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MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS
IA PART 9
BY: ARTHUR W. LONSCHEIN, JUSTICE

Terence Flynn,

Plaintiff,

-against-

The City of New York, Kuldip Kaur Singh, and Gurmeet Kaur Sandhu,

Defendants.

Dated: September 18, 2000

Index Number.....20368/96

Motion Date.....5/2/2000

Motion Cal. Number..13

The plaintiff, a bus driver, claims that he was injured when the bus he was driving struck a tree trunk. The defendants Kuldip Kaur Singh and Gurmeet Aur Singh move for summary judgment; and the defendant City cross–moves for the same relief. For the reasons that follow, the motion and cross–motion are granted, and the complaint is dismissed.

Photographs submitted with the motion papers establish that the tree was situated on the margin of the sidewalk, and that it leaned out over the roadway. The affidavit of a horticulturist retained by the plaintiff shows that the trunk crossed the plane of the curb and began to overhang the street at a height of 6 ½ feet above the curb, and that the maximum extent of the overhang was some 2 ½ feet over the roadway at a height of 11 ½ to 12 feet high.

The defendants Kuldip Kaur Singh and Gurmeet Aur Singh are the abutting landowners, who clearly have no responsibility to trim or otherwise maintain this tree, which is not on their property (see, Zizzo v City of New York, 176 AD2d 722). The plaintiff makes no attempt to oppose their motion.

As to the defendant City, there can be little doubt that it had a duty to maintain the tree. That duty does not establish liability, however, since the tree was an open and obvious hazard, which the defendant as a bus driver was in a position to observe. The accident occurred during daylight hours, when the leaning tree would have been perfectly visible. The law is well established that there is no duty to warn of an open and obvious hazard, which is readily visible to those employing the reasonable use of their senses, for in such a situation the condition is a warning in and of itself (Tarricone v State of New York, 175 AD2d 308; Ackermann v. Town of Fishkill, 201 A.D.2d 441; Terry v. Erie Foundry Co., 235 AD2d 414).

The affidavit of the horticulturist does not show that the hazard was not open and obvious, but only that other drivers of tall vehicles such as buses and trucks had also struck the tree. That others had been similarly careless does not establish that the hazard was in some respect hidden. Similarly, the plaintiff's deposition testimony does not show that the tree was not clearly visible. He testified that at the moment of impact he could not see the part of the tree which struck the bus. All this shows, however, is that when he turned the bus back out into the traffic lane he failed to consider the position of the hazard, which had been clearly visible as he drove up to the bus stop.

A short–form order embodying this decision has been signed herewith.

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J.S.C.