

**Fitzpatrick v Kafka**

2011 NY Slip Op 31046(U)

March 28, 2011

Supreme Court, Queens County

Docket Number: 172/2009

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

THOMAS FITZPATRICK,

Index No.: 172/2009

Plaintiff,

Motion Date: 02/03/2011

- against -

Motion No.: 14

Motion Seq.: 1

SUZANNE KAFKA,

Defendant.

- - - - - x

The following papers numbered 1 to 7 were read on this motion by the defendant for an order pursuant to CPLR 3212 granting the defendant summary judgment on the issue of liability and dismissing the complaint:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 2
Affirmation in Opposition-Affidavits-Exhibits.....	3 - 4
Reply Affirmation.....	5 - 7

This is a personal injury action in which plaintiff, Thomas Fitzpatrick, a sanitation worker with the New York City Department of Sanitation, seeks to recover damages for injuries he sustained on May 27, 2008, as a result of a trip and fall over a 2½ foot long bundle of tree limb clippings which were placed with the garbage cans in front of the defendant's house.

A summons and complaint was filed on January 6, 2009. Issue was joined by service of the defendant's answer on February 11,

2009. The defendant now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the complaint. A defendant who moves for summary judgment in a premises liability case has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Bloomfield v Jericho Union Free School Dist, 80 AD3d 637 [2d Dept. 2011]). Here, the defendant contends that she did not create the transient condition by placing the bundle in front of her house nor did she have actual or constructive knowledge of it, and therefore did not have a legal duty or responsibility to remedy the alleged hazardous condition. In support of the motion, the defendant submits an affidavit from counsel, Joseph T. Schnurr Esq., a copy of the pleadings, and the transcripts of the examinations before trial of the plaintiff, Thomas Fitzpatrick and the defendant, Suzanne Kafka.

The plaintiff, Thomas Fitzpatrick testified at his deposition, taken on June 16, 2010, that he was involved in an accident in front of 69-14 198<sup>th</sup> Street, Queens County on May 27, 2008 at approximately 9:30 p.m. At the time of the accident Fitzpatrick was working in his position as a sanitation worker with the New York City Department of Sanitation assigned to collect house-to-house refuse. He stated that there was "a pile

of wood from trees or shrubs, bushes, whatever you want to call it." He stated that "it was on the grass between the sidewalk and the curb." As he described the incident:

"I had picked up the -- there was a can of garbage and a bag of garbage. I picked up the bag first, threw it in the truck and moved back, picked up the can, put the can of garbage into the back of the truck and then I placed -- I walked back. I placed the garbage can back where I found it, where it was, and then I continued walking towards-down the sidewalk, down the block to the next stop, at which point my feet caught onto the pile of secured-it was tied up, of wood, and I tripped."

He stated that it was dark at the time although there were street lights on "a couple of houses away" but no lights on at the residence where he tripped. When asked where the wood was located, the plaintiff stated, "it was in very close proximity to the garbage can and the bag, all of which was at the base of the tree." The can, the bag and the bundle of wood were all on the grassy area to the right of a tree that was in front of the house. He stated that the bundle of wood was behind the can and the bag, "you couldn't see it because of the darkness." The dimensions of the bag, as described by the plaintiff were 2 ½ feet in length and 10 inches in diameter. Fitzpatrick stated that by the way it was wrapped with cord it looked as if it had been put out by professional landscaper. He stated that he was not assigned to pick up the wood as it was not subject to collection by the Department of Sanitation. According to the plaintiff, the Department rules were not to pick up bundled tree clippings "due to the proliferation of the Asian Long-horned Beetle, which was

spreading havoc throughout parts of the city." He stated that as far as he knew the Department had sent letters to the homeowners telling them not to put out this type of refuse. When asked if he knew who put the wood bundle in front of the house he answered, "the homeowner." However, he stated as he didn't see the homeowner place the bundle there, that he didn't know. He clarified by stating that "my understanding is that when I pick up refuse in front of the home, it was put out for collection by the home owner." The plaintiff sustained a non-displaced fracture of his left elbow as a result of the fall.

