

Rogers v Szczygiel

2022 NY Slip Op 31997(U)

January 31, 2022

Supreme Court, Erie County

Docket Number: Index No. 807003/2018

Judge: Timothy J. Walker

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This opinion is uncorrected and not selected for official publication.

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

AARON ROGERS and
SHAARON ROGERS, his wife,

Plaintiffs,

- against -

DECISION AND ORDER
Index No. 807003/2018

KEITH SZCZYGIEL,
RONALD BRANTLEY,
JACQUELINE BRANTLEY, and
ELLCOTT DEVELOPMENT COMPANY d/b/a
10 ELLCOTT SQUARE CORPORATION,

Defendants.

RONALD BRANTLEY and
JACQUELINE BRANTLEY,

Third-Party Plaintiffs,

- against -

GERALD BELTON and
GEMMA ANTOINE BELTON,

Third-Party Defendants.

BEFORE: **HON. TIMOTHY J. WALKER, Presiding Justice**

APPEARANCES: **VINAL & VINAL, P.C.**
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WALKER, J.

Plaintiffs, Aaron Rogers and Shaaron Rogers, have applied for an order granting partial summary judgment as to negligence and causation against Defendants, Ronald Brantley, Jacqueline Brantley, and Ellicott Development Company d/b/a 10 Ellicott Square Corporation (“Ellicott Development”)¹ (Motion 10; Doc. 189).

Third-Party Defendants, Gerald Belton and Gemma Antoine Belton, have applied for an order granting summary judgment and dismissing the Third-Party Complaint against them (Motion 11; Doc. 207).

Ellicott Development has applied for an order granting summary judgment and dismissing the Complaint against it (Motion 12; Doc. 227).

¹ Although Plaintiffs’ Notice of Motion does not identify Jacqueline Brantley as a defendant against whom Plaintiffs seek relief, the balance of their submission identifies her, and the court presumes that Plaintiffs’ failure to identify her in the Notice of Motion was an inadvertent error (*see, e.g.*, Doc. 190, ¶2; Affidavit of Plaintiffs’ counsel, which states that the Affidavit is submitted in support of the application against, *inter alia*, “Jacqueline Brantley”).

BACKGROUND

Mr. Rogers alleges that on October 30, 2017, while in the driveway of the real property that he leases from Ellicott Development, located at 38 Northampton Street, City of Buffalo (“Ellicott Property”), he sustained personal injuries as a result of a tree that broke and struck him (“Tree”), knocking him to the ground (“Incident”) (Doc. 209, ¶12).

It is undisputed that the Tree was located, in part, on each of the properties located at 1098 Ellicott Street, owned by Defendant, Keith Szczygiel (“Szczygiel Property”), and 1094 Ellicott Street, owned by the Brantley Defendants (“Brantley Property”), and was adjacent to the Ellicott Property, which abuts the Szczygiel Property and the Brantley Property (*Id.*, at ¶¶5, 6, 8, 11)². The tree grew in a narrow, largely inaccessible alley between the garages on the Szczygiel Property and the Brantley Property (Docs. 203-205).

Third-Party Defendant, Gemma Antoine Belton, acquired the Szczygiel Property in approximately 1990 and sold it to Mr. Szczygiel in 2012. In approximately 2010 or 2011, prior to selling the Szczygiel Property to Mr. Szczygiel, Mrs. Belton and her husband, Defendant, Antoine Belton, paid non-party, Franklin Fortifino (a personal friend), to remove branches and limbs from the Tree, following receipt of a citation letter from the City of Buffalo.

At the time of the Incident, Plaintiffs leased the Ellicott Property from Ellicott

² Plaintiffs contend that “Ellicott [Development] admitted that the subject [T]ree is located on the property owned and maintained by Ellicott Development, 38 Northampton Street, Buffalo New York” (Doc. 190, ¶16, citing Doc. 199, p. 18). That statement is untrue. Document 199 is the deposition transcript of Leah Harter, Ellicott Development’s property manager. Page 18 of Ms. Harter’s transcript does not reflect testimony admitting that any portion of the Tree was located on the Ellicott Property. Indeed, she testified that the Tree was not located on the Ellicott Property. The court finds that the Tree is not located on the Ellicott Property (Doc. 285, ¶¶5-15).

Development (Doc. 199, pp. 23-24; Doc. 228, ¶14).

DISCUSSION

Plaintiffs' Application (Motion 10; Doc. 189)

Section 202.8-g(a) of the Uniform Rules for the New York State Trial Courts requires Plaintiffs, as movants, to submit a “short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried.”

Plaintiffs have not submitted a statement of material undisputed facts, and have therefore failed to comply with §202.8-g(a).

Plaintiffs submitted the affidavit of their attorney, Jeanne M. Vinal, sworn to on January 4, 2022 (Doc. 190), but it does not (and cannot) constitute the statement required by §202.8-g(a), because it commingles undisputed facts with disputed facts without making any attempt to differentiate between them.

Plaintiffs' application (Motion 10; Doc. 189) is dated January 4, 2022, and replaces the previous similar application Plaintiffs made on June 29, 2021 (in the form of a cross-motion) (Motion 8; Doc. 116).

The court rejected Plaintiffs' prior application without issuing a decision on its merits, because (i) Plaintiffs failed to submit either a supporting affidavit or a memorandum of law in support of their application³ and (ii) certain of the defendants made similar dispositive

³ NYSCEF document 117, which Plaintiffs identified as “Affidavit or Affirmation in Support of Motion” consists of a second copy of the Notice of Motion electronically filed at document 116, and there is no separate entry for a memorandum of law. Thus, Plaintiffs failed to submit either a supporting affidavit (or affirmation), or a memorandum of law in connection with their prior application.

applications, but submitted combined affidavits and memoranda of law (to which this court refers as “affilaws”), in derogation of this court’s rules. Accordingly, on November 26, 2021, the court (i) informed all parties that their respective dispositive motions (Motion 7; Doc. 98; Motion 8; Doc. 116; and Motion 9; Doc. 136) were summarily denied without review, and (ii) directed the parties to correct these deficiencies and resubmit their respective applications no later than January 7, 2022.

Under these circumstances, where the court previously gave Plaintiffs the opportunity to correct their submission associated with Motion 8, they shall not be afforded an additional opportunity to correct the pending Motion 10. Rather, Plaintiffs’ application is denied, on the merits, for having failed to adhere to 22 NYCRR §202.8-g(a).

The Beltons’ Application (Motion 11; Doc. 207)

Gemma Belton owned the Szczygiel Property from approximately 1990 to December 2012 (Doc. 242, p. 7).

In approximately 2010 or 2011, Gemma Belton received a citation letter from the City of Buffalo providing a deadline to trim the Tree, because it was considered hazardous (*Id.*, at pp. 12-14, 18). Mrs. Belton described the letter as “threatening” and it prompted her and Mr. Belton to arrange with non-party, Franklin Fortifino, to remove branches and limbs from the Tree (*Id.*, at pp. 13-15, 31; quotation at p. 13). Mr. Belton described Mr. Fortifino as a “handyman” (Doc. 241. P. 18). Thereafter, Mrs. Belton sold the Szczygiel Property to Keith Szczygiel in 2012 (*Id.*, at p. 32).

In the third-party action, the Brantleys allege that the Beltons “cut and removed” portions of the Tree “and/or otherwise directed and consented to the cutting and removal of portions of

the [T]ree” and that such actions damaged the Tree, eventually resulting in the Incident after the Brantleys assumed ownership of the Brantley Property (Doc. 211, ¶¶12-15).

The Brantley Defendants, Mr. Szczygiel, and Ellicott Development retained Christopher J. Luley, Ph.D, a Plant and Forest Pathologist, as their expert witness in the field of biological health and mechanical stability of trees (Doc. 266, ¶¶1-2).

Dr. Luley reviewed, *inter alia*, the Complaint, Third-Party Complaint, Mr. Rogers’ deposition transcript, and various photographs of the Tree. He also inspected the tree on September 20, 2021 (*Id.*, at ¶¶3-4).

Dr. Luley opined that work was conducted on the Tree in or before 2011, which was more than mere “pruning” or “maintenance” (*Id.*, at ¶19). Rather, he described the work as “a partial removal of both co-dominant stems of [the] [T]ree” (*Id.*). He further opined that, based upon the presence of bark in a 2011 photograph of the Tree (Doc. 202), the Tree was possibly partly alive prior to this partial removal (Doc. 266, ¶17). Dr. Luley ultimately concluded, as follows (*Id.*, at ¶20):

[R]egardless of the [T]ree’s condition prior to the partial removal, those individuals who performed the partial removal . . . left the subject [T]ree in a defective condition after their work was completed. If the [T]ree was alive prior to the partial removal, a more conservative pruning should have been conducted in order to avoid killing the [T]ree. If it were dead prior to the partial removal, the entire [T]ree should have been removed to the ground in order to avoid further decay and potential failure. This should have been obvious to a contractor experienced in tree maintenance and tree removal.

Plaintiffs’ claims are grounded in premises liability, where a landowner and/or occupier of land owes a non-delegable duty of care to maintain his or her property in a reasonable and safe

condition (*Mucciariello v. A & D Hylan Blvd. Association, LLC*, 133 AD3d 726 [2nd Dept 2015]; *O'Brien v. Trustees of the Troy Annual Conf. of the United Methodist Church*, 257 AD2d 954 [3d Dept 1999]). Whether a duty of care exists for an alleged defective or dangerous condition on real property depends on the extent of the defendant's "[ownership], occupancy, control or special use of the property" (*Minott v. City of New York*, 230 AD2d 719, 720 [2d Dept 1996], quoting *Turrisi v. Ponderosa, Inc.*, 179 AD2d 956, 957 [3d Dept 1992]). Absent a showing that such elements exist, a landowner and/or an occupier of land cannot be held liable for injuries caused by an alleged defective or dangerous condition (*Turrisi*, 179 AD2d at 957).

