

**Pappas v Panco Mgt. of N.Y. LLC**

2011 NY Slip Op 31507(U)

May 25, 2011

Sup Ct, Nassau County

Docket Number: 019142/08

Judge: Randy Sue Marber

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**  
**JUSTICE**

TRIAL/IAS PART 18

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KATHLEEN PAPPAS,

Plaintiff,

Index No.: 019142/08  
Motion Sequence...01, 02, 03  
Motion Date...03/23/11

-against-

**XXX**

PANCO MANAGEMENT OF NEW YORK LLC,  
PANCO MANAGEMENT OF NEW JERSEY LLC,  
ATLANTIC POINT and EAST END PROPERTY  
COMPANY #1 LLC,

Defendants.

\_\_\_\_\_ X

PANCO MANAGEMENT OF NEW YORK LLC,  
PANCO MANAGEMENT OF NEW JERSEY LLC,  
ATLANTIC POINT and EAST END PROPERTY  
COMPANY #1 LLC,

Third-Party Plaintiffs,

-against-

THE BRICKMAN GROUP, LTD. and THE  
BRICKMAN GROUP, LTD., LLC,

Third-Party Defendants.

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Papers Submitted:

Notice of Motion (Mot. Seq. 01).....x

Amended Notice of Motion (Mot. Seq. 02)<sup>1</sup>.....x  
 Notice of Motion (Mot. Seq. 03).....x  
 Affirmation in Opposition.....x  
 Affirmation in Opposition.....x  
 Affirmation in Opposition.....x  
 Reply Affirmation.....x  
 Reply Affirmation.....x  
 Reply Affirmation.....x

Upon the foregoing papers, the Notice of Motion and Amended Notice of Motion (Mot. Seq. 01, 02) submitted by the Third-Party Defendants, THE BRICKMAN GROUP, LTD. and THE BRICKMAN GROUP, LTD., LLC (“Brickman”), seeking an order pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the third-party complaint, and the Notice of Motion (Mot. Seq. 03) submitted by the Defendants/Third-Party Plaintiffs, PANCO MANAGEMENT OF NEW YORK LLC, PANCO MANAGEMENT OF NEW JERSEY LLC, ATLANTIC POINT (“Panco”) and EAST END PROPERTY COMPANY #1 LLC (“East End”), seeking an order pursuant to CPLR § 3212, granting summary judgment in their favor and dismissing the Plaintiff’s claims, or, in the alternative, for common law indemnification from the Third-Party Defendants, are decided as hereinafter provided.

This action was commenced by the Plaintiff to recover for personal injuries allegedly sustained when she tripped and fell on a daylily that was protruding into the walkway at the premises owned by the Defendant, East End and managed by the Defendant,

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<sup>1</sup>The Third-Party Defendant filed an Amended Notice of Motion to correct a typographical error in the Notice of Motion (Mot. Seq. 01). The Amended Notice of Motion is part and parcel with Motion Sequence 01 and should not have a separate sequence number.

Panco, located at 1593 Yarrow Circle, Bellport, New York (hereinafter “Premises”), on August 30, 2007. The Plaintiff originally commenced an action in or about October, 2008 against the Defendants, East End and Panco. Issue was joined by the service of an Answer by the Defendants, Panco and East End on or about December 18, 2008. Subsequently, the Defendants filed and served a third-party summons and complaint, impleading Brickman, the company contracted to perform landscaping services at the Premises, as Third-Party Defendants.

The Court will first address the motion by the Defendants, Panco and East End.

The Plaintiff testified at an Examination Before Trial on January 15, 2010, that as she was exiting her townhouse between 9 a.m. and 9:30 a.m. on August 30, 2007, she tripped on daylilies that were protruding into the walkway. Attached as Exhibit “E” to the Defendants’ Affirmation in Support are photographs of the daylilies that allegedly caused the Plaintiff’s accident. The Plaintiff testified that the photographs are a fair and accurate depiction of the walkway where the accident occurred on that date.

Prior to the date of the Plaintiff’s accident, the Defendants/Third-Party Plaintiffs retained the services of Third-Party Defendants, Brickman, to perform certain landscaping services on the Premises. The contract entered into between Panco and Brickman was in effect at the time of Plaintiff’s accident. The contract states that Brickman was responsible for the maintenance, care and housekeeping of all exterior landscaped areas, but specifically excluded paved areas, lights, signs, fences and irrigation systems.

