STATE OF MAINE
Cumberland, SS

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SUPERIOR COURT
Civil Action
Docket No. CV-02-519

STANLEY KALIS,
Plaintiff

v.

DECISION AND ORDER ON MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

RICHARD STRANG, MARJORIE STRANG, MacDONALD'S SUPERMARKET and MIDDLESEX MUTUAL ASSURANCE COMPANY,
Defendants [1]

I. STATUS OF CASE

The plaintiff alleges that he suffered serious bodily injuries when he slipped and fell on the property of the defendants Strang, d/b/a MacDonald's Super Market (Strang) on October 10, 1996.

The plaintiff initiated this case by filing the complaint with the clerk of courts on October 9, 2002, the last possible day before the expiration of the statute of limitations. Pursuant to M.R.Civ.P. 3, he was required to make service upon defendants and file proof thereof by January 7, 2003. He did not; however, the court granted him two extensions to make service and file proof with the court. Service was apparently made on the defendants because counsel entered an appearance and an answer was filed on behalf of the Strangs shortly before the court imposed a deadline.[2]

Defendant Middlesex Mutual Assurance Company (Middlesex) was never served with a copy of the complaint or summons, although it was aware of the claim

[1] These are the original defendants as named in plaintiff's complaint. Only Richard and Marjorie Strang remain.

[2] The court granted two separate extensions to Kalis, December 5, 2002 and January 22, 2003. The usual proof and return of service is not found in the file.

because of preliminary pre-suit inquiries made at a time when plaintiff was represented by counsel. It is not known when plaintiff and counsel parted company, but Mr. Kalis appeared *pro se* at all times since the complaint was filed in October 2002 until a hearing was scheduled on defendants' pending motions to dismiss and for summary judgment in early 2005.

On October 18, 2004 the court (Humphrey, C.J.) dismissed Middlesex for plaintiff's failure to obtain service and excluded expert testimony from being offered by plaintiff for failure to designate experts and comply with discovery.

On October 18, 2004 the court also ordered plaintiff to comply with the ADR requirements of M.R.Civ.P. 16B within 30 days or "this action *shall be dismissed with prejudice.*"[3] (emphasis added). To date, the record does not show that the plaintiff has done anything in an attempt to comply with ADR procedures.

II. BACKGROUND

Stanley Kalis alleges that on October 10, 1996, he exited MacDonald's Market in Bangor around 7:30 PM. He claims that the stairs were unlighted, the steps were loose, and the railing was missing, which caused him to fall. Kalis alleges that his head was cut open and that he was briefly unconscious. He was taken to Eastern Maine Medical Center, treated, and released. Plaintiff claims that it took many weeks for the swelling on his head to subside and that since the fall he has suffered from dizzy spells and severe headaches.

Kalis' complaint alleges that he has permanent injuries due to the fall, including depression, back pain, and the loss of his "sexual activities." He also alleges that prior to the accident, he had planned to get into the landscaping business, was physically active and dated

[3] *See* Order of Chief Justice Humphrey dated October 18, 2004.

often. Kalis alleges the Strangs, as owners of the building, knew the condition of the stairs and fixed the stairs shortly after his accident.

On December 3, 2004 defendants filed a motion to dismiss based on plaintiff's failure to comply with various court orders and deadlines, including the order to complete ADR and his failure to name any experts, which, according to defendants, precludes him from presenting evidence to link his present day maladies to the 1996 fall.

In their answer, the Strangs denied that they were the owners of the market at the time of the accident and that the building was sold in 1993 to one Joseph Perry. In fact, Perry purchased the business but Strang retained title to the real estate through a lease purchase arrangement. After the transfer Strang worked at the store for a short time to assist Perry but had fully withdrawn about three years before the date of plaintiff's fall.

Plaintiff objects to the motion to dismiss, stating his landlord in Florida threw away many of his documents pertaining to this suit, including his medical records and that he is elderly and poor and did not understand the discovery process because he was not represented by counsel. However, it is not just that his landlord discarded records, there is a copy of a letter in the file from Dr. Stephen Typaldos, D.O., dated November 19, 2003 that medical records of a visit in October 1996, the month of the fall, had been destroyed.

In a letter to the court received January 10, 2005, plaintiff suggested two lawyers to mediate a settlement and a medical expert. Plaintiff also requested a July or August 2005 trial date so that he could save money to come to Maine, organize his witnesses, avoid the cold weather, and not default on his apartment lease.

