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10-30-09

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

PRESENT: HON. KAREN SMITH PART 62

Justice

Index Number : 105184/1999

MARTIN, TERRENCE MICHAEL

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 011

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is disposed of pursuant to the annexed Memorandum Decision and Order

FILED
OCT 21 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: Oct. 15, 2009

HON. KAREN SMITH J.S.C.

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

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: PART 62

----------X

TERRENCE MICHAEL MARTIN,

Plaintiff,

-against-

CITY OF NEW YORK, "JOHN DOE," CONSTRUCTION COMPANY, Identity Being Unknown At This Time), PETROCELLI ELECTRIC CO., INC., WELSBACH ELECTRIC CORP., TURNER ELECTRIC SERVICE INC. and CENTRAL PARK CONSERVANCY, INC.

Defendants.

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Index no.: 105184/99
Motion seq.: 001
Motion date: 4/30/2009

DECISION AND ORDER

PRESENT: KAREN S. SMITH, J.S.C.:

Defendants City of New York ("City") and Central Park Conservancy Inc.'s ("CPC") joint motion for summary judgment pursuant to CPLR § 3212 is granted, as provided for more specifically below. Plaintiff Terrence Michael Martin's cross-motion seeking various relief is denied, as provided for more specifically below.

This is a personal injury action arising from an incident on July 18, 1998 in which plaintiff fell while rollerblading on a paved pathway in Central Park, in the City, County, and State of New York.

Plaintiff commenced the action in April of 1999. On January 4, 2008, plaintiff filed his note of issue and moved to strike the City's answer. Plaintiff's motion was granted on default. On January 5, 2009, this Court issued a decision and order vacating the default judgment, striking plaintiff's note of issue, and ordering all parties to appear for a compliance conference. On February 13, 2009, the parties met for a compliance conference and plaintiff was ordered to file his note of issue on or before April 20, 2009. Plaintiff has not yet filed his note of issue.

The City argues that it is entitled to summary judgment because the plaintiff failed to plead prior written notice and failed to submit any evidence that the City had prior written notice

of the defect which allegedly caused plaintiff's accident. The City argues further that plaintiff may not circumvent the prior written notice requirement by arguing that the City caused and created the defect as there is no evidence that the City caused and created the subject condition. Nor, the City argues, may the plaintiff claim that the special use exception applies because plaintiff did not allege special use in his notice of claim, and, in any event, the special use doctrine is inapposite here since it generally involves the installation of an object for the benefit of a private landowner.

CPC argues that it is entitled to summary judgment because it did not owe a duty to plaintiff. CPC submits a contract, attached to the moving papers as an exhibit, in effect at the time of the accident between itself and the City, which provides that the CPC will maintain the park and the City will "indemnify and hold harmless CPC...from any and all liabilities, obligations, damages, and expenses arising from all services performed" pursuant to the agreement.

Plaintiff argues that the City is responsible for his failure to make a showing as to prior notice because the City failed to provide "documents that would have permitted plaintiff to prove his claims at trial." Moreover, plaintiff argues that the photographs that he submits with his papers provide sufficient notice of the existence of a condition prior to the date of the accident.

Plaintiff argues that the City is liable for the injuries plaintiff sustained as it caused and created the defective condition. Plaintiff argues that a trench excavation (to install electrical service to a light pole) was improperly backfilled, improperly compacted, improperly paved and improperly sealed. Plaintiff also invokes the special use exception to the prior notice requirement, arguing that the City "caused and created the defect in the roadway through their use of the pathway as a roadway and traversing the same with heavy duty trucks, garbage trucks, construction vehicles, delivery trucks and vans, police cars and many other motor vehicles..." By allowing these motor vehicles to travel over the pathway, plaintiff argues, the City has caused and created the defect through its "special use" of the pathway, *i.e.*, as a roadway.

Plaintiff submits several affidavits from Jacques Wolfner, a professional engineer, to provide evidence for his theories of liability. Wolfner opines that the defect in the pathway where the plaintiff fell developed over time as a result of three factors: negligent construction of the

pathway, negligent refilling of a trench after a new electrical service was installed to a nearby light pole, and the passage of motor vehicles over the pathway. Wolfner opined in 2004 that "[t]he condition of the pavement adjacent to and at the trench repair indicates to me that the pavement defect was formed over more than one winter season." In 2007, Wolfner opined that "[r]egular use by motor vehicles, in my opinion, causes early failure of the pavement...[t]he failure of the pavement, and the subsequent pavement patch that I observed adjacent to Light Pole 6847, in my professional opinion, was caused by the special use of motor vehicle traffic on a pedestrian pathway and the improper backfilling and repair of the trench in question." In 2008 Wolfner reiterated that "[t]he pathway was not built to withstand vehicular traffic."

Plaintiff attempts to distinguish his action from the one in *Bielecki v. City of New York*, 14 AD3d 301 (1st Dept. 2005), by arguing that *Bielecki* "involved an instance of erosion over time that created a whole in a pathway," whereas "[t]he case at bar is distinct from this case and involves an affirmative neglect in the construction of the roadway and the repair of the trench."

With respect to CPC, plaintiff argues that it is liable for its negligent operation, control, repair and maintenance of conditions on the pathway that injured plaintiff. Plaintiff essentially incorporates all of his arguments against the City as against CPC.

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action (*Zuckerman v. City of New York*, 49 NY2d 557]).

Administrative Code § 7-201 provides that actions against the City arising out of a dangerous or defective condition in "any street, highway, bridge, wharf, culvert, sidewalk or crosswork" cannot stand unless prior written notice was provided to the City. The prior written notice law applies to paved pathways located in City parks. (*See Bielecki v. City of New York*, 14 AD3d 301 [1st Dept. 2005]). When the City establishes that it lacked prior written notice the burden shifts to the plaintiff to demonstrate the applicability of one of the two recognized exceptions to the rule--that the municipality affirmatively created the defect through an act of

negligence or that a special use resulted in a special benefit to the locality (*Yarborough v. City of New York*, 10 NY3d 726, 28 [2008]). The affirmative negligence exception "is limited to work by the City that immediately results in the existence of a dangerous condition" (*Id.*, *quoting Bielecki*, 14 AD3d 301).

Here, the City makes a *prima facie* showing of entitlement to summary as a matter of law, dismissing the case as against the City. Plaintiff submits no evidence of prior written notice, and plaintiff's attempts to show the defect through photographs are unavailing.

Plaintiff's attempt to distinguish *Bielecki* on a theory of liability based on a claim that they caused or created the defect is also unpersuasive. Plaintiff cannot satisfy Bielecki's immediacy requirement for the affirmative negligence exception to the prior written notice rule, and the Court finds no distinction between the claims in *Bielecki* and the claims in the instant case. The essence of *Bielecki* is not the nature of the defect, but that municipal work must immediately result in the existence of a dangerous condition in order for the municipality to be liable *(See Bielecki*, 14 AD3d at 301-2). That was not the case in Bielecki and it is not the case here. In this case, plaintiff submits the affidavit of an engineer who claims that an improper repair caused the subject defect to form over "more than one winter season." As a result, plaintiff fails to raise an issue of material fact as to affirmative negligence.

As for the other possible exception to the prior written notice rule, the special use doctrine, the notice of claim didn't include this theory of liability and cannot now be amended to include it. General Municipal Law § 50-(e)(6), which provides for amendments to a plaintiff's notice of claim, allows good-faith, non-prejudicial technical changes, but not substantive changes in the theory of liability (*See Mahase v. Manhattan and Bronx Surface Tr. Operating Auth.*, 3 AD3d 410, 411 [1st Dept. 2004]). An exception to the prior written notice law constitutes a "substantive change" for the purpose of this analysis. (*Semprini v. Village of Southhampton*, 48 AD3d 543 [2d Dept 2008]). *Semprini* held that the trial court erred in allowing plaintiff to amend her notice of claim to include an exception to the prior notice rule, where the amendment was sought 20 months after the accident. If a 20 month delay is prejudicial in this context, an eleven year delay is even more so. As a result, plaintiff may not raise an issue of material fact as whether special use.

The Court notes that although *Yarborough* (*supra.)* leaves open the possibility that the special use doctrine may be applied as against the City, the doctrine is generally applied to the use of a portion of land for the benefit of a private landowner, not for the public at large (*See, for example, Guadagno v. City of Niagara Falls*, 38 AD3d 1310 [4th Dept. 2007]). Since the path here was used to provide a benefit to the public at large, the Court does not believe that there would be an issue of material fact as to the special use exception even if plaintiff had included the theory of liability in his notice of claim.

CPC also makes a *prima facie* showing of entitlement to summary judgment as a matter of law dismissing the action against them by submitting that it owes no duty to members of the public with respect to its maintenance of Central Park, as the City has a non delegable duty to maintain Central Park and CPC owes no duty to plaintiff (*See Haxhaj v. City of New York*, 19 Mics3d 1135 [holding that CPC owed no duty to a member of the public who was injured in Central Park]).

Plaintiff's cross-motion seeks an order 1) striking the answer of defendants City and CPC, 2) granting partial summary judgment against the City and CPC on the issue of liability, 3) precluding the defendants from denying that they caused and created the defect in the roadway, 4) permitting plaintiff to amend his notice of claim to add special use to it and to file it *nunc pro tunc,* 5) equitably estopping the City from asserting "any defense of deficiency of the Notice of Claim," and 6) permitting plaintiff to amend his complaint to correct any deficiencies.

Plaintiff alleges in his cross-motion that the City and CPC have failed to perform their duties with respect to discovery in this action. Specifically, plaintiff charges that "[c]oncealment and withholding of evidence" and "[i]ntentional and reckless refusal to make a diligent search for evidence including production of the contract and identification of the contractor who performed the work in the roadway on behalf of the defendants."

The City, in its opposition to plaintiff's cross-motion, argues that there is no basis for striking the defendants' answers. The City argues that the plaintiff has already moved twice to strike the City's Answer. Judge Feinman granted the plaintiff's motion to strike the City's answer on default. This Court vacated the City's default and plaintiff is currently appealing this

With respect to the portion of the cross-motion which seeks to preclude defendants from

denying that it caused or created the defect, the City argues that this issue is encompassed in the appeal currently pending in the Appellate Division. The Court agrees. As to the portion of the cross-motion which seeks partial summary judgment on the issue of liability, the City correctly argues plaintiff has not met his burden because he does not provide any factual or legal arguments to support the argument that he is entitled to summary judgment. For reasons stated above, the Court finds meritless the portions of plaintiff's cross-motion seeking an order equitably estopping the City from asserting defenses related to deficiencies of the notice of claim, and seeking leave to amend the notice of claim and complaint.

Accordingly, it is

ORDERED that defendant the City of New York's motion for summary judgment pursuant to CPLR § 3212 is hereby granted; it is further

ODERED that defendant Central Park Conservancy's motion for summary judgment pursuant to CPLR § 3212 is hereby granted; it is further

ORDERED that the Clerk enter judgment in favor of the City of New York and Central Park Conservancy, Inc., dismissing all claims and cross-claims against them.

ORDERED that plaintiff Terrence Michael Martin's cross-motion for various forms of relief is hereby denied in its entirety.

The foregoing constitutes the decision and order of this court.

Dated: October 15, 2009

ENTER:

Hon. Karen S. Smith, J.S.C.