Kullolli v City of New York
2008 NY Slip Op 32906(U)
October 22, 2008
Supreme Court, New York County
Docket Number: 107683/2005
Judge: Paul G. Feinman
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SCANNED ON 10/24/2008

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 52

Index Number : 107683/2005
KULLOLLI, MYFIT A.
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 001
COMPEL

INDEX NO. 107683/2005
MOTION DATE 9-24-08
MOTION SEQ. NO. 001
MOTION CAL. NO. 8

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	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3, 4, 5

Cross-Motion: ☑ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
OCT 24 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/22/2008 ____________ J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 52

--X

MYFIT A. KULLOLLI,
Plaintiff,
against

THE CITY OF NEW YORK and NEW YORK CITY PARKS DEPARTMENT and CENTRAL PARK CONSERVANCY, INC.,
Defendants.

--X

Index Number 107683/2005
Mot. Seq. No. 001
Submission Date 9-24-2008
Mot. Cal. No. 001

DECISION AND ORDER

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FILED
OCT 24 2008
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NEW YORK

Papers considered in review of this motion for an order to compel disclosure:

Papers	Numbered
Plaintiff's Notice of Motion and Annexed Affidavits	1
Defendants' Notice of Cross-Motion	2
Plaintiff's Notice of Cross-Motion	3
Defendants' Affirmation in Further Supp. of Cross-Motion & in Opposition to Plaintiff's Cross-Motion & Motion	4
Plaintiff's Reply Affirmation in Support of Cross-Motion	5

PAUL G. FEINMAN, J.:

Plaintiff moves the court for an order pursuant to CPLR § 3124 compelling the deposition of defendants Ed Benson and/or Sergio Ricano, and production of the Parks Program Manual. The City of New York, New York City Parks Department and Central Park Conservancy, Inc. (hereinafter collectively referred to as "the City"and/or "defendants") cross-move pursuant to CPLR § 3212 for summary judgment and seek dismissal of plaintiff's complaint pursuant to CPLR § 3211. Plaintiff cross-moves for summary judgment on the issue of liability against the City. For the reasons which follow, plaintiff's motion and cross-motion are denied, and the City's cross-motion is granted.

Factual Background

Plaintiff Myfit Kullolli allegedly was injured on August 19, 2004 when he tripped and fell upon allegedly defective steps located on or near the western boundary of Central Park and Lawn Bowling near 69th Street (Affm. in Supp. of Not. of Mot., ¶ 3 [hereinafter "Pl. Not. of Mot."]). Plaintiff served a notice of claim upon the City on or about October 25, 2004 and appeared on February 2, 2005 for a hearing with the City pursuant to General Municipal Law § 50-e (Affm. in Supp. of Defs. Cross-mot. [hereinafter Defs. Cross-Mot.] ¶¶ 4, 5, Exs. A, C). On June 2, 2005, plaintiff commenced this suit for personal injuries by summons and verified complaint (Defs. Cross-mot., Ex. B).

So far in this litigation, the City has produced three witnesses for examinations before trial. On April 30, 2007, Zully Zurheide, Parks Supervisor for the New York City Parks Department (hereinafter the "Parks Department") was deposed (Pl. Not. of Mot. ¶ 4; Defs. Cross-mot. ¶ 6). The deposition of Nicholas Nelson, Principal Parks Supervisor was held on August 13, 2007 (Pl. Not. of Mot. ¶ 4; Defs. Cross-mot. ¶ 7). On November 21, 2007, Neil Calvanese, Vice President of Operations for the Central Park Conservancy, was also deposed (Pl. Not. of Mot. ¶ 4; Defs. Cross-mot. ¶ 8).

All three witnesses testified that Central Park Conservancy (hereinafter "CPC") was responsible for the maintenance of the Lawn Bowling area of Central Park and the stairways upon which plaintiff allegedly fell (Defs. Cross-mot. ¶ 21). Calvanese testified that employees, who observe a condition on any walkway, sidewalk, or stairways believed to present a safety issue, are required to report the condition to Ed Benson, Director of Parkwide Services of CPC

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(EBT of Neil Calvanese [hereinafter Calvanese EBT], pp. 20-21). Calvanese also testified that CPC employee Sergio Ricano, Supervisor of Section 2, was responsible for maintaining the stairways in the area of plaintiff's accident (Calvanese EBT, p. 27).

At the December 5, 2007 compliance conference, the parties reached a stipulation whereby the City agreed to respond to plaintiff's request for an EBT of Ed Benson or Sergio Ricano within forty-five (45) days of that date, with the deposition scheduled for April 2, 2008, "to extent EBT will be held" (Not. of Mot., Ex. 7). The deposition was not held, and at the parties' next scheduled compliance conference on April 9, 2008, the City informed plaintiff's counsel that it would not produce the requested witnesses and that plaintiff would have to make a motion to the court (Pl. Not. of Mot. ¶ 8).

