

Louallen v New York City Hous. Auth.

2019 NY Slip Op 31623(U)

June 6, 2019

Supreme Court, New York County

Docket Number: 151342/2016

Judge: Gerald Lebovits

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEOVITS PART IAS MOTION 7EFM

Justice

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HAROLD LOUALLEN,

Plaintiff,

- v -

THE NEW YORK CITY HOUSING AUTHORITY, THE CITY OF NEW YORK

Defendant.

-----X

INDEX NO. 151342/2016
MOTION DATE 11/09/2018
MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for

JUDGMENT - SUMMARY

Friedman Sanchez, LLP (Emil J. Sanchez and Andrew Michael Friedman of counsel), for plaintiff.
Leahey & Johnson P.C. (Steven Martin and Michael G. Dempsey of counsel) for defendant, New York City Housing Authority.
New York City Office of the Corporation Counsel (Anthony Bila of counsel), for defendant, City of New York.

GERALD LEOVITS, J.:

In this action for personal injury, defendant New York City Housing Authority (NYCHA) moves for summary judgment under CPLR 3212 (b).

BACKGROUND

Plaintiff Harold Louallen (plaintiff) alleges that, on September 11, 2015, at "the park/sitting area" of the Metro North Houses, located at 310 East 102nd Street in Manhattan (the Premises), he was struck by a tree branch (the Accident) (complaint, ¶¶ 21, 24-25; plaintiff's verified bill of particulars, ¶¶ 1-2).

At his deposition, plaintiff testified that on the date of the Accident, he stopped by the Premises in order to talk to his acquaintances and a relative (08/03/18 Dempsey affirmation,

exhibit H [plaintiff dep tr at 39-41, 47-49, 54, 56]). Plaintiff described the Premises as a little park, in a NYCHA development called Metro North, where there are tables for people to play checkers and cards, as well as a basketball court (*id.* at 36, 40, 63, 119-120). Plaintiff was sitting on a folding chair and was engaged in a conversation, when he was struck by a falling tree branch (*id.* at 35-36, 57, 59-60, 62, 65). The branch struck plaintiff's right shoulder, head, and left knee, and plaintiff fell to the ground (*see id.* at 62, 65, 70). The branch remained on top of plaintiff's body until the emergency medical personnel removed it (*id.* at 37, 65, 68-69). Plaintiff described the tree as "a big old tree" that "stands 30, 40 feet high" (*id.* at 119).

According to a tree expert, retained by NYCHA for the purposes of this litigation, there are five trees at the Premises (*see* 08/03/18 Dempsey affirmation, exhibit L [Panek aff, ¶¶ 6, 10-12; photos of the trees]).

NYCHA's witness, Christopher Brice (Mr. Brice), testified at his deposition that he is employed by NYCHA as a supervisor of grounds (08/03/18 Dempsey affirmation, exhibit I [Brice dep tr at 6-7]). His assignment includes the Metro North development, which consists of three buildings and a plaza in the middle (*id.* at 8-9). The plaza area contains a playground and a basketball court (*id.* at 9). The plaza area is open for public use (*id.* at 23). It is part of his duties to inspect the plaza, specifically "concrete, fences," and "trees" (*id.* at 9-10). As to the trees, Mr. Brice visually inspects the trees by looking and observing if there are "any dead branches"; "[i]f the tree itself [is] dead"; if there any hanging branches; "or [if there are] cavities or holes inside the tree" (*id.* at 10). Once a defect is discovered, Mr. Brice informs his supervisor and technical service (*see id.* at 11). Mr. Brice performs inspections of the grounds every morning, as well as every month, on the basis of which he fills out a report on a NYCHA form and submits it to his

superintendent (*see id.* at 12-13). In September 2015, Mr. Brice was performing visual inspections of the grounds at the Metro North development, including the trees (*see id.* at 22, 25).