Defendants filed a motion for summary judgment on January 18, 2005. This motion is primarily based on plaintiff's failure to designate an expert to link any claims of injury as caused by the fall on the stairs.

Plaintiff obtained counsel in mid-February 2005, who, on May 5, 2005, the day of the scheduled hearing for defendants' motions to dismiss or for summary judgment, filed a Motion to Modify the Scheduling Order to reinstate discovery for plaintiff, and a Motion to Continue to allow for a new discovery period for plaintiff.

A. Defendants' Motion to Dismiss

Defendants move to dismiss the complaint because the plaintiff is in violation of the October 18, 2004 order that stated that the case would be dismissed with prejudice if plaintiff did not complete the Rule 16B requirements for ADR within 30 days.

Defendants filed this motion on December 3, 2004, with their attorney's affidavit stating that the plaintiff had not complied with the Order. Although the plaintiff did suggest several potential mediators via a January 10, 2005 letter, at that time he was in violation of the court order and the complaint should be dismissed on those grounds alone, and plaintiff's actions do not comply with Rule 16B procedures or requirements.

What is most damning to plaintiff, however, is the court's October 18, 2004 Order that because he failed to designate any medical or other experts, plaintiff is precluding from utilizing any expert witnesses at trial.

In order to maintain a claim, a plaintiff must establish a causal relationship between the injury that is the subject of the lawsuit and the alleged consequences of that injury. *Lovely v. Allstate Ins. Co.*, 658 A.2d 1091, 1094 (Me. 1995). The burden is on the plaintiff to prove that the defendant was negligent and that the negligent conduct proximately caused the plaintiff's claimed injuries. *Cox v. Dela Cruz*, 406 A.2d 620, 622 (Me. 1979). The jury cannot be expected

to determine the proximate cause on its own, especially if that determination is based on speculation.

In the limited medical information that has been provided, there is evidence of prior existing conditions that make it necessary for Kalis to have a medical expert to opine as to the …cause of the claimed injuries. This is not a situation where the injury is so obvious that a lay jury or any person without medical training can identify an injury. *id.* ("An exception to the rule requiring expert testimony is recognized 'where the negligence and harmful results are sufficiently obvious as to lie within common knowledge . . ..'" [internal citation omitted]) [4] "Allowing a jury to infer causation on complex medical facts without the aid of expert testimony on the subject and without some showing that [the] conduct was 'more likely than not' a cause of [the] injury, stretches the jury's role beyond its capacity." *Merriam v. Wagner*, 2000 ME 159, ¶ 17, 757 A.2d 778, 782.

Plaintiff claims that he has suffered from dizzy spells, depression, insomnia, headaches, and back pain since his fall. To address just one symptom, plaintiff also admitted that he has suffered other injuries to his back. Thus, the back pain he suffers could have either been caused by the 1996 fall, by previous injuries, by age or could have aggravated a pre-existing condition. Without relevant medical records and expert testimony it will be practically impossible to accurately separate plaintiff's pre-existing conditions from those caused by the 1996 incident or subsequent medical conditions that are independent from those caused by the fall.

"Although there may be multiple causes of any one injury, the existence of multiple possibilities makes the need for evidence … of responsibility for causation all the more important." *Merriam v. Wagner,* 2000 ME 159, ¶ 18, 757 A.2d 778, 782. Without evidence of

[4] The court also noted that "expert medical testimony [is] unnecessary in cases involving egregious [conduct] sufficiently apparent as to lie within the understanding of laymen." *Cox*, at 622, n. 1.

what the fall caused (medically speaking), we are left only with speculation. Though plaintiff claims to have been in perfect health before the fall, there is evidence to the contrary in the records that are available and no way to verify his claims without all of his medical records.

Plaintiff's attorney argues that defendants would not be prejudiced by allowing him to name an expert now, as they have been represented by counsel all along and always knew that an expert could be named. However, it is unfair to handicap defendants for being represented and for their attempt to hold plaintiff to relevant deadlines.

Although the court is often fairly liberal in granting extensions requested by *pro se* litigants and in measuring their compliance with procedural requirements, they are held to the same standards as represented parties and cannot be afforded courtesies that inure to the prejudice of parties represented by counsel. *See Department of Environmental Protection v. Woodman,* 1997 ME 164, ¶ 3 n.3, 697 A.2d 1295, 1297 ("We hold *pro se* litigants to the same standards as represented parties."); *Dufort v. Bangs,* 644 A.2d 6, 7 (Me. 1994)("We have repeatedly held that *pro se* parties are subject to the same standards as represented parties").

In *Gurschick v. Clark* the Law Court specifically stated that holding *pro se* parties to this standard "is particularly true in areas so fundamental as the service of process and statement of the claim," 511 A.2d 36, 36 (Me. 1986), and by logical extension to the procedural aspects of discovery and providing basic information for an opposing party to be informed and be able to mount a valid and knowledgeable defense to a claim.

The plaintiff cannot be allowed to profit from his eleventh hour ability to retain an attorney and last minute efforts to reopen discovery after the case has been pending for over two and a half years and is finally placed on a trial list for May through June, 2005.

B. Defendants' Motion for Summary Judgment

The motion for summary judgment is based on two arguments: first, that the Strangs were not in possession of the property at the time of the incident and are not responsible; and, second, that because plaintiff never named an expert, he will be unable to link his symptoms to the fall. It is well settled that in a motion for summary judgment all disputed facts are construed in the light most favorable to the non-moving party (Strang).

1. Undisputed Facts

An examination of the record shows the following facts to be undisputed.

In 1977 the Strangs purchased real estate in Bangor that included MacDonald's Market and some apartments. From 1977-1993, the Strangs ran the market through a corporation, MacDonald's Market, Inc. In 1993, the Strangs sold the business and lease-sold the building to Joseph Perry so that they could retire. On the advice of counsel, the Strangs did not give title and take back a mortgage; rather they retained title to the building until it is fully paid for.

For a month after the closing, Richard Strang was a paid employee of Perry. During the month that Strang worked for Perry, Perry made all the decisions regarding the market and the building, collected rents, and dealt with tenants. Perry has been in total control of the building since that time. After the summer of 1993, Strang left and has only been in the building two or three times since. Perry is still making payments to the Strangs. Perry's obligation to the Strangs includes paying the purchase price in installments, paying the taxes, and naming the Strangs as additional insureds on his liability insurance policy. The lease with option to buy gives the Strangs the right to enter to view and make improvements to the building, but the lease makes Perry responsible for all building maintenance.

Perry, as the possessor of the premises in October 1996 has never been joined as a defendant.[5]

2. Disputed Facts

The plaintiff's response to defendant's Statement of Material Facts (SMF) does not sufficiently controvert any essential facts or assert any other facts that raise a dispute as to any material facts.

The only facts that are denied or qualified pertain to whether or not the defendants relinquished control of the property to Perry in 1993. The defendants' assertion that they had turned over control of the premises to Perry is based on the personal knowledge of Richard Strang set out in his affidavit. Kalis has not demonstrated any personal knowledge or other evidence as to who was in possession of the premises in October, 1996. Kalis' affidavit speaks generally to his personal situation, dealings with his former attorney and Middlesex Insurance.

The court concludes that the plaintiff has failed to demonstrate any material facts in dispute that are relevant to the issue here.

III. DISCUSSION:

The Strangs claim that since 1993 they have not exercised control over the building or the business, and that at the most, they are in a landlord-tenant relationship with Perry.

A landlord is generally not liable for a dangerous condition that comes into being after the lease is executed and the lessee takes exclusive possession and control of the premises.

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[5] On December 16, 2003 plaintiff filed a statement entitled *Stanley Kalis v. Joseph Perry*, which sets forth the general circumstances of his fall and his injuries. This is accompanied by another document addressed to Perry called "Deposition for Answers" that the court would liberally construe as interrogatories. There is no evidence that these filings were ever served on Perry or that he was ever made a party defendant to this case.

Steward v. Aldrich, 2002 ME 16, ¶ 10, 788 A.2d 603, 606, *see also* RESTATEMENT (SECOND) OF TORTS, § 355 (1965) (lessor is not subject to liability for any dangerous condition that comes into existence after the lessee has taken possession). A landlord is liable for dangerous conditions on his property under the exclusive control of his tenants when the landlord: 1) fails to disclose the existence of a latent defect which he knows or should have known existed, but which was *not* known to the tenants or discovered by the tenants; 2) gratuitously undertakes to make repairs and does so negligently; or 3) expressly agrees to maintain the premises in good repair. *Id.* at ¶ 10, 788 A.2d at 606, quoting *Nichols v. Masden*, 483 A.2d 341, 343 (Me. 1984). *Nichols* requires the landlord to establish an absence of control in order to avoid liability for any dangerous conditions on the premises. In order to avoid liability for harm caused by a dangerous condition on the premises, the landlord must prove lack of control and that none of the *Nichols* exceptions apply. *Steward v. Aldrich*, 2002 ME 16, ¶ 10, 788 A.2d 603, 607.

