

<b>Doyle v Incorporated Vil. of Lake Grove</b>
2007 NY Slip Op 32902(U)
September 5, 2007
Supreme Court, Suffolk County
Docket Number: 0028341/2005
Judge: Robert W. Doyle
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The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Village Law §6-628 provides that “No civil action shall be maintained against the village for damages or injuries to person or property sustained in consequence of any street, highway, bridge, culvert, sidewalk or crosswalk being defective, out of repair, unsafe, dangerous or obstructed or for damages or injuries to person or property sustained solely in consequence of the existence of snow or ice upon any sidewalk, crosswalk, street, highway, bridge or culvert unless written notice of the defective, unsafe, dangerous or obstructed condition or of the existence of the snow or ice, relating to the particular place, was actually given to the village clerk and there was a failure or neglect within a reasonable time after the receipt of such notice to repair or remove the defect, danger or obstruction complained of, or cause the snow or ice to be removed, or the place otherwise made reasonably safe.”

Douglas Colino submitted an affidavit which sets forth that he is employed by the Incorporated Village of Lake Grove as Superintendent of Public Works and is responsible for maintenance of the streets owned by the Village of Lake Grove, which includes maintenance of trees overhanging those streets. He states that upon receipt of the Notice of Claim on August 25, 2005, he made a personal inspection of the tree describe described in the Notice on August 26, 2005 and was unable to determine the cause of the branch breaking off.

He states that if a verbal or written complaint pertaining to trees overhanging public roads in the Village is made, a written service call is forwarded to the Department of Public Works. He searched those records kept in the ordinary course of business by the Village but did not find any written or recorded verbal complaints or service calls with respect to the tree at issue prior to August 25, 2005.

Mr. Colino set forth in his supporting affidavit that during the month of March every year, he takes three to four days and personally drives the roads of the Village inspecting the roads and sidewalks and trees in preparation for the budget for the following Village fiscal year which runs June 1 to May 31. His inspection consists of, but is not limited to, looking for low hanging branches, leaning trees, dead looking trees, holes in trunks, bark falling off trees, and rotted areas in trees. If he sees a problem with a tree, he then makes a closer inspection to confirm a problem with the tree. He then makes a note of it and has the Department of Public Works deal with the issue right away, or calls a contractor to look at the tree and advise if any work is necessary. When he did his inspection in March 2005, he did not notice any problem with the tree at issue and states he had no reason to make a close inspection of that tree.

In addition to the yearly inspection, he states he personally drives the roads of the Village on a daily basis, including Moriches Road, on the average of four times a week and never noticed a problem with the tree at issue. Other employees of the Department of Public Works also look out for problems with trees which overhang the Village roads during the course of their employment, and if they notice a problem with a tree, notify him so that the problem can be addressed. He states he was never notified by any employee of the Department of Public Works of a problem with the tree in issue prior to June 26, 2005.

Mr. Colino testified that he has no training in horticulture gardening or tree horticulture or as an arborist. When he went to the site of the incident two months after the accident on August 26, 2005, he found the tree at issue which was located in the right of way of the Village of Lake Grove. He did not remember if he saw a discoloration of the base of the tree when he inspected it, but did remember seeing the remnant of a broken branch. He could not remember the girth or circumference of the broken limb he saw on the tree and took no measurements of any part of the tree. He did not know how the branch broke off. He did not remember if he saw any other broken branches on the tree. He did not know what type of tree it was. He believed it was a fresh break because it was not gray or brown. The remnant of the branch that fell was hanging over the roadway of Moriches Road. He did not know how close the leaning edge of the tree was to the curb of Moriches Road. The tree itself was trimmed back afterward this inspection, but he did not know when that was done, but believed it was after Christmas. He did not know how much of the tree was trimmed back, but did indicate that the remaining stump of the limb which broke was trimmed back and a combination of dead and live branches and limbs were removed from the tree. This trim work was performed by an outside contractor, Jim's Complete Tree.

The Village of Lake Grove has also submitted the transcripts of the examinations before trial of Kevin Doyle and Wendy Prato in support of the motion.

Wendy Prato testified at her examination before trial that when she returned to the site two weeks after the accident, she found the tree that the branch came from and stated it had a huge crack and jagged limb hanging over the road. She noticed what she described as "rot" on the base of the tree extending towards the middle, with a lot of branches hanging over the road as well as the main branch from the limb that fell on the car. The "rot" she described as looking like mold or fungus. She returned several months later to the scene with her mother and grandmother, and the tree was still there with the same mold and fungus on it.

Kevin Doyle testified at his examination before trial that about a week after the accident he returned to the scene of the accident and found the tree he believed the branch came from as there was the remainder of a limb where the branch snapped off. It was rotting in that area and he stated the base of the tree did not look healthy as it had a lot of moss and some fungus which was visible from the street and the sidewalk along the roadway.

Neither Kevin Doyle nor Wendy Prato testified that they, or someone else gave prior written notice of the condition of the tree to the Village of Lake Grove

Based upon the foregoing, it is determined that the Village of Lake Grove has demonstrated prima facie entitlement to summary judgment on the issue that it did not receive prior written notice of the dangerous condition of the tree.

