Odato v Birch Acres Co-op., Inc.
2015 NY Slip Op 31331(U)
May 11, 2015
Supreme Court, Queens County
Docket Number: 20836/2012
Judge: Robert J. McDonald

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

DANIEL ODATO f/k/a DONATO ODATO and TATIANA ODATO,

Plaintiff,

- against -

BIRCH ACRES CO-OPERATIVE, INC. and ALFRED SCHNEIDER,

Defendants.

- x

Index No.: 20836/2012

Motion Date: 12/19/14

Motion No.: 90

Motion Seq.: 3

The following papers numbered 1 to 16 were read on this motion by defendants, Birch Acres Co-operative, Inc. and Alfred Schneider, for an order, pursuant to CPLR 3212, granting summary judgment in favor of said defendants and dismissing the plaintiff's complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo of Law	1 - 8
Affirmation in Opposition-Exhibits-Memo of Law	9 - 13
Reply Affirmation	14 - 16

This is an action commenced by plaintiff, Daniel Odato, for damages for personal injuries he allegedly sustained as a result of being struck by a tree which fell on him while he was in the process of securing it. Plaintiff, Tatiana Odato, owns a co-operative unit located at 35 Glen Hope Road, Hopewell Junction, in the Town of East Fishkill, New York. The property, which is a cooperative of 47 summer bungalows in Hopewell New York is owned by defendant Birch Acres Co-Operative, Inc (Birch Acres). The complaint asserts that defendant, Alfred Schneider, is the owner and President of Birch Acres.

According to the complaint and bill of particulars, on October 17, 2009, Daniel Odato, was injured when a tree fell on him while he was in the process of preparing to support it by the use of a metal pole. The complaint alleges that the defendants were negligent in operating, managing, and maintenance of the property in permitting a rotted and dilapidated tree to remain on the premises. Plaintiffs allege that the accident occurred as a result of the actions of the defendants in failing to remove the decomposed tree despite having been given actual notice of the poor condition of the tree. Plaintiffs assert that the defendants also had constructive notice of the poor condition of the tree in that the defendants knew or should have known that the hazardous and dangerous condition of the tree in question had existed for a period of time which plaintiff believes to be at least six months and failed to take action to remedy the dangerous condition. Plaintiff claims that he wrote to the defendants on two occasions expressing concerns and issues with the tree and the defendants failed to remedy the situation. Plaintiff claims that it was foreseeable that if the defendants did not take action in removing the tree that the plaintiff would likely remove the tree himself. As a result of the accident, the plaintiff sustained, inter alia, a burst fracture of the T12 vertebrae, displaced fracture of the scapula, transverse fracture through T12, fracture of the left L1 and L2 transverse process, and cerebral concussion with loss of consciousness

The plaintiff commenced the instant action by filing a summons and complaint on October 9, 2012. The complaint contains causes of action for damages for personal injuries to Daniel Odato, for loss of services of his wife Tatiana, and for breach of warranty of habitability. Issue was joined by service of defendants' verified answer with affirmative defenses dated November 27, 2012. Plaintiff filed a Note of Issue on July 18, 2014. The matter is presently on the calendar of Trial Scheduling Part on May 19, 2015.

Counsel for defendants, Brendan T. Fitzpatrick, Esq., now moves for an order granting summary judgment and dismissing the plaintiffs' complaint against the individual defendant Alfred Schneider, President of the Cooperative, on the ground that Mr. Schneider never acted outside his capacity as the President of Birch Acres and as a corporate officer he may not be sued in his individual capacity. Counsel asserts the courts have held in this regard that a corporate officer may not be held liable for the negligence of the corporation merely because of his official relationship. Counsel claims that the evidence shows that Mr. Schneider did not act in his individual capacity or commit any tort outside the scope of his corporate capacity as President of

the Board (citing Bernstein v Starrett City, Inc., 303 AD2d 530 [2d Dept. 2003]).

