Jourdain v Metropolitan Transp. Auth.
2021 NY Slip Op 32927(U)
August 25, 2021
Supreme Court, Rockland County
Docket Number: Index No. 035562/2018
Judge: Sherri L. Eisenpress
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

----------X

MERLANDE JOURDAIN,

Plaintiff,

-*against*-

METROPOLITAN TRANSPORTATION AUTHORITY, COUNTY OF ROCKLAND AND TOWN OF CLARKSTOWN,

Defendants.

----------X

DECISION AND ORDER

Index No. 035562/2018

(Motions #3 and #4)

Sherri L. Eisenpress, J.

The following papers, numbered 1 to 18, were considered in connection with (i) Defendant Metropolitan Transportation Authority's ("MTA") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, for summary judgment dismissing the Verified Complaint as against it (Motion #3); and Defendant Town of Clarkstown's ("Clarkstown" or "Town") Notice of Motion for an Order, pursuant to *Civil Practice Law and Rules* § 3212, for summary judgment dismissing the Verified Complaint as against it (Motion #4):

PAPERS	**NUMBERED**
Motion #3	
NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-E/ MEMORANDUM OF LAW IN SUPPORT	1-3
DEFENDANT CLARKSTOWN'S AFFIRMATION IN PARTIAL OPPOSITION/ EXHIBIT A	4
PLAINTIFF'S AFFIRMATION IN OPPOSITION/EXHIBIT A/MEMORANDUM OF LAW IN OPPOSITION/EXPERT AFFIDAVIT AND CV OF CHARLES K. SADLER	5-7
MEMORANDUM OF LAW IN REPLY/EXHIBIT 1	8
Motion #4	
NOTICE OF MOTION/AFFIDAVIT OF CHRISTOPHER WAGNER/AFFIDAVIT OF JUSTIN SWEET/AFFIDAVIT OF FRANK DIZENZO/AFFIRMATION IN SUPPORT/EXHIBITS A-C/MEMORANDUM OF LAW IN SUPPORT	9-14

PLAINTIFF'S AFFIRMATION IN OPPOSITION/EXHIBIT A/MEMORANDUM OF LAW IN OPPOSITION/EXPERT AFFIDAVIT AND CV OF CHARLES K. SADLER	15-17
AFFIRMATION IN REPLY	18

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

Plaintiff filed a Summons and Complaint through the NYSCEF system on September 14, 2018. The Complaint alleges that on June 19, 2017, while plaintiff was operating a motor vehicle on the south side of Lawrence Street, at or near the intersection of North Pascack Road, in the Town of Clarkstown, Rockland County, she was caused to sustain serious personal injuries when a large tree adjacent fell on top of her stopped vehicle. The action was discontinued against the County of Rockland on November 5, 2018. On December 12, 2018, Defendant MTA interposed an Answer with cross-claims. After, Defendant Clarkstown's CPLR Sec. 3211 motion to dismiss was denied, it filed an Answer with cross-claims on October 31, 2019. After completion of discovery, the above referenced summary judgments were timely filed.

The facts in this case are largely undisputed. On June 19, 2017, plaintiff was operating her motor vehicle on the south side of Lawrence Street, in Spring Valley, New York, in an east-bound direction. Her vehicle was stopped at the intersection with North Pascack Road. At this intersection, North Pascack Road heads south through a one-way tunnel that traverses under an MTA iron rail bridge. The approaches to this MTA rail bridge are made of timber retaining walls and earthen fill. Upon the approaches sit railroad tracks running parallel to Lawrence Street. The MTA owns the embankment and the Town of Clarkstown owns and maintains Lawrence Street. A metal, commercial grade, chain link fence runs along Lawrence Street, on the boundary line between the Town and MTA's property.

As Plaintiff was stopped at a red light, she heard "noise", looked up, and the next thing she recalls was a tree crashing into her car. According to Christopher Wagner, First

Deputy Director of Engineering and Facilities Management for Clarkstown, the subject tree which fell was located south of Lawrence Street, approximately 125 feet west of N. Pascack/S. Pascack Road intersection and approximately 30 feet south of an existing non-climbable fence within the rail carrier's right of way, and outside Clarkstown's right of way. Neither defendant MTA or the Town inspected the trees in that area. The subject tree was removed by the Town from the roadway after it fell.

The Parties' Contentions

Defendant MTA moves for summary judgment and contends that as a public entity, it is entitled to the government immunity defense, precluding recovery by Plaintiff. It also asserts that Plaintiff has failed to demonstrate that defendant owed a duty of care to plaintiff or that any such duty of care was breached. More specifically, the MTA contends that it was under no duty to trim, maintain or otherwise physically alter the tree which injured plaintiff, as the tree was not a danger to the railroad tracks and would not have been subject to any inspection from MTA employees. It further contends that no complaints were made about the tree. Alternatively, Defendant MTA argues that if a duty did exist, that duty belongs to co-defendant Clarkstown since the injury did not occur on MTA property but on Lawrence Street, a public road maintained by the Town. Lastly, Defendant MTA argues that the injuries Plaintiff alleges were an "Act of God" and as such, no liability may attach.

Defendant Clarkstown moves for summary judgment on the ground that it did not owe Plaintiff any duty of care. It claims that the Town has established that the subject tree which fell on Plaintiff's vehicle was not on Town property nor was it in the Town's right of way. In fact, defendant asserts that it is undisputed that the tree was on MTA property, behind a secured fence, and that the Town had no access to it. Defendant Town also claims it is protected by government immunity. Lastly, defendant Town argues that Plaintiff has failed to demonstrate actual or constructive knowledge that the subject tree was in a visibly defective condition.

In opposition to the motions, Plaintiff argues that Defendant MTA owes a duty of care to Plaintiff based upon its status as a common carrier, as a property owner, and based upon New York Railroad Sec. 93 which requires maintenance of bridges and abutments where a highway passes under a railroad. With respect to defendant Clarkstown, Plaintiff argues that it has a duty to maintain its streets in good repair, including the maintenance of tree which may pose a danger to the roadways. Plaintiff argues that Defendant MTA is not entitled to qualified immunity as Plaintiff is not challenging MTA's discretionary decision making but rather its responsibilities as a property owner and common carrier.

Plaintiff argues that Defendants' failure to conduct tree assessment warrants automatic denial of the summary judgment motion. Since defendants admitted that they did not inspect the trees in that area, they are unable to demonstrate the absence of constructive notice. In the event defendants had met their burden, Plaintiff argues that based upon the expert affidavit of arborist Charles K. Sadler, there are triable issues of fact as to whether the tree was in a deteriorated and dangerous condition, such that constructive notice existed. Lastly, she argues that the "Act of God" defense lacks merit as no weather reports were attached and no showing made that it fell due to something like weather, and in the absence of Defendant's negligence.

Legal Analysis

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., *et al*., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in

admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Jacobsen v. New York City Health and Hospitals Corp., 22 N.Y.3d 824, 833, 988 N.Y.S.2d 86 (2014).

As an initial matter, the Court finds no merit to Defendants' argument that they cannot be liable in the instant matter due to governmental immunity. The common-law doctrine of governmental immunity shields public entities from discretionary actions taken during the performance of governmental functions. Lauer v. City of New York, 95 N.Y.2d 95, 99, 711 N.Y.S.2d 112 (2000). While public entitles remain immune from negligence claims arising out of the performance of their governmental functions unless the injured person establishes a special relationship with the entity, which would create a specific duty to protect that individual, public entitles are not immune from negligence claims stemming from the performance of their proprietary functions. Miller v. State of New York, 62 N.Y.2d 506, 510, 478 N.Y.S.2d 829 (1984); Crosland v. New York City Tr. Auth., 110 A.D.2d 148, 154, 493 N.Y.S.2d 474 (2d Dept. 1985). When a municipality acts in a proprietary capacity, it is generally subject to the same duty of care as private individuals and institutes engaging in the same activity. Miller, 62 N.Y.2d at 511. Thus, landowner liability may be imposed upon a municipality in the exercise of proprietary functions. Melby v. Duffy, 304 A.D.2d 33, 37-38, 758 N.Y.S.2d 89 (2d Dept. 2003). Here, the duty imposed upon the municipality or governmental entity to maintain trees on its property, and/or near the roadway, does not implicate the governmental functions of defendants, but rather, their proprietary functions.

"It is fundamental that, in order to be held liable in tort, the alleged tortfeasor must have owed the injured party a duty of care." Forbes v. Aaron, 81 A.D.3d 876, 877, 918 N.Y.S.2d 188 (2d Dept. 2011). "As a general rule, liability for a dangerous or defective condition

on property is predicated upon ownership, occupancy, control, or special use of the property." Tilford v. Greenburgh Hous. Auth. 170 A.D.3d 1233, 1235, 97 N.Y.S.2d 278 (2d Dept. 2019). "The existence of one or more of these elements is sufficient to give rise to a duty of care." Micek v. Greek Orthodox Church of Our Savior, 139 A.D.3d 830, 831, 31 N.Y.S.3d 189 (2d Dept. 2016). Here, Defendant MTA, as the owner of the property upon which the tree was located, owed a duty of care to plaintiff to maintain its property in a reasonably safe condition, thus giving rise to a duty to Plaintiff. Miller, 40 N.Y.2d at 513.

