decided in the prior action and must be decisive in the present action, and (2) the party who is precluded from relitigating the issue must have had a full and fair opportunity to contest the matter in the prior action (see D'Arata v New York Cent. Mut. Fire Ins. Co., 76 NY2d 659 [1990]; Schwartz v Public Adm'r of County of Bronx, 24 NY2d 65 [1969]. The courts decision in the prior motion to discontinue was not a ruling on the identical issue involved in this motion and was not a determination on the merits that Mr. Krzewina as a matter of law was not liable for the injuries to the plaintiff. Further plaintiff did not have a full and fair opportunity to litigate the issue of liability in the prior motion.

In addition, the defendant did not affirmatively demonstrate the merits of its defense and did not submit any evidence purporting to demonstrate that Mr. Krzewina did not have actual or constructive notice of the dangerous oil condition on the basement floor (see Alcalde v Riley, 73 AD3d 1101 [2d Dept. 2010]). Moreover, the defendants failed to submit any evidence to show that the Mr. Krzwina, the owner of the premises, was not in violation of administrative code provisions which require the proper sealing of oil tanks prior to their removal. Thus, this

Court finds that defendant failed to establish its prima facie entitlement to judgment as a matter of law by demonstrating the lack of connection between the statutory violations alleged and the plaintiff's injuries (see Schumeyer v Radu, 78 AD3d 923 [2d Dept. 2010]; Alcalde v Riley, 73 AD3d 1101 [2d Dept. 2010])

Accordingly, the motion by defendant LOIS M. ROSENBLATT, as Public Administrator for the Estate of LEON KRZEWINA for summary judgment dismissing the complaint is denied.

Dated: Long Island City, NY
March 14, 2013

ROBERT J. MCDONALD
J.S.C.