Secondly, defendants assert that the plaintiff's actions in cutting down the tree himself constitutes the sole proximate cause of the accident. The defendants contend that notwithstanding that they may have had knowledge of the condition of the tree, the plaintiffs inexplicable and unforeseeable actions in cutting down the tree were the sole cause of the accident. Counsel claims that the evidence shows that the inappropriate manner in which Odata elected to cut down the tree was unforeseeable and severed any causal nexus between the incident and any purported act or omission on the part of Birch Acres (citing Perez v Rodriguez, 40 AD3d 1062 [2d Dept. 2007]).

In support of the motion, the defendants submit copies of the pleadings, a copy of the plaintiff's verified bill of particulars, copies of the transcripts of the examinations before trial of the plaintiffs, Daniel Odato and Tatiano Odato, non-party witnesses Kebnin Ralph Coppola, and Exburn Barnes, and defendant Alfred Schneider; photographs of the scene after the accident; and copies of written correspondence between the parties.

The examination before trial of Alfred Schneider, age 91, was taken on June 13, 2014 at his home in LaGrangeville, New York. He testified that Birch Co-Operative Inc. is a membership co-operative which has been in existence for 50 years. He states that he is presently the President of the Birch Acres Co-Operative and has been in that position for 12 years without pay. He states that his duties as President include hiring contractors to do work necessary to prepare the premises for the spring and summer seasons. He hires contractors to repair and maintain the pumps and landscaping. He testified that there were companies that would inspect the trees on a regular basis including, Rick, TreeTop Services, Mike Ross and R&S Septic and Landscaping. They would periodically inspect the trees in April. If they made a recommendation to remove or trim a tree he would have the tree trimmed or removed. He stated that there are hundreds of trees on the premises and that he has gotten complaints in the past from owners of co-ops regarding the condition of the trees. He stated that he received no complaints in 2007, 2008 or 2009 from the defendants. He received a certified letter from the plaintiff in January 2008 which discusses numerous issues but none involving a tree.

Schneider also testified that the plaintiffs requested three times to have a particular tree cut down so that they could build an extension. However, he testified that the plaintiffs were told that they would have to have the trees cut down at their own expense by a professional tree contractor. The trees were inspected by the co-op in 2010. He states that if he was notified of a problem with a tree he would follow up on it. He identified correspondence sent to him by the plaintiffs the last being July 17, 2008 in which it states that the plaintiffs notified him three times that there was a problem with a tree on their premises. He stated he was actually notified once. He does not recall if he responded to their complaint. He stated that he sent landscapers, Treetop Services, to the plaintiffs' bungalow within 10 days after the July 17, 2008 letter. The landscaper reported back to him that the plaintiffs' trees were healthy. He stated that he did not recall receiving the letter of January 2008 in which the plaintiff complained as to the dangerous condition of the trees. He stated that he never had a landscaper examine the tree that allegedly fell on the plaintiff prior to the accident. He stated that he did have trees inspected in 2008 by Total Tree Service and they made recommendations as to cutting down certain trees. He stated that the plaintiff did not ask to have a tree removed in 2007, 2008 or 2009 because of a dangerous condition.

Plaintiff Daniel Odato, age 61, testified at an examination before trial on January 17, 2014. He stated that his accident involving a tree occurred in October 2009 at the Birch Acres Co-op in the back of the bungalow #22 owned by his wife. The tree was located ten or twenty feet from a shed in the back of the property. He stated that the tree was leaning over towards his house and he believed it was a threat to the house. He stated that he tried to make a "ditch" in the tree (two or three inch cut) with a chain saw to straighten it out. After he cut into the tree in order to twist it, he intended to brace it with a metal pole. The cut was on an angle near the bottom of the tree. He made one cut up and one cut down to create a notch. He stated that a chunk of the tree did not come out there were only cut lines in the tree. He did not intend to cut the tree down just to brace it with a pole. After he made the cuts into the tree he went in the shed to get a metal pole. About two minutes later as he was coming out of the shed with the pole the tree fell on him. He was still partly in the shed when the tree fell on his head about ten feet away from the base of the tree. He lost consciousness after the was struck. He described the tree as eight inches wide. He stated that the tree was badly deteriorated. He believed it was deteriorated because it would lean on the bungalow when the wind blew and he believed in was decayed inside. He could not identify pictures of the downed tree

