

**Roberts v King Enter. Ltd.**

2014 NY Slip Op 30102(U)

January 13, 2014

Sup Ct, New York County

Docket Number: 107085/08

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

BARBARA JAFFE  
J.S.C.

PRESENT: \_\_\_\_\_  
Justice

PART 12

Index Number : 107085/2008  
ROBERTS, RONNIE  
vs.  
KING ENTERPRISES  
SEQUENCE NUMBER : 004  
SUMMARY JUDGMENT

INDEX NO. 107085/2008  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 004

The following papers, numbered 1 to \_\_\_\_\_, were read on this motion to/for \_\_\_\_\_

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Answering Affidavits — Exhibits \_\_\_\_\_ No(s). \_\_\_\_\_

Replying Affidavits \_\_\_\_\_ No(s). \_\_\_\_\_

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER

FILED

JAN 15 2014

NEW YORK  
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE  
FOR THE FOLLOWING REASON(S):

Dated: 1/13/14

[Signature], J.S.C.  
BARBARA JAFFE  
J.S.C.

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

[Vertical Stamp]  
1/13/14

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
RONNIE ROBERTS,

Plaintiff,

- against -

Index No. 107085/09

Mot. seq. no. 004

**DECISION AND ORDER**

KING ENTERPRISES LTD., and  
THE CITY OF NEW YORK,

Defendants.

-----X  
BARBARA JAFFE, J.:

**FILED**

JAN 15 2014

**NEW YORK  
COUNTY CLERK'S OFFICE**

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Defendant King Enterprises, Ltd. moves pursuant to CPLR 3212 for an order dismissing the complaint. Plaintiff opposes.

I. BACKGROUND

On January 20, 2008, at approximately 4 a.m, plaintiff was allegedly injured when he tripped on a sidewalk tree well at 439 West 51<sup>st</sup> Street, in front of premises owned by defendant. (Def. Exh. A).

At an examination before trial (EBT) held on May 12, 2011, plaintiff testified that he tripped over a raised brick in the tree well. (Exh. H).

When deposed that same day, Peter Camilleri, employee of defendant's property manager denied that defendant planted the tree in the tree well, that defendant performed any work on the

tree well before the accident, knowing who placed the bricks in the tree well, or that he performed any work on the sidewalk before the accident, except for replacing a sidewalk flag. He admitted that in 2010, defendant placed decorative guards around the tree well. (Exh. K).

At an EBT held on February 6, 2013, plaintiff testified that the tree well had no guard around it on the date of the accident, that the dirt inside the tree well was uneven, that the surrounding sidewalk was uneven, and that when he stepped into the tree well with his left foot, he fell forward. (Exh. J).

At an EBT held on February 22, 2013, William Steyer, a director for the New York City Department of Parks and Recreation, stated that the Department had planted the tree and pruned it in October 2002, but that the Department does not perform routine maintenance of tree wells and performed no work on the tree in the two years before the accident. When shown a picture taken of the bricks at the time of the accident, Steyer described them as paving stones, which he distinguished from the granite cobblestone ordinarily used by the Department. (Exh. L).

## II. DEFENDANT'S MOTION

### 1. Contentions

Defendant denies owning, operating, or making special use of the tree well, and thus denies that it can be held liable for failing to maintain it. (Lechleitner Aff., Reply Aff.). Plaintiff alleges that defendant's installation of the guards around the tree well after the accident and Steyer's testimony raise questions of fact as to whether defendant installed the stones or otherwise made special use of the tree well. (Mirman Aff.).

### 2. Analysis

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to

judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as “mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If the movant does not meet this burden, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*, 64 NY2d at 853).

Negligence arises from a duty, a breach thereof, and an injury proximately caused thereby. (*Kenney v City of New York*, 30 AD3d 261, 262 [1<sup>st</sup> Dept 2006]). Liability for a dangerous condition on premises may arise from the duty owed by virtue of ownership, occupancy, control, or special use of the premises. (*Jackson v Bd. of Educ. of City of New York*, 30 AD3d 57, 60 [1<sup>st</sup> Dept 2006]). Absent a duty, there is no liability (*Palsgraf v Long Is. R. Co.*, 248 NY 339, 342 [1928]), and whether a duty exists constitutes a legal question (*Eiseman v State*, 70 NY2d 175, 187 [1987]).

While property owners have a non-delegable duty to maintain abutting sidewalks (Administrative Code § 7-210), this duty does not extend to city-owned tree wells (*Vucetovic v Epsom Downs, Inc.*, 10 NY3d 517 [2008]). Therefore, in an action arising from an alleged defect in a tree well, a property owner demonstrates its *prima facie* entitlement to summary judgment by submitting evidence that it neither negligently repaired the tree well nor caused the dangerous condition, either affirmatively, or by some special use of the tree well. (*See Fernandez v 707, Inc.*, 85 AD3d 539, 540 [1<sup>st</sup> Dept 2011]).

Here, Camilleri's testimony that defendant never performed work on the tree well before the accident, demonstrates, *prima facie*, that defendant owed no duty to plaintiff. (See *Teitelbaum v Crown Hgts. Ass'n for Betterment*, 84 AD3d 935, 936 [2d Dept 2011] [property owner demonstrated *prima facie* entitlement to summary judgment by showing that brick at issue part of tree well]; *Grier v 35-63 Realty, Inc.*, 70 AD3d 772, 773 [2d Dept 2010] [owner of premises abutting sidewalk established, *prima facie*, that it did not create hazardous condition, negligently repair, or cause condition to occur through special use of tree well]; *Fuller v PSS/WSF Hous. Co., L.P.*, 70 AD3d 415 [1<sup>st</sup> Dept 2010] [same; defendant entitled to summary judgment as plaintiff tripped on dirt area of tree well]). Absent evidence rebutting Camilleri's testimony, defendant's installation of decorative guards more than two years after the accident and the Department's unsubstantiated claim that it seldom uses paving stone fail to raise a triable issue. (See *Zuckerman*, 49 NY2d at 562 [unsubstantiated allegations insufficient to defeat summary judgment]; *Krichevskaya v City of New York*, 30 AD3d 471, 472 [2d Dept 2006] [plaintiff's speculation that property owner created dangerous condition on sidewalk insufficient to defeat summary judgment]).

### III. CONCLUSION

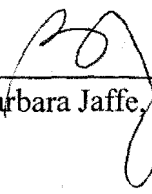
Accordingly, it is hereby

ORDERED, that defendant King Enterprises Ltd.'s motion for summary judgment is granted and the complaint is severed and dismissed, with costs and disbursements to said defendant as taxed by the Clerk upon submission of an appropriate bill of costs, and the Clerk is directed to enter judgment accordingly, it is further

ORDERED, that counsel for said defendant shall serve a copy of this order with notice of

entry upon the County clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158).

ENTER:

  
\_\_\_\_\_  
Barbara Jaffe, JSC

DATED: January 13, 2014  
New York, New York

**FILED**  
JAN 15 2014  
NEW YORK  
COUNTY CLERKS OFFICE