NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 05

Case Disposed ⌟
Settle Order ⌟
Schedule Appearance ⌟

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX:

----------X

BROWN, MELVIN

Index №. **0301906/2011**

-against-

Hon. **ALISON Y. TUITT** ,

2324 LLC

Justice.

----------X

The following papers numbered 1 to 3 Read on this motion, **SUMMARY JUDGMENT/DEFENDANT**
Noticed on **May 15 2013** and duly submitted as No. ____ on the Motion Calendar of 6/17/13

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibits	2	
Replying Affidavit and Exhibits	3	
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

OCT 22 2013

Upon the foregoing papers this motion is decided in accordance with the annexed memorandum decision

Motion is Respectfully Referred to:
Justice: _____
Dated: _____

Dated: 10/17/2013

Hon. A Y Tuitt
ALISON Y. TUITT, J.S.C.

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

MELVIN BROWN,

Plaintiff,

-against-

2324 LLC,

Defendant.

INDEX NUMBER: **301906/2011**

Present:
HON. **ALISON Y. TUITT**
Justice

The following papers numbered 1 to 3,

Read on this Defendant's Motion for Summary Judgment

On Calendar of **6/17/13**

Notice of Motion-Exhibits and Affirmation 1

Affirmation in Opposition 2

Reply Affirmation 3

Upon the foregoing papers, defendant's motion for summary judgment is granted for the reasons set forth herein.

The within action involves plaintiff's claim that he was injured on November 5, 2010 at the defendant's premises located at 2324 Walton Avenue, Bronx, New York, when he fell due to a hanging tree branch on the exterior walkway of the subject premises.

Plaintiff testified that he has lived at the subject premises, Apt. 6J since 1977 or 1978. In November 2010, there was only one path or entrance that residents and visitors could use. On the date of the accident, plaintiff was walking along the sidewalk on Walton Avenue, where the front entrance of the building is located. The building was located to his right. Plaintiff testified that he turned onto the pathway towards the building's entrance with the intention of entering the building. He took two steps onto the pathway when the

accident occurred. Plaintiff further testified that a portion of a "humongous" hedge bush extended over a railing on the walkway leading into the building. The bush extended over half the walkway and was located at his eye level and stomach area. Plaintiff testified that as he turned onto the pathway from the city sidewalk, he heard someone call out his name and he turned around to see who was calling him. Before his name was called out, plaintiff was getting ready to move to the other side of the pathway to avoid the hanging branch. His accident occurred as he turned back around to continue walking into the subject building and walked into the tree branch. Plaintiff turned over his left shoulder and "forgot the stupid tree. I was going around it, and I walked into it." Plaintiff tried to move away from the tree branch and then fell over the metal railing.

Plaintiff testified that he submitted his complaints to the managing agent, not the building's super because the tenants "didn't have to".

Q. Did you ever complain to the superintendent about the hedge bush that you are claiming covered a part of the walkway?

A. No, we didn't have to.

Q. So you never complained to the super?

A. We don't talk.

Q. Did you ever complain to the super?

A. I don't speak to him.

Plaintiff then changed his testimony to state that he complained about the hedge bush for more than six months and, thereafter, stated his recollection was that he had been complaining for a year or more before the accident. He stated that he verbally complained numerous times to the super, more than five times. The super would respond by telling him "leave me alone and don't say nothing. This is my building and I do what I do." Plaintiff testified that he also complained to the super's wife more than five times and he told her that the trees needed to be pruned and that someone could get hurt. He also called the managing agent's office before the accident to complain about the tree. Later in his deposition, plaintiff testified as follows with respect to his complaints to the super:

Q. Did you ever say to him anything about the hedge bush prior to the accident?

A. Here you come with the same thing again. I just told you I don't speak directly to the super. It is not that I dislike him or hate him. I just don't bother the man because he is trouble. You go there and send somebody there and stand around there during the day and you'll see what's going on over there. I want to tell you the truth. After 45 years I'm ready to get out of there.

. . .

Q. So who were you speaking to when you said when are you going to cut the tree, who were you speaking to?

A. Just walk past there and his wife and all the fellows up and down the block and everybody be standing right there in front of the building.

Q. So you would say it in the general direction of the super?

A. Of any of them there. A lot of people said I wonder when they're going to cut these trees.

. . .

Q. Now you are changing it. You are saying not directly?

A. Not directly. Like I would pass you and say something and not come directly to you and say it.

Q. During those occasions when you would speak to the superintendent, you were speaking to him in conversation, you were just making comments as you passed by him? I don't want to put words in your mouth.

. . .

A. He be standing there in front of the building with a bunch of his fellows. All of them down the block. And you just come down the street and you say "when are they going to cut these stupid bushes and thing in front of the building. Somebody is going to get hurt here one day." ... The trees and everything is right there and I could have been hurt long before then, but I kept my sanity..."

Plaintiff admitted that he walked past the subject condition at least one to two times per week and that the condition had existed for six months or more prior to the accident. Plaintiff could not testify to anyone else having had difficulties with the subject tree prior to his accident. While plaintiff alleged that others were aware of the subject condition, he was unable to identify one such person, either by name or apartment number.

Regarding his complaints to the managing agent, plaintiff testified that he called "the agency"; he would call "maintenance services or something, the new management we have now" to complain. Plaintiff then testified that he did not have a conversation with someone before his accident and he denied leaving messages for anyone at the management office regarding the subject condition prior to his accident. He testified that the only person he spoke with was "Thea". Then he testified that he had a conversation with someone at the managing agent about the tree but he did not know who he spoke to and he guessed that he had the conversation several times. "I just pick up my phone and call and that's it."

Althea Devivio testified at a deposition that she was employed by Chestnut Holdings in November 2010 as a field manager. Ms. Devivio managed 17 buildings, and the subject building was one of them. She testified that she visited the subject building once or twice a week, or more frequently if needed. Ms. Devivio further testified she performed inspections on the subject building including addressing any submitted complaints and ensuring that all necessary repairs were performed. Ms. Devivio stated that on October 21, 2010, before plaintiff's accident, six trees were removed from the premises. She was not sure if any work was done on any of the other trees or shrubbery that were not being removed. She further testified that the only time she spoke to plaintiff was on one occasion after the accident had occurred.

Defendant moves for summary judgment on the grounds that the alleged condition was not defective or dangerous and that it did not have the requisite notice of the purported condition for purposes of liability. Defendant further argues that there is nothing inherently dangerous about a tree branch, regardless of whether the branch extends slightly into a pedestrian sidewalk or walkway. Defendant contends that the subject tree was plainly visible, out in the open and readily observed by plaintiff. Defendant further argues that plaintiff, who resided at the subject premises, admitted walked right by the tree branch on dozens, if not hundreds, of occasion prior to the accident date.

The court's function on this motion for summary judgment is issue finding rather than issue

determination. Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395 (1957). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. Rotuba Extruders v. Ceppos, 46 N.Y.2d 223 (1978). The movant must come forward with evidentiary proof in admissible form sufficient to direct judgment in its favor as a matter of law. Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. Stone v. Goodson, 8 N.Y.2d 8, (1960); Sillman v. Twentieth Century Fox Film Corp., *supra*.

The proponent of a motion for summary judgment carries the initial burden of production of evidence as well as the burden of persuasion. Alvarez v. Prospect Hospital, 68 N.Y.2d 320 (1986). Thus, the moving party must tender sufficient evidence to demonstrate as a matter of law the absence of a material issue of fact. Once that initial burden has been satisfied, the "burden of production" (not the burden of persuasion) shifts to the opponent, who must now go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact. The burden of persuasion, however, always remains where it began, i.e., with the proponent of the issue. Thus, if evidence is equally balanced, the movant has failed to meet its burden. 300 East 34th Street Co. v. Habeeb, 683 N.Y.S.2d 175 (1st Dept. 1997).

It is well established that an owner of a premises has a duty to keep its property in a "...reasonably safe condition, considering all of the circumstances including the purposes of the person's presence and the likelihood of injury..." Macey v. Truman, 70 N.Y.2d 918 (1987); Basso v. Miller, 40 N.Y.2d 233, 241 (1976). In order to recover damages for a breach of this duty, plaintiff must demonstrate that the landlord created or had actual or constructive notice of the dangerous or defective condition. Piacquadio v. Recine Realty Corp., 84 N.Y.2d 967, 969 (1994); Leo v. Mt. St. Michael Academy, 708 N.Y.S.2d 372 (1st Dept. 2000). In order to charge a defendant with constructive notice, the defect must be visible and apparent, and it must exist for a sufficient length of time prior to the accident to permit its discovery and remedy. Gordon v. American Museum of Natural History, 67 N.Y.2d 836, 837 (1986).

It is well-settled law that a plaintiff must establish that the alleged condition was dangerous, defective or hazardous to establish their entitlement to recover. See, Delia v. 1586 Northern Blvd Co., LLC, 812 N.Y.S.2d 45 (1st Dept. 2006). Dismissal of a complaint is thus appropriate when a dangerous condition is not present. Gafner v. Chelsea Piers, LP, 812 N.Y.S.2d 490 (1st Dept. 2006); Schurr v. PA of NY and NJ, 763

N.Y.S.2d 304 (1st Dept. 2003). There is no duty to warn of an obvious danger, particularly where the injured party was fully aware of the hazard through general knowledge, observation, or common sense. Liriano v. Hobart Corp., 92 N.Y.2d 232 (1998). "While important to warning law, the open and obvious danger exception is difficult to administer. The fact-specific nature of the inquiry into whether a particular risk is obvious renders bright-line pronouncements difficult, and in close cases it is easy to disagree about whether a particular risk is obvious. It is hard to set a standard for obviousness that is neither under-nor over-inclusive. Because of the factual nature of the inquiry, whether a danger is open and obvious is most often a jury question. Where only one conclusion can be drawn from the established facts, however, the issue of whether the risk was open and obvious may be decided by the court as a matter of law." Id. at 242.

