SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3028-15T2

STEVEN J. SHATKIN,

Plaintiff-Appellant,

v.

WAYNE J. McCARTHY and
BETH McCARTHY,

Defendants-Respondents,

and

BOROUGH OF PARAMUS,

Defendant.

Argued April 3, 2017 – Decided April 18, 2017

Before Judges Sabatino and Haas.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-3422-14.

Harry Jay Levin argued the cause for appellant (Levin Cyphers, attorneys; Mr. Levin and Colleen Flynn Cyphers, on the briefs).

Murray A. Klayman argued the cause for respondents.

PER CURIAM

In this personal injury negligence case, plaintiff Steven J. Shatkin appeals the trial court's grant of summary judgment to defendants Wayne J. McCarthy and Beth McCarthy. Plaintiff also appeals the trial court's denial of his motion for reconsideration. We affirm.

The motion record contains the following pertinent facts and procedural history. We consider that record in a light most favorable to plaintiff as the non-moving party who opposed summary judgment. See R. 4:46-2(c); W.J.A. v. D.A., 210 N.J. 229, 237-38 (2012).

On May 27, 2013, plaintiff, a jogger, tripped over a raised slab on the public sidewalk in front of defendants' residence in Paramus. Plaintiff claims he was injured as a result of his fall. He contends the raised slab was a dangerous condition of property that caused his injury.

Plaintiff contends that the slab was raised approximately two inches by the root of a mulberry tree located in defendants' front yard. The tree was measured to be 111 inches (nine feet, three inches) from the adjoining street, and forty-four inches (nearly four feet) from the edge of the sidewalk. An engineering report concluded that the tree root "most likely" uplifted the sidewalk slab and caused the irregularity.

Although the tree appears to be located slightly within the municipal ten-foot planting easement, the Borough records, which only date back to 1993, contain no indication that the Borough or its agents planted the tree. Nor is there any record that anyone ever complained to the Borough about the tree or the condition of the nearby sidewalk. At his deposition, defendant Mr. McCarthy[1] denied planting the tree during the thirty years that he and his wife have lived at the property. He testified that no one ever contacted him before this incident with concerns about the sidewalk's raised condition.

Plaintiff filed a negligence complaint against defendants and the Borough. During the pendency of the case, plaintiff settled with the Borough. Defendants, the remaining parties, argued that they had no legal responsibility under New Jersey tort law for the condition of the sidewalk apparently caused by the root of a tree that they did not plant.

After the discovery period was extended twice, defendants moved for summary judgment ten days before discovery closed. The trial court granted that motion, agreeing with their legal argument that, even viewing the factual record in a light most favorable to plaintiff, defendants did not owe or breach any duty here.

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[1] Mrs. McCarthy was not deposed.

Plaintiff moved for reconsideration, and to reopen discovery. Plaintiff tendered to the trial court and opposing counsel an expert report from an arborist who had recently inspected the tree and the property. The arborist opined that the tree was native to China rather than the United States. He estimated that the tree had been planted thirty-five to forty-five years ago, and that it was unlikely to be there naturally due to its close proximity to the property line. Plaintiff also supplied web page "screen shots" from records of the Bergen County Clerk's Office, reflecting that defendants had purchased the property from a predecessor in title in February 1981, who, in turn, had bought the property from another owner in August 1977.

The trial court denied reconsideration and plaintiff's late request to reopen discovery. This appeal followed.

The governing legal principles in this State for sidewalk liability arising from tree roots on residential lots derive from the Restatement (Second) of Torts (1965), as adopted in Deberjeois v. Schneider, 254 N.J. Super. 694 (Law Div. 1991), aff'd o.b., 260 N.J. Super. 518 (App. Div. 1992). Deberjeois held that a New Jersey homeowner may be liable to a pedestrian who trips on a raised slab of the public sidewalk in front of his or her home, where the uneven condition was caused by roots growing from a tree

on the owner's property, but only in limited circumstances involving the owner's affirmative conduct. Id. at 702-03.

According to the Second Restatement, if the hazardous condition is "natural," the property owner generally has no liability for the hazard, whereas if the condition is "artificial," the property owner may face potential liability. Id. at 699-700 (citing Restatement (Second) of Torts, supra, § 363 comment b). In particular, the Second Restatement instructed that trees planted by a property owner comprise a "non-natural or artificial condition . . . irrespective of whether they are harmful in themselves or become so only because of the subsequent operation of natural forces." Restatement (Second) of Torts, supra, § 363 comment b.[2]

As Deberjeois explained, "[t]he rule of non-liability for natural conditions of land is premised on the fact that it is unfair to impose liability upon a property owner for hazardous

[2] The Second Restatement also distinguished between "urban" and "non-urban" land, noting that an urban landowner has a greater duty to guard against the risk of harm posed by trees on his or her land near a public roadway. Id. at § 363(2), comment e. Comment e notes that in such urban areas, traffic is more frequent, land is not as wooded, and acreage tends to be smaller. Ibid. The Restatement provision contains no precise definition of land that is "urban," and land that is not. This distinction is not adopted nor mentioned in Deberjeois, nor in any other published New Jersey cases. Accordingly, the "urban/non-urban" classification, which the parties have not argued in this case, does not guide our legal analysis.

conditions of his land which he did nothing to bring about just because he happens to live there." Id. at 702-03. Conversely, "if the condition is an artificial one, or one precipitated by the property owner's affirmative act, the proposition that it would be unfair to attach liability is no longer relevant." Id. at 703. Hence, "a property owner would be liable where he plants a tree at a location which he could readily foresee might result in the roots of the tree extending underneath the sidewalk causing it to be elevated." Ibid.

Applying these principles, the trial judge denied summary judgment to the defendants in Deberjeois because of the affirmative and "artificial" conduct in "the actual planting of the tree which instigated the process" that led to the uneven sidewalk. Ibid. On appeal, we upheld that result, as well as the trial judge's articulation of the governing legal principles. Deberjeois, supra, 260 N.J. Super. at 518-19.

We conclude that the trial court here did not err in its application of these well-settled principles from the Second Restatement and Deberjeois.[3] We reach that conclusion without

[3] In the last decade, the American Law Institute has promulgated the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2005) addressing principles of premises liability in a revised manner. See id. at §§ 49-54. Because our Supreme Court has not adopted or discussed those Third Restatement

needing to consider whether the trial court misapplied its discretion under Rule 4:24-1(c) in declining to extend discovery to allow the admittedly-late expert report from plaintiff's arborist.

Even taking into account the arborist's report, which estimates that the mulberry tree was planted thirty-five or more years ago, there is no genuine issue of material fact here to suggest that defendants planted the tree themselves during their thirty years of ownership. In fact, defendants deny having planted the tree, and plaintiff, despite apparent efforts to contact neighbors and check local records, has no proof to the contrary. Nor is there any proof that the former owners who sold the premises to plaintiff planted the tree themselves. It simply is pure speculation who planted the tree. In sum, there is no genuine triable issue that the tree root condition was "artificial" and thus the responsibility of defendants.

Affirmed.

provisions, we do not apply them to this case. We instead continue to refer to the Second Restatement provisions cited in Deberjeois. We do note that at oral argument on this appeal, both counsel acknowledged that the proof problems and uncertainties about who may have planted a tree years ago can make the application of the Second Restatement factors problematic at times, in cases involving sidewalks that have become uneven due to tree root infiltration.