

Goldberg v Village of Mount Kisco
2014 NY Slip Op 33502(U)
July 31, 2014
Supreme Court, Westchester County
Docket Number: 22329/2010
Judge: Charles D. Wood
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To commence the statutory time period 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
ARNOLD GOLDBERG,

Plaintiff,

-against-

**VILLAGE OF MOUNT KISCO and
TOWN OF MOUNT KISCO,**

Defendants.

-----X
ARNOLD GOLDBERG,

Plaintiff,

-against-

**SAVE-A-TREE COMPANY INC. And
HAWTHORNE BROTHERS TREE
SERVICE INC.,**

Defendants.

-----X
WOOD, J.

**DECISION & ORDER
Index No. 22329/2010
Sequence No. 3**

ACTION NO. 1

**Index No. 60072/11
Sequence Nos. 2&3**

ACTION NO. 2

FILED
AUG - 1 2014
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

The following documents numbered 1-69 were read in connection with defendants' motions for summary judgment in Actions No. 1&2¹ :

ACTION NO. 1 (Index No. 22329/10)

Sequence No. 3 brought by defendants Village of Mount Kisco and Town of Mount Kisco.
Defendants' Notice of Motion, Counsel's Affirmation, Pieragostini Affidavit, 1-17
Exhibits, Memorandum of Law.

¹The parties represent that there was an agreement to consolidate all three motions for summary judgment.

Plaintiff's Counsel's Affirmation in Opposition, Hucker Affidavit, Mamone Affidavit, Exhibits.	18-25
Defendants' Counsel's Reply Affirmation.	26

ACTION NO. 2 (Index No. 60072/11)

<u>Sequence No. 2-brought by defendant Hawthorne Brothers Tree Service, Inc. ("Hawthorne")</u> Hawthorne's Notice of Motion, Counsel's Affirmation, Exhibits.	27-38
Plaintiff's Counsel's Affirmation in Opposition, Hucker's Affidavit, Mamone's Affidavit, Exhibits.	39-46
Hawthorne's Counsel's Affirmation in Reply.	47

<u>Sequence No. 3 brought by defendant Save-A-Tree Company, Inc ("Saveatree")</u> Saveatree's Notice of Motion, Counsel's Affirmation, Exhibits.	48-60
Plaintiff's Counsel's Affirmation in Opposition, Hucker Affidavit, Mamone's Affidavit, Exhibits.	61-68
Saveatree's Reply Affirmation.	69

These actions arise out of a claim for alleged personal injuries sustained by plaintiff, who is 65 years old, in a trip and fall accident over exposed tree roots in Leonard Park in the Village of Mount Kisco on August 12, 2009. Plaintiff alleges that he tripped and fell on an unpaved public walkway located between the handicapped parking lot and a foot bridge leading to the picnic area. In October 2009, plaintiff filed a notice of claim with the Village of Mount Kisco and the Town of Mount Kisco. Plaintiff then commenced action no.1 on August 6, 2010. Issue was joined by service of defendants' answer on or about October 14, 2010. Plaintiff then commenced action no. 2 against Hawthorne and Saveatree on October 28, 2011. Issue was joined in action no. 2 by service of defendants' answer on or about February 8, 2012.² Plaintiff has filed a Note of Issue and Certificate of Readiness in both action 1 and 2.

²Defendants maintain that a stipulation to consolidate both actions have been circulated, but it has not been fully signed or so-ordered as of the date of their submissions.

Defendants now each move for summary judgment dismissing the complaint, arguing that they cannot be held liable for plaintiff's injuries.

NOW based upon the foregoing, the motion is decided as follows:

It is well settled that “a proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v. Sokol, 128 AD2d 492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v. Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented “in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is “even arguably any doubt as to the existence of a triable issue” (Kolivas v. Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v.

Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]). Further, CPLR 3212(b), specifically provides that "the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact".

Further, the elements of common law negligence are: "(1) a duty owed by the defendant to the plaintiff, (2) a breach of that duty, and (3) a showing that the breach of that duty constituted a proximate cause of the injury" (Ingrassia v Lividikos, 54 AD3d 721, 724 [2d Dept 2008]). A threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party (Darby v. Compagnie Natl. Air France, 96 N.Y.2d 343 [2001]). The existence and scope of a duty is a question of law requiring courts to balance sometimes competing public policy considerations juries determine whether and to what extent a particular duty was breached, it is for the courts to decide in the first instance whether any duty exists and, if so, the scope of such duty (Church v Callanan Indus., 99 NY2d 104, 110-11, [2002];(Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 [2002])). In the case of a municipality, once it is determined that the municipality was exercising a governmental function, it can only be found liable if there is a "special relationship" between the municipality and the claimant. The elements of this "special relationship" are: "(1) an assumption by the municipality, through promises or action, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking" (Cuffy v. City of New York, 69 N.Y.2d 255, 260-61,

1987).

A defendant who moves for summary judgment in a slip and fall 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 within a reasonable time (Gordon v. American Museum of Natural History, 67 NY2d 836 [1986]); Baillet v. Auerbach, 277 AD2d 335 [2d Dept 2000]). In other words, to be entitled to summary judgment in a trip and fall case, defendant must establish, prima facie, that it maintained the premises in a reasonable safe condition and did not have notice of, or create, a dangerous condition that posed a foreseeable risk of injury to persons expected to be on the premises (Villano v Strathmore Terrace Homeowners Assn., Inc., 76 AD3d 1061 [2d Dept 2010]). Further, an owner or possessor of real property is not an insurer of the safety of the people on its property (Nallan v Helmsley-Spear, Inc., 50 NY2d 507, 6 [1980]; Donohue v Seaman's Furniture Corp., 270 AD2d 451 [2d Dept 2001]). A property owner has no duty to protect or warn against an open or obvious condition that is inherent or incidental to the nature of the property, that could be reasonably anticipated by those using it and is “readily observable by the use of one's senses” (Neiderbach v 7-Eleven, Inc., 56 AD3d 632, [2d Dept 2008]); (Groom v Village of Sea Cliff, 50 AD3d 1094 [2d Dept 2008]; “A defendant has constructive notice of a defect when it is visible and apparent, and has existed for a sufficient length of time before the accident that it could have been discovered and corrected. To meet its initial burden on the issue of lack of constructive notice, a defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell” (Feola v. City of New York, 102 AD3d 827,827-828 [2d Dept 2013]). A landowner will not be held liable for

injuries arising from conditions on the property that are inherent to the nature of the land and could be reasonably anticipated by those using it Mazzola v Mazzola, 16 AD3d 629, 630 [2d Dept 2005]).

ACTION NO. 1 Index No. 22329/2010

Defendants Village of Mount Kisco and Town of Mount Kisco (“Municipal defendants”) established their entitlement to judgment as a matter of law by demonstrating that the alleged defect (the tree root), was open and obvious and inherent or incidental to the nature of the property, and could be reasonably anticipated by those using it. In support of its motion, Municipal defendants assert that plaintiff really was not sure of the exact area where the incident happened; the alleged defect was inherent to the nature of the premises, and as a matter of law was not defective; the natural condition of the terrain in the area which plaintiff allegedly tripped was open and obvious and readily apparent; and defendants had no prior notice of any defect in the area where plaintiff fell. Therefore, Municipal defendants surmise that as a matter of law, plaintiff’s claim should be dismissed, since a fact finder would be required to speculate as to the cause of his fall where there can be many. They also argue that summary judgment is appropriate because there is no evidence that Municipal defendants either created or had actual or constructive notice of any defective condition which may have caused plaintiff to fall. Further, they claim that there is absolutely no proof regarding how long the condition complained of existed prior to plaintiff’s fall.

In further support of their summary judgment motion, Municipal defendants offer the testimony of Charles Pieragostini, who has been employed by the Village of Mount Kisco for the past 36 years, and in 1994, was appointed the Superintendent of Recreation. He attests that his

staff maintained the parks within the Village of Mount Kisco. He continues that the fields at Leonard Park are inspected each week and are mowed every 5 to 7 days. One of the groundsmen are at Leonard Park almost everyday to clean the facilities, empty the garbage, line the fields and cut the grass as needed. During the course of their weekly maintenance, if any defective condition such as a hole or depression was discovered, the grounds crew would fill it. He also attests that he has never observed any defective condition in the area where plaintiff fell, and has not received any complaints about the subject area prior to the subject incident. As the Director of Parks and Recreation, he would be made aware if a complaint has been received regarding Leonard Park, and he is unaware of any one else having been injured at the subject location because of the condition of the grassy area.

Taking into consideration the arguments raised by Municipal defendants, the court finds that they have met their burden of establishing prima facie entitlement to summary judgment. Municipal defendants have sufficiently demonstrated that they exercised reasonable care, did not create the dangerous condition through their omissions, had no prior complaints about the subject area or that a dangerous condition could have been prevented. It is also clear when the area in question was last inspected relative to the time when plaintiff fell, and whose responsibility that was (Oliveri v Vassar Bros. Hosp., 95 AD3d 973, 974-75 [2d Dept 2012] lv to appeal dismissed, 20 NY3d 965, [2012]).

