

Largo v City of New York
2022 NY Slip Op 35146(U)
February 17, 2022
Supreme Court, Richmond County
Docket Number: Index No. 151140/2020
Judge: Thomas P. Aliotta
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND-----X
JOMARIE LARGO,

Plaintiff,

-against-

CITY OF NEW YORK, NEW YORK CITY
DEPARTMENT OF PARKS AND RECREATION,
WAGNER COLLEGE, WAGNER LUTHERAN
COLLEGE and MARGARET JEROMEY,Defendants.
-----X

Part C-2

Present:

HON. THOMAS P. ALIOTTA**DECISION AND ORDER**

Index No: 151140/2020

Motion No. 002 & 003

Recitation, as required by CPLR 2219(a), of the following documents numbered "1"
through "8" were marked fully submitted on December 15, 2021.Papers
Numbered(MS_002) Defendant Wagner College's Cross-
Motion for Summary Judgment with Supporting Papers1, 2Plaintiff's Affirmation in Opposition
with Supporting Papers3

Defendant Wagner College's Reply4

(MS_003) Defendant City of New York
And New York City Department of Parks and
Recreation, Cross-Motion for Summary Judgment
And in Opposition to Wagner's Motion
for summary Judgment with Supporting Papers5, 6Plaintiff's Affirmation in Opposition to
Defendant City's Cross-Motion.....7Defendant City's Reply..... 8¹

¹ Defendant, Margaret Jeromey, moved for summary judgment under Motion Sequence 001, which was granted after oral argument (NYSCEF 66). The remaining defendants' cross-motions were submitted for decision.

Upon the foregoing, defendant, WAGNER COLLEGE's, motion for summary judgment is denied as premature; and defendants, CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION'S, motion for summary judgment is granted as follows:

This action stems from an accident that occurred on May 17, 2019 near Wagner College's baseball field on Howard Avenue, in Staten Island, New York. The plaintiff, a passenger in defendant, Margaret Jeromey's vehicle, was injured when the vehicle was struck by a falling tree.

Defendant, Wagner College ("Wagner"), moves for summary judgment on the grounds that they bear no liability for the accident. Defendants, City of New York and New York City Department of Parks and Recreation (collectively referred to as "City"), also move for summary judgment arguing that they neither owned the property and tree in question, nor had prior notice of the alleged defective tree. Plaintiff opposes both motions as premature.

In support of their motion for summary judgment Wagner attaches, *inter alia*, the affidavit of Daniel Switzer, the Director of Facilities and Maintenance for Wagner. He attests that prior to the accident, the area where the tree fell was visually inspected several times per week for any hazardous conditions, and none were observed. The visual inspections consisted of ground crew members walking the area to determine if any trees were dead, dying or at a high risk of falling. Mr. Switzer had never received a complaint about any of the trees on Howard Avenue prior to plaintiff's accident.

In opposition, plaintiff argues that Wagner's motion is premature as discovery and depositions have yet to be conducted in this case. Plaintiff further argues that the affidavit of Wagner's facilities manager is conclusory and points out that although Switzer claims that

Wagner staff regularly inspects the area along Howard Avenue, there is no claim that the actual tree in question was inspected. Furthermore, it is unknown as to whether the actual tree is still on the property and if so, whether plaintiff will have the opportunity to inspect it with an expert.

The City also opposes Wagner's motion, arguing that through the affidavit of Switzer, Wagner admitted that they were responsible for inspecting and maintaining the location of plaintiff's accident.

In cases involving fallen trees, a property owner will only be held liable if they knew or should have known of the defective condition of the tree (*see Ivancic v. Olmstead*, 66 NY2d 349, 351 [1985]; *Harris v. Village of E. Hills*, 41 NY2d 446, 450 [1977]; *Pulgarin v. Demonteverde*, 63 AD3d 1026 [2d Dept 2008]; *Lillis v. Wessolock*, 50 AD3d 969 [2d Dept 2008]). "Constructive notice in such a case can be imputed if the record establishes that a reasonable inspection would have revealed the dangerous condition of the tree" (*Lillis v. Wessolock*, 50 AD3d at 969; *see Harris v. Village of E. Hills*, 41 NY2d at 449).

In the instant case defendant Wagner has asserted that they had no notice of any defective condition of the tree and that there was no manifestation of any decay visible by inspection (*see, Lahowin v. Ganley*, 265 AD2d 530 [2d Dept 1999]). However, plaintiff's opposition raises issues of fact as to whether the parties have had sufficient opportunity to conduct discovery, i.e., inspecting the area where the tree fell and/or the tree itself and whether it is still on the property (*see Richardson v New York City Tr. Auth.*, 51 AD3d 899 [2d Dept 2008]).

A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*Bank of Am., N.A. v Hillside Cycles, Inc.*, 89 AD3d 653, 654 [2d Dept 2011]; *see Venables v Sagona*, 46 AD3d 672, 673 [2d Dept 2007]; *Betz v N.Y.C. Premier Props., Inc.*, 38 AD3d 815 [2d Dept 2007]). "CPLR § 3212 (f) permits a party

opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated” (*Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636 [2d Dept 2006]; see *Ruiz v Griffin*, 50 AD3d 1005 [2d Dept 2008]). “This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion” (*Aurora Loan Services, LLC v LaMattina & Assoc., Inc.*, 59 AD3d 578 [2d Dept 2009], quoting *Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 793 [2d Dept 1988]).

Here, Wagner moved for summary judgment before the parties had an adequate opportunity to conduct discovery, as little discovery has taken place and the depositions of the parties had not yet occurred (see CPLR § 3212[f]; *Corvino v Schineller*, 168 AD3d 812, 812-13 [2d Dept 2019]; *Bernstein v. New York City Tr. Auth.*, 153 AD3d 897, 897-898 [2d Dept 2017]; *Sodhi v 112 Park Enters., LLC*, 147 AD3d 1000, 1001 [2d Dept 2017]; *Herrera v Gargiso*, 140 AD3d 1122, 1123 [2d Dept 2016]. Accordingly, Wagner’s motion to dismiss is denied as premature with leave to renew upon the conclusion of discovery.

However, the same is not true for the City. “[T]he duty of a municipality to maintain its roadways in a reasonably safe condition extends to trees which are adjacent to the road and which could reasonably be expected to pose a danger to travellers” (*Hilliard v. Town of Greenburgh*, 301 AD2d 572, 572 [2d Dept 2003], quoting *Leach v. Town of Yorktown*, 251 AD2d 630, 630 [2d Dept 1998]). “However, as a general matter, an owner owes no duty to warn or to protect others from a defective or dangerous condition on neighboring premises, unless the owner had created or contributed to it. The reason for such a rule is obvious—a person who lacks ownership or control of property cannot fairly be held accountable for injuries resulting from a hazard on the property” (*Galindo v. Town of Clarkstown*, 2 NY3d 633, 636 [2004] citing,

Gehler v. City of New York, 261 AD 2d 506 [2d Dept.1999]). Therefore, unless a defendant has a duty to inspect and maintain the premises, constructive notice of defective condition is irrelevant (Id.).

In support of their cross-motion to dismiss, the City attaches the results of searches performed at the location of the accident by the Central Forestry Division and the Staten Island Borough Forestry Division, as well as the affidavits of the record searchers who performed the work. The affidavit of Yelena Bogdanova of the Central Forestry Division indicated that she performed a search for the accident location two years prior to and including the date of the accident of May 17, 2019. This included a search for installation records, which included complaints, service requests, inspections, work orders, and permit applications for the location opposite 830 Howard Avenue, Staten Island, New York. No records were found.

The affidavit of Anita Dyne-Eshun from the Staten Island Borough Forestry Division was also attached. Ms. Dyne-Eshun performed a search for complaints, service requests, inspections, work orders, Commission and Borough Commissioner Correspondence, Incident/Illness/Injury Records, permits and permit applications, daily crew work reports and routine block pruning records for the location opposite 830 Howard Avenue. No records were found.

Here, the City succeeded in establishing its prima facie entitlement to judgment as a matter of law it did not own the property and, therefore, further discovery as to constructive notice is irrelevant. In opposition, plaintiffs failed to submit evidence sufficient to raise a triable issue of fact that the City owned the property adjacent to the roadway where the tree was located so as to impose a duty to inspect and maintain it (*Galindo v. Town of Clarkstown, supra*). Moreover, the record establishes that co-defendants, Wagner, were the owners of the tree based upon their admissions as to inspection and maintenance. It is noted that Wagner did not oppose

the City's motion for summary judgment wherein it is argued that they are the owner of the property and tree. Finally, it is undisputed based upon the affidavit submitted by Wagner that they never put the City on notice that a condition existed on Wagner's premises, or that the tree was on City property, which would necessitate remedial measures by the City. Therefore, based upon Wagner's admissions and the City's records, this Court finds as a matter of law that the City was not charged with the duty to maintain the tree on the private property adjacent to the City owned roadway (*Galindo v. Town of Clarkstown, supra*). This absence of a duty renders the issue of constructive notice as to the City irrelevant.

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the motion to dismiss the action against defendant, WAGNER COLLEGE, is denied as premature with leave to renew upon the conclusion of discovery, and it is further,

ORDERED, that the motion by defendants, CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION, for summary judgment dismissing the complaint, together with all cross-claims, as against said defendants is granted in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: February /7, 2022

ENTER:



HON. THOMAS P. ALIOTTA, J.S.C.