IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

FRANK KESTING	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N12C-07-180 VLM
	)	
DELAWARE HOTEL	)	
ASSOCIATES, L.P.,	)	
	)	
Defendant.	)	

OPINION

Date Submitted: December 16, 2013
Date Decided: March 31, 2014

Upon Consideration of Defendant's Motion For Summary Judgment, **GRANTED.**

Joseph J. Longobardi, III, Esquire, Longobardi & Boyle, LLC, 1303 Delaware Avenue, Suite 105, Wilmington, DE 19806, Attorney for Plaintiff.

Kimberly Meany, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin, 1220 North Market Street, 5th Floor, P.O. Box 8888, Wilmington, DE 19899, Attorney for Defendant.

MEDINILLA, J.

INTRODUCTION

This is a slip-and-fall case brought by Plaintiff Frank Kesting ("Plaintiff") against Defendant Delaware Hotel Associates, L.P. ("Defendant"). Before this Court is Defendant's Motion for Summary Judgment. Defendant argues that summary judgment should be granted because Plaintiff has not made a sufficient showing as to Defendant's duty, an essential element of this case.[1] Plaintiff's counterarguments are insufficient because he has not provided the Court with any evidence indicating that Defendant had ownership, possession or control over the location of the injury. Therefore, Defendant's Motion for Summary Judgment is **GRANTED**.

FACTUAL AND PROCEDURAL BACKGROUND

On November 26, 2009, Plaintiff slipped and fell on a pile of wet leaves located at the entrance to a driveway intersecting with Peach Tree Road in Claymont, Delaware. The driveway was not owned by Defendant. The driveway, which leads to a group of parcels collectively known as Brandywine Corporate Center ("BCC") is mostly privately owned. Defendant owns 630 Naamans Road, one of the four BCC parcels. However, the entrance to the driveway, adjacent to

[1] Separate and apart from this argument, Defendant also argues that the cause of the injury was open and notorious and, therefore, Defendant had no duty to Plaintiff. However, because this Court accepts Defendant's first argument, its second need not be addressed.

the Peach Tree Road sidewalk where Plaintiff fell, is a Delaware Department of Transportation ("DelDOT") public right-of-way.

Defendant's parcel does not abut Peachtree Road.[2] However, when Defendant purchased 630 Naamans Road, it was also granted a non-exclusive easement on the BCC driveway. Defendant's obligations as to the easement, including various responsibilities related to repair and upkeep of the BCC driveway, are set forth in the January 19, 1989 Supplement to Declaration ("SD").

Plaintiff filed a Complaint in the Court of Common Pleas on December 2, 2011 and an Amended Complaint on April 17, 2012. This matter was transferred to this Court on July 17, 2012. Defendant filed a previous Motion for Summary Judgment on September 10, 2012. On November 29, 2012 this Court denied Defendant's Motion without prejudice and recommended that the parties obtain certain title and conveyance documents and a surveyor's report regarding the location of the incident.

Attaching the recommended documents, Defendant filed this Renewed Motion for Summary Judgment on October 1, 2013, and an Opening Brief on October 31, 2013. Plaintiff filed a Brief in Support of Plaintiff's Opposition to

[2] Attached, for reference, is an illustration of the Peach Tree Road intersection created by the Pelsa Company, and provided to this Court as part of Defendant's Motion.

Defendant's Motion on November 27, 2013. Defendant filed a Reply Brief on December 9, 2013. A hearing on the matter was held before this Court on December 16, 2013.

DISCUSSION

I. *Standard of Review*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party[4] and the moving party bears the initial burden of establishing that material facts are not in dispute.[5] If, after discovery, the non-moving party cannot make a sufficient showing of the existence of an essential element of his or her case, summary judgment must be granted.[6] If, however, material issues of fact exist, or if the Court determines that

[3] Super. Ct. Civ. R. 56(c).
[4] *Burkhart v. Davies*, 602 A.2d 56, 59 (Del.1991).
[5] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del.1979).
[6] *Burkhart*, 602 A.2d at 59.

it does not have sufficient facts to enable it to apply the law to the facts before it, summary judgment is inappropriate.[7]

II. *Defendant's Duty*

To succeed under a negligence claim, a plaintiff must prove that the defendant owed the plaintiff a duty, and that a breach of that duty caused plaintiff's injury.[8] A landowner's duty toward a plaintiff in a negligence action is a matter of law.[9] Defendant argues that summary judgment should be granted because it owed no duty to maintain the place of injury. While both parties now agree that Defendant did not own any part of the driveway, Plaintiff nevertheless offers three alternative bases upon which Defendant's duty could be established. The Court considers the three arguments below and finds none meritorious.

a. The Supplement to Declaration

Plaintiff first argues that the SD placed a duty on Defendant to maintain the place of injury. This argument fails because, as shown in Defendant's uncontested surveyor's report, the area of the driveway where the injury occurred is a DelDOT right-of-way, not governed by the SD. Plaintiff provided no evidence indicating

[7] *Sternberg v. Nanticoke Mem'l Hosp., Inc.*, 2012 WL 5830150 (Del. Super. Feb. 13, 2012) *aff'd*, 62 A.3d 1212 (Del. 2013) (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del.1962)).
[8] *Dilks v. Morris*, 2005 WL 445530 (Del. Super. Feb. 25, 2005).
[9] *Argoe v. Commerce Square Apartments Ltd. Partnership*, 745 A.2d 251, 254 (Del. Super. 1999).

that the SD is applicable, and admits that "[t]he portion of the driveway on which Plaintiff fell is an easement granted by the State."[10] As such, this Court finds that the SD does not impose a duty on Defendant as to Plaintiff's claims.

b. 6.3.4 of Standards and Regulations for Subdivision Streets and State Highways

Plaintiff next argues that Provision 6.3.4 of Standards and Regulations for Subdivision Streets and State Highways ("Provision 6.3.4") imposes a duty on Defendant to maintain the place of injury. Provision 6.3.4 states in pertinent part:

> DelDOT shall assume responsibility for future maintenance of the entrance within the shoulder area and any necessary cleaning or replacing of drainage pipe, and guardrail repair within the right-of-way. Entrance appurtenances beyond the edge of shoulder are the responsibility of the property owner for maintenance. This includes any traffic control signs (i.e. Stop or Yield) that may need future maintenance.[11]

Plaintiff's reliance on this provision is misplaced. Of note, Defendant does not own the BCC driveway and Plaintiff provides no support for the assumption that Defendant is the "property owner" for the purposes of Provision 6.3.4. Even if Defendant was the property owner, the only duties referred to in Provision 6.3.4 relate to "entrance appurtenances beyond the edge of a traffic shoulder . . . [such

[10] *Kesting v. Delaware Hotel,* C.A. No. N12C-07-180, Brief in Support of Plaintiff's Opposition to Defendant's Motion for Summary Judgment, at 3 (November 27, 2013).
[11] 2 Del. Admin. Code Del. 2309-6.

as] traffic control signs."[12] "Appurtenances" refer to "anything corporeal or incorporeal which is an incident of, and belongs to some other thing as principal;"[13] removal of leaves and mud are outside the scope of that duty.

c. Easement by Necessity

Plaintiff's final argument purports that Defendant's duty stems from an easement by necessity on the area in question. This Court does not agree.

Although Plaintiff has provided some support for Defendant's right to access, a right to access does not on its own create a duty.[14] Rather, the liability of a land user generally requires actual control over the premises.[15] Plaintiff provides no evidence which demonstrates that Defendant had control over the DelDOT right-of-way. Finally, this case does not fall into the narrow exception to the control requirement that exists when the "injured plaintiff [is] *compelled* to cross the dangerous public way to get from one parcel of the possessor's property to the other in order to use the land possessor's facilities."[16]

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[12] 2 Del. Admin. Code Del. 2309-6.
[13] APPURTENANCE, Black's Law Dictionary (9th ed. 2009).
[14] *See Sandie, LLC v. Plantations Owners Ass'n, Inc.*, 2012 WL 3041181 (Del. Ch. July 25, 2012) (holding that an easement by necessity only creates a duty to contribute if parties intended such a result).
[15] *Craig v. A.A.R. Realty Corp.*, 576 A.2d 688, 695 (Del. Super. 1989) *aff'd*, 571 A.2d 786 (Del. 1989); *Coale v. Rowlands*, 723 A.2d 395 (Del. 1998) ("landowners generally are not responsible for the condition of adjoining public roads").
[16] *Sandt v. Delaware Solid Waste Auth.*, 1994 WL 680114 (Del. Super. Sept. 22, 1994).

CONCLUSION

In consideration of all of the parties' filings and evidence put forth at the hearing, and viewing this evidence in a light most favorable to the non-moving party, this Court finds that there is no genuine issue of material fact as to Defendant's alleged duty to maintain the place of injury. As such, Defendant's Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

/s/ Vivian L. Medinilla
Judge Vivian L. Medinilla

cc: Prothonotary

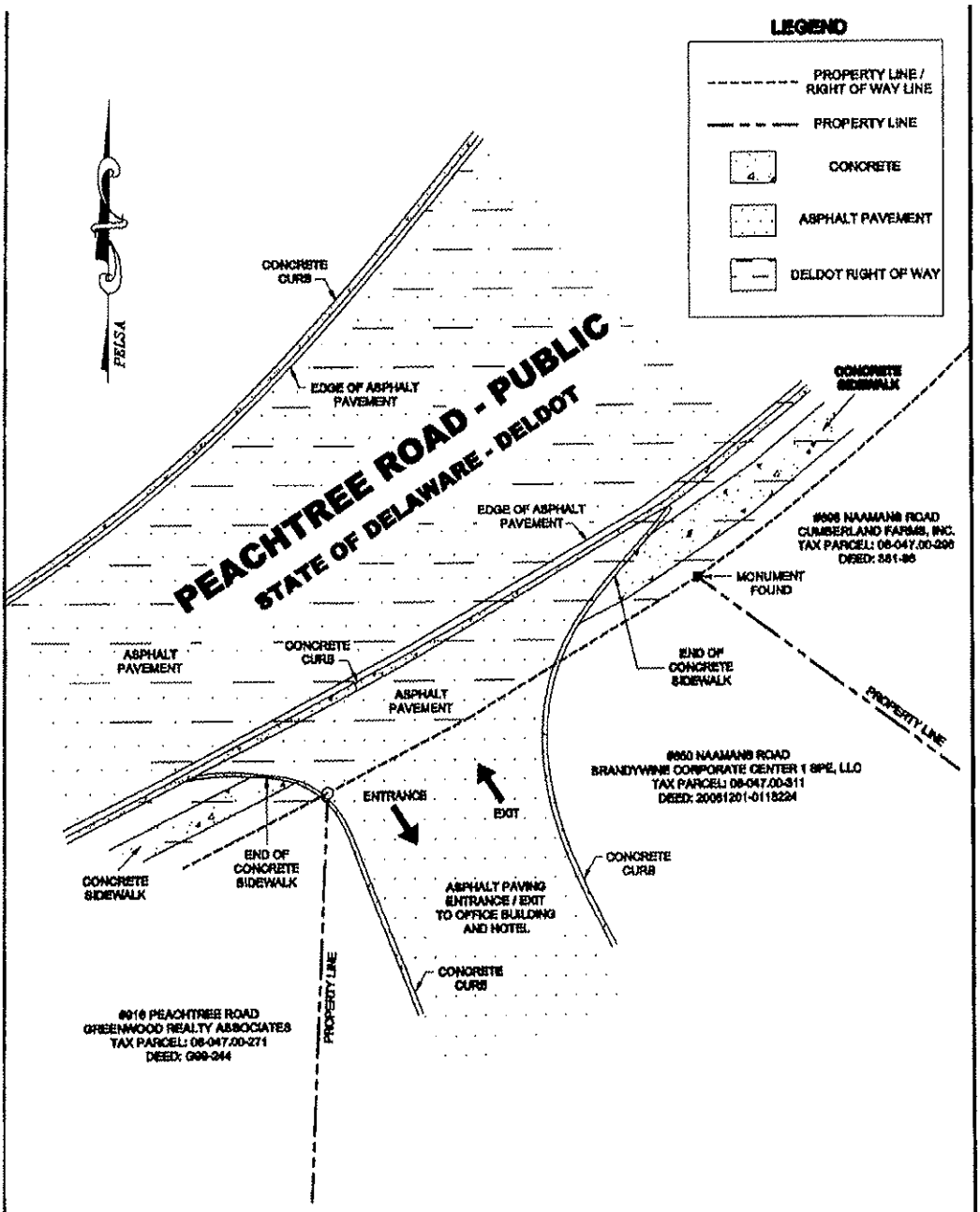

Exhibit Plan Of Drive Location On Peachtree Road
for
Complaint Frank Kesting v. Delaware Hotel Associates
Brandywine Hundred
New Castle County, Delaware

THE FEATURES AS SHOWN WERE FIELD LOCATED AND ARE SHOWN RELATIVE TO PROPERTY LINES, SURVEYED BY THE PELSA COMPANY AND UNDER MY DIRECT SUPERVISION.

MICHAEL R. PARASKEWICH P.L.S.

Index Sheet 1 of 2

THE PELSA COMPANY Engineering, Surveying, Environmental Sciences

810 PEOPLES PLAZA NEWARK, DE 19702
(302) 834-9771 (410) 398-9800

Approved: Professional Land Surveyor

Degree of Accuracy ____ Marsh ____ Rural ____ Suburban X Urban ____

Date 01/30/13 Scale 1" = 20' Project Number P-2878