

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

JEROME REVELL and	)	
SALLY J. REVELL	)	
	)	
Plaintiffs,	)	
	)	
	)	C.A. No. N13C-05-113 CLS
v.	)	
	)	
ARCHIE E. SIMMONS JR., and	)	
STAR PROPERTY	)	
MANAGEMENT, LLC	)	
	)	
Defendants.	)	

Date Submitted: August 13, 2014  
Date Decided: November 12, 2014

On Defendant's Motion for Summary Judgment.  
**GRANTED.**

**ORDER**

Gary S. Nitsche, Esq. and Eileen McGivney, Esq. Weik, Nitsche, Dougherty & Galbraith, Wilmington, Delaware 19899. Attorneys for the Plaintiffs.

Joel H. Fredricks, Esq. Casarino Christman Shalk Ransom & Doss, P.A., Wilmington, DE 19899. Attorney for Defendants.

**Scott, J.**

## Introduction

Before the Court is Defendants Archie E. Simmons, Jr. (“Mr. Simmons”) and Star Property Management LLC’s (“Star”) (collectively, “Defendants”) Motion for Summary Judgment. The Court has reviewed the parties’ submissions. For the foregoing reasons, Defendants’ Motion for Summary Judgment is **GRANTED**.

## Facts

On March 13, 2013, Plaintiffs Jerome Revell (“Mr. Revell”) and Sally Revell (“Mrs. Revell”) (collectively, “Plaintiffs”) filed this action against Defendants alleging personal injuries sustained by Mr. Revell after he slipped on water leaking from the ceiling in the bathroom of his residence on December 30, 2011.<sup>1</sup> The complaint stated that Mr. Revell fell at 904 N. Madison Street, Apartment 1, Wilmington, Delaware 19801.<sup>2</sup> On July 15, 2013, Defendants answered the Complaint and denied Plaintiffs’ allegation that Mr. Simmons owned the Madison Street Property.<sup>3</sup> On October 9, 2013, in response to an interrogatory, Defendants again denied owning the property.

The Court issued Trial Scheduling Order stated that the deadline to

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<sup>1</sup> See Complaint at ¶¶ 1-5.

<sup>2</sup> *Id.*

<sup>3</sup> Answer at ¶ 2. Defendants denied Paragraph 3 of the Complaint which alleged that Mr. Simmons resided in Greenville and that he owned and operated the property located at the Madison Street Address.

file motions to amend was February 28, 2014<sup>4</sup> and the parties scheduled the depositions of Mr. Simmons and Plaintiffs for February 26, 2014. In early February, Plaintiffs' counsel contacted defense counsel to confirm that Mr. Simmons was denying ownership of the property where the incident occurred and to request that defense counsel provide the identity of owner.<sup>5</sup>

As a result of discovery and depositions, it is undisputed that Defendants have never owned or managed the property located at 904 N. Madison Street in Wilmington, Delaware.<sup>6</sup> For this reason, on March 10, 2014,<sup>7</sup> Plaintiffs filed a motion seeking to amend their complaint to remove Simmons from the lawsuit, identify a different address for the alleged slip-and-fall, and add a separate defendant as the owner of the new address.<sup>8</sup> Based on the unduly delayed filing and Plaintiffs' inexcusable neglect, this Court denied Plaintiffs' motion to amend their complaint on June 30, 2014.<sup>9</sup>

### **Parties' Contentions**

Defendants assert that there is no genuine issue of material fact in

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<sup>4</sup> D.I. 14.

<sup>5</sup> Pls. Mot. to Amend, Ex. A.

<sup>6</sup> Mr. Simmons stated that he owned both Star, a management company, and Owl's Nest Properties, LLC ("Owl's Nest), an umbrella company. (Mr. Simmons' Dep. Trans. at 10). He also stated that Owl's Nest was the owner of the East 11<sup>th</sup> Street Property. (*Id.* at 16:6-12).

<sup>7</sup> Despite the fact that depositions took place before the deadline for motions to amend, Plaintiffs nevertheless filed their motion to amend substantially after the deadline had passed.

<sup>8</sup> See Plts. Mot. to Amend Complaint.

<sup>9</sup> See June 30, 2014 Order Denying Plts. Mot. to Amend ("June 30 Order").

dispute because it is undisputed that Defendants never owned or managed the 904 N. Madison Street residence. Moreover, the Court denied Plaintiffs' motion to amend the complaint to change the location at which the alleged injury occurred. Thus, Defendants owed Plaintiffs no duty because there is no nexus between Defendants and the location where Mr. Revell was allegedly injured.

Plaintiffs argue that there is a genuine issue of material fact because there are factual disputes as to whether Simmons owned the property where the alleged injury occurred and whether Simmons had knowledge of the incident. Plaintiffs now claim that Mr. Revell was injured at 418 E. 11<sup>th</sup> Street, Apartment A, Wilmington, Delaware 19801, which is owned by Mr. Simmons' umbrella company, Owl's Nest Properties, LLC. Moreover, Plaintiffs argue that Simmons had knowledge of a lease agreement between Simmons and Mrs. Revell at this location. Therefore, Plaintiffs argue that Simmons was on notice of the proper address of the alleged incident.

### **Standard of Review**

The Court may grant summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter

of law.”<sup>10</sup> The moving party bears the initial burden of showing that no material issues of fact are present.<sup>11</sup> Once such a showing is made, the burden shifts to the non-moving party to demonstrate that there are material issues of fact in dispute.<sup>12</sup> In considering a motion for summary judgment, the Court must view the record in a light most favorable to the non-moving party.<sup>13</sup> “Summary judgment will not be granted when a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances.”<sup>14</sup>

### **Discussion**

Negligence is not presumed.<sup>15</sup> Summary judgment should be granted if the plaintiff cannot establish the elements necessary for his negligence claim.<sup>16</sup> To survive a motion for summary judgment, the plaintiff must prove the presence and breach of a duty owed by the defendant, which is the proximate and legal cause of the plaintiff’s injury.<sup>17</sup>

Here, Plaintiffs claim that Defendants’ negligence was the proximate cause of Mr. Revell’s injuries, asserting that Defendants owed Plaintiffs a

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<sup>10</sup> Super. Ct. Civ. R. 56(c); *Burkhart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

<sup>11</sup> *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979).

<sup>12</sup> *Id.* at 681.

<sup>13</sup> *Burkhart*, 602 A.2d at 59.

<sup>14</sup> *Phillip-Postle v. BJ Prods., Inc.*, 2006 WL 1720073, at \*1 (Del. Super. Apr. 26, 2006).

<sup>15</sup> *Smith v. Daimler Chrysler Corp.*, 2002 WL 31814534, at \*5 (Del. Super. Nov. 20, 2002).

<sup>16</sup> *Morris v. Theta Vest, Inc.*, 2009 WL 693253, at \*1 (Del. Super. Mar. 10, 2009).

<sup>17</sup> *Id.* (citing *Duphily v. Delaware Elec. Co-op., Inc.*, 662 A.2d 821, 828 (Del. 1995)).

duty because the 904 N. Madison Street residence was owned by Simmons and managed by Star.<sup>18</sup> However, it is now undisputed that Defendants have never owned or managed the 904 N. Madison Street residence at which Mr. Revell claims to have been injured. Thus, Plaintiffs have failed to prove the elements necessary for a negligence claim because Defendants did not owe any duty to Mr. Revell. For this same reason, Defendants have satisfied their burden of showing that, based on the pleadings, depositions and discovery, there is no genuine issue of material fact in dispute.

Upon satisfaction of Defendants' burden on summary judgment, the burden shifts to Plaintiffs to rebut such a conclusion and demonstrate that there is any genuine issue of material fact. On summary judgment, the Court may only consider "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any..." in its determination of whether there are any material factual disputes.<sup>19</sup> The denial of the plaintiff's motion to amend their complaint precludes any assertions in the amended complaint, but not in the original complaint, from becoming part of the record for consideration on summary judgment.

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<sup>18</sup> See Complaint at ¶¶ 1-5.

<sup>19</sup> Super. Ct. Civ. R. 56(c); *Burkhart*, 602 A.2d at 59.

Here, Plaintiffs' argument in opposition to summary judgment has already been rejected by this Court.<sup>20</sup> As previously reasoned, the facts in *McClain v. McDonald's Restaurants of Delaware, Inc.*<sup>21</sup> are the most analogous to the facts here. In *McClain*, the personal injury plaintiff moved to amend his complaint to correctly identify the location and name the owner of where his injury occurred, one year after defense counsel's clarification request and plaintiffs counsel's confirmation of the correct location and stipulation to dismissal of all defendants not associated with that location, on the basis that the plaintiff misidentified the location of his injury.<sup>22</sup> Persuaded by the fact that defense counsel had questioned the correct location and that plaintiff's counsel had confirmed that the complaint properly identified the location, the Court found that the plaintiff's failure to amend the complaint was inexcusable neglect<sup>23</sup> and that the record was void of any justification for the delay.<sup>24</sup>

Based on the factual similarities to *McClain*, this Court did not allow Plaintiffs to amend their complaint in order to identify the East 11<sup>th</sup> Street Address as the location of the incident or add Owl's Nest as the correct

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<sup>20</sup> See June 30 Order.

<sup>21</sup> 2011 WL 2803108 (Del. Super. July 5, 2011) *aff'd*, 32 A.3d 989 (Del. 2011).

<sup>22</sup> *Id.* at \*1-5.

<sup>23</sup> *Id.* at \*4 (The plaintiff's "protracted failure to identify the correct [] location, and thus the correct defendant, cannot be explained other than by inexcusable carelessness.").

<sup>24</sup> *Id.*

owner due to Plaintiffs' inexcusable neglect. As in *McClain*, Defendants here also made assertions that should have alerted Plaintiffs of the possibility that they named an incorrect location or owner. In their Answer to Plaintiffs' Complaint in July of 2013, Defendants indicated that they did not own the property contained in the Complaint, and denied ownership again in October of 2013. In *McClain*, plaintiff's counsel confirmed that the incorrect location was correct; here, in response to Defendants' interrogatory requesting Plaintiffs' prior addresses, Plaintiffs again listed the Madison Street Address. Although Plaintiffs' counsel attempted to determine ownership of the Madison Street Property through an e-mail prior to depositions, Plaintiffs had a lease agreement showing that the proper location was the East 11<sup>th</sup> Street Address. The Court's finding of inexcusable neglect was further supported by Plaintiffs' failure to timely amend, despite Plaintiffs' counsel's discovery of the correct location before the deadline to file motions to amend.

Despite the fact that this Court has prohibited such an assertion, Plaintiffs impermissibly attempt to introduce this second location<sup>25</sup> for Mr. Revell's alleged injury to demonstrate a material factual dispute as to

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<sup>25</sup> Plt's. Response to Def's. Mot. for Summary Judgment asserts, as fact, that the location where Mr. Revell's allege injury occurred was 418 E. 11<sup>th</sup> Street, Apartment A, Wilmington, Delaware 19801.



whether Mr. Simmons owned the property on which the alleged injury occurred. Moreover, in attempting to create this factual dispute, Plaintiffs not only mischaracterize and omit material facts in support of their argument, but entirely omit the original location<sup>26</sup> where Plaintiffs claimed the incident occurred.<sup>27</sup> Accordingly, the Court will not consider Plaintiffs' argument that the alleged injury occurred at a different location<sup>28</sup> as demonstration of a material factual dispute because such a claim is prohibited by previous Court order.<sup>29</sup>

Plaintiffs' only other argument, premised on the first argument, is that Defendants had notice of the proper location of the alleged injury because Mr. Simmons was the sole owner of Owl's Nest and Star, he received notice when Star was served, and the only agreement that he entered into with Mrs. Revell was for the East 11<sup>th</sup> Street apartment.<sup>30</sup> The Court rejects this argument, again based on its denial of Plaintiffs' motion to amend. Any notice would have been "of a materially different set of operative facts" from the facts alleged at the inception of this suit.<sup>31</sup> Plaintiffs claimed that

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<sup>26</sup> See Complaint at ¶¶ 1-5.

<sup>27</sup> Plt's. Response to Def's. Mot. for Summary Judgment at ¶ 1.

<sup>28</sup> Plaintiffs claim that Mr. Revell's alleged injury occurred at the 418 E. 11<sup>th</sup> Street residence instead of the 904 N. Madison Street residence.

<sup>29</sup> See June 30 Order.

<sup>30</sup> The second location Plaintiffs claim the incident occurred.

<sup>31</sup> *McClain*, 2011 WL 2803108, at \*5 (The Court stated that the plaintiff could not demonstrate that the owner had notice because "the 'notice' [the owner] received of [the]

Mr. Revell fell at a property that neither Mr. Simmons nor his companies owned or managed.

Moreover, Mr. Simmons likely would have been unsuccessful in searching all of the agreements and applications for his properties for Mr. or Mrs. Revell because the rental agreement and application were signed by Mrs. Revell using a different last name, and “Revell” was not mentioned anywhere on either document as her spouse or otherwise. That search would have been further complicated by the fact that the address Mrs. Revell listed in the rental application was not listed in response to Defendants’ interrogatory requesting Plaintiffs’ prior addresses. For these same reasons, the Court also finds that Defendants could not have known that, but for these mistakes, Owl’s Nest would have been named a proper party.

**Conclusion**

For these reasons, Defendants Archie E. Simmons, Jr. and Star Property Management, LLC’s Motion for Summary Judgment is **GRANTED.**

**IT IS SO ORDERED.**

*/s/ Calvin L. Scott*  
**Judge Calvin L. Scott, Jr.**

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suit was notice of a materially different set of operative facts from those encompassed by [the plaintiff’s] proposed amendments.”)