SHORT FORM ORDER ORIGINAL INDEX No. 17-611708
CAL. No. 19-00487OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-13-19
ADJ. DATE 8-8-19
Mot. Seq. # 002 - MG; CASEDISP

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ANJA GROTH and WILLIAM GROTH,

Plaintiffs,

- against -

JOHN STANECK and TONI ELIZABETH STANECK,

Defendants.

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Upon the following papers read on this motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendant dated May 9, 2019; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers by plaintiffs dated June 26, 2019; Replying Affidavits and supporting papers dated August 2, 2019; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion of the defendants for summary judgment dismissing the complaint is granted.

The plaintiffs commenced this action to recover damages for injuries that plaintiff Anja Groth allegedly sustained as a result of hitting her head on a tree branch while she was participating in a wellness walk organized by the West Hampton Beach Elementary School. The plaintiffs allege that the tree was located on property owned by defendants John Staneck and Toni Elizabeth Staneck, and that the branch extended over the sidewalk abutting the defendants' property.

The defendants now move for summary judgment dismissing the plaintiffs' claims on the grounds that they did not owe a duty to Anja, that the tree was an open and obvious condition, and that they did not have actual or constructive notice of the condition. The plaintiffs oppose the motion.

At her deposition, Anja testified that on the morning of the accident, she was participating in a wellness walk with approximately 200 participants associated with Westhampton Beach Elementary School. While she was walking at a "rapid pace" on Mill Road, her head hit a tree branch that was extended over the sidewalk. She was walking with two adults to her right and four children were walking ahead of her. The tree was located on the left of the sidewalk and was adjacent to a residence on Mill Road. Immediately before the accident, Anja was in conversation with the two people who were walking with her. She testified that her view of the sidewalk was not obstructed and that she had walked the portion of the sidewalk where the accident occurred on at least four prior occasions. Anja had not observed the branch before the date of the accident. She testified that while she was walking, the upper left part of her head came into contact with it, causing her to sustain injury to her head and causing her to fall to the ground.

John Staneck testified that he owned the residence located at 257 Mill Road since 2013, and that a tenant resided at the property at the time of the plaintiff's accident. There were trees abutting the property, which Staneck had observed on multiple occasions. Staneck testified that he had walked on the portion of the sidewalk where the plaintiff's accident occurred several times and he did not observe the tree branch over the sidewalk. He did not prune the subject tree, and he did not receive any notification from the police or from the Town concerning the tree at any point during his ownership of the property. Toni Elizabeth Staneck testified similarly to John Staneck.

It is well established that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). Should the movant meet his or her burden, it is then incumbent upon the nonmoving party to demonstrate that there is a material issue of fact to defeat the motion (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]). Mere conclusions and unsubstantiated allegations are insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557; ***Billordo v E.P. Realty Assoc.***, 300 AD2d 523, 524, 752 NYS2d 556, 557 [2d Dept 2002]).

To impose liability for injuries resulting from an allegedly dangerous condition, the plaintiff must establish that the property owner either created, or had actual or constructive notice of the condition (*see* ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***D'Esposito v Manetto Hill Auto Serv., Inc.***, 150 AD3d 817, 818, 54 NYS3d 429, 431 [2d Dept 2017]; ***Collins v Mayfair Super Markets, Inc.***, 13 AD3d 330, 331, 786 NYS2d 105, 106 [2d Dept 2004]).

An abutting landowner will be liable to a pedestrian injured by a defect in a public sidewalk only when the owner either created the condition or caused the defect to occur because of a special use, or when a statute or ordinance places on the owner an obligation to maintain the sidewalk, and expressly makes the owner liable for injuries caused by a breach of that duty (***Grant v Schwartz***, 276 AD2d 526,

527, 713 NYS2d 769 [2d Dept 2000]). Additionally, "there is no common-law duty on a landowner to control the vegetation on his or her property for the benefit of users of a public highway" (***id.*** citing ***Ingenito v Robert M. Rosen, P.C.***, 187 AD2d 487, 488, 589 NYS2d 574 [2d Dept 1992]; *see also* ***Echorst v Kaim***, 288 AD2d 595, 596, 732 NYS2d 285 [3d Dept 2001]). A public highway includes a public sidewalk (***id.***). Moreover, no liability attaches to a landowner whose tree branch causes injury to another outside of his premises "unless there exists actual or constructive knowledge of the defective condition of the tree" (***Ivancic v Olmstead***, 66 NY2d 349, 350-351, 497 NYS2d 326 [1985]; *see* ***Tyrrell v Kelly***, 50 Misc. 3d 129 [A], 2015 NY Slip Op 51898 [U] [App Term 2015]; ***Austin v Town of Southampton***, 34 Misc. 3d 1212 [A], 2012 NY Slip Op 50057 [U] [Sup Ct, Suffolk County 2012]).

Here, the defendants have established their prima facie entitlement to judgment as a matter of law dismissing the complaint. The record establishes that neither John nor Toni Staneck derived a special use from the subject sidewalk (***Grant v Schwartz***, 276 AD2d 526, 527, 713 NYS2d 769). Additionally, both John and Toni Staneck testified that they observed the subject tree on multiple occasions and did not observe that it was a hazard to pedestrians (*see* ***Sleezer v Zap***, 90 AD3d 1121, 1122, 933 NYS2d 764 [3d Dept 2011]). They also testified that they did not receive any prior notification concerning the tree from the Town or the Village in which the property is located. The injured plaintiff testified that she walked on the portion of the sidewalk where the accident occurred on prior occasions and she did not observe the condition of the tree (*see* ***Sorce v Great Oak Mar.***, 282 AD2d 598, 599, 723 NYS2d 505 [2d Dept 2001]).

The plaintiffs failed to raise an issue of fact in opposition. The submission by the plaintiffs "did not indicate that an average person—as opposed to an expert—would have been able to conclude, upon reasonable inspection of this healthy tree, that a limb was structurally unsound and posed a danger based on the length, angle and weight of that limb" (*see* ***Sleezer v Zap***, 90 AD3d 1121, 1122, 933 NYS2d 764). Accordingly, the motion of the defendants for summary judgment dismissing the complaint is granted.

Dated: FEB 14 2020

HON. JOSEPH A. SANTORELLI
J.S.C.