Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19

Justice

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RAYMOND ALLEN and BRENDA ALLEN,

Plaintiffs,

Index No.: 9664/06
Motion Date: 12/3/08
Motion Cal. No: 2
Motion Seq. No: 2

- against -

J. P. MORGAN CHASE & CO., and RAC 200 REALTY ASSOCIATES,

Defendants.

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Third Party Index No.: 350100/07

J. P. MORGAN CHASE & CO.,

Third-Party Plaintiff,

- against -

RAC 200 REALTY ASSOCIATES,

Third-Party Defendant.

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The following papers numbered 1 to 14 read on this motion by defendant/third party plaintiff J. P. Morgan Chase & Co., for an order granting it summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' complaint and all cross claims alleged against it; and on this cross-motion by defendant/third party defendant RAC 200 Realty Associates for an order, pursuant to CPLR §3212, granting it summary judgment dismissing the complaint and all cross claims asserted against it.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Notice of Cross Motion-Affirmation-Exhibits.....	5 - 8
Affidavits in Opposition-Exhibits.....	9 - 12
Reply Affirmation	13 - 14

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Relevant Facts

This is an action commenced by plaintiffs Raymond Allen and Brenda Allen against defendant/third party plaintiff J. P. Morgan Chase & Co. ("Chase"), and defendant/third party defendant RAC 200 Realty Associates ("RAC 200 Realty"), to recover money damages for personal injuries sustained by plaintiff Raymond Allen ("plaintiff") on September 30, 2005, when he tripped and fell over an exposed tree root in a grassy area at the Chase Bank located at 200 Vanderbilt Parkway, Hauppauge, New York. On February 26, 2002, defendant Chase, as lessee of the property where plaintiff fell, commenced a third party action against RAC 200 Realty, the lessor of the property, seeking common law indemnification, contractual indemnification and contribution, and damages based upon breach of contract. Plaintiffs thereafter amended the complaint to add defendant RAC 200 Realty as a direct defendant. Defendant Chase now moves for summary judgment dismissing the complaint and all cross claims, alleging that plaintiff's accident occurred in a common area to a multi-tenant commercial building consisting of a grass median, for which it had no obligations, and which is "natural land" to which no liability attaches. Defendant RAC 200 Realty cross moves for the same relief.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2d Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

1. Defendant Chase's summary judgment motion

The initial question in a negligence action is whether a duty of care is owed to the injured party. See, Church ex rel. Smith v. Callanan Industries, Inc., 99 N.Y.2d 104 (2002); Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136 (2002); Eaves Brooks Costume Co., Inc. v. Y.B.H. Realty Corp., 76 N.Y.2d 220 (1990); Sheila C. v. Povich, 11 A.D.3d 120 (1st Dept. 2004). To prove a prima facie case of negligence, there must be a demonstration of the existence of a duty, a breach of that duty, and such breach was a proximate cause of the injury. See, Fernandez v. Elemam, 25 A.D.3d 752 (2nd Dept. 2006); Edwards v. Mercy Home for Children & Adults, 303 A.D.2d 543, 544 (2nd Dept. 2003). "In the absence of a duty, there is no breach and no liability (citations omitted)." Coral v. State, 29 A.D.3d 851 (2nd Dept. 2006). "Although juries determine whether and to what extent a particular duty was breached,"[Daubert v. Flyte Time Regency Limousine, 1 A.D.3d 395, 396 (2nd Dept. 2003)], the existence and scope of that duty are legal questions for the courts to

determine. See, 532 Madison Ave. Gourmet Foods, Inc. v. Finlandia Ctr., Inc., 96 N.Y.2d 280 (2002); Solan v. Great Neck Union Free School Dist.,43 A.D.3d 1035 (2nd Dept. 2007).