The Beltons contend that they may not be held liable for Plaintiffs' injuries because, as of the date of the Incident, they no longer owned, occupied, controlled or made a special use of the Brantley Property. However, "liability for a dangerous condition on land" may extend to a former owner "where a dangerous condition existed at the time of the conveyance and the new owner has not had a reasonable time to discover the condition, if it is unknown, and to remedy the condition once it is known" (*Marrero v. Marsico*, 218 AD2d 226, 228-29 [3d Dept 1996]).

The Brantley Defendants and Mr. Szczygiel each testified that they never saw the Tree until after the date of the Incident (Doc. 219, p. 10; Doc. 243, p. 31; Doc. 221, pp. 17-18). While it may appear disingenuous that they each claim to have not seen the Tree prior to the Incident, the Tree is located in a narrow, largely inaccessible alley between the garages on the Brantley Property and Szczygiel Property, and it is for the jury to assess witness credibility (*Haas v. F.F. Thompson Hosp., Inc.*, 86 AD3d 913, 914 [4th Dept 2011] [conflicting issues of witness credibility cannot be resolved on a motion for summary judgment]).

Moreover, the Brantley Defendants contend that the portion of the Tree that broke,

causing the Incident, was not readily observable from the Brantley Property (*see* photograph at Doc. 281), because the Tree's stem that broke off and struck Mr. Rogers was to the rear of the garages on the adjoining Brantley and Szczygiel Properties facing the Ellicott Property (*Id.*). Thus, the Brantley Defendants contend, the co-dominant stem, which remained standing, blocked both access and view of the stem that broke (*Id.*).

Accordingly, questions of what the Brantleys should have known about the Tree as of the date of the Incident, and what constitutes a reasonable time for them to have discovered the Tree's defect, which the Brantleys contend was difficult to access or visualize from their Property, are material questions of fact for the jury, precluding the Beltons' application for summary judgment.

Ellicott Development's Application (Motion 12; Doc. 227)

Prior to the Incident, Plaintiffs contacted Ellicott Development regarding maintenance issues, such as, *inter alia*, problems with the heat and basement sink, but they never contacted Ellicott Development about the Tree until after the Incident occurred (Doc. 240, pp. 199-200). Prior to the Incident, Ellicott Development never received notice from anyone about issues with the Tree (Doc. 248, ¶5).

Clearly, Ellicott Development did not own, occupy, control, or make a special use of the properties on which the Tree was located; i.e, the Szczygiel Property and the Brantley Property. Thus, Ellicott Development did not have a duty to maintain the Tree (*Minott, supra; Turrisi, supra*).

Notwithstanding, Ellicott Development may be held liable for Plaintiffs' injuries if it possessed actual or constructive knowledge of the Tree's defective condition (*Ivancic v.*

Olmstead, 66 NY2d 349 [1985] [no ability attaches to a landowner whose tree falls outside of his premises and injures another unless there exists actual or constructive knowledge of the tree's defective condition]). With respect to constructive notice, "there is no duty to consistently and constantly check all trees for non-visible decay. Rather, the manifestation of said decay must be readily observable in order to require a landowner to take reasonable steps to prevent harm" (*Id.*, at p. 351).

Aaron Rogers testified that he never watered, pruned, or otherwise maintained the Tree or any of the trees on the Ellicott Property, and both he and Sharon Rodgers testified that they never considered the Tree to be unsafe (Doc. 149, pp. 203, 250; Doc. 154, pp. 17-18).

The record is bereft of any admissible evidence suggesting that Ellicott Development should reasonably have known that the Tree - located adjacent to, but off the Ellicott Property, was or could potentially be hazardous.

In light of the foregoing, it is hereby

ORDERED, that Plaintiffs' application for partial summary judgment is denied in its entirety; and it is further

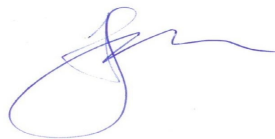
ORDERED, that the Beltons' application for summary judgment is denied in its entirety; and it is further

ORDERED, that Ellicott Development's application for summary judgment is granted, and the Complaint and all cross-claims against it are hereby dismissed.

This constitutes the Decision and Order of this Court. Submission of an order by the

parties is not necessary. The delivery of a copy of this Decision and Order by this Court shall not constitute notice of entry.

Dated: January 31, 2022
Buffalo, New York

A handwritten signature in blue ink, appearing to read "T. Walker", with a long horizontal flourish extending to the right.

HON. TIMOTHY J. WALKER, A.S.C.J.