as being the tree that allegedly fell on him. He stated that the management was responsible for maintaining the tress on the property. He stated that although management was responsible he cut the tree himself because the President had not been responsive to several letters he had sent to Mr. Schneider regarding the deteriorated condition of the tree. He stated that he verbally complained two dozen times, the last time being two weeks before the tree fell. He stated that he would tell him about the deteriorated tree but nothing would get dome about it. He also stated he sent nine or ten certified letters to three separate addresses. He identified several letters sent to the President which discussed the problems with the tree. On January 28, 2008 he wrote that the tree was dangerous. Many of the letters were not picked up by Mr. Schneider. He also testified that he had an arborist, Kevin Cappola, examine the tree as well as Leonard Exuburm Barnes and SaveATree. He stated that Coppola looked at the tree a week before the accident. He told the plaintiff the tree was dangerous but he could not cut it for at least two weeks and the plaintiff wanted it to be cut immediately. Coppola told him that the tree need to be "cured" or cut. He then called Mr. Barnes to look at the tree and he told the plaintiff the same thing to the effect that the tree was dangerous. He offered to cut the tree down in a few weeks. To his knowledge Birch Tree did not have the tree evaluated. He stated that he never asked permission from Birch Acres to cut the tree down. He also stated that he appeared at a board meeting and raised the issue of the dangerousness of the tree. He testified that he sustained multiple fractures to his lower spine and fractured his left knee. He had surgery which required the insertion of a stainless steel rod in his back held in place with screws.

He identified letters he wrote one in May 2007 complaining as to the fact that a tree was touching the bungalow. Birchwood responded that permission to cut down the trees was denied until he has approval to build.

Plaintiff, Tatiana Odato, age 54, testified at an examination before trial on February 12, 2014. She stated that at the time of her husbands accident she was shopping and came back to find him lying down on the ground near the shed with a tree over him. She and a neighbor removed the tree from his body. She stated that to her knowledge he did not cut the tree. She stated that her husband had previously made complaints about the tree to the president, Mr. Schneider because the tree was leaning over the patio where they have a table and swing. She stated it was not leaning over the house. She testified that her husband had made written complaints on multiple occasions. She believed the

tree was dangerous as it was no longer vertical, rather it was leaning over and they asked to have it removed because it was dangerous.

Mr. Ralph Coppola, age 50, a certified pesticide applicator specialist testified at an examination before trial on July 18, 2014. He is employed by Save-A-Tree to take care of trees and lawns. He is not a certified arborist but he does tree work on the side. He went to look at trees for the plaintiff and he gave the plaintiff an estimate and recommendations of what should be done with the trees. With respect to the tree in question, he told Odato he was too busy at the time to take it down immediately. Plaintiff also told the witness he needed to get permission first from the Board. After the accident plaintiff called and asked for a letter stating that he looked at trees on the property prior to the accident. He stated that the letter that was produced depicting his signature was not, in fact, his signature. He also stated there were portions of the letter that he did not include. He stated that he did not write that the tree was causing an immediate danger. He did not write substantial portions of the letter and he stated that the signature was definitely not his signature. From looking at the pictures he believed the tree was cut three fourths through.

Exburn Barnes testified at an examination before trial on August 21, 2014, stating that he is self-employed in a construction business which does sheetrocking, tree cutting, roofing, tile, and trash removal. He has no special training as a tree specialist. He used to work in the plaintiff's construction business. He stated that the plaintiff asked him to cut a tree down on his property. He stated that he was so busy at the time he never got a chance to look at the tree or to give him an estimate. The first time he saw the tree was after it had fallen When shown a letter purportedly written and signed by him dated June 4, 2014 he stated he did not type it but he did sign it without reading it and had it notarized at a bank. He contradicted certain portions of the substance of the letter he denied that he went to the house to see the tree before the accident and he never told the plaintiff that the tree was an emergency situation. He stated that he went to the house after the accident to cut the tree up and take it away.