Plaintiff opposes the motion on the grounds that defendant was negligent in maintaining the sidewalk and roadway by permitting a tree in a dangerous, deteriorating condition to remain overhanging the roadway. Plaintiff further contends that defendant was negligent in its inspections of the roadway and overhanging tree branch. In support, plaintiffs have submitted, inter alia, the transcripts of the 50(h) hearing and the examination before trial of Kevin Doyle; the transcript of the examination before trial of Wendy Prato; the affidavit George A. Iannaccone, a certified arborist, and witnesses Carol Drago, Chris Denneen, and Bruce Drago.

Prior written notice of a defect is not required where the municipality is affirmatively negligent in creating the alleged condition (*Cannon v Incorporated Village of Lindenhurst*, 226 AD2d 662, 641 NYS2d 728 [2<sup>nd</sup> Dept 1996]).

While plaintiffs, in opposing this motion, have not demonstrated that the Village of Lake Grove received prior written notice of the defect involving the tree at issue, they have submitted the affidavit of George A. Iannaccone, a certified arborist licensed in the State of New York in support of their argument that defendant Village was negligent in its inspection of the roadway and in causing or permitting a dangerous condition, a defective tree branch, to remain overhanging the roadway where the accident occurred, thus permitting the tree limb to fall.

Mr. Iannaccone avers that on June 30, 2005 he inspected and photographed the tree at issue, including the broken stump of the limb involved in the June 26, 2005 accident. He states that wood decay, "conks," were present at the base of the tree which had numerous dead branches and broken, hollow stubs in the upper crown of the tree. Part of the top portion of the crown of the tree was broken off and cavities in the upper stem were observed. These dead branches, he opined, pre-existed the accident of June 26, 2005. He sets forth that a "conk," or rot, is a mushroom-like fruiting body seen on standing timber and indicates a fungal invasion of the tree. In the early stages, conk simply causes a stained purple or light pink discoloration on the base of a tree. In the later stages, the wood breaks down to form a honeycomb appearance, which was present on the tree at issue, indicting the tree was diseased, sick and decayed. It is Mr. Iannaccone's opinion based upon a reasonable degree of scientific certainty that this rot existed for at least two to three years prior to June 26, 2005, based upon the size of the conk, and its shape, and the presence of numerous dead and broken and hollowed-out stubs in the upper part of the canopy of the tree, and the broken and missing crown of the tree, in addition the freshly broken limb involved in the accident. He further opined that the tree presented a high risk of failure and that it was foreseeable and predictable that a limb, such as the one which broke off on June 26, 2005, was going to break off at any time for approximately two years prior to June 26, 2005, thus posing a risk and danger hanging over the roadway and sidewalk to those passing by. He further stated that the dead branches, broken and hollow stubs, and the missing part of the top of the tree was clearly and easily visible from the road surface and sidewalk of Moriches Road as one drove or walked by the tree for at least two years prior to the date of the accident, and that the "conk" condition and dead limbs were readily observable by a person looking for signs of decay, rot and disease in a tree.

Plaintiffs also submitted the affidavit of Carol Drago who witnessed the accident and saw a branch from a tree on the east side of Moriches Road fall onto a Ford Pick Up Truck which was traveling northbound. After the accident, she states, she observed the tree from which the branch fell. The branch overhung Moriches Road and the tree had a fresh break toward the top of the tree.

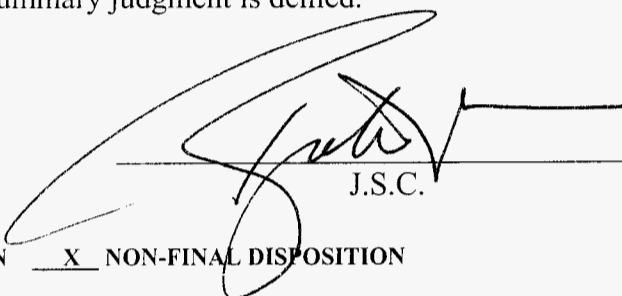
The affidavit of Chris Denneen, also submitted by plaintiffs, sets forth that he/she, while traveling northbound on Moriches Road on June 26, 2005, witnessed a tree limb drop on top of the windshield of the vehicle in front. The limb overhung the roadway. After the accident, the break in the limb of the tree that remained could be observed.

The affidavit of Bruce Drago sets forth that on June 26, 2005 he was operating his motor vehicle on Moriches Road and observed a branch from a tree on the east of Moriches Road fall and strike a Ford Pick Up Truck traveling northbound on Moriches Road. The branch overhung the roadway. After the accident, the stump of the branch that broke off from the tree could be observed. He stated it was a fresh break.

The Court concludes that defendant's submissions have raised issues of fact concerning whether the Village of Lake Grove was negligent in its inspections of the tree at issue, whether it was negligent in permitting a defect or dangerous condition or hazard to develop and/or remain, whether it was negligent in failing to observe rot, mold and fungus and dead and broken limbs on the tree at issue during the inspections, and whether it was negligent in failing to take reasonable measures to remedy the conditions. These factual issues preclude the grant of summary judgment to the Village of Lake Grove.

Accordingly, the instant motion for summary judgment is denied.

Dated: SEP 05 2007

  
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J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION