

**Hebel v City of New York**

2009 NY Slip Op 32505(U)

October 16, 2009

Supreme Court, New York County

Docket Number: 114246/2006

Judge: Karen Smith

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

~~KAREN SMITH~~ J.S.C. ~~KAREN SMITH~~ J.S.C.

PRESENT: \_\_\_\_\_ J.S.C.

PART 62

Index Number : 114246/2006

HEBEL, ROBERT

vs

CITY OF NEW YORK

Sequence Number : 001

DISMISS

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on 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 pursuant to annexed Memorandum Decision and Order.

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

RECEIVED  
OCT 16 2009  
IAS MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL

FILED  
OCT 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

CASE DISP

Dated: 10/16/2009

*KSS*

KAREN SMITH

J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 62

-----X  
ROBERT HEBEL, DAWN HEBEL, KEVIN  
KOBETITCH, and STEPHANIE KOBETITCH

Plaintiffs,

-against-

Index no.: 114246/06

Motion seq.: 001

Motion date: 4/23/2009

**DECISION AND ORDER**

CITY OF NEW YORK, and CENTRAL PARK  
CONSERVANCY, INC.

Defendants.

**FILED**  
OCT 28 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

-----X  
**PRESENT: KAREN S. SMITH, J.S.C.:**

Defendants City of New York ("City") and Central Park Conservancy Inc.'s ("CPC") joint motion to dismiss pursuant CPLR § 3211(a)(7) and for summary judgment pursuant to CPLR § 3212 is denied, in part, and granted, in part, as provided for more specifically below.

This is a personal injury action arising from an incident on July 9, 2005 in Central Park, in the City, County, and State of New York. Plaintiffs Robert Hebel and Kevin Kobetitch, police officers for the City, were on duty, investigating a disorderly person, when a stone step on a staircase leading to the Blockhouse, a small fort in the northern part of Central Park, collapsed beneath their feet and they both fell and were injured.

Officers Hebel and Kobetitch commenced the action, along with their wives, who bring derivative loss of consortium claims, by filing the summons and verified complaint on October 4, 2006. The City and CPC joined the action by service of answer on November 3, 2006.

The City argues that it is entitled to an order dismissing the complaint pursuant to CPLR § 3211(a)(7), or, in the alternative, summary judgment pursuant to CPLR § 3212 because 1) plaintiff's common law causes of action are barred by the firefighter rule; 2) prior written notice must be properly pleaded and proven in cases involving park pathways and staircases; 3) plaintiffs may not circumvent the firefighter's rule through General Municipal Law § 205-e because plaintiffs did not plead and cannot prove that the City had prior written notice of the defect in the subject staircase; 4) none of the statutory predicates claimed by plaintiff in order to

satisfy the requirements of General Municipal Law § 205-e are relevant to the instant facts, and plaintiff cannot prove them as a matter of law 5) the City did not cause and create the subject condition; 6) even if prior written notice is not required, plaintiff still cannot prove actual or constructive notice of a defective condition at the location of the accident, and 7) plaintiffs Dawn Hebel and Stephanie Kobetitch's derivative claims must be dismissed as derivative claims are not cognizable under General Municipal Law § 205.

Plaintiffs argue that prior written notice is not required in order to bring a case against the City in the instant circumstances, contending that the prior written notice rule does not apply since the stairwell does not qualify as a sidewalk or a street under § 7-201 of City's Administrative Code. In the place of prior written notice, plaintiffs submit photographic evidence, which, plaintiffs argue, provide constructive notice to the defendants. Plaintiffs further argue that they need not provide proof of prior written notice when they are claiming the City caused or created the defective condition in issue.

A complaint should not be dismissed pursuant to CPLR § 3211(a)(7) "so long as, when the plaintiff is given the benefit of every possible favorable inference, a cause of action exists." (*Rovello v. Orofino Realty Co., Inc.*, 40 NY2d 633, 634 [1976]). On a motion to dismiss for legal insufficiency, it is proper to consider the facts in plaintiff's affidavit "for the limited purpose of sustaining the pleading" (*Ackerman v. Vertical Club Corp.*, 94 AD2d 665 [1<sup>st</sup> Dept. 1983]).

Here, plaintiffs state a cause of action in negligence, pursuant to General Municipal Law § 205-c, which provides that police officers may recover in negligence against a municipality for injuries suffered while they are on duty so long as the accident is "caused by a municipality's failure to comply with any statute, ordinance or other laws." Plaintiffs' complaint offers various predicate violations by the City, including violations of New York City Administrative Code Title 25, Chapter 3, 25-301, New York City Charter 533, and Rules and Regulations of the City of New York 63, RCNY § 12-01. As this constitutes a cause of action, the portion of the motion seeking dismissal of the complaint pursuant to CPLR § 3211 is denied.<sup>1</sup>

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<sup>1</sup> While the City argues that plaintiff must plead prior written notice, the case the City cites for this proposition, *Poirer v. City of Schenectady*, 85 NY2d 310 (1995), does not discuss the issue. While it is true that plaintiffs must plead exceptions to the prior written notice rule, such as affirmative creation, as they represent separate theories of liability, the Court finds no authority which requires that plaintiffs plead prior written notice (*See*

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).

Section 7-201(c)(2) of the New York City Administrative Code, the Pothole Law, provides that no action shall be maintained against a municipality for personal injury caused by a defect in any sidewalk unless written notice of the condition was previously given to appropriate municipal employees. The Court of Appeals has explicitly extended the prior written notice rule of the Pothole Law to stairwells in municipal parks, reasoning that a stairwell “fulfills the same purpose that a standard sidewalk would serve on flat topography, except that it is vertical instead of horizontal” (*Woodson v. City of New York*, 93 NY2d 936, 938 [1999]).

Where the City establishes that it lacked prior written notice under the Pothole Law, “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, [2008]). The affirmative negligence exception “is limited to work by the City that immediately results in the existence of a dangerous condition” (*Bielecki v. City of New York*, 14 AD3d 301 [1st Dept. 2005]).

This analysis is not altered by the fact that plaintiffs are police officers bringing negligence claims pursuant to General Municipal Law § 205-e. The purpose behind General Municipal Law § 205-e was to soften the effect of the common law firefighter rule which disadvantaged on-duty police and firefighters; the statute, “was not, however, intended to give police officers greater rights and remedies than those available to the general public” (*Montalvo v. City of New York*, 46 AD3d 772, 773 [2d Dept. 2007]). As a result, “the prior notice requirement found in New York Administrative Code § 7-201, applies to lawsuits brought by

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*Semprini v. Village of Southampton*, 48 AD3d 543 [2d Dept. 2008].

police officers under General Municipal Law § 205-e” (*Id.*).

The City makes a *prima facie* showing of entitlement to summary judgment as a matter of law dismissing the action against them by submitting that plaintiffs have provided no evidence of prior written notice. Plaintiffs concede that they cannot provide evidence of prior written notice of the defect and argue instead that they are not required to do so. Plaintiffs claim that the City affirmatively created the defect but only submit photographs of the steps and conjecture of neglect, which is not enough to raise an issue of material fact as to the affirmative creation exception. As a result, plaintiffs fail to rebut the City’s *prima facie* showing of entitlement to summary judgment.

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 Misc3d 1135 [holding that CPC owed no duty to a member of the public who was injured in Central Park]). Plaintiffs fail to rebut this showing.

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

ORDERED 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 the case in its entirety.

The foregoing constitutes the decision and order of this court.

Dated: October 16, 2009

ENTER: *KS*

Hon. Karen S. Smith, J.S. **FILED**  
OCT 28 2009  
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NEW YORK