SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3073-16T3

IRMA DECTER and ISAAC DECTER,
her husband,

Plaintiffs-Appellants,

v.

MANOJ HEJIB and PALLAVI HEJIB,

Defendants-Respondents,

and

TOWNSHIP OF LIVINGSTON,

Defendant.

Argued May 7, 2018 – Decided June 4, 2018

Before Judges Sabatino, Ostrer and Firko.

On appeal from Superior Court of New Jersey, Law Division, Essex County, Docket No. L-4285-15.

Robert A. Jones argued the cause for appellants.

Frank J. Kunzier argued the cause for respondents (Zimmerer, Murray, Conyngham & Kunzier, attorneys; Frank J. Kunzier, of counsel and on the brief; Sidney E. Goldstein, on the brief).

Eric G. Kahn, President, New Jersey Association for Justice, argued the cause for amicus curiae New Jersey Association for Justice (Javerbaum Wurgaft Hicks Kahn Wikstrom & Sinins, attorneys; Eric G. Kahn and Annabelle M. Steinhacker, of counsel and on the brief).

Ryan A. Richman argued the cause for amicus curiae New Jersey Defense Association (McCarter & English, LLP, attorneys; Matthew J. Tharney and Natalie S. Watson, of counsel and on the brief; Ryan A. Richman, Christopher A. Rajao, and Elizabeth K. Monahan, on the brief).

PER CURIAM

In this pedestrian fall down case, plaintiffs Irma and Isaac Decter appeal from a February 17, 2017 Law Division order, which granted summary judgment to defendant homeowners, Manoj and Pallavi Hejib, and dismissed the complaint with prejudice for failing to state a cause of action.[1] We affirm.

The following facts are derived from the evidence presented in support of, in opposition to, and in reply to the motion for summary judgment, viewed in the light most favorable to plaintiffs. See Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523 (1995).

[1] Defendant Township of Livingston also moved for summary judgment and oral argument was heard. The motion was unopposed and the trial court entered a separate order on February 17, 2017, granting summary judgment to the Township of Livingston. No appeal is taken from that ruling.

On July 31, 2013, Irma Decter was walking on the sidewalk in front of 16 Post Lane, Livingston, defendants' home. Her foot got caught on the raised portion of the sidewalk, which caused her to fall and fracture her left wrist. Plaintiffs' engineering expert, Michael G. Natoli, P.E., opined that tree roots caused the defective condition and were part of a landscaping bed situated on defendants' property. Defendants contend that they purchased the property in July 2010 and moved there in August 2010. The condition of the sidewalk was unchanged from the time they purchased their home until the date of the accident. According to defendants, the subject tree was already there when they purchased the home. Prior to this accident, no complaints about the sidewalk were made to defendants.

Defendants moved for summary judgment, contending that they are not liable for plaintiffs' injury and damages because the defective sidewalk was not the result of any affirmative conduct on their part, but due to a naturally occurring condition. In opposition, plaintiffs argued that there was a genuine issue of material fact as to whether defendants acted affirmatively by failing to take corrective action to abate the sidewalk's dangerous condition. Plaintiffs also argued that sidewalk liability should be extended to defendants pursuant to the Restatement (Third) of

Torts: Liability for Physical and Emotional Harm, § 54 (Am. Law Inst. 2012).

After hearing the motion argument, Judge Robert H. Gardner granted summary judgment to defendants. In his oral opinion, Judge Gardner applied the current law in this State for sidewalk liability as it pertains to residential owners.

On appeal, plaintiffs reiterate the arguments made before the trial judge. Amicus, New Jersey Association for Justice (NJAJ), joins plaintiffs in arguing for reversal. The New Jersey Defense Association (NJDA) has presented an opposing amicus position.

We review the trial court's granting of the motion de novo, applying the same legal standards that govern summary judgment motions. Steinberg v. Sahara Sam's Oasis, LLC, 226 N.J. 344, 349-50 (2016). We consider the factual record, and reasonable inferences that can be drawn from those facts, "in the light most favorable to the non-moving party" to decide whether the moving party was entitled to judgment as a matter of law. IE Test, LLC v. Carroll, 226 N.J. 166, 184 (2016) (citing Brill, 142 N.J. at 540; R. 4:46-2(c)).

The court accords no special deference to a trial judge's assessment of the documentary record, as the decision to grant or withhold summary judgment does not hinge upon a judge's determinations of the credibility of testimony rendered in court,

but instead amounts to a ruling on a question of law. See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995) (noting no "special deference" applies to a trial court's legal determinations).

In order to prove a claim of negligence, a plaintiff must demonstrate: (1) a duty of care, (2) that the duty has been breached, (3) proximate causation, and (4) injury. Townsend v. Pierre, 221 N.J. 36, 51 (2015) (citations omitted). A plaintiff bears the burden of proving negligence, see Reichert v. Veqholm, 366 N.J. Super. 209, 213 (App. Div. 2004), and must prove that unreasonable acts or omissions by defendant proximately caused his or her injuries. See Camp v. Jiffy Lube No. 114, 309 N.J. Super. 305, 309-11 (App. Div. 1998).

The presence or absence of an enforceable duty is generally a question of law for the court. Clohesy v. Food Circus Supermarkets, Inc., 149 N.J. 496, 502 (1997) (citation omitted); see also Doe v. XYC Corp., 382 N.J. Super. 122, 140 (App. Div. 2005).

Prior to 1981, both commercial and residential landowners in this State could not be held liable for injuries occurring on public sidewalks abutting their property, except "for the negligent construction or repair of the sidewalk . . . or for direct use or obstruction of the sidewalk by the owner in such a

manner as to render it unsafe for passersby." Yanhko v. Fane, 70 N.J. 528, 532 (1976) (citations omitted). Thereafter, in Stewart v. 104 Wallace St, Inc., 87 N.J. 146, 149 (1981), the Supreme Court revised that principle and held that commercial landowners could be liable for injuries sustained on sidewalks adjacent to their properties. In rendering that decision, the Court recognized the arbitrariness of holding commercial property owners responsible for injuries sustained within a commercial building but finding no liability when an injury was incurred a few feet from a business's door. Id. at 156-57.

The Court strictly limited its holding in Stewart to commercial owners, emphasizing that "[t]he duty to maintain abutting sidewalks that we impose today is confined to owners of commercial property," despite the fact that "whether the ownership of the property abutting the sidewalk is commercial or residential matters little to the injured pedestrian . . . ." Id. at 159 (citations omitted). The Court also noted that "[a]s for the determination of which properties will be covered by the rule we adopt today, commonly accepted definitions of 'commercial' and 'residential' property should apply, with difficult cases to be decided as they arise." Id. at 160.

In Luchejko v. City of Hoboken, 207 N.J. 191, 195 (2011), the Court held that an "overwhelmingly owner-occupied 104-unit

condominium complex" must be classified as a "residential," and not a "commercial," property, for purposes of sidewalk liability principles. The plaintiff in Luchejko was walking on the sidewalk in front of the condominium building when he slipped and fell on a sheet of black ice, breaking his leg. Id. at 196. He brought a negligence action against the non-profit condominium association responsible for the building. Ibid.

In reviewing the history of sidewalk liability in our State, the Court in Luchejko notably observed that "[o]ur decisions consistently reflect that residential property owners stand on different footing than commercial owners who have the ability to spread the cost of the risk through the current activities of the owner." Id. at 206. The Court further underscored that "[t]he commercial/residential dichotomy represents a fundamental choice not to impose sidewalk liability on homeowners . . . ." Id. at 208.

The Restatement (Second) of Torts (Am. Law Inst. 1965) provides the basis for this State's governing legal principles in the area of sidewalk liability. See Deberjeois v. Schneider, 254 N.J. Super. 694, 698-702 (Law Div. 1991), aff'd o.b., 260 N.J. Super. 518 (App. Div. 1992).

