

Keller v Nyack Union Free Sch. Dist.
2021 NY Slip Op 33284(U)
March 25, 2021
Supreme Court, Rockland County
Docket Number: Index No. 035913/2017
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

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MARSHA LYNN KELLER, AS THE ADMINISTRATRIX OF THE
ESTATE OF JEROME D. MUHLENBERG AND MARSHA
LYNN KELLAR, INDIVIDUALLY,

Plaintiff,

**DECISION AND ORDER
(Motion # 2 AND #3)**

-against-

Index No.: 035913/2017

NYACK UNION FREE SCHOOL DISTRICT, NYACK PUBLIC
SCHOOLS and UPPER NYACK ELEMENTARY SCHOOL and
ROCKLAND TREE EXPERT CO., INC.,

Defendant.

-----X
Sherri L. Eisenpress, A.J.S.C.

The following papers, numbered 1 to 10, were considered in connection with
(i) Defendant Nyack Union Free School District, Nyack Public Schools and Upper Nyack
Elementary School (hereinafter "Nyack School District") Notice of Motion for an Order,
pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in its favor,
and dismissing the action:

PAPERS

NUMBERED

NOTICE OF MOTION BY NYACK SCHOOL DISTRICT (#2)/AFFIRMATION IN SUPPORT/EXHIBITS A-Q/MEMORANDUM OF LAW IN SUPPORT	1-3
NOTICE OF MOTION BY ROCKLAND TREE (#3)/AFFIRMATION IN SUPPORT/EXHIBITS A-F	4-5
AFFIRMATION IN OPPOSITION BY PLAINTIFF TO MOTION #2/AFFIDAVIT OF WAYNE CAHILLY/EXHIBITS A-I	6-7
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AFFIRMATION IN REPLY BY NYACK FREE SCHOOL DISTRICT	10

Upon the foregoing papers, the Court now rules as follows:

Plaintiff commenced this personal injury/wrongful death action on December 5, 2017. Defendants Nyack School District answered on January 16, 2018 and defendant

Rockland Tree answered on February 6, 2018. An amended complaint was filed on May 3, 2018, and answers, with cross-claims, were timely served. Third-Party Plaintiff, Nyack School District commenced the third-party action on February 7, 2019 against Orange and Rockland Utilities and the Village of Upper Nyack, who timely answered the Complaint. On August 20, 2020, the third-party action was discontinued. Plaintiff filed a Stipulation of Discontinuance as to Defendant Rockland Tree on October 23, 2020.

Plaintiff alleges that on May 18, 2017, on the public thoroughfare of North Broadway, at or about 336 N. Broadway, Upper Nyack, New York, while the decedent Jerome D. Muhlenberg was driving, a tree and/or parts thereof fell from its location on defendants' premises, adjacent to and/or abutting the public sidewalk onto the public thoroughfare, striking the decedent's motor vehicle causing serious injuries, resulting in his death on May 18, 2017, as a result of defendants' or their agents and/or employees ownership, maintenance, and/or control of their premises and the ownership, maintenance or control of the subject tree. Although Plaintiff initially pursued a broader theory of negligence which encompassed the days and weeks prior to the incident, it has now limited its claims against defendant Nyack School District to that which occurred on the day of the subject occurrence.

Statement of Facts

In 2016 and 2017, Rockland Tree had a contract with the Nyack School District in which it would perform work on trees located on school property on an "as-needed" basis. It appears from the records, testimony and expert affidavit, that although Rockland Tree was called to look at the subject oak tree several times in the months leading up to the accident, that there was no patent evidence prior to the day of the accident that the tree was rotten and/or decayed.

On the day of the accident, Harold Brewer, a security aid employed at Upper Nyack Elementary School, testified that in the morning he would walk by the subject tree located alongside the sidewalk in the front of the school in order to put cones out to

establish a drop off lane. He testified that after he finished this task around 6:40-6:50 a.m., he observed a crack around the whole tree and an opening in the adjacent dirt. He also observed an "unusual" condition in the nature of a root at the bottom of the tree that was snapped and broken away from the tree. He then returned to the building and made a pot of coffee for the staff around 6:45 a.m. Mr. Brewer saw the custodian but did not say anything to him about the tree. When the principal of the school, Mr. Mercora, arrived at the building, Mr. Brewer had a conversation with him about the tree. He asked him if he wanted to take a walk outside and see the tree because he was concerned about how it looked. He testified as follows:

We walked outside and I said to him, I said I don't know, it might be nothing, it might be something but I just wanted to show you this here. So I showed him, we looked at it and we went back in the building.

Mr. Brewer pointed out the snapped root to Mr. Mercora. This took a few seconds and then once back inside the building, Mr. Brewer observed Mr. Mercora call Mr. Heaton, the facilities director, and leave a voicemail.

Joe Mercora testified that at the time of the accident he was the principal of Upper Nyack Elementary School. He testified that he arrived at approximately 7:20 a.m. on the morning of the accident. Mr. Mercora said that he was greeted by his security guard, Harold Brewer, who wanted to show him an irregularity that he saw in the tree and more specifically a "crack in the soil." Mr. Brewer took him over to show him the crack in the soil located at the foot or bottom of the tree, which Brewer described as odd and noted that he hadn't seen it before.

Mr. Mercora took photographs of the crack and also of the "snapped root." When Mercora was asked if he had any concerns about the integrity or the safety of the tree, he responded "No. It looked irregular. I sent it to Kevin Heaton." Mr. Mercora sent the photos to Kevin Heaton because that was what you were supposed to do if there was something irregular on the grounds. Mr. Mercora did not call the police at that time nor did

he ask Mr. Brewer to call them. After sending the pictures, Mr. Mercora returned to his office and attempted to reach Mr. Heaton but was unable to do so. Mr. Heaton then called back and while they were on the telephone, he heard what sound like an "explosion" but was the tree falling. Mr. Mercora then called "911." The tree fell at what was probably 7:30 a.m.

Kevin Heaton testified that he is employed by the Nyack School District as a Maintenance Mechanic and oversees the facilities department. He confirmed that he received texts from Joe Mercora which showed photos of cracking around the base of a tree. Mr. Heaton called Mr. Mercora back and was speaking to him when he heard Mercora yell out that the tree fell. Dean Dykeman, an arborist from Rockland Tree testified that he was notified on the day of the incident by Kevin Heaton that a tree had fallen at approximately 7:35 a.m.. He immediately went to the school and observed that a big oak tree had fallen down across the road and that there was a car underneath. Upon examination of the tree, Mr. Dykeman opined that the tree had fallen due to root decay below the soil. Mr. Dykeman testified that a crack in the soil around the tree line could indicate the possibility of tree failure, which could cause the tree to fall.

The Parties' Contentions

Defendant Nyack School District moves summary judgment and dismissal of the Complaint on the ground that the internal decayed and rotted condition of the fallen tree was a latent defect which was not discoverable upon reasonable inspection. They further argue that there is no evidence that the School District did not maintain its premises in a reasonably safe condition, as they had a contract with Rockland Tree to perform as needed work on the School District premises, and had no actual or constructive notice of a problem with the tree. They argue that the school personnel acted swiftly and appropriately based upon their knowledge of the situation as it unfolded that morning, and that they acted as any layperson would have with respect to their observations. Additionally, the School District argues that if for some reason they are liable for plaintiff's damages, they are entitled to full

common-law indemnification from their independent contractor, Rockland Tree, who they hired for their expertise as certified arborists and tree maintainers.

As the direct action against Rockland Tree has been discontinued against them by Plaintiff, they move for summary judgment and dismissal as to cross-claims asserted by Nyack School District. It argues that the cross-claims must be dismissed because the evidence shows that the Plaintiff's accident was not due solely to Rockland's alleged negligent performance or nonperformance of an act totally within its province. Defendant Rockland Tree notes that for the School District to obtain a grant of common law indemnity, the party seeking indemnity must be free of negligent conduct and demonstrate same. Here, it contends that Plaintiff's theory of negligence is limited to the School District employees' acts on the date of the accident, more specifically that the School District failed to secure the area, and there is no longer a claim that Rockland Tree was negligent in its inspection of the subject tree in the months and weeks prior to the subject occurrence.

Plaintiff opposes the School District's summary judgment motion and argues that there are triable issues of fact as to whether it had actual and/or constructive notice of a "large tree leaning over a highway with a crack around the base and snapped root", which was observed approximately 40-50 minutes before the accident, during which time the Police or Fire Department could have been called to shut down the roadway until such time as the stability of the subject tree could be ascertained. The Plaintiff argues that this constituted a dangerous condition which a reasonable person, with or without expertise, should have realized required immediate attention by either calling the arborist or the police or fire department to safeguard the road. Plaintiff submits the affidavit of A. Wayne Cahilly, a certified arborist and Qualified Tree Risk Assessor who opines that the subject tree had a 22 degree or greater lean toward the road; that the cracked root associated with the soil cracks was ample evidence for a reasonable person to determine that there was a call for concern about the stability of the tree; and that a phone call to the police would have

brought a trained safety officer to the site who would have had the authority to close North Broadway while an arboricultural professional evaluated the situation.

Defendant School District opposes Rockland Tree's summary judgment and argues that the School District "is still at liberty to present to the jury evidence that if any entity is responsible for the tree's failure, it would be due to Rockland Tree's negligence in its failure to adequately inspect, monitor and service the subject tree pursuant to the parties' agreement, since Rockland Tree is the expert arborist.

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).

"A landowner must act as a reasonable man in maintaining his property 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." Basso v. Miller, 40 N.Y.2d 233, 241, 386 N.Y.S.2d 564 (1976). "Whether a dangerous or defective condition exists on the property of another so as to create liability depends on the circumstances of

each case and is generally a question of fact for the jury." Perez v. 655 Montauk, LLC, 81 A.D.3d 619, 916 N.Y.S.2d 137 (2d Dept. 2011).

"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).

In the instant matter, the Court finds that there are triable issues of fact as to whether Defendant Nyack School District had constructive notice of the defective/dangerous condition of the tree based upon the observation by Mr. Brewer of the crack around the circumference of the tree and the snapped root at approximately 6:40-6:50 a.m. on the morning of the occurrence. Additionally, while admittedly a close call, the Court also finds a triable issue of fact as to whether given the circumstances present and the potential dangers posed, Defendant Nyack School District was negligent in not taking further action in the nature of contacting the police or fire department in order to secure the roadway until such time as a determination as to the stability of the tree could be made during the 40-50 minutes before the tree fell. As such, Defendant Nyack School District's summary judgment motion must be denied.

The Court reaches a different conclusion, however, with respect to the summary judgment motion of Rockland Tree to dismiss Nyack School District's cross-claims. The principle of common-law, or implied, indemnification permits a party who has been

compelled to pay for the wrong of another to recover from the wrongdoer the damages the party paid to the injured party. Arrendal v. Trizechahn Corp., 98 A.D.3d 699, 950 N.Y.S.2d 185 (2d Dept. 2012). If an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of a contractor engaged by a landowner, the contractor may be held liable to the landowner for common-law indemnification. Id.

In the instant matter, Plaintiff's claims of negligence relate solely to the actions of the School District on the morning of the accident. While the School District is correct that it is not limited to the negligence claims asserted by Plaintiff with respect to its cross-claims, it nonetheless must demonstrate a triable issue of fact as to Rockland Tree's negligence in not observing that the tree was in a dangerous/rotting condition on the prior occasions when it inspected the tree. Defendant School District fails to make any showing that this was the case by way of expert affidavit or otherwise. The School District's representation that it would be free to do so at trial does not defeat Rockland Tree's prima facie showing of entitlement to summary judgment. Likewise, Defendant Nyack School District has failed to demonstrate an issue of fact as to their contractual indemnification claim. As such, Rockland Tree's summary judgment motion is granted.

Accordingly, it is hereby

ORDERED that the Notice of Motion filed by Defendants Nyack Union Free School District, Nyack Public Schools, and upper Nyack Elementary School for summary judgment dismissing the Complaint (Motion #2) is DENIED in its entirety; and it is further

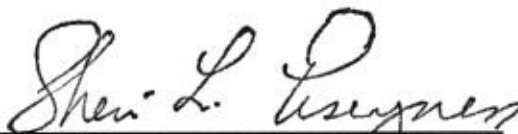
ORDERED that the Notice of Motion filed by Defendant Rockland Tree Expert Co. Inc. for summary judgment dismissing all cross-claims (Motion #3) is GRANTED in its entirety; and it is further

ORDERED that the remaining parties are directed to appear for a settlement conference on **MAY 14, 2021 at 10:30 a.m.** via Microsoft Teams. The parties are expected

to have settlement authority from their clients at that time and be able to reach out to them during the conference, if necessary.

The foregoing constitutes the Decision and Order of this Court on Motion #2 and #3.

Dated: New City, New York
March 25, 2021



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

TO: (all parties via NYSCEF)