In response to plaintiff's notice for discovery and inspection, NYCHA produced: "the Monthly Grounds and Playgrounds Inspection Reports from June and July 2015"; "the Supervisor of Grounds Daily Log Books from September 11, 2014 to September 11, 2015"; and "a Work Ticket from July 15, 2014" (08/03/18 Dempsey affirmation, ¶ 23; exhibit K).¹ The June 2015 Inspection Report, signed by Mr. Brice on June 26, 2015, among other things, states: "large branches falling around b-ball court," and the July 2015 Inspection Report, signed by Mr. Brice on July 30, 2015, among other things, provides: "[t]rees around b-ball court losing limbs" (*see id.*, exhibit K). Mr. Brice's daily logbook has a notation that on June 25, 2015 a resident reported that "someone was struck . . . by a fallen branch on 102nd st next to the . . . [basket]ball court area" (*see id.*, exhibit K [June 25th entry]).

In the verified complaint, plaintiff alleges that NYCHA and defendant The City of New York (the City), among other things, "were negligent in the ownership, operation, management, maintenance, inspection, control and pruning of said premises," including "the trees," and "in creating and/or allowing and/or permitting a hazardous condition to exist" (*see* 08/03/18 Dempsey affirmation, exhibit C [verified complaint, ¶¶ 26-27]). In the verified answer, NYCHA admitted that it "owns the premises known as 310 East 102nd Street in the County of New York, City and State and New York and operates and maintains those portions of the premises used in common by all persons lawfully thereat" (*see id.*, exhibit D [NYCHA's answer, ¶¶ 12, 14, 16, 18]). NYCHA also asserted two cross claims against the City (*see id.*).

¹ It appears that NYCHA produced these records subsequent to Mr. Brice's deposition, and that Mr. Brice was not deposed again with respect to these records.

In the supplemental bill of particulars, dated May 31, 2018, plaintiff alleged that NYCHA had actual and constructive notice of the dangerous condition based on, among other things: NYCHA's awareness of at least two prior similar accidents, NYCHA's receipt a notice of claim "with regard to the condition of falling trees branches at the location of the within accident;" and its "grounds reports stat[ing] that tree branches [were] falling from the trees . . . and that the trees are losing limbs" at the Premises (*see id.*, exhibit J [supp bill of particulars, ¶¶ 6-9]).

Previously, in motion sequence number 001, by order dated June 3, 2016, the court (d'Auguste, J.) dismissed the complaint against the City (*see* NYSCEF doc No. 19).² NYCHA is now moving for summary judgment.

DISCUSSION

To obtain summary judgment, the movant must tender evidentiary proof that would establish the movant's cause of action or defense sufficiently to warrant judgment in his or her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[T]he proponent of a summary judgment motion" does so by "tendering sufficient evidence to demonstrate the absence of any material issues of fact. This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citations omitted]).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v*

² In its notice of motion, the City sought the dismissal of all cross claims as well. The June 3, 2016 Order did not direct the dismissal of cross claims.

Prospect Hosp., 68 NY2d 320, 324 [1986]; see also *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]).

“In order to set forth a prima facie case of negligence, the plaintiff’s evidence must establish (1) the existence of a duty on defendant’s part as to plaintiff; (2) a breach of this duty; and (3) that such breach was a substantial cause of the resulting injury” (*Merino v New York City Tr. Auth.*, 218 AD2d 451, 457 [1st Dept 1996], *affd* 89 NY2d 824 [1996]).

Just like any other landowner, NYCHA “owe[s] a duty of care to keep its premises in a reasonably safe condition” (see *Ortiz v NY City Hous. Auth.*, 85 AD3d 573, 574 [1st Dept 2011]). “A landowner has a duty to exercise reasonable care to maintain its premises 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” (*Smith v NY City Hous. Auth.*, 52 AD3d 808, 808 [2d Dept 2008] [internal quotation marks omitted] [emphasis added]).

“The liability of a landowner to one injured on his property is governed by the standard applicable to negligence cases generally, i.e., . . . the standard of reasonable care under the circumstances whereby foreseeability shall be a measure of liability” (*Malloy v Delk Transmission*, 191 AD2d 303, 304 [1st Dept 1993] [internal quotation marks and citations omitted]). A property owner “must take reasonable measures to prevent injury to those whose presence on the property can reasonably be foreseen” (*Scurti v New York*, 40 NY2d 433, 441-442 [1976]; see also *Schwartz v Armand Erpf Estate*, 255 AD2d 35, 39 [1st Dept 1999] [stating same]).