Here, defendant Chase makes the two-fold argument that it owed no duty to plaintiff because the accident occurred in a common area to a multi-tenant commercial building consisting of a grass median, for which it had no obligations, and which is "natural land" to which no liability attaches. Addressing initially the first argument, it is well recognized that to "'establish a prima facie case of negligence, a plaintiff must establish the existence of a duty owed by a defendant to the plaintiff, a breach of that duty, and that such breach was a proximate cause of injury to the plaintiff (citations omitted).' '[L]iability for a dangerous condition on property is generally predicated upon ownership, occupancy, control or special use of the property (citations omitted).' 'The existence of one or more of these elements is sufficient to give rise to a duty to exercise reasonable care (citations omitted)." Nappi v. Incorporated Village of Lynbrook, 19 A.D.3d 565 (2nd Dept. 2005); see, Comack v. VBK Realty Associates, Ltd., 48 A.D.3d 611 (2nd Dept. 2008); Vetrone v. Ha Di Corp., 22 A.D.3d 835 (2nd Dept. 2005); see, also, Casale v. Brookdale Medical Associates, 43 A.D.3d 418 (2nd Dept. 2007)["[T]he imposition of liability for a dangerous condition on property must be predicated upon occupancy, ownership, control, or special use of the premises"]. Moreover, even assuming an ownership interest or control or special use, notwithstanding the duty to maintain its premises in a reasonably safe manner, a property owner "has no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous (citations omitted)" Gagliardi v. Walmart Stores, Inc., 52 A.D.3d 777 (2nd Dept. 2008); Rao-Boyle v. Alperstein, 44 A.D.3d 1022 (2nd Dept. 2007); Errett v Great Neck Park Dist., 40 A.D.3d 1029 (2nd Dept. 2007); Morgan v. TJX Companies, Inc., 38 A.D.3d 508 (2nd Dept. 2007); Sclafani v. Washington Mut., 36 A.D.3d 682 (2nd Dept. 2007). Ramsey v. Mt. Vernon Board. of Education, 32 A.D.3d 1007 (2nd Dept. 2006) ;Zimkind v Costco Wholesale Corp ., 12 A.D.3d 593 (2nd Dept. 2004); Cupo v. Karfunkel, 1 A.D.3d 48 (2nd Dept. 2003).

Here, defendant Chase has established its prima facie entitlement to summary judgment in their favor on the first argument. Robert Hoek, who testified at a deposition on behalf of third party defendant RAC 200 Realty, the owner and landlord of the commercial property of which defendant Chase was only one of the tenants, and who was the Maintenance Supervisor, stated that the responsibility for landscaping related to shrubbery and trees was the landscapers hired by defendant RAC 200 Realty, and that the landscaper was responsible for the maintenance of that grassy area and the trees in 2005. The evidence submitted on this issue was sufficient to establish prima facie that defendant Chase owed no duty to plaintiff because it had neither ownership, occupancy, control or special use of the property.

Turning next to its second argument that defendant Chase owed no duty to plaintiff because the area where he fell was "natural land," to which no liability attaches, it is well-settled that a defendant moving for summary judgment in such a case demonstrates the prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against it with evidence that a particular condition, such as a tree root, was a condition inherent or incidental to the nature of the property and could be reasonably anticipated by those using it, was open and obvious and not

inherently dangerous. See, Badalbaeva v. City of New York, 55 A.D.3d 764, 764-65 (2nd Dept. 2008); Torres v. State of New York, 18 A.D.3d 739 (2nd Dept. 200); Mazzola v. Mazzola, 16 A.D.3d 629, 793 N.Y.S.2d 59; Stanton v. Town of Oyster Bay, 2 A.D.3d 835. As a general proposition, the issue of whether a dangerous condition exists on the property of another which would create liability depends on the particular facts and circumstances of each case and is generally a question of fact for the jury. See, Trincere v County of Suffolk, 90 N.Y.2d 876 (1997); Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2nd Dept. 2006). While landowners have a duty to prevent the occurrence of foreseeable injuries on their premises, they are not obligated to warn against a condition that could be readily observed by the reasonable use of one's senses, and which are not inherently dangerous. Cupo v. Karfunkel, 1 A.D.3d 48, (2nd Dept. 2001); Ramsey v. Mt. Vernon Bd. of Educ., 32 A.D.3d 1007 (2nd Dept. 2006). Moreover, landowners will not be held liable for injuries arising from a condition on the property that is inherent or incidental to the nature of the property, and that could be reasonably anticipated by those using it. Badalbaeva v. City of New York, 55 A.D.3d 764 (2nd Dept. 2008); Torres v. State, 18 A.D.3d 739 (2nd Dept. 2005); Mazzola v. Mazzola, 16 A.D.3d 629 (2nd Dept. 2005); Stanton v. Town of Oyster Bay, 2 A.D.3d 835 (2nd Dept. 2003). A property owner, thus, may not be held liable for trivial defects, not constituting a trap or a nuisance over which a pedestrian might merely stumble, stub his or her toes, or trip. See, Ambroise v New York City Tr. Auth., 33 A.D.3d 573 (2nd Dept. 2006); Taussig v Luxury Cars of Smithtown, 31 A.D.3d 533 (2nd Dept. 2006). "In determining whether a defect is trivial, the court must examine all of the facts presented, including the 'width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstance of the injury' (Trincere v. County of Suffolk, 90 N.Y.2d 976, 978, 665 N.Y.S.2d 615, 688 N.E.2d 489; see Taussig v. Luxury Cars of Smithtown, Inc., 31 A.D.3d 533, 818 N.Y.S.2d 593)." Nyala v. Guin., 49 A.D.3d 677 (2nd Dept. 2008); see, Outlaw v. Citibank, N.A., 35 A.D.3d 564 (2nd Dept. 2006); Velez v Inst. of Design & Constr., 11 A.D.3d 453 (2nd Dept. 2004).