In New Jersey, residential property owners, unlike commercial property owners, have no duty to maintain the sidewalks adjacent

to their land so long as they do not affirmatively create a hazardous condition. See Deberjeois, 254 N.J. Super. at 699-700; see also Stewart, 87 N.J. at 159 (holding duty to maintain sidewalks confined to commercial property owners); Lodato v. Evesham Twp., 388 N.J. Super. 501, 507 (App. Div. 2006) (holding residential landowners remain protected by common-law public sidewalk immunity).

In Deberjeois, the court addressed a situation involving the affirmative act of homeowners,[2] through the planting of a tree whose roots uplifted the sidewalk and caused it to become uneven. 254 N.J. Super at 696, 703. There, the court reasoned that the property owner's liability was founded on the "positive act - the affirmative act - of the property owner in the actual planting of the tree" that caused the issue with the sidewalk, rather than the "natural process of the growth of the tree roots." Id. at 703. The Law Division in Deberjeois explained, "The fact that the affirmative act is helped along by a natural process does not thereby make the condition a natural one within the meaning of the traditional rule." Id. at 703-04. The Deberjeois trial court cited a law review article, Dix W. Noel, Nuisances from Land in

[2] The Law Division in Deberjeois did not identify who planted the culprit tree. However, our opinion states it was a predecessor in title. Deberjeois v. Schneider, 260 N.J. Super. 518, 518 (App. Div. 1992).

its Natural Condition, 56 Harv. L. Rev. 772 (1943), when explaining the difference between natural and artificial conditions. Id. at 704. The trial judge in Deberjeois stated:

> In the Restatement of Torts, land in its natural condition is used to mean land which has not been changed by any act of a human being. The expression includes not only the soil itself in its undisturbed state but also the natural growth of trees, weeds and other vegetation upon land not artificially made receptive thereto. It does not include conditions which have arisen as the result of some human activity, even though the harmful character of such conditions has been brought about by the subsequent operation of natural forces.
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> [Ibid. (citing Noel, 56 Harv. L. Rev. at 772)]

The Restatement (Second) of Torts defines "[n]atural condition of the land" "to indicate that the condition of land has not been changed by any act of a human being, whether the possessor or any of his predecessors in possession, or a third person dealing with the land either with or without the consent of the then possessor." Restatement (Second) of Torts § 363, cmt. b (Am. Law Inst. 1965). The phrase "is also used to include the natural growth of trees, weeds, and other vegetation upon land not artificially made receptive to them." Ibid.

Furthermore, the Restatement (Second) of Torts concludes that trees planted by property owner are artificial conditions for which the property owners are liable. Deberjeois, 254 N.J. Super.

at 700. The Restatement (Second) of Torts § 363, cmt. b (Am. Law Inst. 1965) states that "a structure erected upon land is a non-natural or artificial condition, as are trees or plants planted or preserved . . . ." The Deberjeois court further explained, "The 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 conditions of his land which he did nothing to bring about just because he happens to live there." Id. at 702-03.

Here, defendants assert they did not plant the tree in question. Plaintiffs have not provided any evidence that establishes, or even suggests, anything contradictory. Therefore, the tree is a "natural condition" under current New Jersey law, which adheres to the standards of the Restatement (Second) of Torts. Consequently, defendants owed no duty to plaintiffs.

Plaintiff and amicus NJAJ urge us to apply the standards of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 54 (Am. Law Inst. 2012). However, the Supreme Court has not to date issued an opinion adopting or repudiating Section 54 of the Third Restatement. In the absence of contrary

guidance from our State's highest Court, we accordingly continue to apply the Second Restatement standards.[3]

Summary judgment was properly granted to defendants.

Affirmed.

[3] If the Court chooses to take up the subject in this or some other appropriate case, we respectfully suggest consideration of whether the "predecessor in title" facet of our current law should be continued. Although none of the parties or amici have argued to eliminate it, this aspect of the Deberjeois standard poses evidentiary complications and fairness concerns that may warrant revision of the test.