Here, NYCHA admits that it owns and maintains the Premises (see NYCHA’s answer, ¶¶ 12, 14, 16, 18). The Premises are open to the public (see e.g. Brice dep tr at 23). Within months prior to the Accident, NYCHA’s own employee noted in two consecutive monthly reports that

“large branches” were falling off the trees located at the Premises, and that the trees growing at the Premises were “losing limbs” (*see* June 2015 and July 2015 Inspection Reports). Falling large tree branches is not an isolated episode, when a lone tree branch unexpectedly falls on a pedestrian, but rather may constitute a dangerous condition where specific trees are known to lose limbs (*see Freas v Tilles Ctr.*, 89 AD3d 680, 681 [2d Dept 2011]).

In support of the motion, NYCHA provides an affidavit of Waldemar Zig Panek, a New Jersey licensed tree expert (*see* 08/03/18 Dempsey affirmation, exhibit L [Panek aff]). Mr. Panek conducted the inspection of the five trees at the Premises on July 18, 2018, which is almost three years after the Accident took place. Mr. Panek states that, at the time of the inspection, all five trees were healthy and showed no signs of wounds, damage, or decay (*see id.*). Mr. Panek acknowledges that the trees have been pruned, but asserts that pruning “would [not] have destroyed evidence of a prior break” of a branch (*see id.*, ¶ 14, exhibit 2 [photos of the trunks of the trees showing marks of pruned branches]). He claims that “to a degree of horticultural certainty, the accident could not have happened as Plaintiff alleges” (*id.*, ¶ 16). Mr. Panek’s affidavit might have been sufficient to show that the alleged defect was trivial, or even nonexistent. However, NYCHA’s own records from 2015 reflect that, at the Premises, large branches were falling off the trees. If anything, Mr. Panek’s affidavit creates an issue of fact as to the seriousness of this branch-falling condition, which needs to be resolved by a trier of fact (*see e.g. Gutierrez v Riverbay Corp.*, 262 AD2d 64, 64 [1st Dept 1999]).

NYCHA contends that it had no notice of the dangerous condition. However, the previously referenced Mr. Brice’s monthly reports from June and July 2015, which he submitted to his supervisor, as well as his June 25, 2015 daily logbook entry constitute actual notice (*see* Brice dep tr at 12-13; *see also* 08/03/18 Dempsey affirmation, ¶ 23; exhibit K; *Atashi v Fred-*

Doug 117 LLC, 87 AD3d 455, 456 [1st Dept 2011] [“[a]ctual notice may be found where a defendant . . . was aware of [the] existence [of the condition] prior to the accident”).

The trier of fact may find that falling tree branches constitute a dangerous condition, and that it was foreseeable that a visitor to the Premises, which is open to the public, could get hurt by a falling branch. If so, having received actual notice of the dangerous condition in June and July 2015, NYCHA had sufficient time to remedy it prior to the Accident which took place in September 2015 (see Backer v Central Parking Sys., 292 AD2d 408, 409 [2d Dept 2002]).

NYCHA has not demonstrated that it took any steps to eliminate or, at least, to warn the public of this condition (see Scurti v New York, 40 NY2d at 441-442). Accordingly, NYCHA has failed to make a prima facie showing of entitlement to summary judgment, and its motion is denied (see e.g. Sarbak v Sementilli, 51 AD3d 1001, 1002 [2d Dept 2008] [denial of summary judgment where the defendant landlord failed to make a prima facie showing that there was no evidence of a dangerous condition on his property and that he had no notice of the condition]; see also Freas v Tilles Ctr., 89 AD3d at 681 [denial of summary judgment where “the defendants failed to make a prima facie showing that the alleged defect was trivial as a matter of law”]).

Accordingly, it is

ORDERED that defendant New York City Housing Authority’s motion for summary judgment is denied.

6/6/2019

DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE