

**Plumacher v Dubin**

2014 NY Slip Op 32908(U)

January 13, 2014

Supreme Court, Westchester County

Docket Number: 56368/2011

Judge: Francesca E. Connolly

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
KIM PLUMACHER,

Plaintiff,

-against-

DECISION and ORDER

Sequence No. 1

Index No. 56368/2011

GLEN DUBIN and EVA DUBIN, individually and d/b/a  
HICKORY HILL FARM,

Defendants.  
-----X

CONNOLLY, J.

The following documents were read in connection with the defendants' motion for summary judgment:

Defendants' Notice of Motion, Affirmation, Affidavit, Memo of Law, Exhibits	1-15
Plaintiff's Affirmation in Opposition, Exhibits	16-18
Defendants' Affirmation in Reply	19

**FACTUAL BACKGROUND/PROCEDURAL HISTORY**

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on November 13, 2010 when a motorcycle he was operating collided with a tree that had allegedly fallen from the defendants' property into the plaintiff's path of travel. The complaint alleges causes of action sounding in negligence and public nuisance.

The defendants move for summary judgment dismissing the complaint on the ground that they did not have notice, actual or constructive, of any defect of the alleged tree on their property. In support of their motion, the defendants rely upon, among other things, a copy of the pleadings, deposition testimony of the plaintiff and Don Carr, the defendants' full-time employee, various photographs, and a copy of an uncertified police accident report.

According to the plaintiff, he was traveling on his motorcycle southbound on Route 121 in North Salem, New York, at a rate of speed of about 45 miles per hour, and when he was 1/2 mile south of Silo Ridge Road and 2/10ths of a mile north of Turkey Hill Road, he noticed a tree falling across the road. He had approximately fifteen feet to stop the motorcycle, which made it impossible

for him to avoid colliding with the tree (*see* Plaintiff's Deposition at 16-21). He was able to slow down his speed by about five miles per hour before he hit the tree and flipped over several times (*see* Plaintiff's Deposition at 22). The tree had fallen across both lanes of traffic.

During the plaintiff's deposition, he identified two different trees as being the subject tree involved in the accident. The first tree, which he had identified in a discovery response, was not the same tree he later identified as the subject tree that caused his accident (*see* Plaintiff's Deposition at 19-35). He discovered the first tree at the location of the accident approximately one month after it occurred, but when he returned to the location six to eight months later, he discovered a second tree, which he believes, due to its size, location, and proximity to the area where the accident occurred, was the subject tree (*see* Plaintiff's Deposition at 38).

Don Carr, a licensed arborist employed by the defendants as a full-time grounds foreman since 2007, testified at a deposition on behalf of the defendants (*see* Carr's Deposition at 8-12). Carr and his employees' duties included cutting grass, cutting down trees, picking up branches, trimming vines, and other general landscaping (*see* Carr's Deposition at 9). Carr and his employees would conduct visual inspections of the trees on the defendants' property, and if they noticed a dead or decaying tree, they would remove it or hire a tree removal company (*see* Carr's Deposition at 18-20). He recognized both trees identified by the plaintiff as being on the defendants' property along Route 121. Carr opines that the first tree identified by the plaintiff as the subject tree could not be the fallen tree since it was at least 50-60 feet off the roadway (*see* Carr's Deposition at 36-37). The second tree identified by the plaintiff was approximately 30 feet from the road (*see* Carr's Deposition at 24). Despite his familiarity with this tree, Carr could not recall its condition (*see* Carr's Deposition at 24). Although the tree in the photograph shown to Carr appeared to be dead, he opined that it was not dangerous as depicted because the top was missing, and it was only 20 feet tall and leaned away from the roadway (*see* Carr's Deposition at 24-25). If one of his employees had seen the tree in this condition, and at its full height prior to the plaintiff's accident, he would have expected his employees to report its condition to him (*see* Carr's Deposition at 26). Additionally, after learning of the accident six months after it occurred, Carr inspected the property and was unable to identify any tree that appeared as though it had fallen from the defendants' property onto the roadway (*see* Carr's Deposition at 34).

The defendants argue that since the plaintiff is unable to identify the tree in question that allegedly caused his accident, they are entitled to summary judgment dismissing the complaint. Specifically, the defendants contend that the plaintiff's speculation regarding the subject tree is fatal to the action. Additionally, the defendants contend that they are entitled to summary judgment dismissing the complaint because there is no evidence that they had actual or constructive notice of a defect in the subject tree and, in any event, the plaintiff cannot demonstrate that the subject tree exhibited signs of readily observable manifestations of decay.

In opposition, the plaintiff submits his affidavit and an affidavit from Zig Panek, a certified tree expert. The plaintiff avers that approximately one month after the accident he went to the location of the accident to look for the trunk of the fallen tree and spotted one dead tree and, although

he was unsure of whether this was the tree that caused his accident, he took a photograph of it. The plaintiff avers that since he was in a great deal of pain and could not look for any more trees at that time, he returned to the location of the accident a few months later, walked along Route 121, and found portions of a tree trunk in the same location where he observed people moving them off the roadway on the date of the accident as he waited for medical attention. Approximately 10 feet away from the broken pieces of the tree trunk, he observed a tree stump. The plaintiff avers that this is the tree that caused his accident since the first tree he observed was at least fifty feet from the roadway.

Panek avers that he conducted an inspection of the fallen portions of a tree along Route 121, as identified by the plaintiff. He opined that the standing tree trunk was dead without vegetation or bark and an orange sign was posted on it identifying the owner as "Dubin." He further opines that the base of the tree was clearly rotting and there were other structure fissures on the tree that would cause the tree to continue to break apart. Panek opines that the subject tree was approximately 25 years old, that it had sustained damage to the area where the trunk broke at least 10 years prior to the subject accident, that the tree was wholly dead, and presented a significant risk. He further opined that even a casual visual inspection would have revealed the danger the tree posed.

In reply, the defendants contend that the plaintiff's deposition testimony as to the identity of the specific tree involved in the accident is speculative and cannot support a finding of liability against the defendants, and further, the plaintiff cannot rely upon a self-serving affidavit submitted in opposition to the defendants' motion to defeat summary judgment. The defendants also contend that the Court should not consider the expert affidavit of Panek because it is speculative and conclusory, relying solely on the plaintiff's equivocal identification of the subject tree.

### **LEGAL ANALYSIS/DISCUSSION**

The defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that they had neither actual or constructive notice of the alleged defective tree (*see Babcock v County of Albany*, 85 AD3d 1425, 1426 [2d Dept 2011] ["Constructive notice that a tree or limb is dangerous may be based upon signs of decay or other defects that are readily observable by someone on the ground or that a reasonable inspection would have revealed"]; *see also Michaels v Park Shore Realty Corp.*, 55 AD3d 802, 802 [2d Dept 2008]; *Crawford v Forest Hills Gardens*, 34 AD3d 415 [2d Dept 2006]). The defendants submitted the deposition testimony of Carr, who testified that he is the defendants' full-time grounds manager and conducted visual inspections of the trees on their property. Prior to the plaintiff's accident, neither he nor his employees observed any decay or defects in the trees on the defendants' property that would have caused him to suspect that they posed any danger. This evidence is sufficient to shift the burden to the plaintiff to proffer evidence creating a triable issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1980]).

However, in opposition, the plaintiff raise a triable issue of fact. The plaintiff submitted an expert affidavit from Panek who opined that even a casual visual inspection, within a five year period prior to the plaintiff's accident, of the subject tree (the second tree identified by the plaintiff) would have revealed the danger the tree posed, as there would have been no vegetation or bark on

the tree during that period of time (*see Babcock v County of Albany*, 85 AD3d at 1426 [Plaintiff raised issues of fact through the submission of an affidavit by an expert who opined that the tree and limbs had defects that would have been readily observable]; *see also Crawford v Forest Hills Gardens*, 34 AD3d at 416 [“[T]he plaintiffs offered the affidavit of their expert which raised a triable issue of fact as to whether the tree presented a ‘readily-observable manifestation of decay’ that should have alerted the appellants to the defective condition”]). Accordingly, the defendants’ motion for summary judgment dismissing the complaint is denied.

Insofar as the defendants contend that they are entitled to summary judgment on the ground that the plaintiff’s testimony is too speculative as to which tree on the defendants’ property caused the subject accident, this argument is without merit (*see Hartman v Mountain Valley Brew Pub, Inc.*, 301 AD2d 570, 570 [2d Dept 2003] [“[T]he absence of direct evidence of causation would not necessarily compel a grant of summary judgment in favor of the defendant, as proximate cause may be inferred from the facts and circumstances underlying the injury, [and] the evidence must be sufficient to permit a finding based on logical inferences from the record and not upon speculation alone”]). In the instant action, the plaintiff identified two different trees on the defendants’ property as the subject tree, however, he also explains that the first time he visited the location of the accident he was in pain, could not continue to look for the remains of the fallen tree, and was unsure as to whether the photographed tree was the subject tree that caused his accident. Thus, upon his second visit he identified the second tree as the subject tree that caused his accident. Further, the defendants’ witness, Carr, confirms in his deposition testimony that the first tree identified by the plaintiff could not have been the fallen tree due to its distance from the roadway, and that the second tree, the subject tree, appeared to be dead as evidenced by the lack of bark. Accordingly, there is sufficient non-speculative evidence in the record to permit the plaintiff to proceed.

Based upon the foregoing, it is hereby

ORDERED the defendants’ motion for summary judgment is denied; and it is further

ORDERED that all parties appear in the Settlement Conference Part on March 13, 2014 at 9:30 a.m., in courtroom 1600 of the Westchester County Supreme Court, 111 Dr. Martin Luther King, Jr., Boulevard, White Plains, New York, 10601; and it is further

ORDERED that all other relief requested and not decided herein is denied.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
January 13, 2014

  
HON. FRANCESCA E. CONNOLLY, J.S.C.