SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9
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WILSON ROLAND PELAEZ LOJA,

Plaintiff,

-against-

ADVANCE FINANCIAL REALTY CORP.,

Defendant.
----------X

DECISION / ORDER
Index No. 519353/2018
Motion Seq. No. 1
Date Submitted: 2/4/22

Recitation, as required by CPLR 2219 (a), of the papers considered in the review of defendant's motion for summary judgment

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation, Affidavits and Exhibits Annexed.....	17-32
Affirmation in Opposition to Motion and Exhibits Annexed.....	34-40
Reply Affirmation.....	41

Upon the foregoing cited papers, the Decision/Order on this motion is as follows:

Upon the foregoing papers, defendant Advance Financial Realty Corp. (hereafter "Advance") moves, (Mot. Seq. # 1) pursuant to CPLR 3212, for an order granting it summary judgment dismissing plaintiff's complaint. After virtual oral argument, the motion is granted for the reasons which follow.

This action arises from an accident which took place on March 24, 2018 in the backyard of the premises known as 340 Halsey Street, Brooklyn, NY. The premises are a two-family house owned by defendant for investment purposes. The duplex on the first and second floors, with exclusive use of the backyard, were rented to a residential tenant and his wife, James and Kimberly Nester. One of these tenants, Kimberly Nester, asked plaintiff to come to her home to prune a tree in the backyard. Mr. Nester testified at his EBT that

plaintiff agreed to do this work without payment, and that he did not obtain permission from the property owner to do this work, nor had he informed the property owner about having someone do this work. Plaintiff came to prune the tree, and after he had finished and while he was cutting up the branches so they could be tied together and put out with the trash, he claims he either tripped over loose "tree material" or "lost his footing" in an indentation, which caused him to somehow lose his balance and cut his hand with the saw blade of the power tool he was using. Plaintiff brought this action against the property owner, but not against the tenants who had engaged him to prune the tree. The complaint includes two causes of action, one which cites no statutes but states that defendant failed to provide the plaintiff with a safe and proper place to work, and the other for common law negligence. The complaint alleges that the defendant property owner engaged plaintiff's employer, WRP LLC, to do the work at issue. It demands judgment "in an amount which satisfies diversity jurisdiction of the Federal Courts pursuant to 28 USCA §1441 and 1331." The plaintiff's bill of particulars elaborates on the first cause of action and cites Labor Law Sections 200, 240(1) and 241(6) as being applicable to this accident. It also claims that plaintiff had actual and/or constructive notice of the "hazardous premises condition."

Defendant supports the motion with the pleadings and the deposition transcripts of the plaintiff, the defendant, and the tenant James Nestor. Movant also provides an affidavit from an engineer and some photographs. Defendant alleges that the complaint should be dismissed as there was no hazardous premises condition, it was not negligent, and it did not direct or control the work that plaintiff was performing.

Plaintiff opposes the motion only with regard to his negligence claim. He does not oppose dismissal of his Labor Law claims, and at virtual oral argument, plaintiff's attorney

withdrew those claims to the extent they are asserted in his complaint. In any event, the Labor Law is inapplicable to this matter, as plaintiff was not trimming a tree in connection with a construction project going on at the premises (see *Lombardi v Stout*, 80 NY2d 290 [1992]; *Enos v Werlatone, Inc.*, 68 AD3d 713 [2d Dept 2009]). The court also notes that a "volunteer" cannot make a claim under the Labor Law, which may underlie the disputed testimony about payment (See *Whelen v Warwick Val. Civic and Social Club*, 47 NY2d 970, 970 [1979]).

Discussion

James Nester testified at his EBT on September 15, 2020. He said he had moved into the premises in 2013, initially as a roommate of another tenant who leased the first and second floor duplex apartment, and he became a direct tenant with the owner in 2014. He then sublet to various people. He understood that the owner was a man named Leo Roland. He paid his rent directly to him by Venmo. He had never heard of the defendant's business name [Page 71]. He married in 2018 and his wife moved in. Mr. Roland did not come to the property "unless there was an emergency" [Page 26]. There was no superintendent. The tenants took care of the garbage. He has thrown out all leases except the current one [Page 40]. He did not know who shoveled the snow [Page 50]. Mr. Nester testified that he had been employed by a landscaping and lawn maintenance company in Pennsylvania for four or five years [Page 29] and was experienced in landscaping, tree trimming, and gardening. He testified [Page 32] that in 2014 "I had asked him [Leo Roland] if he would be okay if I could fix the backyard up. I told him I had experience in landscaping, that I liked to do it as a hobby, and he gave me his permission." He then fixed up the yard. He mowed the grass and planted the plants, which was his hobby and he said he enjoyed having a nice backyard.

The owner never sent anyone to do any yard maintenance in the backyard [Page 36]. He owned an electric mower, a weed whacker, an electric leaf blower, a clipper, and a pole saw for his yard maintenance, which he kept in the cellar [Page 38].

Mr. Nester testified that there were two trees in the backyard. He said he had never asked Mr. Roland for permission to prune them [Page 47]. In 2016, two years before the plaintiff's accident, one of the trees was completely cut down by a company Mr. Roland hired after an adjacent property owner complained that it was leaning against her fence and causing the fence to crack, and it seemed that it would fall into her yard if there was a storm. Mr. Nester located and recommended a company, obtained an estimate, and Mr. Roland okayed the job. He then let the company in. He testified that Mr. Roland told them to leave the branches and the sections of the trunk in the yard after they were cut into small pieces [Page 63]. He did not know why Mr. Roland did not tell them to remove the pieces. Most of it was still in the corner of the yard on the date that plaintiff had his accident. He testified that Mr. Roland had never come into the backyard while he was a tenant, but he had seen the yard from a window and told him that it looked "nice" [Page 77].

In March of 2018, including March 24, 2018, the date of plaintiff's accident, Mr. Nester testified that the pieces of the trunk and the branches that had been removed were still in the backyard from the 2016 work [Page 81]. The trunk sections were in the back rear, and the branch pieces were in a "nice pile," also in the rear, on the right side of the yard. When plaintiff came, he was there to let him in. He had never met him before, but "knew of him" [Page 88] through his wife, as she knew him through her friends. She had contacted plaintiff to come to the property to trim the branches on the tree that remained in the backyard. He did not want to do the work himself as it required power tools and a ladder. His wife, Kimberly

Nester, “asked him if he would help us out and do us a favor with trimming some branches” [Page 91]. He did not obtain a business card or determine plaintiff’s credentials, and did not discuss payment, as “it was a favor” and he “had no intention of paying Wilson at all.” When asked if he had discussed having this work done with the defendant property owner, Mr. Nester said “no” [Page 95]. He said he spoke to plaintiff in English [Page 109].

Plaintiff testified at an EBT on October 20, 2020 and on two other dates, with the assistance of a Spanish interpreter [Docs 24-26]. He had a full time job at the time of the accident. He worked for a property management company and his work included “paint, place sheetrock, change kitchen furniture, change kitchen floors, sand wooden floors, some plumbing, some electric [Doc 24 Page 28]. He came to the United States from Ecuador about twenty years ago. He has lived in several northeast states and had several different kinds of jobs. He took side jobs painting, installing doors, windows, and cabinets [Page 30]. He used the company name WRP LLC for his side jobs. His employer “opened up” this company for him [Page 31]. He was asked many, many questions about his experience over the last thirty years with different types of power tools.

The EBT of the plaintiff continued on October 27, 2020. Plaintiff testified that he did not own the grinder he used on the date of his accident [Doc 25 Page 116]. It was owned by his brother-in-law Rene [Page142]. Asked what safety warnings he had been given when he was trained in the use of this tool, he said “At the place that I'm going to do the job, I have to keep the area clean, the area where I work. Make sure that the connection cord is in optimum condition, make sure that the blade is well-locked. . . Use goggles. . . . keep your hands away from the machine [Page 122]. He brought the grinder to the EBT [Page 145]. He had borrowed it from Rene twice before. It did not have a safety guard. He had pruned

a tree only once before the date of this accident [Page172]. On that occasion, he used a hand saw, specifically a pole saw [Page 173]. He had never used a grinder to perform "tree cutting or tree pruning." He had not read the user manual for this tool. He did not use goggles on the date of the accident [Page 181]. After the accident, he went to the hospital. He and his brother went back to the house afterwards, and he collected the grinder and his $200 payment for the job. He has kept the grinder in his possession since then. He said he "went by the owner of the house" but is referring to Mr. Nester [Page 183]. He said he was not a volunteer, it was a job, and James Nester's wife Kimberly contacted him at the office where he worked at the time. She worked there too, as a secretary. She told him the tree caused too much shade and needed some branches cut. He testified that the "owner" wanted the work done, but the name of the owner was not mentioned. He asked for a photo of the tree, and she texted him one. He said he told her that he would do the job for $200 after he saw the photo. There was no written agreement. He told her on Friday that he would come on Saturday [Page 196]. He arrived at 10:00 a.m. He had called Kimberly on her cell phone to estimate his time of arrival. She said her husband was waiting for him outside. He brought the grinder and a hand saw to the house, along with a 20-foot extension cord for the grinder. The grinder had been in his car since the last time he had borrowed it. He did not bring any goggles or gloves. This was a "side job" and not for his boss [Page 189]. Mr. Nester brought him to the backyard. He continues to refer to Mr. Nester as the "owner". He says at Page 204 "the owner told me that I had to cut the longer branches." Then, when asked, he said "James" is who he was referring to. Then, he said he knew James was not the owner, and he had never spoken to the owner [Page 206]. James told him to leave all the tree pieces and rocks that were already there - that he did not need to clean that up.

James brought out a ladder and a pole saw. He climbed from the ladder into the tree and cut the branches with the pole saw Mr. Nester provided, while James Nester cut the smaller, thinner branches. He was up in the tree for about an hour and a half. The branches they cut fell to the ground, where they remained while they worked [Page 218]. When he was done, he jumped down from the tree [Page 222]. He next needed to cut the branches that had been removed into smaller pieces. He testified that a few minutes after he started, using the grinder that he had brought with him, while standing among the branches that had fallen, his accident took place. He testified that he did not move the branch away from the tree to a flat location, which was, according to the photos, adjacent to the area where he had been working, because "I was not going to be moving branches from one side to the other if you could cut it at the same place" [Page 230]. He described the area as a "mess," with pieces of wood, rocks, leaves, holes, and pieces of concrete [Page 239]. He was asked why he did not use the hand saw he had brought with him, and he answered [Page 234] "the teeth of the hand saw were deteriorated." Plaintiff then said he was standing in the mess, not holding the branch he was cutting, but "free-handing" with the grinder while his left hand "was free" [Page 240]. In sum, he was using a grinder which had no guard on it, one that he testified he had not read the instruction booklet for, without gloves or goggles, not standing on a flat surface, and not holding the branch he was cutting. This was not the proper use of the tool. He also testified that he had never used a grinder to cut a tree branch before this day.

Plaintiff's deposition continued on a third day, November 5, 2020. After two full days of testimony, the questions had not yet reached the details of his accident. He was provided with the same Spanish interpreter on all three days. He testified that when his accident happened, he was cutting the small branches off of a branch that was two inches in diameter

[Doc 26 Page 266]. He said, “The branch fell exactly on top of all of those old branches that you see in the back of the yard.” Asked for more specific information, he said the old wood that had been piled up was 4 to 5 feet wide by 6 feet, or approximately 30 square feet, and it was “approximately 6 feet high” [Pages 270-271]. None of the photos show anything of this nature. He said the branches he cut fell on top of this “pile” and he apparently was standing in this “mess” as he described it, free-handing with a grinder (a power saw) that had no guard. A few pages later, he tries to describe that the yard was “sloped” and that one end of the branch he was cutting was 4 inches off the ground. He then said that at the time he was working, he was standing “on the slope, on top of it. The upper part” [Page 279] and “I was facing the wood pile” [page 280] and “standing one foot from it.” He had placed his right foot “on top of some rocks” and his left foot “on some rocks” [Page 281] with his left foot about four inches higher than his right foot. He was first going to cut the little branches off the main branch, and they were about a half inch thick. James was “organizing the branches” and using his pole saw and clippers at the time to cut the fallen branches into smaller pieces [Page 290]. The plaintiff described his accident [Page 288] as follows:

> “My feet were basically moving on rocks and old wood and garbage. You could also see a separation between the rocks. There were like holes, but there were dry leaves covering all of this debris. At that time, my right foot, the tip of my right foot got inside a hole. Immediately, my body went forward. My left foot moved forward to look for some balance, and I tripped over old wood, over old branches. With that movement, my right hand was holding the machine, and my left hand touches the tip of the blade. That's how the accident happened.”

Plaintiff testified that he did not fall, but in the course of balancing himself, he cut his left hand [Page 295]. When he left the emergency room, he and his brother took a taxi to James Nester’s home to get his car, which he had left there. He spoke to Mr. Nester and was given his grinder and $200. Mr. Nester told him that the “owner” had left the $200 for

him.

Leo Roland testified at an EBT for the defendant property owner on March 16, 2021, after the other depositions. He testified that he had purchased the property in 2007, and he transferred it to a corporation in 2017. He acknowledged that the Nesters were his tenants at the time of plaintiff's accident pursuant to a residential lease. He learned of the plaintiff's accident when he was served with the summons and complaint. He then contacted Mr. Nester for details. He had "absolutely not" [Page 82] asked James Nester to hire someone to trim the tree. He said he had never told anyone he would pay $200 for tree trimming [Page 83]. Mr. Roland said that if Mr. Nester had hired someone without his permission it "would go against the lease" [Page 83].

Mr. Roland was asked about the trees. He said there may have been a small tree on the right side of the yard as you look out of the windows, but the larger tree was on the left. He said that the large tree was pruned, not cut down entirely, in 2016, as it was leaning on the neighbor's fence [Doc 29 Page 23]. It was the owner of the house behind his building who had complained, not the ones on either side. He recalled that his tenant James Nester gave him the name and phone number of a tree company whose truck he had seen parked on the street. He said he did not think the small tree on the right side was there anymore, but he was not sure. He could not remember the name of the company, nor did he have a receipt [Page 26]. With regard to the detritus from the 2016 pruning work, Mr. Roland testified as follows [Page 27]:

> "James, my tenant, had asked me if I would leave the tree branches in the back for his own exclusive doing. You know, like he did some landscaping. He wanted to use the tree branches for a portable fire pit kind of thing, those Home Depot things. So, I didn't see an issue with that. He also used some of the tree trunks and made seats, chairs out of them."

Mr. Roland was then asked if he would be surprised to learn that Mr. Nester had testified that it was his idea to leave the branches in the yard and not have them removed, he said “yeah” and “I had no use for the branches, so there was no need for me to leave them in the yard” [Pages 28-29].

Mr. Roland was asked about Mr. Nester’s work in the backyard. He said [Page 43] “James, he's been with me for seven years, I had James call me and he said, is it okay for me to plant tomatoes in the backyard?" You know, I understand he's a landscaper in his prior life, I guess. He enjoys working in his yard for his own exclusive benefits, but it doesn't affect me in any way, so. He's been a long-term tenant.” He was then asked if there was any written communication with Mr. Nestor about the backyard, and he said “no” [Page 44]. He testified that the Nesters had exclusive access to the backyard from their duplex apartment. He had verbally approved the fire pit and had seen it in the middle of the yard [Page 76]. He also approved the installation of a pond. He said that other than installing a walkway of brick in the yard shortly after he bought the property in 2007, which did not extend all the way to the back of the yard, the tree pruner he hired in 2016 was the only company he had hired to work in the backyard prior to the plaintiff’s accident [Page 46]. He confirmed Mr. Nester’s statement that he had not been in the backyard during Mr. Nester’s tenancy and had only seen it by looking out the window.

Mr. Roland was shown photos of the yard and asked about it. He said [Page 54] the area under the tree is higher than the grassy area in the middle of the yard, and that before he purchased the house, somebody “was probably doing something back there and they never finished it and they just left it.” After numerous questions,

he said there were cinderblocks in the rear of the yard which someone, not him, had covered with dirt before he bought the property [Page 79].

Lastly, George H. Pfreundschuh, P.E. provides an expert's affidavit in support of defendant's motion. He states that he inspected the grinder. He says he inspected the backyard on August 10, 2020. He took photos. He measured the backyard, and it is twenty feet wide and fifty feet deep. Most of the affidavit is either a summary of the EBT testimony or is hearsay from his conversation with James Nester when he did his site visit. He spends a lot of time on the Labor Law claims that have been discontinued. There is nothing in his affidavit that is helpful with regard to the cause of action for negligence in the motion for summary judgment.

Defendant argues in its motion that plaintiff's negligence claims "should be dismissed in that ADVANCE was not negligent, ADVANCE did not direct or control the work plaintiff was performing, and there was no defective condition on the premises which caused or contributed to the subject accident." Defendant's attorney also states in her affirmation in support "plaintiff admitted that the sloped area was not a proper place to do this work, and that there were other areas in the yard that were flat and clear. [Exhibit F: pp. 203-204, 224-225]. When asked why he did not move the branch to another part of the yard, he answered that, although it would have been possible to move it, it was easier to cut it where the branch had fallen. [Exhibit F: pp. 229-230]. As he was preparing to cut a branch, he lost his footing on a hole in the ground and cut his hand. [Exhibit F: p. 288]." Defendant also argues that plaintiff's errata sheets for his EBT transcripts should be stricken, as they do not reflect proper corrections, but seek to change the facts he testified to. For example, he "corrects" the several references to the extension cord that he testified was 20 feet long and replaces

them with "two 25-foot extension cords connected together."

In opposition, plaintiff's attorney provides an affirmation which argues "plaintiff tripped and fell due to a combination of hazardous conditions, which included a hole between rocks, uneven ground covered in debris, and old branches left in the yard for two years. The defendant had directed that the old branches be left in the yard. In addition, there had been other work performed at the rear of the yard which resulted in scattered rocks and broken concrete on a sloped area under the tree on which plaintiff later worked. . . as owner of the premises, defendant is responsible for the hazardous conditions which existed there on the date of the accident. In failing to clear old debris from the uneven ground and maintain the pile of old branches, defendant negligently created the hazardous conditions which caused and/or contributed to plaintiff tripping and falling. It is beyond dispute that defendant had actual notice of the hazardous conditions which were involved in the subject accident." He asserts that "the plaintiff is entitled to the benefit of all reasonable inferences arising from the evidence, which must be accepted as true for purposes of the motion," citing *Demshick v Community Housing Management Corp*., 34 AD3d 518, 521 (2d Dept 2006) ("As the plaintiff was the party opposing… summary judgment, the plaintiff's evidence should have been accepted as true and given the benefit of every reasonable inference which may have been drawn from the evidence").

Summary Judgment

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court and should thus only be employed when there is no doubt as to the absence of triable issues of material fact (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see also *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). However, a motion for summary judgment will be

granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law (CPLR 3212 [b]; *Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 967 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) and the party opposing the motion for summary judgment fails to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (*Alvarez v Prospect Hosp*., 68 NY2d 320, 324 [1986], citing *Zuckerman*, 49 NY2d at 562).

"[T]he 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" (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dept 2010], quoting *Alvarez*, 68 NY2d at 324; see also *Zuckerman*, 49 NY2d at 562; *Winegrad v New York Univ. Med. Ctr*., 64 NY2d 851, 853 [1985]; *Sillman v Twentieth Century-Fox Film Corp.,* 3 NY2d 395, 404 [1957]). The motion should be granted only when it is clear that no material and triable issue of fact is presented (*Di Menna & Sons v City of New York,* 301 NY 118 [1950]). If the existence of an issue of fact is even arguable, summary judgment must be denied (*Phillips v Kantor & Co.*, 31 NY2d 307 [1972]; *Museums at Stony Brook v Vil. of Patchogue Fire Dept*., 146 AD2d 572 [2d Dept 1989]). Also, parties opposing a motion for summary judgment are entitled to every favorable inference that may be drawn from the pleadings, affidavits and competing contentions (*Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; see also *Akseizer v Kramer*, 265 AD2d 356 [2d Dept 1999]; *McLaughlin v Thaima Realty Corp*., 161 AD2d 383, 384 [1st Dept 1990]; *Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65, 74 [1st Dept 1987]; Strychalski v Mekus, 54 AD2d 1068, 1069 [4th Dept 1976]). Furthermore, in determining the outcome of the

motion, the court is required to accept the opponents' contentions as true and resolve all inferences in the manner most favorable to opponents (*Pierre-Louis v DeLonghi America, Inc*., 66 AD3d 859, 862 [2d Dept 2009], citing *Nicklas v Tedlen Realty Corp*., 305 AD2d 385 [2d Dept 2003]; *Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]; see also *Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 105-106 [2006]). Moreover, a party seeking summary judgment has the burden of establishing prima facie entitlement to judgment as a matter of law by affirmatively demonstrating the merit of a claim or defense and not by simply pointing to gaps in the proof of an opponent (*Nationwide Prop. Cas. v Nestor,* 6 AD3d 409, 410 [2d Dept 2004]; *Katz v PRO Form Fitness*, 3 AD3d 474, 475 [2d Dept 2004]; *Kucera v Waldbaums Supermarkets*, 304 AD2d 531, 532 [2d Dept 2003]). Lastly, "[a] motion for summary judgment 'should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility'" (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2010], quoting *Scott v Long Is. Power Auth.,* 294 AD2d 348 [2d Dept 2002]; see also *Benetatos v Comerford*, 78 AD3d 750, 751-752 [2d Dept 2010]; *Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Baker v D.J. Stapleton, Inc*., 43 AD3d 839 [2d Dept 2007]).

Conclusions of Law

In order for the defendant to prevail on this motion for summary judgment dismissing the complaint, it must demonstrate that either there was no condition that was inherently dangerous which caused the plaintiff to have an accident, or if there was such a condition, that defendant did not create the condition or have actual or constructive notice of it with sufficient time to remedy it. The court finds that defendant has made a prima facie case. See *Haynie v NY City Hous. Auth.*, 95 AD3d 594 [1st Dept 2012] and the cases cited therein.

Plaintiff was not hired by the defendant property owner. He was asked to prune a tree either for $200 or as a favor to Kimberly Nester, who knew him prior to his accident. There is no evidence that the backyard was not in a reasonably safe condition for use by its tenants as a backyard. The Nesters made no complaints to the landlord about any conditions in the backyard which needed to be repaired or corrected. While James Nester said the owner wanted the 2016 tree debris to remain in the backyard, Mr. Roland testified that it was Mr. Nester who wanted the branches to remain so he could burn them in his fire pit, the pieces of wood that were in the rear corner of the yard from the 2016 tree work did not cause the plaintiff's accident. The accident was caused by the plaintiff's own negligence.

There is a general principle that a "defendant is not required to protect a plaintiff from his own folly" (*Haynie v New York City Hous. Auth.*, 95 AD3d 594 [1st Dept. 2012]), which is instructive. While proximate cause is generally an issue for the trier of fact, it "may be decided as a matter of law where only one conclusion may be drawn from the established facts" (*Howard v Poseidon Pools, Inc.*, 72 NY2d 972 [2d Dept. 1988]). For example, summary judgment is warranted when the sole proximate cause of the accident was the plaintiff's own conduct (*see Yedynak v Citnalta Constr. Corp.*, 22 AD3d 840 [2d Dept. 2005]; *see also Conte v Orion Bus Indus., Inc.*, 162 AD3d 638 [2d Dept. 2018]). Further, a defendant will be relieved of liability where a superseding cause interrupts the causal chain of connection between the injuries and the defendant's negligence, including the plaintiff's own conduct (See *Campbell v Door Automation Corp.*, 2019 NY Slip Op 34333[U], *5 [Sup Ct, Suffolk County 2019] citing *Mesick v State of New York*, 118 AD2d 214 [3d Dept 1986]).

Here, to the extent the plaintiff claims there was tree debris that he tripped over, he either created the debris himself or, if it was there previously, he should have moved the 4-

foot long branch he was cutting up to a place in the yard that was level. He testified that he was trained not to use a power tool unless the surface was level. Thus, he knew he should not have been working under the tree, as he knew the ground under it was sloped. He should have been wearing safety gloves. His grinder should have had a guard. Further, defendant notes that his testimony that he tripped while "under the tree" is contradicted by his testimony that with the extension cord, the grinder had twenty-eight feet of cord from the outlet on the back of the building. The engineer measured the yard as fifty feet deep, and all of the testimony was that the tree was near the rear fence, at least forty feet from the rear wall of the building.

Without the Labor Law claims, this is a trip and fall case, and plaintiff's claim that he was caused to fall as a result of a dangerous premises condition is unsupported by the facts. Plaintiff's injury to his hand, defendant has established, was caused by plaintiff's own negligence. While perhaps there were some twigs and rocks in the backyard before he arrived, they would be a transient condition which the property owner established that he had no actual or constructive notice of, and the tree debris was not a hazardous premises condition. It is black letter law that "while a landowner must act as a reasonable person in maintaining his or her property in a reasonably safe condition in view of all the circumstances, there is no duty to protect or warn against an open and obvious condition which, as a matter of law, is not inherently dangerous (See *Errett v Great Neck Park District*, 40 AD3d 1029 [2d Dept 2007]. Further, "landowners are not obligated to warn against conditions on the land that could be readily observed by the use of one's senses, and landowners will not be held liable for injuries arising from a condition on the property that is inherent or incidental to the nature of the property, and that could be reasonably anticipated

by those using it" (see *Torres v State*, 18 AD3d 739 [2d Dept 2005; *Nardi v Crowley Mar. Assoc.*, 292 AD2d 577 [2d Dept 2002]). Further, crediting plaintiff with his version of the facts, that he did have two extension cords connected together which reached all the way to the tree, to the extent there was a slope under the tree because of buried cinderblocks covered by dirt, there is no evidence that this sloping area was unsafe or hazardous before plaintiff dropped cut branches under the tree and then stood in the middle of the pile of branches to free-hand with a grinder (power saw) which had no guard.

Accordingly, it is **ORDERED** that the branch of defendant's motion for summary judgment, which seeks to dismiss plaintiff's complaint, is granted. The complaint is hereby dismissed. The branch of the motion which seeks an order striking the plaintiff's errata sheets with regard to his deposition transcript is therefore denied as academic.

This shall constitute the decision and order of the court.

Dated: March 28, 2022

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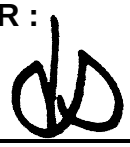

Hon. Debra Silber, J.S.C.