The Court reaches a different conclusion with respect to Defendant Clarkstown in the instant matter and finds that, under the circumstances present in this case, Clarkstown did not owe a duty to Plaintiff. Municipalities have a duty to maintain their roadways in a reasonably safe condition, and this duty extends to trees adjacent to the road which could pose a danger to travelers. Schillaci v. Town of Islip, 163 A.D.3d 600, 601, 81 N.Y.S.3d 208 (2d Dept. 2018). However, in the instant matter, it is undisputed that the subject tree was not on the Town's property, it was not in the Town's right of way, and it was not hanging over the roadway. Moreover, the subject tree was located on MTA property behind a secured fence, making an inspection of the subject tree extremely difficult and impractical. As no duty was owed to Plaintiff, Defendant Clarkstown's summary judgment motion is granted.

When a tree falls and injures someone who is not present on the property where the tree is located, the landowner can only be held liable if he or she had actual or constructive knowledge of the defective condition of the tree. Babcock v. County of Albany, 85 A.D.3d 1425, 1426, 925 N.Y.S.2d 703 (3d Dept. 2011); Figueroa-Corser v. Town of Cortlandt, 107 A.D.3d 755, 756, 967 N.Y.S.2d 744 (2d Dept. 2013). "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." Babcock, 85 A.D.3d at 1426. Moreover, 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 A.D.3d 802, 803, 865 N.Y.S.2d 686 (2d Dept. 2008).

Given the procedural posture of this matter, it was incumbent on Defendant MTA to demonstrate a complete absence of material fact as to whether the subject tree which fell was not in a deteriorated condition and that it did not have constructive notice of same. While Defendant MTA takes issue with Plaintiff's expert arborist's opinion that the subject tree was in a state of decay, was growing out of a constructed timber retaining wall which failed, and was on a very steep slope, all of which contributed to the subject occurrence, it fails to offer an expert opinion of its own that the subject tree was not in a visible deteriorated or dangerous condition. As such, it failed to meet its burden on summary judgment.

Moreover, Defendant MTA failed to demonstrate the absence of constructive notice, as it concedes that no inspection of the subject tree was performed prior to the subject occurrence. Whereas "the exercise of reason does not dictate the impossible task of climbing and bore-testing all of the trees within" the MTA's property, "it does require at least the casual observation, and reason dictates that those observing see what is plainly there to be seen and that they initiate appropriate corrective action." Rinaldi v. State of New York, 49 A.D.2d 361, 364, 374 N.Y.S.2d 788 (3d Dept. 1975). Since Defendant MTA failed to meet its prima facie burden on summary judgment, the Court need not address the sufficiency of Plaintiff's opposition papers. Priore v. New York City Dept. of Parks & Recreation, 124 A.D.3d 749, 750, 2 N.Y.S.3d 170 (2d Dept. 2015).

Lastly, there is no merit to Defendant MTA's "Act of God" defense. "For a loss to be considered the result of an act of God, human activities cannot have contributed to the loss in any degree." Cangialosi v. Hallen Const. 282 A.D.2d 656, 566, 723 N.Y.S.2d 387 (2d Dept. 2001); Priore v. New York City Department of Parks and Recreation, 124 A.D.3d 749, 750, 2 N.Y.S.3d 170 (2d Dept. 2015); Sawicki v. Gamestop Corp., 106 A.D.3d 979, 966 N.Y.S.2d 447 (2d Dept. 2013). Stated another way:

> [T]he act of God, which exempts from liability, is something which operates without any aid or interference of man, and when the loss occasioned is the result in any degree of human aid, or interference, or if any act of human negligence contributed to the injury, or, though the injury proceed directly from natural causes, if it might have been avoided by human prudence and foresight, it cannot be considered an act of God. Woodruff v. Oleite Corp., 199 A.D.772, 192 N.Y.S.189 (1st Dept. 1922)

Here, Defendant MTA has not shown that its own possible negligence with respect to the maintenance of its property played no role with respect to the subject occurrence.

Accordingly, it is hereby

ORDERED that Defendant MTA's Notice of Motion for summary judgment and dismissal of Plaintiff's Complaint is DENIED (Motion #3); and it is further

ORDERED that Defendant Town of Clarkstown's Notice of Motion for summary judgment and dismissal of Plaintiff's Complaint is GRANTED (Motion #4); and it is further

ORDERED that the remaining parties are ordered to appear for a Settlement Conference on **November 3, 2021 at 10:00 a.m.** via Microsoft Teams. The parties are directed to have settlement authority at the time of the conference and be able to contact their clients/adjusters during the conference if requested to do so.

The foregoing constitutes the Decision and Order of this Court on Motions# 3 and #4.

Dated: New City, New York
August 25, 2021

HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties (via- NYSCEF)