The burden now shifts to plaintiff to raise a triable issue of fact to defeat Municipal defendants motion for summary judgment.

As a preliminary matter, defendants argue that plaintiff identifies an expert and submits an affidavit from said expert for the first time, in opposition to the motion for summary

judgment, and after the note of issue was filed. Thus, defendants argue that the court should not consider the expert affidavit in regard to this summary judgment motion. Notably, a court is not divested of its discretion to consider an affidavit submitted by that party's experts in context of a timely motion for summary judgment, despite the fact that the offering party did not disclose the expert's identity pursuant to CPLR 3101 (d) prior to the filing of the notice of issue and certificate of readiness (Rivers v. Birnbaum, 102 AD3d 26 ,42 [2d Dept 2012]). Based upon the foregoing, the court, in its discretion will consider plaintiff's expert, J. David Huckler, an arborist, in the context of this motion, as no prejudice has been shown in opposition.

Turning to the merits of plaintiff's opposition, plaintiff offers the affidavit of J. David Huckler, RCA, an arborist, who reviewed photographs and aerial images of Leonard Park. Huckler states that the subject area is of necessity a primary access for visitors at Leonard Park, and as such the clearly visible protruding roots should have been recognized by the staff of the park as a real and imminent tripping hazard. He claims that this condition existed for several years prior to plaintiff's fall, and should have been mitigated well prior to plaintiff's fall. Huckler opines that as an arborist, with a reasonable degree of professional certainty in this field, that the failure of the landowner and its contractors to properly maintain this path in Leonard Park was the proximate cause of plaintiff's fall and injuries.

Moreover, plaintiff argues that a triable issue of fact exists as to whether the subject walkway and the roots that were found growing along that pathway were either open and obvious and or inherent to the nature of the premises. Plaintiff argues that defendants' liability for failure to maintain a common walkway that reasonably permits the use of such walkway by members of the public to reach the picnic area, creates an issue of material fact that cannot be disposed of on

summary judgment. Plaintiff claims that he was aware as of the date of the accident that it was a tree root that caused him to fall. Plaintiff also offers the affidavit of Angel Mamone, who attests that on August 12, 2009, he witnessed plaintiff's fall and observed the tree roots prior to plaintiff's fall. He describes the grassy area where plaintiff fell as a well traveled path marked by two trash receptacles and that the path had numerous exposed tree roots.

Plaintiff also notes that the police report taken at the scene states that plaintiff's injuries resulted from a fall on a tree root. Furthermore, plaintiff argues that no sidewalk existed to assist pedestrian even though the pathway was used as a matter of necessity by pedestrians for some time. Plaintiff notes that defendant recognized its duty to warn entrants of some hazardous conditions in the immediate vicinity of the accident site as evidenced by the "no diving" sign.

Based upon the arguments, the court finds that plaintiff has raised a triable issue of fact as to whether a raised tree root could easily have been observed by plaintiff in that tree roots were surrounded by grass that may conceal the roots from an ordinary person's senses. Also, an issue of fact exists as to whether the alleged defects would have been discovered by reasonable inspection by the Municipal defendants, and thus whether the defect was open and obvious.

ACTION NO. 2

Regarding the liability of third party persons, a party who enters into a contract to render services may have assumed a duty of care and thus be potentially liable in tort to third persons in the following circumstances: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launch[es] a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the

premises safely (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 140 [2002])

(collectively, “the Espinal Exceptions”). Thus, a limited contractual undertaking to provide services does not make the contractor liable in tort for personal injuries of third parties (Lubell v. Stonegate at Ardsley home Owners Ass’n, Inc., 79 AD3d 1102, 1103 [2d Dept 2010]).

Sequence No. 2-Defendant Hawthorne’s motion for summary judgment

Here, Hawthorne asserts that it contracted with Mt. Kisco Recreation in 2009 to perform pesticide application pursuant to their 2009 Pest Management Contract. Hawthorne offered the testimony of John R. Hawthorne, the owner of Hawthorne who claims that their work in 2009 did not involve tree roots or any ground work, and was limited to the spray application of a water soluble pesticide to birch trees. Therefore, Hawthorne notes that it did not own, control, occupy maintain, manage or possess the subject area where plaintiff fell. Based upon the record, Hawthorne demonstrated its entitlement to summary judgment as a matter of law, inasmuch as none of the Espinal Exceptions apply here. Hawthorne owed no duty to plaintiff at the time of his accident, and as such, cannot be liable for his accident.

