Heidi Cordeiro

v.

Rockville General Hospital, Inc. et al.

TTD CV 07-5001627-S

Superior Court of Connecticut, Rockville

August 21, 2007

Caption Date: August 21, 2007

(with first initial, no space for Sullivan, Dorsey, and Walsh): Vacchelli, Robert F., J.

Opinion Title: MEMORANDUM OF DECISION RE DEFENDANT ROCKVILLE GENERAL HOSPITAL'S MOTION TO STRIKE

In this case, the plaintiff, Heidi Cordeiro, alleges that on June 25, 2006, a tree belonging to the Defendant, Rockville General Hospital, fell into the yard and driveway of the premises she was renting, damaging a car. When she went out to look at the damage, she tripped and fell on the branches of the tree. She sues her landlord, in Count One, and the Hospital, in Count Two, in negligence for personal injury and damage to the car. Rockville Hospital moves to strike the Count against it arguing that the plaintiff has failed to state a claim. The court agrees and grants the motion accordingly.

I

"The purpose of a motion to strike is to contest . . . the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted." (Citations omitted; internal quotation marks omitted.) *Fort Trumbull Conservancy, LLC v. Alves*, 262 Conn. 480, 498, 815 A.2d 1188 (2003). "A motion to strike challenges the legal sufficiency of a pleading and, consequently, requires no factual findings by the trial court." (Citations omitted; internal quotation marks omitted.) *Greco v. United Technologies Corp.*, 277 Conn. 337, 347, 890 A.2d 1269 (2006). "A motion to strike admits all *facts* well pleaded; it does not admit *legal conclusions or the truth or accuracy of opinions* stated in the pleadings." (Emphasis in original; citation omitted; internal quotation marks omitted.) *Faulkner v. United Technologies Corp.*, 240 Conn. 576, 588, 693 A.2d 293 (1997). "It is fundamental that in determining the sufficiency of a complaint challenged by a defendant's motion to strike, all well-pleaded facts and those facts necessarily implied from the allegations are taken as admitted." (Citations omitted; internal quotation marks omitted.) *Asylum Hill Problem Solving Revitalization Ass'n v. King*, 277 Conn. 238, 246, 890 A.2d 522 (2006).

II

Rockville Hospital argues that the plaintiff has failed to state a claim in three respects: first, the facts alleged do not give rise to any duty owed to the plaintiff; second, the complaint evinces an event caused by an "act of God" for which it is not liable; and third, it evinces an open and obvious defect that the plaintiff should have avoided. The court agrees with the Hospital on the first point, but finds no cause to strike the complaint on the other grounds. Each point is discussed seriatim.

III

The essential elements of a negligence action are: duty, breach of duty, causation and actual injury. *RK Constructors, Inc. v. Fusco Corp.*, 231 Conn. 381, 384, 650 A.2d 153 (1994) citing, *inter alia*, W. Prosser & W. Keeton, Torts (5th Ed. 1984) §30, pp. 164-65. The plaintiff in the instant case alleges that "a tree . . . belonging to the defendant . . . fell upon the yard and driveway area of the premises where the [plaintiff] resided [as a tenant], and when the plaintiff went out to look at the damage to the vehicle parked in her driveway, she was caused to trip and fall over the branches of said tree, causing her to sustain . . . injuries." Complaint, Count Two, para. 1. The Hospital argues it owed no duty to the plaintiff, as she did not occupy property owned by the Hospital at the time of the alleged occurrence and, therefore, the plaintiff was not a business or social invitee or licensee. The plaintiff argues that she has alleged a cognizable negligence claim. The court finds that the allegations in Count Two not legally sufficient to state a claim upon which relief can be granted.

Concerning the law on point, in 1939 a Connecticut Superior Court Judge observed, "There is comparatively little law on the question, but what we have seems determinative of the problem even though we are compelled to reason somewhat by analogy." *Dalling v. Weinstein*, 6 Conn.Sup. 498, 499 (1939). The same is true today.

In early times, there was generally no liability for trees falling on neighboring lands, an obvious practical necessity when land holdings were very large and in a primitive state, "[b]ut it is scarcely suited to cities, to say that a landowner may escape all liability for serious damage to his neighbors, merely by allowing nature to take its course." *Toomey v. State of Connecticut*, Superior Court, judicial district of Litchfield, Docket No. CV 91-0057183 (February 17, 1994, Dranginis, J.) quoting W. Prosser and W. Keeton, Torts, (5th Ed., 1984) §57; accord, D. Wright, J. FitzGerald and W. Ankerman, Connecticut Law of Torts (3rd Ed. 1991) §53. Thus, particularly in urban areas like the City of Rockville, there is generally found to be a "duty of reasonable care, including inspection to make sure that the tree is safe."

Toomey v. State of Connecticut , supra. The law has developed to apply "the ordinary rules as to negligence . . . in the case of natural conditions, and that becomes a question of the nature of the locality, the seriousness of the danger, and the ease with which it may be prevented." *Id.* It is now generally recognized, particularly in urban areas, that "[o]ne who maintains poles or trees on his or her premises owes a duty to avoid injuring invitees on his or her premises, or persons on adjoining premises, by permitting a tree or pole to become so defective or decayed that it will fall on them; a tree owner has a duty to an adjoining landowner to exercise reasonable care to prevent an unreasonable risk of harm presented by an overhanging dead branch in a residential area. Thus, an invitee of commercial premises may recover for injuries sustained from the fall of a defective or unsound tree growing on adjoining premises, including trees of a purely natural origin. Am.Jur.2d Part 2, Premises Liability §648 citing *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (1987); see also *Premium Point Park Ass'n v. Lanza* , 2007 N.Y. Slip Op. 50034 (U), City Court, New Rochelle (January 8, 2007, Colangelo, J.) ("[A]bsent actual or constructive notice of a tree's disease or defect, the tree's owner is not responsible for damage caused when his or her tree falls onto an adjacent property due to wind, storm or other natural causes."); *Wertz v. Cooper*, 2006-Ohio-6844, Court of Appeals of Ohio (December 13, 2006) ("In order for a plaintiff to establish the duty element in a negligence action arising from a fallen tree, the evidence must establish that the landowner had actual or constructive notice of a patent danger that the tree would fall.") *Klein v. Weaver*, 265 Ga.App. 390, 392, 593 S.E.2d 913 (2004) ("In regard to liability for a defective tree, the ordinary rules of negligence apply. The owner of a tree is liable for injuries from a falling tree only if he knew or reasonably should have known the tree was diseased, decayed or otherwise constituted a dangerous condition. A landowner who knows that a tree on his property is decayed and may fall and damage the property of an adjoining landowner is under a duty to eliminate the danger. But a landowner does not have a duty to consistently and constantly check all trees on his property for non-visible rot; the manifestation of decay must be visible, apparent, and patent").

Similarly, in Connecticut, where a tree fell from a church yard onto an adjacent parking lot owned by a town, injuring the plaintiff visitor, it was held that the court did not err when it instructed the jury that the "plaintiff bore the burden of establishing that there were visible signs of decay or weakness of structure . . . [a]nd that the church failed to observe . . . but the reasonable care would have resulted in these signs being seen." *McDermott v. Calvary Baptist Church* , 263 Conn. 378, 388, 819 A.2d 795 (2003). And, where a tree branch fell from defendants' property onto a well traveled highway causing the deaths of travelers, the court found that the owner had "a duty of reasonable care relative to the tree, including inspection to make sure that it is safe." *Toomey v. State*, *supra*. In sum, it is widely held, in modern cases, that a tree owner in an urban setting is subject to liability only if he or she had actual or constructive notice of a dangerous condition in the tree. See Am.Jur.2d Part 2, Premises Liability §649 citing *Klein v. Weaver*, *supra*; *Ivancic v. Olmstead* , 66 N.Y.2d 349, 497 N.Y.S.2d 326, 488 N.E.2d 72, 54 A.L.R.4th 523 (1985); *Jurgens v. Whiteface Resort on Lake Placid L.P.* , 293 A.D.2d 924, 742 N.Y.S.2d 142 (ed Dept. 2002); *Gibson v. Hunsberger*, 109 N.C.App. 671, 428 S.E.2d 489 rev, denied 334 N.C. 433, 433 S.E.2d 177 (1993); *Heckert v. Patrick*, 15 Ohio St.3d 402,473 N.E.2d 1204 (1984). Particularly in Connecticut, it is held that if the tree condition is one of which the defendant would become aware through reasonable exercise of its faculties, the defendant is chargeable with notice. *Toomey v. State of Connecticut*, *supra*. Accordingly, in this case, plaintiff must plead and prove facts showing that the Hospital knew or reasonably should have known the tree was diseased, decayed or otherwise constituted a dangerous condition, or other such proof of actual or constructive notice, in order to state a claim.

The plaintiff, in the instant case fails to make any such necessary factual allegations. Instead, she alleges that the Hospital "was responsible for the proper maintenance of its trees and was responsible to assure that its trees did not fall into adjoining properties, causing injury." Complaint, Count Two, para. 2. She alleges that her fall was caused by the carelessness and negligence of the Hospital in that "(a) it allowed and permitted a tree which was not properly maintained to fall upon an adjoining property, making said property dangerous for use; (b) it failed to properly maintain its trees so that they did not fall on adjoining properties, causing damage; and (c) failed to give any warning to the plaintiff of the dangerous condition it had created on the adjoining property." Complaint, Count Two, para. 3. In the context of the allegations of this case, the law does not require landowners to continuously examine their trees for nonvisible decay to assure they do not fall. *McDermott v. Calvary Baptist Church* , *supra*, 68 Conn.App. 295; D. Wright, J. FitzGerald and W. Ankerman, Connecticut Law of Torts (2007 Cum.Supp.) §53 n.144. It requires them to take action when there is actual or constructive notice of a dangerous natural condition. Plaintiff has not alleged such facts in this case so as to state a claim upon which relief can be granted, and, so, the Motion to Strike must be granted on this ground.

IV

The Hospital also argues that Count Two should be stricken because the allegations evince an event caused by an "act of God" for which it is not liable; and an open and obvious defect that the plaintiff should have avoided. Both are potential grounds for avoiding liability. See, e.g., *Dalling v. Weinstein*, *supra*, 6 Conn.Supp. 502 (act of God); *Kraus v. Newton*, 14 Conn.App. 561, 568-69, 542 A.2d 1163 (1988), aff'd, 211 Conn. 191, 558

A.2d 240 (1989) (obvious defect). At this stage of the case, the court is confined to the allegations pled by plaintiff. *Asylum Hill Problem Solving Revitalization Ass'n v. King*, *supra*, 277 Conn. 246. The allegations do not admit whether these grounds for avoiding liability are present or not. Accordingly, the Motion to Strike on these grounds must be denied.

V

For all of the foregoing reasons, the Motion to Strike Count Two is granted.

Robert F. Vacchelli

Judge, Superior Court