Here, defendant Chase made a prima facie showing that the complained-of condition was both open and obvious, i.e., readily observable by those employing the reasonable use of their senses, and not inherently dangerous. See, Cupo v. Karfunkel, 1 A.D.3d 48, 49-53, 767 N.Y.S.2d 40; Sun Ho Chung v. Jeong Sook Joh, 29 A.D.3d 677 (2nd Dept. 2006). The photographs submitted on the motion show tree roots. Such roots, one of which caused plaintiff to trip and fall, are a condition on the property that is inherent or incidental to the presence of a tree on that property. As the presence of a tree root could be reasonably anticipated by those using the grassy area that encompassed the tree, defendant Chase, in the evidence submitted on the motion, met its burden of demonstrating its prima facie entitlement to summary judgment on that issue.

Once the moving party makes a prima facie showing of entitlement to summary judgment in its favor, it is incumbent upon the opposing party to come forth with evidentiary proof in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2nd Dept. 2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001). Pursuant to CPLR 3212, summary judgment should be granted when there is no doubt as to the

absence of triable issues. See, Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (2nd Dept. 1993). Plaintiffs failed with respect to both issues that confronted them.

In opposition to the ownership or special use issue, plaintiffs argue that defendants "breached their duty and obligation to maintain the premises and area in a reasonably safe condition despite notice of the existence of significant tripping hazards within the confines of a 'desired pathway' through a grassy area lying between a portion of the parking lot and the public entrance to the Defendant Chase bank." "While the issue of whether a hazard is latent or open and obvious is generally fact-specific and thus usually a jury question (citations omitted), a court may determine that a risk was open and obvious as a matter of law when the established facts compel that conclusion (citations omitted)." Tagle v. Jakob, 97 N.Y.2d 165, 169 (2001). The converse also is true. This Court's determination that the tree root could be reasonably anticipated by those using the grassy area finds support in the opposition submitted on this motion. Plaintiff, in his affidavit, acknowledged that he frequently used the grassy area to reach the bank entrance. In describing the area, he stated:

> Once we arrived at the bank, the vehicle was parked perpendicular to the building at the location to the right of the entrance to the Defendant Chase Bank when facing the building. To the left of the vehicle was a large grassy area lying between the vehicle and the bank entrance. A large tree and some signage were also situated in the grassy area at that time.

He further described how the accident occurred, stating:

> On the date of the incident, after I stepped up onto the grassy area, I proceeded to walk across the grass toward the bank entrance. Before I reached the end of the grassy area, however, I tripped over an exposed tree root and fell causing me to fracture my ankle.

In discussing the before and after photographs of the area where he fell, plaintiff further stated:

> As demonstrated by both sets of photographs (except that there are leaves covering some areas in the marked photographs) the grassy area where I fell is replete with matted down areas of dead grass, dirt and pathways which were obviously created by myself and others who had walked over the grassy area over a long period of time, starting long before my accident on September 30, 2005, in order to get from the parking lot [to] the post office box and/or the bank entrance.

The photographs taken just after September 30, 2005, showed tree roots that were both open and obvious. None of the legal arguments asserted or cases relied upon alter the conclusion that no issue

of fact is raised by the opposition papers. As was found in Badalbaeva v. City of New York, 55 A.D.3d 764, 764-65, in upholding the dismissal of the complaint:

> the tree root was a condition inherent or incidental to the nature of the property and could be reasonably anticipated by those using it (see Torres v. State of New York, 18 A.D.3d 739, 795 N.Y.S.2d 710; Mazzola v. Mazzola, 16 A.D.3d 629, 793 N.Y.S.2d 59; Stanton v. Town of Oyster Bay, 2 A.D.3d 835, 769 N.Y.S.2d 383; Nardi v. Crowley Mar. Assoc., 292 A.D.2d 577, 741 N.Y.S.2d 246), and which this Court finds, as a matter of law, not inherently dangerous.

As, plaintiffs failed to submit evidence sufficient to raise a triable issue of fact as to the negligence of defendant Chase, the complaint is dismissed as to it.

2. Defendant RAC 200 Realty's summary judgment motion

Defendant RAC 200 Realty also seeks dismissal of the complaint insofar as asserted against it, as well as the third-party complaint in which defendant Chase seeks indemnification. As owner of the property with responsibility for maintaining the area at issue, defendant RAC 200 Realty stands on a different footing than defendant Chase. However, the same legal principles apply. Defendant RAC 200 Realty contends that "plaintiff tripped on an exposed tree root in broad daylight and there is no duty to warn as this is not a hazardous condition and secondly, the defect alleged by the plaintiff is not a defect, but is a condition that is inherent to the land."

"To demonstrate its entitlement to summary judgment in a trip-and-fall case, a defendant must establish, prima facie, that it did not create the condition that allegedly caused the fall and did not have actual or constructive notice of that condition for a sufficient length of time to remedy it." Gregg v. Key Food Supermarket, 50 A.D.3d 1093 (2nd Dept. 2008); Sloane v. Costco Wholesale Corp., 49 A.D.3d 522 (2nd Dept. 2008); Frazier v. City of New York, 47 A.D.3d 757 (2nd Dept. 2008); Ulu v. ITT Sheraton Corp., 27 A.D.3d 554 (2nd Dept. 2006); White v. L & M Corporate, Inc., 24 A.D.3d 659 (2nd Dept.2005); Beltran v. Metropolitan Life Ins. Co., 259 A.D.2d 456 (2nd Dept.1999). "Where there is no indication in the record that the defendant created the alleged dangerous condition or had actual notice of it, the plaintiff must proceed on the theory of constructive notice." Rabadi v. Atlantic & Pacific Tea Co., Inc., 268 A.D.2d 418, 419 (2nd Dept. 2000); see, also, Ramos v. Castega-20 Vesey Street, LLC, 25 A.D.3d 773 (2nd Dept. 2006); Klor v. American Airlines, 305 A.D.2d 550 (2nd Dept. 2003); O'Callaghan v. Great Atlantic & Pacific Tea Co., 294 A.D.2d 416 (2nd Dept. 2002). Morever, "[t]o constitute constructive notice, a defect must be visible and apparent, and must exist for a sufficient length of time prior to the accident to permit the defendant's to discover and remedy it." Green v. City of New York, 34 A.D.3d 528, 529 (2nd Dept. 2006); see, Stone v. Long Island Jewish Medical Center, Inc., 302 A.D.2d 376 (2nd Dept. 2003); Blaszczyk v. Riccio, 266 A.D.2d 491 (2nd Dept. 1999); Russo v. Eveco Development Corp., 256 A.D.2d 566 (2nd Dept. 1998); Dima v. Breslin Realty, Inc., 240 A.D.2d 359 (2nd Dept.1997); Kraemer v. K-Mart Corp., 226 A.D.2d 590 (2nd Dept.1996). Defendant RAC 200 Realty, through

the landscaping company responsible for maintaining the area where the accident occurred, can be chargeable with notice that would trigger a duty to warn.

That defendant RAC 200 Realty may have had or may be chargeable with notice of the tree root, however, that is not dispositive. As set forth above, although a landowner has a duty to maintain its premises in a reasonably safe manner, a "landowner has no duty to protect or warn against an open and obvious condition, which, as a matter of law, is not inherently dangerous." Gagliardi v. Walmart Stores, Inc., supra. Here, Defendant RAC 200 Realty made a prima facie showing that the tree root over which plaintiff tripped was not an inherently dangerous condition, and was readily observable to those employing the reasonable use of their senses. As set forth above, the complained-of condition was both open and obvious, i.e., readily observable by those employing the reasonable use of their senses, and not inherently dangerous. See, Cupo v. Karfunkel, 1 A.D.3d 48, 49-53, 767 N.Y.S.2d 40; Sun Ho Chung v. Jeong Sook Joh, 29 A.D.3d 677 (2nd Dept. 2006); see, also, Taubenfeld v. Starbucks Corp., 48 A.D.3d 310 (1st Dept. 2008)[tenant in commercial property owed no duty to pedestrian with regard to tree root located in tree well where pedestrian fell]; Mazzola v. Mazzola, 16 A.D.3d 629 (2nd Dept. 2005)[alleged defect, tree root, was inherent to the nature of the land, and known to the infant plaintiff]. Accordingly, defendant RAC 200 Realty's cross motion for summary judgment dismissing the complaint as to it is granted; its motion to dismiss the third-party complaint is denied as moot.

Conclusion

Based upon the foregoing, the motion by defendant/third party plaintiff J. P. Morgan Chase & Co., and on the cross-motion by defendant/third party defendant RAC 200 Realty Associates, for an order granting each summary judgment, pursuant to CPLR §3212, dismissing plaintiffs' complaint and all cross claims alleged, are granted, and the complaint hereby is dismissed as to both defendants.

Dated: February 6, 2009

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J.S.C.