Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Cliff Perciavalle,

Plaintiff,

- against -

Josif Tapalaga, Maria Tapalaga, The City of New York, Forest Hills Garden Corporation, and Forest Hills garden Restoration, Inc.,

Defendants.

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Index Number: 17919/11

Motion Date: 7/2/13

Motion Cal. Number: 95

Motion Seq. No.: 1

The following papers numbered 1 to 9 read on this motion by defendant, The City of New York, for summary judgment.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits	1-4
Affirmation in Opposition-Exhibit	5-7
Reply	8-9

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by the City for summary judgment dismissing the complaint is granted.

As a preliminary matter, the action has been discontinued against co-defendants Tapalaga, Forest Hills Gardens Corporation and Forest Hills Gardens Restoration, Inc.

Plaintiff allegedly sustained injuries when a tree limb from a curbside tree fell upon him during a rainstorm in front of 103-03 72nd Avenue in Queens County on September 16, 2010. Plaintiff alleges, inter alia, that the subject tree was diseased and that the City failed to reasonably inspect and remedy the dangerous condition by removing the tree, notwithstanding that the City had actual or constructive notice of the condition.

The City moves for summary judgment upon the grounds that it did not create the allegedly dangerous condition of the tree and

that it had neither actual nor constructive notice of the condition.

To impose liability upon the owner or operator of property, it must be established that a dangerous or defective condition existed and that the owner either created the condition or had actual or constructive notice of it (see King v. New York City Transit Authority, 266 AD 2d 354 [2nd Dept 1999] [citations omitted]; see also Medina v. Sears Roebuck and Co., 41 AD 3d 798 [2nd Dept 2007]; Richardson v. Campanelli, 297 AD 2d 794 [2nd Dept 2002]).

There is no issue as to whether the City created the allegedly dangerous condition of the tree. Plaintiff's allegation, indeed, is that the tree was diseased. Moreover, the City has proffered unrebutted evidence that it did not have actual notice of the defective condition of the tree.

Annexed to the moving papers is a copy of the deposition transcript of Anthony Squillacioti, a NYC Park Department climber, pruner and inspector in which he testified, referring to the Parks Department work orders also annexed to the moving papers, that the tree located at 103-03 72nd Avenue was inspected and pruned on October 15, 2005, and that it was noted by the inspector that the tree was in "excellent" condition, that a tree limb was picked up on July 10, 2006 on which occasion it was noted that the tree was in "good" condition, and that the tree was subsequently pruned on July 3, 2007, at which time it was noted by the inspector that the tree was in "good" condition. There are no other records of any subsequent complaints, inspections or prunings concerning the subject tree.

With respect to constructive notice, in order for the owner to be deemed to have had constructive notice of a dangerous condition, the condition must have been visible and have existed for a sufficient length of time prior to the accident to permit it to have discovered and remedied the condition (see Gordon v. American Museum of Natural History, 67 NY 2d 836 [1986]).

In this regard, the City has proffered prima facie evidence in the form of the aforementioned records and deposition testimony of Squillacioti that there was no visible dangerous condition that would have alerted the City to correct it but that inspections of the tree revealed that it was in excellent and good condition.

Finally, the City's counsel contends that the downing of the tree limb in question was an act of God caused by a tornado.

No issue of fact is proffered by plaintiff in opposition.

Plaintiff annexes as Exhibit "A" to his opposition the affidavit of his expert arborist, Wayne Cahilly, who concludes that contrary to the notation of the inspectors that the tree was in excellent or good condition, the tree was diseased and decayed and that its condition was visible and apparent for many years prior to the date of the accident and that plaintiff's accident was not caused by a rainstorm or gust of wind but by the City's incompetent inspections.

As a preliminary matter, contrary to the argument of counsel for the City, the Court is not precluded from considering the affidavit of plaintiff's expert upon the ground that his identity was revealed for the first time in plaintiff's opposition. "[T]here is no basis for concluding that a court must reject a party's submission of an expert's affidavit or affirmation in support of, or in opposition to, a timely motion for summary judgment solely because the expert was not disclosed pursuant to CPLR 3101[d][1][i] prior to the filing of a note of issue and certificate of readiness, or prior to the making of the motion" (Rivers v Birnbaum, 102 AD 3d 26, 39 [2nd Dept 2012]). Rather, the court has the discretion either to consider such an affidavit or reject it depending upon the particular circumstances of the case (see id.; see, e.g., Brande v City of White Plains, 2013 NY Slip Op 04766 [2nd Dept, June 26, 2013]; Salcedo v Ju, 106 AD 3d 977 [2nd Dept 2013]). One factor stressed by the Appellate Division, Second Department, is where the party seeking to submit the expert affidavit has violated an order of the court setting a specific deadline for expert disclosure under CPLR 3101(d)(1)(I), in which case, the court has the discretion either to consider an expert's affidavit or to impose an appropriate sanction. In the present matter, there is no indication that the City ever made a request for expert witness disclosure pursuant to CPLR 3101(d). Therefore, there is no basis for this Court to refuse to consider Cahilly's affidavit.

Notwithstanding, Cahilly's affidavit lacks probative value and does not raise a triable issue of fact.

Cahilly did not inspect the tree or limb in question but proffers his opinion based solely upon his examination of photographs. He states, "Shortly after the tree-limb failed, photographs were taken of the rescue of Mr. Perciavalle. These images show the trunk, limbs and the broken stub of the limb that fell." He admits that his opinion is based upon these photographs and that his investigation was severely hampered by his inability to inspect the tree. He avers, "Upon review of the photographs, there are several external conditions that are apparent, which evidence the hazardous nature of the tree. There is a large area of

missing bark on the back side of the leader which failed. Within that area of dead wood and missing bark is a visible horizontal crack." He further states, "As I alluded to earlier, horizontal cracking is apparent in the photographs. Horizontal cracks are a red flag in risk assessment. The significance of horizontal cracking is that a failure is presently underway – not that a failure might happen sometime in the future." He further elaborates, "Included in the photographs, is an image of the tree top lying on the ground. The photograph reveals that the limb failure occurred at the location of the horizontal crack in the dead wood. The photograph further reveals that there was decay associated with a dead area that extended to the middle of the stem or beyond." He also opines that this crack existed for a period of years and was visible and could have been seen in a simple drive by inspection.

Cahilly does not annex the photographs he references to his affidavit. However, plaintiff's counsel annexes a series of photographs, marked as Plaintiff's exhibits 1-4, to his opposition papers immediately after Cahilly's affidavit as part of the same Exhibit "A". None of these photographs depicts the rescue of plaintiff or any of the conditions that Cahilly states are "apparent".

Plaintiff's Exhibit "1" is a Google Maps photograph of the location of the accident. It shows a large curbside tree, identified in pen with an arrow pointing to it as "big tree", and another tree, to the left and at some distance behind this "big tree" on the front lawn of 103-03 72nd Avenue, a residential home. The tree on the front lawn of the home is also identified in pen with an arrow pointing to it as "pine", and it appears to be some species of evergreen. This photograph is not dated, but it clearly was taken prior to the accident in question, as the trees are intact.

Exhibit "2" is also a Google Maps photograph showing a view of 72nd Avenue at the corner of Harrow Street. This view is at some distance to the right of 103-03 and the trees in question, does not show the area of the accident and is, therefore, irrelevant.

The two photographs marked as Exhibit "3" depict a downed tree – the "pine" tree, not the curbside tree.

Exhibit "4" consists of 18 photographs. The first three clearly show the felled pine tree from the front lawn of the premises and do not depict the curbside tree. Indeed, two other photographs in this exhibit are of the front lawn of 103-03 showing only lawn and no pine tree present any longer. The rest of the

photographs are close-ups of a tree stump on the curbside lawn strip in front of 103-03. This apparently is the remains of the curbside tree depicted in Exhibit "1". However, there are no photographs showing this curbside tree as fallen or any fallen limbs from this tree. Moreover, no missing bark, dead wood or cracks in tree limbs are visible in any of the photographs.

Therefore, Cahilly's opinion that the tree limb that struck plaintiff was due to an obvious diseased nature of the tree is not supported by objective evidence and lacks probative value. Indeed, no evidence is proffered that plaintiff was struck by a limb from the curbside tree at all. As heretofore noted, all the photographs submitted by plaintiff show that the tree that fell was the pine tree from the lawn of the 103-03 premises. No photograph of the limb that struck plaintiff is depicted or identified and Cahilly does not otherwise identify the limb that struck plaintiff as belonging to the curbside tree owned by the City.

Thus, there is no objective basis proffered for Cahilly's conclusion that the tree limb that struck plaintiff was not caused by a rainstorm or gust of wind but by the City's failure to conduct a competent inspection, recognize the external factors of decay and remove the tree prior to the date of the accident. In this regard, although he parrots plaintiff's counsel's argument that no wind speed or precipitation data was provided by the City in support of its argument that an ongoing rainstorm caused the limb failure, he renders no opinion as to the effect of a tornado upon trees and does not state that the tree limb would not have fallen in a tornado even if the tree were healthy.

Counsel for the City contends that plaintiff's accident was an act of God caused by a tornado. Plaintiff testified in his deposition that the accident happened during a rainstorm at approximately 5:30 - 6:00 p.m. on September 16, 2013. Plaintiff's counsel contends that the City's counsel's reference to a tornado is inadmissible hearsay since no meteorological data has been proffered to evidence the existence of a tornado. This Court disagrees. The freak tornado and micro-burst that occurred on September 16, 2013 in Forest Hills Queens at precisely the time that plaintiff was struck by the tree limb is of such common knowledge that this Court takes judicial notice of it. The scenes of devastation with hundreds of trees uprooted and hurled upon parked cars and homes was widely broadcast in the media and is known to all the residents of Queens County, especially Forest Hills. Inasmuch as it is well-known that a powerful tornado struck the precise location of plaintiff's accident at the precise time of his accident, downing a large proportion of the neighborhoods trees and causing extensive property damage, it was incumbent upon

plaintiff, in opposition, to proffer evidence that the extreme weather event was not the sole proximate cause of plaintiff's accident. He has failed to do so.

In any event, no evidence has been proffered that the limb that struck plaintiff was from the curbside tree. Rather, as heretofore noted, plaintiff's own photographs show that the only tree that was down in front of 103-03 was the pine tree that fell from the front lawn of that property.

Accordingly, the motion is granted and the complaint is dismissed.

Dated: July 10, 2013

KEVIN J. KERRIGAN, J.S.C.