Plaintiff now moves the court for an order to compel the deposition of witnesses Ed Benson or Sergio Ricano. Plaintiff argues that the City employs these witnesses, who may have personal knowledge of facts that are material and relevant to the issues at hand, and the testimonies of the requested witnesses are necessary because the City has no written records regarding the maintenance of the stairway where plaintiff's accident occurred (Pl. Not. of Mot. ¶ 9). According to plaintiff, the City's response to the Case Scheduling Order states that no incident or accident reports or maintenance and repair records exist thus, plaintiff's only access to information about the stairs would be directly from those employees (Benson or Ricano) that were specifically charged with the stairs' repair, in the event a complaint was made (Pl. Not. of Mot. ¶¶ 10-11; Pl. Cross-mot. ¶ 4, Ex. 3)

The City objects to producing any further witnesses, particularly witnesses employed by CPC, and argues that there is no indication that further witnesses will be able to show that the City had prior *written* notice of the alleged defect (Defs. Cross-mot. ¶ 22). According to Calvanese's testimony, CPC would not create reports for issues regarding stairs because CPC would simply just fix any problems they came across (Defs. Cross-mot. ¶ 23; Calvanese EBT, p. 21). Benson and Sergio have both provided affidavits, in which they each aver that their search for records did not produce any reports regarding defective stairs in Central Park at the Lawn Bowling area near 69th Street (Defs. Cross-Mot. ¶ 23, Ex. D). The City also argues that any knowledge that Benson or Sergio might have about the allegedly defective condition is wholly irrelevant, since these witnesses cannot provide plaintiff with prior written notice (Defs. Cross-mot. ¶¶ 18, 23).

The City also objects to production of the Parks Program Inspection Manual, and argues that the manual, an internal document provided to Parks employees working in the City's Parks, is wholly irrelevant to plaintiff's burden of proving prior written notice of a defective stair (Defs. Cross-mot. ¶¶ 18, 24).

The City now cross-moves for summary judgment and seeks dismissal of the complaint, arguing that it is entitled to dismissal of the complaint because it did not have prior written notice of the alleged defective condition (Defs. Cross-mot. ¶ 9). The City relies on Section 7-201(c) Administrative Code of the City of New York, which provides in pertinent part:

> No civil action shall be maintained against the City for damage to property or injury to person or death sustained in consequence or any street, highway, bridge, wharf, culvert, sidewalk, or crosswalk, or any part or portion of any of the foregoing including any encumbrances thereon or

> attachments thereto, being out of repair, unsafe, dangerous or obstructed, unless it appears that written notice of the defective, unsafe, dangerous, or obstructed condition, was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice, or where there was previous injury to person or property as a result of the existence of the defective, unsafe, dangerous, or obstructed condition...

(Defs. Cross-mot. ¶ 10).

The City argues that there are no applicable exceptions to the prior written notice statute, since the City neither caused nor created the allegedly defective condition at issue in this litigation (Defs. Cross-mot. ¶¶ 19-21). The City also contends that the only activity the Parks Department performed at the accident site was trash removal, and thus, it is entitled to summary judgment, since it did not create the alleged defect upon which plaintiff fell (Defs. Cross-mot. ¶ 21). Further, the City states that it conducted a search for prior written notice of any defects or conditions at the location where plaintiff was allegedly injured, and according to the affidavit of Patricia Kendly, Director of Operations for Manhattan Operations of Parks, there were no inspection reports, maintenance and repair records, or complaints regarding the stairs at issue for a period of two years prior to and including the date of plaintiff's accident (Defs. Cross-mot. ¶ 13, Ex. D).

The City points out that Calvanese testified to the agreement between CPC and the Parks Department entered into on February 11, 1998 in which CPC agreed to "provide services specified for maintaining and repairing Central Park to the reasonable satisfaction of the Commissioner ... includ[ing] keeping and maintain Central Park in good condition and repair, all in accordance with the provisions of this agreement," and in which the City agreed to

"indemnify and hold harmless CPC ... from any and all liabilities, obligations, damages, and expenses arising from all services performed... pursuant to this agreement in Central Park ..." (Defs. Cross-Mot. ¶ 14, Ex. E, pp. 2, 13). The City argues that this agreement between CPC and the Parks Department does not create a duty of care on the part of CPC to third parties (Defs. Cross-mot. ¶ 15). The City also contends that under § 7-201(c) of the Code, plaintiff bears the burden of pleading and proving that the City had prior written notice of the alleged defective condition (Defs. Cross-mot. ¶¶ 12, 14, 15 Ex. E; Calvanese EBT).

