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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 3

Present: HON. UTE WOLFF LALLY
Justice

NELSON COLON,

Plaintiff,

-against-

DAVINI REALTY, LLC,

Defendant.

Motion Sequence #2, #3
Submitted June 10, 2011

INDEX NO: 675/10

The following papers were read on these motions for summary judgment and vacatur of the Note of Issue:

Notice of Motion and Affs	**1-4**
Affs in Opposition	**5&6**
Affs in Reply	**7&8**
Memorandum of Law	**9&9a**
Second Notice of Motion and Affs	**10-13**
Affs in Opposition	**14&15**
Affs in Reply	**16&17**

Upon the foregoing papers it is ordered that this motion by the defendant for an order pursuant to CPLR 3212 granting summary judgment in favor of defendant dismissing the plaintiff's complaint is denied. The motion by the defendant for an order pursuant to CPLR 3402 and 22 NYCRR §208.17(c) Uniform Civil Rules of Court for the Supreme Court, vacating the Note of Issue and Certificate of Readiness and striking this matter from the calendar on the grounds that the Certificate of Readiness contains incorrect

statements, discovery has not been completed, and the matter is not ready for trial, or in the alternative, for an order permitting this matter to remain on the calendar while discovery proceeds; and for an Order of this Court pursuant to CPLR 3101(d) directing plaintiff to comply with defendant's Post Physical Examination of Plaintiff Demand for Authorizations, and/or precluding the introduction of any proof by plaintiff of his pre-incident eyesight at the trial of this action is determined as hereinafter set forth.

This is an action to recover money damages for personal injuries allegedly sustained by the plaintiff as a result of the alleged negligence of the defendant relating to an allegedly dangerous condition located on defendant's property.

On the date of the incident the plaintiff, employed by Gilman Management, was moving boxes for his employer from Rockville Centre to 55 Water Mill Lane in Great Neck, N.Y. Plaintiff was attempting to get some boards to use as a ramp to move the boxes out of the truck. There was a chain link fence between the property at 55 Water Mill Lane and the defendant's premises at 49 Water Mill Lane. Plaintiff alleges that as he walked to the area near the fence where the wood was located, branches were coming through the fence. Plaintiff bent down to pick up the wood and one of the branches struck him in the eye. Plaintiff asserts the branches came from a small scrubby "tree" near the fence.

David Elva, the principal of defendant Davini Realty LLC, in support of the motion for summary judgment claims that the branches that struck plaintiff's eye came from a tree not on defendant Davina's property. He asserts that the chain link fence was located inside the property line of 55 Water Mill Lane, and was bent around the bottom of the tree inside the 55 Water Mill Lane property line. Mr. Elva testified that the chain link fence belonged to 55 Water Mill Lane, was on the property of 55 Water Mill Lane, and that the

owner of 55 Water Mill Lane had removed it after the subject incident and replaced it with a new fence and a new line of trees. The defendant further asserts the "tree" was a small, scrubby growth that appears to look more like a bush than a tree, which emanates from roots that come up out of the ground on the 55 Water Mill Lane property, pushing the bottom of the chain link fence in towards 55 Water Mill Lane. At no point, Elva contends, was the tree on the defendant's property. In further support of its motion for summary judgment defendant asserts that a new fence was installed by the owner of 55 Water Mill Lane after they removed the old fence and the scrubby trees growing up against it. Defendant contends that the fact that the owner of 55 Water Mill Lane removed the fence and trees and erected a new fence and trees in their place is proof of ownership of the "trees" and the property on which they stood. Moreover, defendant asserts it had no dominion or control over the branches since they were not on the defendant's property and defendant cannot be liable for any injury that the branch allegedly caused.

Defendant finally argues that even assuming *arguendo* the "tree" was on its property, the branches did not constitute an actionable defect but were the type of open and obvious condition that does not give rise to an actionable claim. Defendant points out that the plaintiff testified that as he approached the fence, he saw the branches sticking out. Nevertheless, he bent down, poking his eye on one of the branches. Defendant argues that the open and obvious condition of the branch does not give rise to a claim against the landowner on either side of the fence.

In deciding a motion for summary judgment, the Court's function is to determine whether a material factual issue exists that must be tried, not to resolve it. (*Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404). A *prima facie* showing of a right to

judgment is required before summary judgment can be granted to a movant. (*Alvarez v Prospect Hospital*, 66 NY2d 320; *Winegrad v New York University Medical Center*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*, 129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133). It is the opinion of this Court that the defendant has established an adequate *prima facie* entitlement to summary judgment.

Once a movant has demonstrated a *prima facie* right to summary judgment, the burden shifts to the opposing party to prove that a factual dispute exists requiring a trial. Such facts presented by the opposing party must be proffered by evidentiary proof in admissible form. (*Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065). Conclusory statements are insufficient. (*Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *see Zuckerman v City of New York*, 49 NY2d 557; *see also Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660).

In opposition to the motion for summary judgment the plaintiff asserts that based on photographs his wife took right after the accident, the "tree" was on the side of the fence belonging to the defendant.

It is not clear, from the various photographs proffered by each party, on whose property the fence and "tree" were located. The plaintiff rebutted by document any evidence defendant's assertion that the "tree" and the fence were on plaintiff's property. In order to meet its burden in moving for summary judgment the party cannot point to gaps in its opponent's proof but must affirmatively demonstrate the merits of its claim. (*Fromme*

v Lamour, 292 AD2d 417; *George Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 814).

Therefore, the Court finds that plaintiff has raised a question of fact as to whose property the "tree" and fence were on.

Defendant contends that the condition was open and obvious. However, the fact that the condition of the "tree" was open and obvious does not negate the defendant's duty to maintain the property in a reasonable and safe condition. (*Barberio v Agramunt*, 45 AD3d 514; *Sportiello v City of New York*, 6 AD3d 421).

Thus the Court finds that there is an issue of fact as to whether the premises was maintained in a reasonable and safe condition. Since issue finding, rather than issue determination, is the key to summary judgment. (*In re Cuttitto Family Trust,* 10 AD3d 656; *Greco v Posillico,* 290 AD2d 532) and since the Court should refrain from making credibility determinations (*S.J. Capelin Assoc. v Globe Mfg Corp.*, 34 NY2d 338) and must scrutinize the papers in the light most favorable to the party opposing the motion. (*Glover v City of New York*, 298 AD2d 428), the defendant's motion for summary judgment dismissing the complaint is denied.

In determining defendant's motion to strike the Plaintiff's Note of Issue or in the alternative order further discovery it is beyond cavil that plaintiff's injury consists solely of an alleged eye injury. The defendant's examining doctor disputes a causal relationship and opines that "the refractive errors that he has in the left eye is similar to the refractive error in the right eye, and therefore I believe that his current refractive error is pre-existing and not secondary to the accident." [Exhibit E to moving papers, p. 2]. Therefore, defendant seeks outstanding discovery as to examinations and treatment of plaintiff's eyes

prior to the within incident. Although an authorization was provided for same, defendant's counsel asserts it now appears from plaintiff's counsel's affirmation that the prior records may not be available. Recognizing that something that no longer exists cannot be produced, and mindful of the crucial nature of any evidence of the pre-incident condition of plaintiff's eyes, the defendant's attorney requests that alternative relief be granted, including but not limited to directing the plaintiff to produce the eye glasses he obtained prior to this incident (which he testified to at his deposition) for discovery and inspection by an optometrist retained by defendant who can determine the strength of the lenses in said glasses. Said production shall take place within thirty (30) days from today's date. In addition, the plaintiff shall appear for a further examination before trial on the sole issue of prior treatment and examination of his eyes. Defendant is also granted the right to subpoena a witness from "World Vision" to testify with regard to counsel's statements that he had a discussion with someone from that provider with regard to the records. Plaintiff's counsel shall provide the name of the person he spoke with and the date, within the same thirty (30) day period.

Defendant is given leave to obtain further discovery regarding the pre-incident condition of plaintiff's eyes, including but not limited to Motor Vehicle Department records and any records of plaintiff's employer or any other entity where plaintiff may testify his eyes were examined.

Finally, the plaintiff shall be precluded from producing any evidence of pre-incident treatment or examination of plaintiff's eyes that has not been provided to defendant.

Defendant's motion for an order vacating the Note of Issue and Certificate of Readiness and striking this matter from the trial calendar is denied.

Date: AUG 18 2011

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