The defendant, Suzanne Kafka, was deposed on June 17, 2010. She testified that she has a gardener who comes two or three times in the summer. She stated that when he comes he "trims, like the hedges and whatever, then he puts those big trash bag tie things. He doesn't come that often." When asked if she had any independent recollection of whether the gardener came anytime in 2008 before Memorial Day, she could not recall. She also could not recall ever receiving any flyers or letters from the New York City Department of Sanitation or the Parks Department regarding disposal of tree branches and shrubs. She stated that she was never told by anyone that she could not dispose of tree branches with the trash. When asked if tree branches are ever placed outside with the garbage near her tree, she replied that she did not know. As far as the action of the gardener she stated, "what he does, he puts in trash bag, ties them. Usually puts them in

front of the garbage or takes them with him. And if he doesn't take them with him, I may have to wait for my son or friend, for trash pick up in the morning."

In his affidavit in support of the motion for summary judgment, defendant's counsel contends that Ms. Kafka did not create the alleged condition or have knowledge of it and therefore did not have any legal duty or responsibility for the alleged condition. Counsel claims that there is no evidence in the record which shows that the defendant put the tree branches out in front of her house. In fact, counsel claims the defendant testified that she did not put them out nor was there any proof that the gardener put the bundles there or anyone else at the direction of the defendant. Counsel further contends that the plaintiff failed to see something for which he should have been fully aware. Counsel contends that the defendant established a prima facie case in that the defendant owed plaintiff no duty of care regarding the wood bundle which she did not place at the curb or had knowledge of, and is therefore entitled to summary judgment dismissing the complaint.

In opposition to the motion, plaintiff's counsel, Marni Schlesinger, Esq., submits her affidavit as well as an affidavit from plaintiff. In his affidavit dated January 4, 2011, Mr. Fitzpatrick states that on May 27, 2008 he was on a collection route which was not his regular route. When he arrived in front the defendant's home he loaded the truck with a can of garbage

and a bag of garbage that had been in front of her house. He then stated that as he continued to walk down the sidewalk to his next stop, "I tripped and my feet caught onto a pile of bundle of tied up wood." He stated that the wood was tied and was located to the right of a tree in front of the house. He stated that the area was not well lit and that the wood was not subject to collection by the Department of Sanitation. Further, defendant states that by having wood in front of her house, the plaintiff was in violation of RCNY § 16-308(g) which stated that tree prunings could not be set out without first making an appointment with the Department Of Sanitation due to the presence of Asian Long-horned Beetles. The plaintiff states that regardless of who put the branches in front of the house, "defendant was bound by the rule of law."

Ms. Schlesinger further states in her affidavit in opposition to the motion that the plaintiff tripped and fell over a secured bundle of wood left in front of the premises owned by the defendant. Counsel states that plaintiff never expected to come across any such bundle of branches because defendant's home in Queens is located in a quarantine zone for the Asian Long-horned Beetle. Counsel states that Fitzpatrick did not see the branches until after the accident due to the poor lighting conditions at the time. Counsel also contends that placing branches outside the home was a violation of RCNY § 16-308 which states that bundles of tree clippings were not to be placed

outside without a prior appointment. Counsel contends that such violation is evidence of negligence. Further, counsel conceded that even if the bundle constituted an open and obvious condition it does not preclude a finding of liability against the homeowner for failure to maintain the property in a safe condition, but rather is relevant only to the issue of the plaintiff's comparative negligence.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. 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, 49 NY2d 557[1980]). A defendant owner or entity who is responsible for maintaining a premises who moves for summary judgment in a slip-and-fall or trip-and-fall case involving the property has the initial burden of making a prima facie showing that it neither created the hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (see Arzola v. Boston Props. Ltd. Partnership, 63 AD3d 655 [2d Dept. 2009]; also see Brak v Razag, Inc., 60 AD3d 715 [2d Dept. 2009]). To provide constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and

remedy it (see Gordon v American Museum of Natural History, 67 NY2d 836 [1986]).

Upon review and consideration of the defendant's motion, the plaintiff's affirmation in opposition and the defendant's reply thereto, this court finds that the defendant's deposition testimony was sufficient to demonstrate, prima facie, that the defendant-homeowner did not personally place the branches in front of her house. In addition, the record shows that defendant was not told that the clippings were in front of her house nor was there any indication of how long the bundle was there. Thus, the defendant made a sufficient showing, prima facie, that she had no constructive notice of the allegedly hazardous condition, as it was a transient condition, which she stated was neither visible nor apparent for a sufficient length of time prior to the accident to permit her to have addressed it.