See Contract, dated March 14, 2007. In support of their motion for summary judgment, the Defendants/Third-Party Plaintiffs, Panco and East End, submitted the sworn testimony of Mark Kaspiev, the property manager for the Premises employed by Panco. See Kaspiev Deposition, dated January 15, 2010, attached to the Defendants' Notice of Motion as Exhibit "J". Mr. Kaspiev is responsible for the day-to-day management of the Premises. Mr. Kaspiev testified that Brickman performed all landscaping services at the Premises, including regularly inspecting the Premises to ensure that all trees and bushes were properly pruned. Mr. Kaspiev testified that the pictures, attached to the Defendants' Notice of Motion as Exhibit "E", depicted an area that Brickman was responsible to landscape, including pruning and ensuring that the area appeared neat and presentable.

Mr. Kaspiev further testified that if management received any complaints regarding the landscaping of the premises, said complaint would be forwarded to Brickman. He testified that he did not receive any complaints regarding the walkway prior to the date of the Plaintiff's accident and that he also never observed any obstruction in the walkway prior to the date of the accident.

Based upon the foregoing facts, the Defendants argue that the daylilies are not inherently dangerous as a matter of law, and, as such, summary judgment is warranted in their favor.

A landowner "must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the

likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk”. *Peralta v. Henriquez*, 100 N.Y.2d 139, 144 (2003), quoting *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976). A landowner has no duty to warn of an open and obvious danger. *Cupo v. Karfunkel*, 1 A.D.3d 48, 51 (2d Dept. 2003). “Apart from the duty to warn of dangerous conditions on the property, a landowner also has a concomitant duty to keep the property in a reasonably safe condition for those who use it”. *Id.*

“Proof that a dangerous condition is open and obvious does not preclude a finding of liability against a landowner for the failure to maintain the property in a safe condition but is relevant to the issue of the plaintiff’s comparative negligence”. *Id.* at 52.

A court is not precluded, however, from granting summary judgment to a landowner on the ground that the condition complained of by the plaintiff was both open and obvious and, as a matter of law, was not inherently dangerous. *Id.*

The Court finds that the Defendants sustained their prima facie burden establishing that daylilies, in and of themselves, are not inherently dangerous as a matter of law. From the Court’s review of the photographs depicting the daylilies, the daylilies do not appear to be inherently dangerous. Moreover, the Plaintiff first lodged a complaint regarding the daylilies on the day of her accident on August 30, 2007, at which time Brickman promptly cleared the walkway.

In opposition, the Plaintiff fails to raise an issue of fact. The Plaintiff contends that Brickman was responsible for pruning shrubbery that grew excessively in length,

including cutting the daylilies. Even in the event it was found that Brickman was responsible for cutting the daylilies, the fact remains that the condition was open and obvious and was not inherently dangerous. The Plaintiff testified that she traversed the walkway where the accident occurred approximately four to five times daily and never complained about the length of the daylilies prior to the date of her accident. Indeed, the photographs taken of the walkway show that there was a clear path in the walkway on which the Plaintiff could have chosen to traverse. *See* Defendants Exhibit “E”. The daylilies did not encroach on the entire walkway. Clearly, this was a condition that could be readily observed by those employing the reasonable use of their senses.

Moreover, notwithstanding the fact that the condition that caused the accident was open and obvious and not inherently dangerous, the Defendants were not on notice, actual or constructive, of the purported dangerous condition. The Plaintiff posits that complaints from other residents regarding other walkways serves as sufficient notice to the landlord that the daylilies on the Plaintiff’s walkway should have been pruned. The Plaintiff’s argument is misguided as the notice provided regarding other walkways is not relevant to whether the landlord was on notice of a dangerous condition on the Plaintiff’s walkway.

Based upon the foregoing, summary judgment in favor of the Defendants, Panco and East End is warranted as a matter of law. In light of the Court’s determination of the Defendants’ motion, the Third-Party Defendants’ motion (Mot. Seq. 01, 02), pursuant to

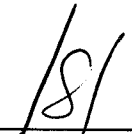
CPLR § 3212, seeking an order dismissing the third-party complaint against it, is rendered moot.

Accordingly, it is hereby

**ORDERED**, that the Defendants' motion (Mot. Seq. 03), pursuant to CPLR § 3212, seeking an order granting summary judgment in their favor and dismissing the Plaintiff's complaint, is **GRANTED**.

This decision constitutes the decision and order of the court.

DATED: Mineola, New York  
May 25, 2011

  
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Hon. Randy Sue Marber, J.S.C.  
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**ENTERED**  
MAY 26 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE