

Corprew v City of New York

2013 NY Slip Op 31894(U)

August 8, 2013

Supreme Court, New York County

Docket Number: 115023/08

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

DAYON CORPREW, an infant, by his mother,
and natural guardian, AVA RILEY, AND AVA
RILEY, INDIVIDUALLY,
Plaintiff,

Index No.: 115023/08

Motion Date: 12/21/12

Motion Seq. No.: 04

- v -

THE CITY OF NEW YORK and THE NEW
YORK CITY HOUSING AUTHORITY,
Defendant.

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1
Answering Affidavits - Exhibits	No (s) .	2
Replying Affidavits - Exhibits	No (s) .	3

FILED

AUG 14 2013

COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers,

In this action for personal injury, plaintiffs Dayon
Corprew, an infant, by his mother and natural guardian, Ava Riley
and Ava Riley individually, move for an order, pursuant to CPLR
3212, granting summary judgment on their claims against defendant
the New York City Housing Authority (NYCHA), the only remaining
party.

The following facts are not in dispute. On September 10,
2007, Corprew, then five years old, sustained injuries when he

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

- CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

was struck by a falling tree limb at the General Grant Housing Complex, a public housing development operated by NYCHA, located at 1315 Amsterdam Avenue in New York City (the Premises). Plaintiffs subsequently commenced this lawsuit asserting two causes of action for negligence and loss of affection. Defendant The City of New York filed an answer on November 28, 2007. NYCHA filed its answer on December 4, 2008. The City of New York subsequently moved for dismissal, which was granted on June 24, 2009.

Plaintiffs argue that they are entitled to summary judgment on their first cause of action because: (1) the tree limb that struck Corprew on the head was on NYCHA's property; (2) the child sustained injuries which included a fractured skull and an altered mental state; (3) NYCHA had actual and constructive notice of the dangerous condition which led to Corprew's injuries; and (4) a reasonable inspection of the Premises would have uncovered the fact that the trees on the Premises were in need of pruning.

NYCHA argues that plaintiffs are not entitled to summary judgment because: (1) NYCHA did not have actual or constructive notice of the alleged dangerous condition of the damaged tree limb alleged to have caused Corprew's injuries; and (2) plaintiffs failed to identify the specific location within the Premises at which the alleged construction or maintenance of the

grounds was negligent; and (3) plaintiff's expert's affidavit is based on hearsay and is devoid of any reference to the photographs and documents exchanged in this litigation.

Plaintiffs have met their burden in establishing a prima facie showing of entitlement to judgment as a matter of law on their first cause of action for negligence.

"A property owner is subject to liability for a defective condition on its premises if a plaintiff demonstrates that the owner either created the alleged defect or had actual or constructive knowledge of it" (Singh v United Cerebral Palsy of N.Y. City, Inc., 72 AD3d 272, 275 [1st Dept 2010]). "To constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to an accident to permit [the] defendant's employees to discover and remedy it" (Chianese v Meier, 98 NY2d 270, 278 [2002] [internal quotation marks and citation omitted]).

Furthermore, "[a] landowner has a duty to exercise reasonable care in maintaining its property in a safe condition under all the circumstances, including the likelihood of injury to others, the seriousness of the potential injuries, the burden of avoiding the risk, and the foreseeability of a potential plaintiff's presence on the property" (Toes v National Amusements, Inc., 94 AD3d 742, 742 [2d Dept 2012]).

Plaintiffs argue that a NYCHA employee was aware that tree

limbs on the Premises exhibited signs of decay for a sufficient length of time before Corprew's accident to permit NYCHA's employees to discover and remedy the problem, but NYCHA failed to do so.

Plaintiffs submit testimony from Timothy Johnson, the grounds supervisor at the Premises. Johnson's duties include snow removal, fence repair, maintenance of the grass, hedges minor trees and landscape on the Premises, garbage removal and inspection of the grounds. Each quarter, Johnson conducts an inspection of the grounds and fills out a written report as to the condition of the Premises. As NYCHA's representative, he is trained to spot readily observable elements of tree rot or decay for purposes of his quarterly reports and duties. On June 19th, 20th and 21st of 2006, outside contractors pruned the major trees (those in excess of 15 feet) on the Premises. Johnson inspected the Premises shortly thereafter and recorded in the July 2006 quarterly report that the state of the trees in need of pruning was fair, meaning there was no evidence of any dead trees in need of removal. The report also noted that the outside contractors had not completed the work of pruning the trees. The following year, in July of 2007, Johnson recorded the condition of the pruned trees as unsatisfactory, meaning there was either a visible cavity or dead branches on the trees at the Premises. Johnson could not recall whether the outside contractors returned

in 2006 to complete the work that he recorded as unfinished. He also could not recall whether the trees in question were among those specified as unsatisfactory.

Plaintiffs also submit testimony from Jon Hickey, an arboricultural consultant who inspected the alleged defective trees on September 18, 2007, a week following Corprew's injury. Hickey inspected two "London Plane" trees. The branches extended over the fence and public sidewalk and each had dead limbs that measured at least three inches in diameter. Hickey asserts that the decay he observed demonstrates sustained deterioration for a period of two to three years. He avers that he observed locations on the trunks, limbs, and canopies of the two trees in question that demonstrated dead limb loss or breakage. However, he did not observe any recent pruning cuts on either of those trees.

Riley avers that on September 10, 2007, she was standing on the corner of 125th Street and Amsterdam Avenue at the Grant Houses when a tree limb fell and struck her five-year old son. When she looked over, she saw her son lying on the ground. He was unconscious and lay bleeding from a wound on his head. The limb that struck her son was large and it broke into pieces upon impact. Riley identified the tree that caused her son's injury from a photo presented to her during her deposition testimony.

Plaintiffs also submitted testimony from Corprew. When

questioned about the incident, Corprew recalled sleeping in a hospital following "hitting my head from the tree".

Plaintiffs have demonstrated that the alleged defect was visible and apparent, and that it existed for a sufficient length of time before the accident to permit NYCHA's employees to discover and remedy it (Chianese v Meier, 98 NY2d at 278).

However plaintiffs' claims that NYCHA was negligent in failing to conduct inspections of the property to identify defective tree limbs, as a matter of law, are unavailing. "[T]he concept of constructive notice with respect to liability for falling trees is that 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" (Ivancic v Olmstead, 66 NY2d 349, 351 [1985], *lv denied* 67 NY2d 754 [1986], *cert denied* 476 US 1117 [1986]). "The duty of a property owner to reasonably inspect premises arises in situations distinct from the facts here, such as where a statute imposes the duty. . . or where the object capable of deteriorating is concealed from view" (Singh v United Cerebral Palsy of New York City, Inc., 72 AD3d at 276). Since plaintiffs do not point to any specific statute in this instance and it appears the tree in question was not concealed from view, under these circumstances NYCHA did not have a duty to consistently and constantly inspect the trees in the area.

However, as the plaintiffs have come forward with circumstantial prima facie evidence that the unsafe condition was reasonably observable and that NYCHA was negligent in not taking reasonable steps to prevent harm, the burden now shifts to NYCHA to rebut plaintiff's evidence that there was constructive notice. The record reveals that the Premises contains eight 21-story buildings and one 13-story building which amounts to approximately 15 acres. Neither Johnson's July 2006 nor his July 2007 quarterly reports designate the location of any specific tree as unsatisfactory. Furthermore, the record does not include a photograph of the exact location of Corprew's injury or the alleged tree from which the branch fell and struck him on the head. In the 15 months prior to Corprew's accident, Johnson had not received any prior complaints by residents or staff of falling tree branches on the property. In fact, Johnson was not made aware of Corprew's accident until a week prior to his deposition testimony. As NYCHA argues, plaintiffs failed to include any photographic evidence of the condition of the areas designated as unsatisfactory in Johnson's July 2007 quarterly report that they allege caused infant plaintiff's injury. Thus, NYCHA has identified triable issues of fact on the issue of constructive notice.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment is

denied; and it is further

ORDERED that should this action not settle in Mediation I, the parties shall appear in IAS Part 59, 71 Thomas Street, New York, New York, for a pre-trial conference on November 19, 2013, 2:30 PM.

This is the decision and order of the court.

Dated: August 8, 2013

ENTER:

~~Debra A. James~~
J.S.C.
DEBRA A. JAMES

FILED
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