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff’s accusations concerning spoliation of defendant Hawthorne’s spray records, and other records are irrelevant to this action. In light of the foregoing, Hawthorne’s motion for summary judgment is granted.

Sequence No. 3- Defendant Saveatree’s motion for summary judgment

As a threshold matter, the court will address the timeliness of Saveatree’s motion for summary judgment. Saveatree admits that this motion is submitted 61 days from the filing of the note of issue contrary to the Westchester Supreme Court Differentiated Case Management

Protocol, Part Rules, which provide that any motion for summary judgment by any party must be served within 60 days following the filing of the note of issue.

CPLR Rule 3212(a) states: Time; kind of action. Any party may move for summary judgment in any action, after issue has been joined; provided however, that *the court may set a date after which no such motion may be made*, such date being no earlier than thirty days after the filing of the note of issue. *If no such date is set by the court, such motion shall be made no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown*. “In the absence of a showing of good cause for the delay in filing a motion for summary judgment, the court has no discretion to entertain even a meritorious nonprejudicial motion for summary judgment. (Greenpoint Props, Inc. v. Carter, 82 AD3d 1157, 1158 [2011], quoting *John P. Krupski & Bros., Inc. v. Town Bd. of Southold*, 54 AD3d 899, 901 [2008]; see Brill v. City of New York, 2 NY3d 648, 652 [2004]). “Good cause’ in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion—a satisfactory explanation for the untimeliness rather than simply permitting meritorious non prejudicial filings, however tardy” (Brill v. City of New York, 2 NY3d 648, 652 [2004]).

Since this motion was brought fairly contemporaneously with the other defendants’ motions for summary judgment, with similar issues in question, said motion will be considered along with the other motions, as there is no prejudice to plaintiff or the other parties by the motion being one day late, and judicial economy will be served by addressing it now.

Turning to the merits of Saveatree’s motion, it offers the testimony of its territory manager, Daniel J. Swim, who is in charge of all tree care, fertilization, pruning and take downs in the Mount Kisco and Katonah areas. Swim stated that defendant Saveatree has never done any

work in the location of plaintiff's subject accident or even on that side of the park entrance. Saveatree was not under contract with the Village of Mt. Kisco to perform regular tree maintenance before August 2009. Thus, it did not owe a duty of care to plaintiff as it did not own the property and did not contract for any duty of maintenance or responsibility over the area.

Based upon the record, Saveatree has established its prima facie entitlement to judgment as a matter of law on the basis that it did not owe a duty of care. Saveatree did not have a contract with the Village of Mt. Kisco. There is no evidence that Saveatree created the condition, had any notice of any dangerous or defective condition or performed any work in the location where plaintiff's accident occurred.

The burden now shifts to plaintiff. Based upon the record, plaintiff has failed to raise a triable issue of fact, and has failed to substantiate his claims concerning spoliation and discovery. Accordingly, it is

ORDERED that defendants Village of Mount Kisco and Town of Mount Kisco's motion in Action No. 1 for summary judgment dismissing the complaint is **DENIED**, and it is further

ORDERED that defendant Hawthorne's motion for summary judgment in Action No. 2, dismissing the complaint as to Hawthorne Brothers Tree Service, Inc is **GRANTED** , and it is further

ORDERED that defendant Saveatree's motion for summary judgment in Action No. 2, dismissing the complaint as to Save-A-Tree Company Inc. is **GRANTED**, and it is further

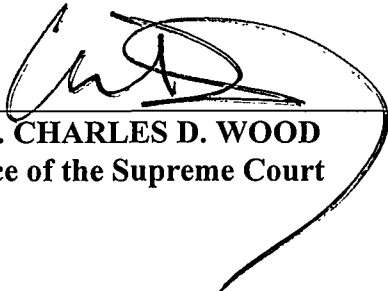
ORDERED that plaintiff's complaint in Index No. 60072/11 is dismissed in its entirety, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

All matters not specifically addressed are herewith denied. This constitutes the decision and order of the court.

It is further, **ORDERED**, that the remaining parties are directed to appear on *September 19th*, 2014, at *9¹⁵* a.m, in courtroom 1600, the Settlement Conference Part of the Westchester County Courthouse.

Dated: July 31, 2014
White Plains, New York



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Justice of the Supreme Court

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