SCAN

SHORT FORM ORDER mg

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

LINDA DOWN,

Plaintiff(s),

-against-

MOTION DATE:10/31/08
INDEX No.:11252007
MOTION SEQUENCE NO:1,2
X X X
CAL. NO.:2008H2246

TOWN OF OYSTER BAY, HSU GUO CHEN and JAMES CHEN,

Defendant(s).

The following papers read on this motion:

Notice of Motion/ Order to Show Cause.....	1-3
Notice of Cross Motion.....	4-6
Answering Affidavits.....	7-9
Replying Affidavits.....	10,13
Briefs:	

Upon the foregoing papers, it is ordered that the motions by defendant Town of Oyster Bay and the defendants Karen Chen s/h/a Hsu Guo Chen and James Chen for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them are granted.

The plaintiff in this action seeks to recover money damages for personal injuries she sustained on January 14, 2006 when the limb of a tree fell on her. The tree was situated on a strip of property between the sidewalk and the roadway in front of the Chen's house at 47 Florence Drive in Syosset.

The defendants seek summary judgment dismissing the complaint and any and all cross-claims against them on the grounds that they did not have notice that the tree was defective.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Sheppard-Mobley v King, 10 AD3d 70, 74, aff'd. as mod., 4 NY3d 627, citing

Alvarez v Prospect Hosp., 68 NY2d 320, 324; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (Alvarez v Prospect Hosp., supra, at p. 324). The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference (See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521, citing Secof v Greens Condominium, 158 AD2d 591).

The Town of Oyster Bay does not dispute its responsibility for the area where the plaintiff's accident occurred. However, it maintains that the Chens share that responsibility,which the Chens dispute.

Section 205-4 of the Town Code of the Town of Oyster Bay denominates the area between the sidewalk and the curb as a public right of way. In fact, Section 225-8 of the Town Code of the Town of Oyster Bay prohibits trees from being removed from, *inter alia*, any public street owned or controlled by the Town without the prior written consent of the Town Superintendent of Highways. Furthermore, a municipality's duty to maintain its roadways in a reasonably safe condition extends to trees adjacent to the road which could reasonably be expected to pose a danger to travelers (Collado v Incorporated Town and/or Village of Freeport, 6 AD3d 378, citing Leach v Town of Yorktown, 251 AD2d 630, lv to app den., 92 NY2d 814; Guido v State of New York, 248 AD2d 592). Nevertheless, Section 205-2 of the Town Code of the Town of Oyster Bay requires property owners and occupants to "keep the sidewalk in front of the lot or house free from obstructions or encumbrances," and it provides that they "shall be liable for any injury or damage by reason of omission, failure or negligence to make, maintain, or repair such sidewalk." "Sidewalk" includes the area between the sidewalk and the curb (Malone v Town of Southold, 303 AD2d 651, 652 , citing Zizzo v City of New York, 176 AD2d 722; Gallo v Town of Hempstead, 124 AD2d 700; see also, LoCurto v City of New York, 2 AD3d 277; Callan v City of New York, 17 Misc3d 248; Vehicle & Traffic Law § 144).

"Liability does not attach unless the municipality had actual or constructive notice of the defective condition" (Collado v Incorporated Town and/or Village of Freeport, supra, at p. 379, quoting Hilliard v Town of Greensburgh, 301 AD2d 572, citing Harris v Village of East Hills , 41 NY2d 446, 450; Fowle v State of New York, 187 AD2d 698, 699). Similarly, "[i]n cases involving fallen

trees, a property owner will be held liable only if he or she knew or should have known of the dangerous condition of the tree" (Lillis v Wessolock, 50 AD3d 969, citing Ivancic v Olmstead, 66 NY2d 349, 351, cert den. 476 U.S. 1117; Harris v Village of East Hills, supra; Asnip v State of New York, 300 AD2d 328; Lahowin v Ganley, 265 AD2d 530; Golan v Astuto, 242 AD2d 669). Therefore, absent actual or constructive notice of the defective condition of the tree, liability does not attach to either the Town or the Chens (See, Ivancic v Olmstead, supra, at p. 350-351, citing Harris v Village of East Hills, supra, at p. 449; Restatement [Second] of Torts § 363; Prosser and Keaton, Torts, at 390 [5th ed.]).

Constructive notice may be imputed when there is evidence that a "reasonable inspection" would have revealed the dangerous condition of the tree (Lillis v Wessolock, supra, citing Harris v Village of East Hills, supra). However, "the 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 nonvisible decay" (Ivancic v Olmstead, supra, at p. 351). "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, supra, at p. 351, citing Berkshire Mut. Fire Ins. Co. v State of New York, 9 AD2d 555). Even where there is evidence which would alert a tree expert to a tree's defective condition, there must be indicia of decay or disease observable upon ordinary inspection in order to put a landowner on notice of the defective condition so as to trigger his or her duty to take reasonable steps to prevent potential harm (Ivancic v Olmstead, supra, at p. 351; Harris v Village of East Hills, supra, at p. 449; see also, Rinaldi v State of New York, 49 AD2d 361). "Where there is no evidence that the tree trunk showed any visible, outward signs of decay prior to the accident, it cannot be said that the municipality [or the property owner] had constructive notice of the defect" (Quog v Town of Brookhaven, 273 AD2d 287, citing Leach v Town of Yorktown, supra).

The pertinent facts here are as follows:

At her examination-before-trial, the plaintiff testified that January 14, 2006 was a rainy day. At about 9:30 p.m., when there was a break in the rain, she took one of her dogs out for a walk, and during that walk she noticed a wind gust. She returned home around 9:45 p.m. and gathered her other two dogs to go for a walk. At about 10:00 p.m. as she was walking her dogs in the street near the curb, she heard a sound like a flag flapping but she did not see anything. As she continued to walk, she was hit in the back and thrown to the ground. She later learned that a tree limb had hit her. The limb fell from a tree situated on the strip of property between the sidewalk in front of the Chens' house and the roadway.

Plaintiff testified at a 50-h hearing that she frequently walked in this area prior to her accident and that she never noticed any problems or unusual conditions with any of the trees in this area nor did she ever observe any work being done to them.

James Chen testified at his examination-before-trial that he and Karen Chen s/h/a Hsu Guo Chen have owned the property at 47 Florence Drive since 2000. Their property is actually at the corner of Florence Drive and Carol Lane. He testified that he lodged a complaint with the Town on April 20, 2005 about a large tree branch that had come down and that the Town had the branch removed. It turns out that the limb that fell on the plaintiff came from the same tree that the branch had fallen from some nine months earlier. James Chen testified that the limb that hit the plaintiff was large and sizeable: When it fell, it damaged the sidewalk. He also testified that other than the branch falling in 2005, he never noticed any problem with the tree whose limb fell and hit the plaintiff: It always appeared alive and fine.

Joseph Tricaro, Assistant Superintendent of Highways of the Town of Oyster Bay, testified at his examination-before-trial regarding the pertinent Town records. A complaint had been made by a Chen defendant on April 20, 2005 about a tree limb which had fallen and the Town had it removed.

Karen Chen s/h/a Hsu Guo Chen testified at her examination-before-trial that a tree had been removed from Carol Lane but she couldn't remember when and that a tree had been removed from Florence Drive by the Town before the plaintiff's accident but she was not sure why. She surmised that there was a problem with branches falling from that tree: Either she or James contacted the Town and the Town removed it. She described the weather on the day of the plaintiff's accident as a very windy storm.

Assuming, *arguendo*, that the Chens and the Town are both responsible for the tree and that the history of a branch falling from it imparted a duty on them to inspect it (see, Diamond v State of New York, 53 AD2d 958, app dism. 40 NY2d 969), the defendants have nevertheless established that there is no evidence that a reasonable ordinary inspection of the tree would have yielded notice of a defective condition, thereby entitling them to summary judgment dismissing the complaint based on lack of notice Collado v Incorporated Town and/or Village of Freeport, supra; Asnip v State, supra; Quog v Town of Brookhaven, supra; Leach v Town of Yorktown, supra; compare Jurgens v Whiteface Resort on Lake Placid, L.P., 293 AD2d 924; Fitzgerald v State, 198 Misc 39 (Court of Claims 1950)].

Plaintiff's counsel never disclosed the existence of the

expert on whom they now rely, calling into serious question whether his affidavit should be considered (See, Safrin v DST Russian & Turkish Bath, Inc., 16 AD3d 656, citing Gralnik v Brighton Beach Assoc., 3 AD3d 518; Dawson v Cafiero, 292 AD2d 488, lv to app den. 98 NY2d 210).

In any event, the plaintiff's expert fails to demonstrate the existence of a material issue of fact. He concludes that the fallen branch in April, 2005 provided notice to the defendants that the tree might have defects. He further states that his inspection of photographs of the cut up tree revealed that there was "**internal** staining and discoloration," which, he concludes, indicates that there were signs of defects of which the defendants would have been aware had a proper inspection been conducted. However, what defects the defendants would have been aware of are not further identified nor established. And, **internal** staining and/or discoloration are not "visible, outward sign[s]" of a defect in the tree, as is required to establish constructive notice (see, Quoq v Town of Brookhaven, supra). As the court observed in Ivancic v Olmstead (supra, at p. 351):

> [N]ot one of the witnesses who had observed the tree prior to the fall of the limb testified as to observing so much as a withering or dead leaf, barren branch, discoloration, or any of the other indicia of disease which would alert an observer to the possibility that the tree or one of its branches was decayed or defective.

It is clear that the defendants lacked notice of any defects in the tree. Their motions for summary judgment are granted and the complaint is dismissed. This action is concluded.

Dated: DEC 18 2008

J.S.C.

ENTERED
DEC 23 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

down