Plaintiff rather than merely oppose the City's motion for summary judgment, "cross-moves" within his own motion, for summary judgment on the issue of liability as against the City of New York (Pl. Not. of Cross-Mot.). Plaintiff contends he is entitled to summary judgment because the City violated the statutory mandate of Section 50-g of the General Municipal Law (Pl. Cross-Mot. ¶ 3). Section 50-g (1) of the General Municipal Law directs, in pertinent part, that "the City shall keep an indexed record, in a separate book of all written notices, which it shall receive of the existence of such defective, unsafe, dangerous or obstructed condition..." (Pl. Cross-Mot. ¶ 6 [b]). Section 50-g (2) provides in pertinent part that "the record shall be made and kept by an officer or employee designated for that purpose... In the absence of such the record shall be made and kept by the commissioner of public works..." (Pl. Cross-Mot. ¶ 6 [d]).

Plaintiff contends that, for New York City, under Administrative Code § 7-201, the Commissioner of the Department of Transportation (hereinafter "DOT") is the statutorily designated officer to receive, index, keep and maintain all such written notices (Pl. Cross-Mot. ¶

6 [e]). Plaintiff alleges that defendants never conducted a search for DOT records concerning Central Park (Pl. Cross-Mot. ¶ 11). Plaintiff also argues that on and prior to August 19, 2004, the date of the incident at issue, the City chose not to keep and maintain records regarding Central Park in violation of statute, and is therefore, estopped from asserting lack of prior written notice as a defense to this action (Pl. Cross-Mot. ¶¶ 3, 6 [e]).

In opposition to plaintiff's cross-motion, the City argues that the deposition transcripts of the three City witnesses show that the Parks Department and CPC "are responsible for, and actively maintain Central Park" (Defs. Affm. in Supp of Cross-Mot. ¶ 7). The City argues that the DOT has made clear, in its October 2004 and December 2004 responses to plaintiff's FOIL requests, that the area where plaintiff was allegedly injured does not fall under its jurisdiction and that any further requests should be forwarded to the New York City Parks and Recreation Department (Defs. Affm. in Supp. of Cross Mot. ¶¶ 11, 12; Pl. Cross-Mot., Ex.). The City contends that, since the DOT neither maintains nor repairs the steps near the Lawn Bowling area where plaintiff allegedly fell, "it would not make sense, and would be a waste of time, to search for documents maintained by an agency that has nothing to do with the location of Plaintiff's fall" (Defs. Affm. in Supp. of Cross-Mot. ¶ 7).

Legal Analysis

Cross-Motions for Summary Judgment

Summary judgment is proper when there is no genuine issue of material fact upon which the court could find for the non-moving party (*Alvarez v Prospect Hosp.*, 68 NY 320, 324 [1986]). It is a drastic remedy that should not be granted if there is doubt as to whether a triable

issue exists (*Gilson v Metropolitan Opera*, 5 NY3d 574, 578 [2005]). Issue finding as opposed to issue determination is the function of a court on a motion for summary judgment (*Karian v G&L Realty, LLC*, 32 AD3d 261, 269 [1st Dept. 2006]). The moving party must produce evidence to conclude that summary judgment should be granted in its favor (*Shaw v Time-Life Records*, 38 NY2d 201, 207 [1975]). The evidence will be construed in the light most favorable to the non-moving party (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], citing *Matsushita Elec. Indus. Co. v Zenith Radio Corp.*, 475 US 574, 587 [1986]). Once the moving party has met its burden, and demonstrates its entitlement to summary judgment, the burden shifts to the opposing party to submit proof in admissible form sufficient to create a question of fact requiring trial (*Zuckerman v New York*, 49 NY2d 557, 562 [1980]). Dismissal of plaintiff's complaint should not be granted unless it can be shown that no significant dispute exists (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

Generally, liability for a dangerous or defective condition on property is hinged upon establishing ownership, control or special use of the property (*see Balsam v Delma Eng'g Corp.*,139 AD2d 292, 296 [1st Dept. 1988]). A *prima facie* case of negligence requires plaintiff to show that defendant owed a duty of care to the plaintiff, breach of that duty, and that the defendant's actions proximately caused plaintiff's injury (*see Boltax v Joy Day Camp*, 67 NY2d 617 [1986]). The law in New York at the time of plaintiff's injury, August 19, 2004, was that the City had a duty to maintain all sidewalks in a reasonably safe condition, and was generally responsible for accidents that occurred on the public sidewalks if it had prior written notice of the defective condition at issue (*see Weiskopf v City of New York*, 5 AD3d 202, 203 [1st Dept.