Tree limbs have specifically been held to not be inherent dangerous instrumentalities. See, Pepic v. Joco Realty, Inc., 628 N.Y.S.2d 89 (1st Dept. 1995)(Plantar did not constitute a hazardous condition); Cohen v. Shopwell, Inc., 765 N.Y.S.2d 40 (1st Dept. 2003)(There is no duty to warn against an open and obvious condition that forms a part of the natural landscape); Sorce v. Great Oak Marina, 723 N.Y.S.2d 505 (2d Dept. 2001)(Overhanging tree branches did not constitute an inherently dangerous condition because the branches could be readily observed by the reasonable use of one's senses); Hessner v. Laporte, 567 N.Y.S.2d 944 (3rd Dept. 1991)(A tree branch does not constitute a dangerous condition).

In the instant matter, plaintiff has failed to establish that the subject condition was dangerous and/or in any way defective. Moreover, there is no evidence that defendant had actual notice of the subject condition. Plaintiff never submitted any written complaints and his testimony regarding his alleged complaints to the super is very contradictory and speculative. Plaintiff had never experienced any problem with the purported condition prior to the accident and he was aware that the tree branch extended into the walkway as he walked past the condition numerous times prior to his accident. Furthermore, there is not evidence that defendant had constructive notice of the condition. In addition to being open and obvious, plaintiff has failed to show that the subject bush or branch was defective and dangerous.

The affidavit of plaintiff's expert, Vincent Baffa, who states that he has over 20 years experience in building maintenance and management, including maintenance of grounds surrounding a building, fails to raise any issues of fact. Defendant objects to the fact that the expert was not previously exchanged prior to the making of the summary judgment motion. Defendant argues that the report was prepared on or about June 4,

2013, after plaintiff had filed a note of issue and certified that discovery was complete. See, Lombardi v. Alpine Overhead Doors, Inc., 939 N.Y.S.2d 528 (2d Dept. 2012)(Failure of plaintiff to identify an expert witness until after the note of issue was filed precluded consideration of the expert's report in connection with the defendant's summary judgment motion); Construction by Singletree, Inc. v. Lowe, 866 N.Y.S.2d 702 (2d Dept. 2008)(Court properly declined to consider defendant's expert report which was first exchanged after discovery was complete and in opposition to plaintiff's motion for summary judgment).

Here, the Court has the discretion to consider defendant's expert's affidavit. See, Begley v. City of New York, --- N.Y.S.2d ----, 2013 WL 5225242 (2d Dept. 2013)(Considering affidavit of private nurse's expert on nurse's motion for summary judgment was warranted. Even though the expert was not timely disclosed, there was no indication that nurse retained expert before note of issue was filed and deliberately delayed in responding to parents' expert witness demand, or that delay in disclosing expert's identity hampered parents' ability to respond to her motion); LeMaire v. Kuncham, 957 N.Y.S.2d 732 (2d Dept. 2013)(Court's refusal to consider patient's expert affidavit submitted in opposition to physician's motion for summary judgment for their late disclosure was an improvident exercise of discretion); Rivers v. Birnbaum, 953 N.Y.S.2d 232 (2d Dept. 2012)(Failure to disclose expert information prior to filing of note of issue and certificate of readiness did not divest court of discretion to consider affirmation or affidavit submitted by that party's experts in context of timely motion for summary judgment).

Regardless of the timeliness of plaintiff's expert exchange, there are no issues of fact raised. The affidavit as it is subjective and conclusory. See Mauro v. Rosedale Enterprises, 873 N.Y.S.2d 627 (1st Dept. 2009) (Determination as to whether plaintiff's untimely expert report should be considered was unnecessary as the report failed to create an issue of fact to warrant the denial of defendant's summary judgment motion). Mr. Baffa does not identify any codes, statutes, laws or regulations that were purportedly violated by defendant and he does not provide any basis for his conclusions. In addition, Mr. Baffa never actually inspected the site of the accident. See, Amaya v. Denihan Ownership Co., LLC, 818 N.Y.S.2d 199 (1st Dept. 2006)(Engineer's affidavit regarding alleged structural defects in platform outside hotel entrance was entitled to no probative force, and thus was insufficient to withstand summary judgment motion as engineer did not inspect platform until 3-1/2 years after accident, and his affidavit contained only speculative, conclusory assertions as to the alleged defects, and cited to broad or inapt engineering rules, regulations and standards).

Accordingly, the defendant's motion for summary judgment is granted and the complaint is dismissed.

This constitutes the decision and Order of this Court.

Dated: 10/17/2013

Hon. Alison Y. Tuitt