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 : STATE OF NEW YORK
COUNTY OF ROCKLAND
HON. ROBERT M. BERLINER, J.S.C.

----------x

MADELYNE LANGFORD and PETER D. KAUFMANN

Plaintiffs,

-against-

COUNTY OF ROCKLAND, COUNTY OF ROCKLAND DIVISION OF ENVIRONMENTAL SERVICES and COUNTY OF ROCKLAND PARK COMMISSION,

Defendants.

----------x

DECISION AND ORDER

Index No.: 030555/2018

Motion Sequence # 2

The following papers, numbered 1 to 9, were read on Defendants' motion for summary judgment dismissing Plaintiffs' complaint:

Notice of Motion/Chafizadeh Affirmation /Exhibits(1-11)/DiMiola Affidavit/Exhibits (A-C)/Duff Affidavit/Exhibits (A-B)/Memorandum of Law in Support 1-5
Affirmation in Opposition/Exhibit(1)/Kalish Affidavit/Exhibits (A-C)..... 6-7
Reply Affirmation/Memorandum of Law in Reply 8-9

Upon the foregoing papers, it is ORDERED that this motion is disposed of as follows:

Plaintiffs commenced this action against Defendants for their injuries sustained after a tree branch fell on them while on a trail in Kennedy Dells Park ("the Park") located in New City, New York. The Park is owned by Defendant County of Rockland and operated by Defendant County of Rockland Park Commission. Defendants moved for summary judgment dismissing Plaintiffs' complaint based on three arguments: (1) Defendants are immune from liability of negligence pursuant to General Obligations Law ("GOL") § 9-103; (2) Defendants lacked actual or constructive notice as to the existence of a dangerous condition involving the tree at issue; and (3) there is no evidence of proximate cause because Plaintiffs' injuries were caused by a

naturally occurring condition, the danger of which was open and obvious and assumed by Plaintiffs.

Standard for Summary Judgment

"As we have stated frequently, the 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. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]. "Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a material and triable issue of fact." *Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]. Issue finding, not issue determination, is the key to summary judgment. *Krupp v Aetna Casualty Co.*, 103 AD2d 252 [2d Dept 1984]. In deciding such a motion, the Court must view the evidence in the light most favorable to the non-moving party. *See Kutkiewicz v Horton*, 83 AD3d 904 [2d Dept 2011]. First, the Court addresses Defendants' motion for summary judgment based on immunity under GOL § 9-103.

Defendants' Immunity Pursuant to GOL § 9-103

In support of their motion, Defendants allege that they are entitled to immunity under GOL § 9-103 as a matter of law because the two elements for applicability are satisfied. Specifically, they allege that Plaintiffs engaged in a requisite recreational activity and that the Park is suitable for that activity, hiking. In opposition, Plaintiffs allege that Defendants' motion for summary judgment cannot be granted based on immunity because there are issues of material fact regarding whether the County assumed a duty to act reasonably in the operation and maintenance of a supervised public park and recreational facility. In reply, Defendants allege that the applicability of the statute is a question of law for the Court to determine and that whether the Park is supervised is irrelevant to the applicability of the statute.

Pursuant to GOL § 9-103, a landowner owes not duty to keep its premises safe for entry or use by others for certain enumerated recreational activities, including hiking. "To establish entitlement to summary judgment based upon the statute, a defendant must establish ownership

of the property, the plaintiff's engagement in one of the recreational activities specified by the statute, and the suitability of the property for that recreational use." *Finnocchiaro v Napolitano*, 52 AD3d 463, 465 [2d Dept 2008][internal citations omitted]; *see also Bragg v Genesee County Agric. Soc'y*, 84 NY2d 544, 551-552 [1994]. The Court of Appeals has held that GOL § 9-103

> "does not provide immunity to a municipality, which, irrespective of any inducement contained in General Obligations Law § 9-103, *already operates and maintains a supervised facility, such as defendant's, for use by the public*. Nothing in the wording of General Obligations Law § 9-103 or its history supports defendant's construction which results in a drastic reduction in a municipality's responsibility in the operation and maintenance of its supervised parks, and serves no discernible public interest, certainly not one consistent with the stated aim of section 9-103: encouraging a landowner to permit persons to come upon his property for the purpose of hunting, fishing and other outdoor recreational activities (see, Russo v City of New York, 116 AD2d 240, 244, 245; Bush v Village of Saugerties, 114 AD2d 176, 178-180; O'Keefe v State of New York, 104 AD2d 43)."

Ferres v New Rochelle, 68 NY2D 446, 453-54 [1986][emphasis added]; *see Meyer v County of Orange*, 129 AD2d 688, 690 [2d Dept 1987].

Here, Defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting evidentiary proof that Plaintiffs were engaged in hiking, an activity identified in GOL § 9-103, and that the Park is suitable for hiking. However, Plaintiffs raised a triable issue of fact as to the applicability of the statute. The Park has five hiking trails which are marked and named for the public to traverse. The County's Park Operations Manager testified that the County checked the trails at the Park and performed any maintenance necessary as park rangers and park security walked through the trails looking for hazards. Defendants highlight that the Park's staff was limited to approximately 10 employees with a minimal degree of maintenance and without any supervision of hiking, which supports a finding that the Park was indeed unsupervised by the County. These contentions are belied by the fact that the Park's park rangers and security checked trails on a monthly basis and after any large storm event, as testified by the Park Operations Manager. Defendants had no specific protocol in maintenance, but trees were pruned through visual inspection and after big storms the County closed the Park and opened trails after it cleared fallen trees.

Based upon the foregoing, the Court finds that issues of fact exist as to whether the County has undertaken the duty that the law imposes in the operation and maintenance of

supervised park facilities. *See Schiff v State of New York*, 31 AD3d 526, 528-29 [2d Dept 2006]; *Leonakis v State*, 126 AD2d 706, 707 [2d Dept 1987]. Therefore, this branch of Defendants' motion for summary judgment is denied. Next, the Court addresses whether Defendants had any notice, actual or constructive, as to any defect of the tree.

Defendants' Actual or Constructive Notice

Defendants allege that they had no actual or constructive notice as to any dangerous condition of the tree at issue. They submit, *inter alia*, the Park Operations Manager's affidavit stating that the County's business records showed no concerns or need for follow-up regarding the tree from the routine maintenance patrols and that it received no notice of a dangerous condition by other means. Additionally, Defendants provide an affidavit from its arborist-expert witness who inspected the tree and concluded that there was a previous small crack in the limb that fell on Plaintiffs and had no outward visual signs. In his opinion, "[t]his crack allowed oxygen and water to enter the limb allowing fungal fruiting bodies to grow, but there were no signs of decay or rot in the limb." Duff Affidavit ¶ 23. Therefore, there were no visible signs that the tree and limb were structurally unsound, dead or decayed. In opposition, Plaintiffs provide an affidavit from their own arborist-expert witness who opines that the tree was structurally unsound as there was clear indicia of a "target limb." He states "[a]ny reasonable inspection of the canopy at the accident location, would have revealed a NOTICABLE mammoth over hanging and over extending limb which should have been red flagged as a limb 'reduction or removal' to an arborist." Kalish Affidavit ¶ 19.

"On a motion for summary judgment to dismiss the complaint based upon lack of notice, the defendant is required to make a prima facie showing affirmatively establishing the absence of notice as a matter of law." *Goldman v Waldbaum, Inc.*, 248 AD2d 436, 437 [2d Dept 1998][internal citations omitted]. "In cases involving falling trees or branches, liability may be imposed if there is actual or constructive notice of the alleged dangerous or defective condition of the tree. Constructive notice may be imputed if the record establishes that a reasonable inspection would have revealed the alleged dangerous or defective condition of the tree." *Michaels v Park Shore Realty Corp.*, 55 AD3d 802 [2d Dept 2008][internal citations omitted].

"A municipality does not have constructive notice simply because a tree is leaning." *Quog v Town of Brookhaven*, 273 AD2d 287, 288 [2d Dept 2000].

The instant case is similar to *Sleezer v Zap*, where two very large tree limbs on the defendant's property fell and struck the plaintiff's vehicle while he was driving on the highway. 90 AD3d 1121 [3d Dept 2011]. The plaintiff's expert therein opined that the cause of the fall was "structural, mainly that the angle and length of the larger limb that fell created a weight factor and a hazardous condition that, due to environmental conditions in this area, would result in an accident at some time." *Id.* at 1122. He also conceded that the tree was not rotted, and the health of the tree was fair to good. *Id.* There, the court highlighted the fact that plaintiff's expert "did not indicate that an average person – as opposed to an expert—would have been able to conclude, upon reasonable inspection of this healthy tree, that a limb was structurally unsound and posed a danger based on the length, angle and weight of that limb." *Id.* Subsequently, the Appellate Division, Third Department reversed the supreme court's order and granted the defendant's motion for summary judgment. *Id.*

Similar to *Sleezer*, Plaintiffs' expert herein concedes that the limb at issue had no outward visible indicia of decay or disease, as concluded by Defendants' arborist-expert. Plaintiffs' expert contributes the fall of the limb to its size and extension, rendering it "structurally unsound," which to an arborist, rather than an average person, should have been a red flag to reduce and remove the limb. The Court notes that the parties' submissions do not indicate that the Park's personnel include an arborist who checks the trails. Based upon the foregoing, the Court finds that Defendants have met their prima facie burden showing that they lacked actual or constructive notice as to a dangerous condition of the tree, and that Plaintiffs failed to establish any triable issues of material fact. Consequently, Defendants' motion for summary judgment dismissing Plaintiffs' complaint is granted.

Given that Defendants' lacked notice, the Court need not address the issue of proximate cause.

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York
July 22, 2020

ENTER

HON. ROBERT M. BERLINER, J.S.C.

To:

Counsel of record via NYSCEF