Alfred Schneider submits an affidavit dated September 26, 2014. He states that he is the President of Birch Acres Cooperative Board and that he was the President on Oct 17, 2009, the date of the plaintiff's accident. He states that the cooperative provides services such as garbage removal, landscaping, and water on a seasonal basis. He states that all of

the actions which he took regarding the plaintiffs herein and the subject tree were part of his official duties as President. He states that he never acted as an individual or outside his role as President. He states that he had no knowledge the plaintiff was going to attempt to cut down or work on the tree on the date in question. He never told plaintiff to cut or otherwise attempt to remove the tree and he never provided the plaintiff with instructions or directions on what actions he should take in regard to the tree.

Brendan T. Fitzpatrick, Esq., counsel for defendants submits that the action must be dismissed against Mr. Schneider because a corporate officer may not be held liable for the purported negligence of the corporation merely because of his official relationship to the company. Counsel asserts that all of the allegations against Mr. Schneider are based upon his purported misfeasance as the President of the cooperative. Counsel asserts that here is no evidence in the record that he acted independently of his capacity as an officer of Birch Acres (citing Wesolek v Jumping Cow Enters., Inc., 51 AD3d 1376 [4th Dept. 2008]; Bernstein v Starrett City, Inc., 303 AD2d 530 [2d Dept. 2003]).

Secondly, counsel asserts that the plaintiff's action in negligently cutting the tree constitutes the sole proximate cause of the accident. Counsel asserts that notwithstanding notice to Birch Acres and notwithstanding that the tree may have been dangerous, it was the plaintiff's negligence and inexplicable and unforeseeable actions that were the sole cause of the accident. Counsel claims that the plaintiff testified that he cut into the tree with a chainsaw and then walked away from it without securing it. Defendants assert that the plaintiff's method of tree cutting and his voluntary actions, rather than an unsafe condition on the property, was improper and negligent and was the sole proximate cause of the accident. Defendant asserts that there was no breach of duty on the part of the defendant that was the proximate cause of the tree falling on the plaintiff because the defendants had no duty to protect the plaintiff from the unfortunate consequences of his own actions (citing Macey v Truman, 70 NY2d 918[1987]; Captanian v Schramm, 33 AD3d 834 [2d Dept. 2006]; Poole v Ogiejko, 62 AD3d 977 [2d Dept. 2009]; Smith v Taylor, 279 AD2d 566 [2d Dept. 2001]).

Further, counsel alleges that even if Birch Acres was negligent for failing to remove the tree, plaintiff's unforeseeable actions and inappropriate manner in cutting the tree severed any causal connection between their purported omission and the incident and represented a superseding or

intervening event (citing Perez v Rodriguez, 40 AD3d 1062 [2d Dept. 2007]; Mikelinich v Giovannetti, 239 AD2d 471 [2d Dept. 1997]).

In opposition, plaintiff's counsel, David Gevanter, Esq. argues that the defendants were negligent in that the evidence shows that they did not check all of the trees for disrepair and took no action to check the plaintiff's tree despite being notified in writing on several occasions that a tree was dilapidated and dangerous. Counsel claims that it was foreseeable that if the defendants did not take action to remove a dilapidated tree that was in close proximity to the plaintiff's premises, that plaintiff would likely remove the tree himself. Plaintiff asserts that the evidence shows that on June 23, 2008 and July 17, 2008, plaintiff wrote to Alfred Schneider expressing concerns with the tree (citing Snyder v Moore, 72 AD2d 580 [2d Dept. 1979]; McCann v City of New York, 205 AD2d 668 [2d Dept.1994]). Plaintiff contends that the issue of foreseeability and the comparative negligence of he plaintiff are questions of fact that need to be resolved by a jury. Plaintiff claims that the defendants, as landowners, failed to keep the property in a reasonably safe condition by failing to inspect the trees for safety and permitting the trees to remain in an unsafe condition. Counsel claims that it is clear that the defendants were put on notice of the defective condition of the tree and failed to take any action to remedy the situation. Thus it is argued, there is a question of fact as to whether the defendants were negligent in failing to inspect and remove a tree that was deteriorated. Plaintiff has not opposed that branch of them motion which seeks to dismiss the action against Mr. Schneider individually.

Upon review and consideration of the defendants' motion plaintiff's affirmation in opposition and defendants' reply thereto this court finds as follows:

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 landowner has a duty to exercise reasonable care to maintain his or her premises in a safe condition considering all of the circumstances including the purpose of the person's presence and the likelihood of injury (see Perez v Rodriguez, 40 AD3d 1062 [2d Dept. 2007]). Here, it is clear that the plaintiff

pursuant to letters dated June 23, 2008 and July 17, 2008 put the defendants on notice that there was an allegedly dangerous tree in close proximity to the plaintiff's cottage that plaintiff believed was required to be cut down because of a decaying condition.

However, despite the defendant landowner being on notice of the allegedly hazardous condition of the tree, the plaintiff did not wait for the defendant to inspect or remedy the condition, rather the plaintiff sought to have a tree removal service take down the tree. However, when the tree removal service could not perform the work within the time period desired by the plaintiff, the plaintiff took it upon himself to cut into the tree to try and remedy the allegedly dangerous condition. The evidence, including the plaintiff's deposition testimony and photographs of the tree after it fell, show that the plaintiff using a chain saw made at least a 3-4 inch notch cut into a tree with an 8 inch base to create a "ditch" so that he could use a metal pole to stabilize the tree. However, after making the notch in the tree the plaintiff walked away from the tree without stabilizing it leaving it in an unsafe condition.

This court finds that under the circumstances of this case the defendants established their prima facie entitlement to judgment as a matter of law by demonstrating that the plaintiff's injury did not result from a physical defect or unsafe condition on the property, but rather that the injuries sustained by the plaintiff were a direct result of the manner in which the plaintiff chose to cut into the tree with a chain saw. His injury was solely the result of the method he used in attempting to make the tree safer. Under these circumstances, the law imposed no duty on defendant as landowner to protect plaintiff from the unfortunate consequences of his own actions (see Macey v Truman, 70 NY2d 918 [1987]; Stamatatos v Stamatatos, 95 AD3d 1297 [2d Dept. 2012]; Captanian v Schramm, 33 AD3d 834[2d Dept. 2006]; Mattes v Joseph, 282 AD2d 506 [2d Dept. 2001]; Poole v Ogiejko, 62 AD3d 977 [2d Dept. 2009]; Mendelsohn v Kampfer, 2014 NY Slip Op 30808(U) [Sup Ct. Suffolk Co. 2014]).

In addition, defendants established as a matter of law that plaintiff's actions were a superseding cause absolving them from liability. "An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant" (see Ingrassia v Lividikos, 54 AD3d 721 [2d Dept. 2008]; Gomez v Hicks, 33 AD3d 856 [2d Dept 2006]). "While

foreseeability is generally an issue for the fact finder, where only one conclusion can be drawn, proximate cause may be decided as a matter of law" (Bell v Board of Educ. of the City of N.Y., 90 NY2d 944 [1997]).

In opposition, the plaintiff failed to raise a triable issue of fact.

Therefore, for all of the above stated reasons, it is hereby,

ORDERED, that the motion by defendants Alfred Schneider and Birch Acres Cooperative, Inc., for an order granting summary judgment dismissing the plaintiff's complaint is granted.

Dated: March 11, 2015
Long Island City, N.Y.

_____
ROBERT J. MCDONALD
J.S.C.