Moreover, the courts have held that although a property owner has a duty to maintain his or her property in a reasonably safe condition (see Basso v Miller, 40 NY2d 233 [1976]), 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 (see Bloomfield v Jericho Union Free School Dist., 80 AD3d 637 [2d Dept. 2011]; Tyz v First St. Holding Co., Inc., 78 AD3d 818 [2d Dept. 2010]; Weiss v Half Hollow Hills Cent. School Dist., 70 AD3d 932 [2d Dept. 2010]; Bretts v Lincoln Plaza Assoc., Inc., 67 AD3d 943 [2d Dept. 2009]; Cupo v Karfunkel, 1

AD3d 48 [2d Dept. 2003]). "Whether a hazard is open and obvious cannot be divorced from the surrounding circumstances. A condition that is ordinarily apparent to a person making reasonable use of his or her senses may be rendered a trap for the unwary where the condition is obscured or the plaintiff is distracted" (Katz v Westchester County Healthcare Corp., 2011 NY Slip Op 01620 [2d Dept. 2011]). Here, the tied up bundle of tree clippings which is not in itself, an inherently dangerous condition, was placed in close proximity to the defendant's garbage can which had been placed in front of defendant's house for refuse collection. A sanitation worker who is collecting garbage through the reasonable use of his senses would ordinarily be on the lookout and seeking items of refuse put out in front of homes for collection. The bundle in question was 2 ½ feet long and as it was placed with the rest of the refuse it was open and obvious. Thus, although it was not a well-lit area, this particular bundle having been placed with the defendant's garbage can cannot be considered to be a trap for the unwary. Thus, this court finds that the defendant made a sufficient showing prima facie that the alleged condition that caused the plaintiff to trip and fall was open and obvious and not inherently dangerous (see Quattro Piu, Inc., v Loiacono, 2011 NY Slip Op 01980 [2d Dept. 2011]; Ramos v Cooper Invs. Inc., 49 AD3d 623 [2d Dept. 2008]; see generally Cupo v Karfunkel, 1 AD3d 48 [2d Dept. 2003] cf. Beck v Bethpage Union Free School District, 2011 NY Slip Op

02339 [2d Dept. 2011]; Carson v Baldwin Union Free School Dist., 77 AD3d 878 [2d Dept. 2010]). Further, "the landowner need not guard against hazards inherent in the worker's occupation, hazards caused by the condition the worker is engaged to repair, or hazards which are readily observed by someone of the worker's age, intelligence, and experience" (Schindler v. Ahearn, 69 AD3d 837 [2d Dept. 2010]).

In opposition the plaintiff failed to raise a triable issue of fact. Although the plaintiff claims that the defendant was negligent as a matter of law for violating New York City Rule § 16-308(g), the Rule cited by plaintiff contained in the New York City Administrative Code 16-308(g) states:

g. Generators of yard waste, except those identified in subdivision h of this section, shall separate, tie, bundle, or place into paper bags, or rigid containers, in accordance with rules promulgated by the commissioner, any yard waste set out for collection by the department pursuant to subdivision b of this section. The commissioner shall notify all residents in districts that receive yard waste collection by the department of such pre-collection procedures, and undertake any other action necessary to effectuate the purposes of this subdivision."

The plaintiff contends that a particular rule promulgated by the commissioner was in effect at the time of the accident and specified that due an infestation of Asian Long-horned Beetles residents had to schedule an appointment for the pick-up of tree limbs and branches and were not otherwise to set out such bundles. A violation of the commissioner's rule was subject to a fine. Although the violation of a statute or ordinance may be an indication of negligence, the rule cited by plaintiff was not

enacted to protect the safety of pedestrians but rather as means to prevent the spread of Asian Long-horned Beetles. In addition, the plaintiff failed to show that there was a question of fact regarding whether the defendant placed the bundle at the curb, whether she was told about it or how long the bundle was in the area.

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the defendant's motion for summary judgment is granted and the plaintiff's complaint is dismissed.

Dated: Long Island City, N.Y.  
March 28, 2011

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**ROBERT J. MCDONALD**  
**J.S.C.**