"Control" means a power over the premises that the landlord reserves pursuant to the terms of the lease or the tenancy, whether express or implied. *Steward*, 2002 ME 16, ¶ 13, 788 A.2d 603, 607. Landlords are more likely to be liable when they reserve some power over the premises pursuant to the terms of the lease. *Id.* While defendants reserved the right in the lease to enter the building to view and make improvements, it was Perry who was responsible for all maintenance at the building.

Mr. Strang alleges that the sale and lease sale took place in the summer of 1993 and that since then he has only been to building two or three times. Strang further alleges that he gave over complete control and possession of the building and the business to Perry at the closing in July 1993. The Lease states, "Lessee shall be responsible for keeping the exterior and interior of the premises ... in good repair and shall be responsible for all maintenance of any kind."

Plaintiff alleges that his injuries were due to bad lighting, a loose stair, and no handrail. All of these were problems that the tenant should have discovered in his exercise of reasonable care. The defendants never agreed to maintain the premises and did not agree to perform repairs on the premises. The safety issues that plaintiff alleges led to his fall were obvious and Perry must have been aware of them. Perry was responsible for building maintenance. The fact that the defendants retained the right to enter the building does not generate an issue of material fact sufficient to withstand a motion for summary judgment when Strang's assertions that he had no control over the premises are uncontroverted.

A review of the file shows that the court has provided numerous extensions to the plaintiff to allow him to make service, to get information, to respond to discovery, to arrange for ADR and to generally comply with the rules of procedure. Kalis' responses have been directly to the court and follow a general theme that he is *pro se*, that he is elderly, without substantial means to finance this litigation, is confused and unfamiliar with court rules and proceedings.

Notwithstanding his difficult circumstances, the defendants are entitled to stand on their rights to hold the plaintiff to his proof, especially after not being given any notice of plaintiff's claims until six years and eight months after the accident and more than nine years after they conveyed the business to Perry and retired to a new life.

IV. DECISION AND ORDER FOR JUDGMENT

The clerk will make the following entries and the Orders and judgment of the court:

A. Plaintiff's Motion to Modify the Scheduling Order is denied.

B. Plaintiff's Motion to Continue is denied.

C. The defendants are entitled to a dismissal based on plaintiffs' repeated failure to appropriately respond to discovery and for absolute failure to comply with the court's Order regarding ADR.

D. Defendants' Motion to Dismiss with prejudice is granted.

E. Plaintiffs' complaint is dismissed with prejudice.

F. The defendants would otherwise be entitled to summary judgment; however, because the court has dismissed the complaint, the issue is moot and an Order is not required.

G. The defendants are awarded their costs as allowed by rule and statute.

SO ORDERED.

Date: May 9, 2005

Thomas E. Delahanty II
Justice, Maine Superior Court

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MACDONALD'S SUPER MARKET - DEFENDANT
MUTUAL ASSURANCE COMPANY DISMISSED - DEFENDANT

SUPERIOR COURT
CUMBERLAND, ss.
Docket No PORSC-CV-2002-00519

DOCKET RECORD

Filing Document: COMPLAINT Minor Case Type: PROPERTY NEGLIGENCE
Filing Date: 10/09/2002

Docket Events:

10/09/2002 FILING DOCUMENT - COMPLAINT FILED ON 10/09/2002

12/02/2002 Party(s): STANLEY G. KALIS
MOTION - MOTION FOR ENLARGEMENT OF TIME FILED ON 12/02/2002
BY PLAINTIFF (IN LETTER FORM) TO EXTEND TIME FOR SERVICE WITH ATTACHMENTS

12/10/2002 Party(s): STANLEY G. KALIS
MOTION - MOTION FOR ENLARGEMENT OF TIME GRANTED ON 12/05/2002
THOMAS E HUMPHREY , JUSTICE
PLAINTIFF IS GRANTED AN EXTENSION OF 90 DAYS FROM THE DATE OF THIS ORDER TO FILE PROOF OF SERVICES UPON THE DEFENDANT. PLAINTIFF MAY WISH TO CONSIDER ALTERNATE METHODS OF SERVICES PURSUANT TO RULE 4 OF THE MAINE RULES OF CIVIL PROCEDURE. COPY MAILED STANLEY KALIS, P.O. BOX 362, BRUNSWICK, ME 04011 ON 12-10-02.