STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

BRADLEY P. BENGTSON, M.D., P.C., a Michigan professional service corporation, d/b/a Bengtson Center for Aesthetics and Plastic Surgery,

Plaintiff,

vs.

BRIAN J. HAWLEY, doing business as 24 Seven Janitorial Services, LLC, a Michigan corporation,

Defendant.
_____/

Case No. 13-01504-CKB

HON. CHRISTOPHER P. YATES

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY DISPOSITION

On July 1, 2012, Matthew Forbush and Daniel Hurst conducted their regular cleaning duties at the office of Plaintiff Bradley P. Bengtson, M.D., P.C. ("BPB") on behalf of Defendant Brian J. Hawley d/b/a 24 Seven Janitorial Services, LLC ("Hawley"). These services included removing all trash and discarded boxes from the office, so on the evening of July 1, 2012, Forbush and Hurst threw out several boxes that they believed had been discarded. As it turned out, one of the discarded boxes contained Slim Lipo Laser equipment that, in working condition, was worth $44,490.00. BPB contends that the discarded boxes should never have been removed because they were not in a designated trash area and were clearly marked "do not touch." Thus, BPB brought this lawsuit against Hawley for negligence.[1] BPB now requests summary disposition pursuant to MCR 2.116(C)(10).

[1] Plaintiff BPB initially named Clean It! 24 Seven, LLC ("Clean It") as an additional party defendant and asserted claims for breach of contract and negligence against both Hawley and Clean It. BPB has since agreed to dismiss Clean It from this action, and BPB concedes that its claim against Hawley sounds only in negligence.

"'A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint[,]'" Corley v Detroit Board of Education, 470 Mich 274, 278 (2004), and the Court must consider "the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties." Id. Summary disposition is appropriate when, "[e]xcept as to the amount of damages, there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." MCR 2.116(C)(10). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." West v General Motors Corp, 469 Mich 177, 183 (2003).

The parties do not dispute the legal standards underlying Plaintiff BPB's claims for negligence. To support a claim for negligence, the plaintiff must establish four elements: "(1) duty; (2) breach of that duty; (3) causation, both cause in fact and proximate causation; and (4) damages." See Romain v Frankenmuth Mutual Ins Co, 483 Mich 18, 21-22 (2009). BPB contends that Defendant Hawley breached the ordinary standard of care when its employees threw out the boxes containing the Slim Lipo Laser equipment on the evening of July 1, 2012. In contrast, Hawley argues that the record presents a genuine issue of material fact as to whether Hawley breached the ordinary standard of care, so the Court cannot grant BPB's motion for summary disposition under MCR 2.116(C)(10).

By all accounts, Matthew Forbush and Daniel Hurst threw out boxes containing Slim Lipo Laser equipment on July 1, 2012. But the parties dispute whether the boxes were in a designated trash area and whether the boxes were clearly marked "do not touch." Jayni Olk, a BPB employee, testified that she left the boxes in a procedure room away from the trash area and clearly labeled the boxes "do not touch." But Forbush and Hurst both testified that, although they do not specifically remember where the boxes were located, their habit was to discard only boxes that were placed in designated trash areas. Thus, they would not have thrown out any boxes left in the procedure room away from the trash area or

any boxes labeled "do not touch." BPB produced a surveillance video from the evening in question, but that video merely depicts the back hallway of the BPB office while Forbush and Hurst leave the office with the boxes and other trash. The video does not show where the boxes were initially located in the office, and it does not clearly depict whether the boxes were labeled "do not touch."

Plaintiff BPB contends that the Court should grant summary disposition in its favor because Defendant Hawley has not presented any concrete evidence to dispute Ms. Olk's testimony that she left the boxes in the procedure room away from the trash area and marked the boxes "do not touch." In contrast, Hawley contends that the testimony of Forbush and Hurst regarding their cleaning habits is enough to contradict Ms. Olk's testimony and create a genuine issue of material fact. "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice." See MRE 406. And here, the trier of fact could reasonably conclude from the habit evidence that Forbush and Hurst would not have taken any boxes that were not properly discarded. See Skinner v Square D Co, 445 Mich 153, 185-186 & n18 (1994) (Levin, J, dissenting). Thus, the Court concludes that the parties have presented a genuine issue of material fact that cannot be resolved on a motion for summary disposition pursuant to MCR 2.116(C)(10), so the Court must deny BPB's motion and set this matter for trial.[2]

IT IS SO ORDERED.

Dated: April 1, 2014

HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

[2] Defendant Hawley also disputes Plaintiff BPB's calculation of damages, but the Court need not address issues of damages when considering summary disposition under MCR 2.116(C)(10). Thus, the Court must leave the issue of damages to the trier of fact after liability has been established.