SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0048-16T3

DOROTHY SPRUCE,

Plaintiff-Appellant,

v.

ROUTE 18 SHOPPING CENTER ASSOCIATES, BURGER KING CORP., PICTURE PERFECT LANDSCAPING, LLC, ROESCHEISE ASSOCIATES, and ABOVE ALL LANDSCAPING,

Defendants,

and

IPT, LLC d/b/a FM FACILITY MAINTENANCE, NORTHWEST COMPANIES, INC., and PINO'S LANDSCAPING,

Defendants-Respondents.

Submitted September 19, 2017 – Decided November 16, 2017

Before Judges Reisner and Hoffman.

On appeal from Superior Court of New Jersey, Law Division, Middlesex County, Docket No. L-5162-13.

Falcon Law Firm, LLC, attorneys for appellant (Alexander R. DeSevo, on the briefs).

Faust Goetz Schenker & Blee, LLP, attorneys for respondent IPT, LLC (David I. Blee and Laura A. Lelio, on the brief).

Callahan & Fusco, LLC, attorneys for respondent Northwest Companies, Inc. (Ryan D. Lang, on the brief).

Kent & McBride, PC, attorney for respondent Pino's Landscaping (Christopher D. Devanny, on the brief).

PER CURIAM

In 2012, plaintiff injured her right knee when she tripped over a mulch-covered tree stump at the East Brunswick Burger King restaurant, where she worked as the general manager. In 2013, plaintiff filed a personal injury complaint against various defendants. She now appeals from a series of July 27, 2016 Law Division orders granting summary judgment dismissal of her claims against defendants FM Facility Maintenance (FM), Northwest Companies, Inc. (Northwest), and Pino's Landscaping (Pino's). We affirm.

We summarize the pertinent facts, viewing them in a light most favorable to plaintiff, the party against whom summary judgment was sought. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995); see R. 4:46-2.

On April 2, 2012, plaintiff arrived at the Burger King parking lot between 8:45 and 8:50 a.m. As she walked through the parking

lot to enter the restaurant, she noticed a newspaper blowing in the wind and observed a portion become stuck underneath some bushes, about ten feet from the restaurant door. The area contained approximately three to four bushes surrounded by mulch.

Plaintiff walked towards the bushes intending to pick up the newspaper. As she stepped off the sidewalk and onto the mulch, she "tripped over the stump" and landed on her knee, with resulting injury. According to plaintiff, she did not see the stump because "[i]t was covered with mulch."

Plaintiff stated Burger King did not require her to inspect the landscaping work outside the restaurant, but she often took it upon herself to do so. Plaintiff did not notice any issues in the area of the stump prior to her injury.

At the time of plaintiff's accident, Burger King had a contract with defendant FM, effective August 31, 2011, to perform maintenance services for the restaurant, including landscaping, snow plowing, and general repairs. FM, in turn, retained defendant Northwest as an independent contractor, effective September 13, 2011, to perform landscaping services. Northwest then entered into a subcontract agreement with defendant Pino's, whereby Pino's agreed to provide exterior maintenance services at the restaurant.

The contract between Northwest and Pino's required Pino's to perform various "in scope" services defined in attached schedules.

The contract further provided for Pino's to "occasionally complete 'out of scope' services," but such services required prior approval of Northwest. The list of "in scope" services specifically noted that mulching was "not approved." Moreover, according to the owner of Pino's, Pino Tortorici,[1] the contract did not authorize Pino's to remove tree stumps; instead, Pino's first had to obtain a "work order" before completing such work.

Pursuant to its contract with Northwest, Pino's expected to begin providing regular monthly maintenance to the subject Burger King on April 1, 2012. However, on March 27, 2012, the Northwest account manager emailed Pino to inform him Burger King requested a "one[-]time early service" at the restaurant. Pino testified at deposition that his company performed a "spring cleanup" on March 30, 2012. This process involved removing loose debris such as leaves, sticks, and branches from the grass, mulch beds, and sidewalks; cutting the grass; and "blow[ing] off" the lawn. According to Pino, the purpose of the "spring cleanup" was to "give [the premises] a one[-]time run-through and clean it up and make it look nice before the actual work in April was started."

In her pleadings, plaintiff alleged defendants negligently maintained the premises by allowing it to become hazardous and

[1] We refer to Pino Tortorici as "Pino" and to his company as "Pino's."

negligently failed to remove the debris that caused her injury. At the completion of discovery, defendants moved for summary judgment.

At the summary judgment hearing, Judge Arnold L. Natali, Jr. heard oral argument and then addressed plaintiff's claims against each defendant separately. The judge granted summary judgment to each remaining defendant, including Pino's, Northwest, and FM, finding plaintiff failed to identify a duty that any defendant arguably breached.

In a supplemental written opinion, Judge Natali expanded on his reasoning, first finding Pino's duty "was limited by the scope of the services for which [it] was hired." He noted Pino's had not been hired to perform mulch services, and because the cleanup was Pino's first time on the premises, it did not create the dangerous condition. Rather, an unidentified landscaping company had performed work prior to Pino's. The judge also noted, "While [Pino] may have observed tree stumps on limited areas of the property, there is nothing in the record to indicate that [Pino] became aware of the particular condition at the location where plaintiff allegedly fell." The judge thus found neither duty nor breach.

Next, addressing Northwest and FM, the judge concluded:

> Nothing in the contract imposed a duty upon either company to inspect and ensure the landscaping services . . . previously performed by other vendors. . . . Thus, FM and Northwest would only have a contractual obligation to correct the hazardous condition . . . if it had resulted from an unsatisfactory service performed by one of its vendors.