2004]; *see also, D'Ambrosia v New York* 55 NY2d 454, 457 [1982]). Section 7-201 (c)(2) of the Administrative Code of the City of New York (Pothole Law) requires that written notice of the defect, dangerous, or unsafe condition at issue be provided to the City prior to the commencement of any civil suit for damages resulting from the alleged condition. Neither actual nor constructive notice of the defect may substitute for prior written notice (*Amabile v City of Buffalo*, 93 NY2d 471, 474[1999]). However, under §7-201 (c)(2), there is no requirement that the City have prior written notice of an alleged defect where the City either caused or created the defect (*Gonzalez v City of New York*, 268 AD2d 214, 215 [1st Dept. 2000], *see also, Cuffey by Cuffey v City of New York*, 255 AD2d 203, 203 [1st Dept. 1998]). Plaintiff bears the burden of pleading and proving that the City received written notice prior to plaintiff's accident (*see Sandler v New York City Transit Auth.*, 188 AD2d 335, 336 [1st Dept. 1992]).

Here, plaintiff argues that the City failed to produce records indicating a lack of prior written notice of the defective stair, and argues that the City intentionally "chose not to keep and maintain records regarding Central Park in violation of statute." The court finds this argument unavailing. The evidence presented does not demonstrate the City's failure to keep records of the alleged defective condition. Thus, plaintiff's reliance on Gen. Mun. Law § 50-g is misplaced. Rather, the evidence suggests that a thorough search revealed that the City did not receive any records of the existence of a defective, unsafe, dangerous or obstructed condition of the stair where plaintiff was allegedly injured.

Further, plaintiff's allegation that the City never conducted a search for DOT records concerning Central Park is contradicted by the record evidence in this matter. The DOT

informed plaintiff, via two written correspondences, that the area where plaintiff allegedly fell does not fall under its jurisdiction and that requests for records should be directed to the New York City Parks and Recreation Department. The court notes that the City submits the affidavit of Patricia Kendly, Director of Operations for Manhattan Operations of Parks, who avers that at the conclusion of a diligent search for records of any alleged defect at the location of plaintiff's injury, no records could be found regarding any inspections, maintenance and repair, or complaints pertaining to the stairs at issue.

The court further notes that, under Administrative Code of City of NY, § 7-201 (c)(2), the burden of proving that the City had prior written notice of the alleged defective condition rests with the plaintiff. Nonetheless, plaintiff submits no evidence that the City received prior written notice of the alleged defective stair to render the City liable for injuries caused by such defect (*see e.g., Bielecki v City of New York* 14 AD3d 301, 301 [2005]; *see also e.g., Jameer v Fine Fare Express, Inc.*, 279 AD2d 256, 257 [1st Dept. 2001]). Likewise, there is no evidence that the City caused or created the defective condition (*see e.g., Campisi v Bronx Water & Sewer Serv.*, 1 AD3d 166, 167 [1st Dept. 2003]). Therefore, defendants' cross-motion to dismiss brought pursuant to CPLR § 3211 must be granted in the absence of any proof that the City had prior written notice of the alleged defect. Similarly, defendants' cross-motion for summary judgment and dismissal of the complaint must also be granted, since plaintiff has not raised a triable issue of fact as to whether the City had prior written notice, or alternatively, created the alleged defective condition within the meaning of the only exception to the prior written notice requirement (*see e.g., Yarborough v City of New York*, 10 NY3d 726, 728 [2008]; *see also e.g.*,

Roman v City of New York, 38 AD3d 442, 442-443 [1st Dept. 2007 [finding that plaintiffs were unable to show that the municipal defendants had prior written notice of the alleged defect in the pathway as required by Administrative Code § 7-201(c), or that any of the defendants created the defect through their own affirmative negligence]).

As for CPC, as a matter of law, it can not be held liable. Its contractual duty runs to the City, and not to third-parties who were not contemplated as beneficiaries of the contract. Moreover, the argument that CPC has entirely displaced the City in the maintenance of Central Park and therefore has a duty to the park's users has been rejected by a court of co-ordinate jurisdiction and the court finds that decision to be persuasive, albeit not controlling, authority. *See, Haxhaj v City of New York,* 19 Misc. 3d 11135A (Sup. Ct. NY Co., Shafer, J. 2008). Additionally, *Haxhaj* made clear that the prior written notice statute applies to CPC as well.

Plaintiff's Motion to Compel

Pursuant to CPLR 3124, any party may move the court for an order to compel discovery. "New York has long favored open and far-reaching pretrial discovery" (*Anonymous v High School for Environmental Studies*, 32 AD3d 353, 358 [1st Dept. 2006]). However, plaintiff's motion to compel the depositions of either Ed Benson or Sergio Ricano has been rendered academic by this court's determination that defendants are entitled to summary judgment in this litigation for plaintiff's failure to allege and establish prior written notice. Their testimony, could at best, provide evidence of actual or constructive notice, not the written notice exacted by the statute. Accordingly, it is

ORDERED that plaintiff's motion and "cross-motion" are denied for the reasons set forth above; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted and the complaint is dismissed with costs and disbursements to defendants as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: October 22, 2008
New York, New York

J.S.C.

FILED
OCT 24 2008
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NEW YORK