The judge also addressed the opinion of plaintiff's expert, an engineer, who opined that FM's failure "to properly and safely maintain this property in compliance with the minimum requirements of the Property Maintenance Code [of] the Township of East Brunswick caused this accident." The judge rejected the expert's opinion because "[t]he opinion is entirely speculative, untethered to the facts and therefore 'net.'" The judge found no "factual predicate" for the expert's contention that the local property code applied here to make FM "responsible for 'properly and safely' maintaining the property under all circumstances."

Judge Natali therefore granted summary judgment to FM, Northwest and Pino's, finding

> no basis upon which the court could impose a duty upon the defendants, either pursuant to a contractual obligation or under common law . . . . Simply put, the record does not create a factual question that any defendant had anything to do with the creation of the alleged dangerous condition.

II.

In reviewing a grant of summary judgment, we apply the same standard under Rule 4:46-2(c) that governs the motion court. See Bhagat v. Bhagat, 217 N.J. 22, 38 (2014). We must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540.

"To establish a prima facie case of negligence, a plaintiff must establish the following elements: (1) duty of care, (2) breach of that duty, (3) proximate cause, and (4) damages." D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011). Whether a party owes a legal duty, as well as the scope of the duty owed, are questions of law for the court to decide. Carvalho v. Toll Bros. & Developers, 143 N.J. 565, 572 (1996). "The inquiry has been summarized succinctly as one that 'turns on whether the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy.'" Olivo v. Owens-Illinois, Inc., 186 N.J. 394, 401 (2006) (quoting Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439 (1993)). We examine foreseeability, Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502-03 (1996), as well as such factors as "the relationship of the parties, the nature of the

attendant risk, the opportunity and ability to exercise care, and the public interest in the proposed solution." Acuna v. Turkish, 192 N.J. 399, 414 (2007) (internal quotation marks omitted), cert. denied, 555 U.S. 813, 129 S. Ct. 44, 172 L. Ed. 2d 22 (2008).

On appeal, plaintiff raises the following points of argument:

> POINT I
>
> THE TRIAL COURT'S DECISION THAT RESPONDENTS OWED NO DUTY TO APPELLANT REQUIRES A DE NOVO REVIEW BY THE APPELLATE COURT BECAUSE DUTY IS A QUESTION OF LAW.
>
> POINT II
>
> RESPONDENTS WERE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THE TRIAL COURT JUDGE ERRED IN FINDING THAT RESPONDENTS OWED NO DUTY TO APPELLANT.
>
> POINT III
>
> RESPONDENTS['] PREVENTATIVE MAINTENANCE CONTRACTOR SHOULD HAVE INSPECTED THE PREMISES AND FOUND THE STUMP.
>
> POINT IV
>
> RESPONDENT PINO'S LANDSCAPING HAD ACTUAL OR CONSTRUCTIVE KNOWLEDGE OF THE STUMP AND HAD A DUTY TO TAKE REASONABLE STEPS TO ADDRESS THE HAZARD.
>
> POINT V
>
> ADEQUATE NOTICE EXISTED OF THE HAZARDOUS STUMPS AT THE SUBJECT PROPERTY.

POINT VI

NORTHWEST HELD A SUBSTANTIAL RIGHT TO CONTROL PINO'S ACTIVITIES, SUCH THAT NORTHWEST CAN BE DEEMED VICARIOUSLY LIABLE FOR PINO'S NEGLIGENCE.

POINT VII

FM WAS AWARE OR SHOULD HAVE BEEN AWARE OF THE HAZARD BY REVIEWING PROPERTY PHOTOS OR REVIEWING PINO'S JOB PERFORMANCE.

POINT VIII

RESPONDENTS DISREGARDED EAST BRUNSWICK'S PROPERTY MAINTENANCE CODE AND THEIR FAILURE TO COMPLY CAUSED THE ACCIDENT.

We find no merit in any of these arguments and conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We affirm substantially for the reasons set forth by Judge Natali in his cogent written opinion issued on July 14, 2016. We add the following comments.

While the record reflects that Pino's performed a spring clean-up at the subject Burger King on March 30, 2012, three days before plaintiff's accident, Northwest had issued Pino's a very specific and detailed scope of work order, which did not include stump removal and specifically prohibited mulching. Because the scope of work provision of Pino's contract specifically prohibited mulching, Pino believed that stump removal was also not authorized. Additionally, the only work Pino's was specifically authorized to

perform on March 30 was a "spring clean-up," which meant mowing the lawn and other limited services, such as picking up loose trash. Pino had never been to this Burger King before and was not hired to complete a safety inspection. A photo of the premises, allegedly taken right after Pino's completed its work, shows no visible stumps in the mulch beds.

The record reflects the subject stump was a hidden danger. The record contains no evidence that any defendant performed the mulching that resulted in the concealment of the stump, or had any responsibility for removing it. As the manager of the restaurant, plaintiff took it upon herself to inspect the landscaping work; as a result, she was in a good position to identify the alleged dangerous condition in the landscaping, and she observed none.

We further note that Judge Natali correctly rejected the opinions of plaintiff's expert under the net opinion doctrine. An expert's "bare conclusions, unsupported by factual evidence" are inadmissible as a net opinion. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). The expert is required "to give the why and wherefore of his [or her] expert opinion, not just a mere conclusion." Jimenez v. GNOC, Corp., 286 N.J. Super. 533, 540 (App. Div.), certif. denied, 145 N.J. 374 (1996). As the judge found, the record lacks the essential "factual predicate" for the

expert's opinion that the municipal property code applied to make FM responsible for safely maintaining the subject property.

Affirmed.