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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DERIC SPINDELL,

Plaintiff,

- against -

TOWN OF HEMPSTEAD and SCHEURER MONUMENTS INC.,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 156/09
Motion Seq. Nos.: 01, 02
Motion Dates: 04/29/10
04/29/10

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 01), Affirmation and Exhibits	1
Notice of Cross-Motion (Seq. No. 02), Affirmation and Exhibits	2
Affirmation in Opposition and Exhibits	3
Reply Affirmation (Seq. No. 01) and Exhibits	4
Reply Affirmation (Seq. No. 02) and Exhibit	5

Defendant Scheurer Monuments Inc. ("Scheurer") moves (Motion Seq. No. 01), pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiff's complaint, as well as any and all cross-claims asserted against it, on the grounds that plaintiff has failed to establish a *prima facie* case of negligence. Defendant Town of Hempstead ("TOH") cross-moves (Motion Seq. No. 02), pursuant to CPLR § 3212, for an order granting summary judgment and dismissing plaintiff's complaint against it on the grounds that plaintiff has failed to establish a *prima facie* case of negligence. Plaintiff opposes defendants' motions.

This personal injury action arises from injuries sustained by plaintiff on July 24, 2008, at approximately 4:45 p.m., while he was at Veterans Memorial Park located at Prospect Avenue,

East Meadow, New York. At the time of the accident, plaintiff, then seventeen years old, was allegedly leaning against a granite September 11th monument ("monument") which had been installed by defendant Scheurer within the aforementioned park which is owned and operated by defendant TOH. Plaintiff asserts that he was leaning on the monument with his elbows and pushing against the monument with his foot so as to allegedly stretch his leg muscles before a game of handball. After approximately two to three minutes, plaintiff claims that the monument fell towards him and landed on his foot. As a result of this accident, plaintiff sustained a crush injury to his left foot - a distal phalanx fracture at the great big toe and comminuted fractures of the second through fifth toes at the level of the metatarsophalangeal joints with extensive soft tissue irregularity. Plaintiff underwent immediate traumatic amputation to the left forefoot at the levels of the metatarsophalangeal joints of the second through fifth toes with sparing of the hallux, completion of the forefoot amputation to all lesser toes, percutaneious pinning of the intra-articular fracture dislocation of the IP joint of the hallux and debridement of the compound wound with partial deep closure. Shortly after the accident, plaintiff underwent a third surgery where first toe amputation and completion of the fifth toe amputation along with a split-thickness skin graft was performed. Plaintiff was incapacitated and partially disabled for a period of five months following the accident and subsequent surgeries. Plaintiff now walks with a limp and is in constant pain. On or about December 31, 2008, plaintiff commenced the present action by service of a Summons and Verified Complaint. On or about January 20, 2009, issue was joined by defendant TOH. On or about February 23, 2009, issue was joined by defendant Scheurer.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital,* 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York,* 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a

matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. S*ee Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989).

It is the existence of an issue, not its relative strength that is the critical and controlling consideration in the determination of a summary judgment motion. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964). Summary judgment is rarely granted in negligence cases. *See Connell v. Buitekant*, 17 A.D.2d 944, 234 N.Y.S.2d 336 (1st Dept. 1962).

Defendant Scheurer states that it is entitled to summary judgment since plaintiff's explanations of how the accident occurred are incredible as a matter of law in that they defy the rules of physics and science. Defendant Scheurer argues that, as such, said allegations should not be entertained and plaintiff's complaint should be dismissed. Defendant Scheurer submits

that, in reaching a summary judgment decision, the court may not ordinarily weigh the credibility of the affiants unless untruths are clearly apparent. Defendant Scheurer's expert, Timothy J. Carlsen, P.E., states that plaintiff's testimony at his Examination Before Trial and 50-h hearing concerning "what occurred defies the rules of physics and science and could not have been what actually transpired before the incident. The plaintiff's claim that the monument fell while he was stretching his legs and pushing against it is inconsistent with the reality that the monument had to be pushed and/or pulled in the plaintiff's direction with a significantly large force for it to fall upon his foot." Defendant Scheurer submits that the monument weighed approximately seventeen hundred pounds. According to Mr. Carlsen, based upon that weight, a force of approximately three hundred pounds would be required to topple the monument, especially in light of the fact that epoxy had been placed between the monument and the stone pedestal upon which it was resting. Accordingly, defendant Scheurer submits that "this is one of those circumstances where the sworn testimony of the plaintiff is a 'patent falsity' which...the Court is not required to shut its eyes to." Defendant Scheurer argues that it has made a *prima facie* showing that plaintiff's cause of action has no merit. It states that its expert, Mr. Carlsen, has set forth that the monument was configured, manufactured and installed in compliance with industry standards and that said installation was not a proximate cause of the accident. Additionally, defendant Scheurer submits that it did not receive any complaints regarding the monuments, nor any requests for it to inspect same, during the five years following its installation in July 2003. As such, if any defective condition had developed during that period of time, the movant had no notice of same and as such cannot be held negligent for failure to take corrective action.

Defendant TOH, in its cross-motion, submits that the factual record before the Court is devoid of any evidence of negligence, carelessness or recklessness by defendant TOH in relationship to the installation or maintenance of the monument before this occurrence. Defendant TOH asserts that the monument was installed by defendant Scheurer in compliance with all Industry Standards without any assistance or direction by defendant TOH. Defendant TOH states that the monument was commissioned and erected by the East Meadow Kiwanis Club and that there were no discussions between defendant Scheurer and defendant TOH regarding the installation of said monument. Defendant TOH argues that "the factual record is devoid of any actual notice to the TOWN of any defect with the subject monument. Likewise,

the Plaintiff himself, who was leaning against the monument, could not detect any leaning, listing or movement in the monument immediately before it allegedly toppled over on his foot. Additionally, during the TOWN's cleaning of the monument every three months, there was also no indication that the monument was unstable, leaning or listing. Thus, there is no factual evidence in the record before this Court to establish that before this incident the monument exhibited any indication to the TOWN that is was unstable or subject to falling. Any argument by the Plaintiff that the TOWN had either actual or constructive notice of any defect with the installation of the monument (or created a dangerous condition with the installation of the subject monument) is also without any factual basis." Defendant TOH alleges that plaintiff will have to establish that the defendants had constructive notice of the alleged condition in order to impose liability.

In opposition to defendants' motion, plaintiff argues that "[t]he Court of Appeals has consistently held that negligence cases, by their very nature, do not generally lend themselves to summary judgment and determinations as to credibility should be left for trial." Plaintiff additionally contends that defendants, as the movants on a motion for summary judgment, must submit evidence sufficient to establish that they did not create the defect or lacked actual or constructive notice of the dangerous condition thereof. Plaintiff states that it is thus not his burden in opposing the motion for summary judgment to demonstrate, as the defendants assert, that defendants had actual or constructive notice of the dangerous and unsafe condition, but rather, it is the responsibility of defendants to establish the absence of notice as a matter of law. Plaintiff submits that defendants have offered no evidence, admissible or otherwise, of any kind, and the record is void of same, as to when before the accident, the monument was last inspected or maintained by an employee of either defendant. Plaintiff also claims that defendants have failed to produce any evidence from any witnesses with personal knowledge of the condition of the monument on the date of plaintiff's accident. Plaintiff argues that "[w]hile both defendants focus on the perceived defects in SPINDELL's evidence of prior notice of the condition, the defendants fail to come forward with probative evidence of their own lack of knowledge." Plaintiff submits that "[d]efendants have failed to establish that the monument, was kept in a reasonably safe condition at the time of the accident. Defendants have failed to establish that they and/or their agents did nothing to cause and/or create an unreasonably dangerous condition at the time of the accident. Defendants have failed to establish that the unreasonably dangerous

condition alleged herein was not the proximate cause of the accident. Plaintiff also contends that he does not need to show either or actual constructive notice since plaintiff's theory is that the condition was caused and created by defendant Scheurer. With respect to defendant TOH, plaintiff states that "Veterans Memorial Park is a public park owned, maintained and supervised by the TOWN. The TOWN, as the owner and operator of the park, including the monument, has a non-delegable duty of maintenance with regards to the premises, as well as a non-delegable duty to operate the premises in a reasonably safe condition....The TOWN cannot hide behind its own ignorance of the installation of the monument, never received a contract for the installation of the monument, never directed or controlled the location or manner of the installation of the monument and had no obligation after its installation to maintain the monument to ensure it was in a safe condition. Simply put, the monument was on their property and the TOWN could not simply ignore its existence."

Plaintiff further contends that the defendants did not disclose their expert at any time prior to the filing of their respective motions. Plaintiff states "Mr. Carlsen's affidavit, dated April 9, 2010, submitted by the defense for the first time in support of their respective motions for summary judgment, should not be considered by the Court in light of their failure to properly disclose this witness in their prior discovery responses before the note of issue and certificate of readiness was filed in this case, *to wit*, prior to January 20, 2010."

In reply to plaintiff's opposition, defendant Scheurer argues that said opposition should not be considered in that it is without factual basis and is speculative in nature. Defendant Scheurer claims that "[i]n order to oppose the instant motion, plaintiff's counsel and expert have taken the liberty to change the deposition testimony of Mr. Spindell, including, but not limited to the issue of notice and perhaps more importantly as to how this accident actually occurred." Defendant Scheurer further contends that the affidavit of plaintiff's expert and the opinions contained therein should not be entertained by the Court in that it was never stated that any of said opinions were determined with a reasonable degree of certainty. Additionally, defendant Scheurer states that plaintiff's expert opinion as set forth within his affidavit should also not be considered in that no authority, codes, etc., has been cited to support his numerous contentions that the installation of the subject monument was not in compliance with industry standards. Defendant Scheurer also argues that plaintiff has not proven that it had either actual or constructive notice of any of the alleged defect. Finally, defendant Scheurer submits that the

defendants disclosed their expert at the earliest possible time and that plaintiff has suffered no prejudice so, therefore, the affidavit of Timothy J. Carlsen should be considered. Defendant Scheurer claims that it had a valid excuse why the identity of Mr. Carlsen was not disclosed prior to the Note of Issue. Defendant Scheurer states it did not provide the identity of Mr. Carlsen prior to the taking of the non-party depositions of plaintiff's friends, Luke Mac and Nick Decicco, because it was not certain as to what these individuals would testify and that their testimony could change any opinion offered by Mr. Carlsen. As such, it was not until at least Mr. Mac's deposition was completed that Mr. Carlsen's affidavit, dated April 9, 2010, was exchanged. Defendant Scheurer asserts that the failure to previously disclose the identity of defendants' expert was not intentional or willful, but rather due to the fact that necessary discovery was not yet complete. Defendant Scheurer claims that the lengthy adjournments of the present summary judgment motions allowed sufficient time for plaintiff's counsel and his expert to review the opinions of Mr. Carlsen so that plaintiff was not prejudiced by the time of said disclosure.

In reply to plaintiff's opposition, defendant TOH argues that plaintiff's factual argument is based upon the unsupported and speculative allegations of plaintiff's expert. Defendant TOH states that plaintiff's expert "admits that it was merely his 'profession opinion' that the monument fell because it was not properly installed. The mere professional opinion of a so called expert, without supporting facts and evidence to support such opinion, is also not sufficient to defeat a Motion for Summary Judgment. The Plaintiff's expert here should not be allowed to simply speculate as to standards, nor allowed to provide conclusory allegations regarding causation and negligence....However even if the Court finds that Mr. Hueston's speculative and unsupported Affidavit raises an issue of fact as to whether the subject monument had been properly installed five years before this incident, such findings of fact should not defeat the TOWN's motion for Summary Judgment." Defendant TOH further argues that it is uncontroverted that it did not commission the monument, direct or control its installation or participate in any way with the installation of the monument and there is no factual evidence of either actual or constructive notice to it as to any problems with the installation of stability of the subject monument. Defendant TOH states that the factual record before the Court is completely devoid of any complaints being made to it that the subject monument was either improperly installed or unsteady before this incident. Additionally, there

was no evidence of any prior incidents where the subject monument moved or exhibited any signs that it was unstable. Defendant TOH also asserts that plaintiff is incorrect in his analysis of municipal liability and defendant TOH's duty with regards to the subject monument and, in fact, there is no valid cause of action here against defendant TOH under a theory of municipal liability. Defendant TOH states that the Court of Appeals has held that the law in New York is that an agency of the government is not liable for the negligent performance of a governments function unless there exists a special duty to the injured person in contrast to the duty owed to the general public. Thus, defendant TOH's general duty to the public to maintain the park in a safe condition does not provide a cause of action here to this plaintiff as such general duty does not create any special duty with regards to plaintiff.

The proponent of a motion for summary judgment must demonstrate the absence of any material question of fact. *See Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). Based upon the evidence and argument currently before it in the present motions, the Court finds that there is indeed a question of material fact as to how the seventeen hundred pound monument was able to fall and cause plaintiff to sustain his serious injuries. As previously mentioned, defendants state that plaintiff's explanations of how the accident occurred are incredible and therefore his complaint should be dismissed. Defendants therefore are calling upon the Court to rule on plaintiff's credibility by only reading the testimony that he gave in at his Examination Before Trial and 50-h Hearing. "It is axiomatic that summary judgment requires issue-finding rather than issue determination and that resolution of issues of credibility is not appropriate." *Greco v. Posillico*, 290 A.D.2d 532, 736 N.Y.S.2d 418 (2d Dept. 2002). The court, on a motion for summary judgment, should not determine issues of credibility or the probability of success on the merits, but should only determine whether there is a triable issue of fact. *See id.; Venetal v. City of New York*, 21 A.D.3d 1087, 803 N.Y.S.2d 609 (2d Dept. 2005).

A "trial judge, who must ordinarily keep hands off the credibility question and leave it to the jury, may sometimes direct a verdict if some factor in the case enables the judge to label the testimony of a given witness incredible as a matter of law. The motion judge on a summary judgment application will rarely be in that position. The judge can examine a party's or a witness's affidavit for candor and directness and discount it if it is coy or evasive, but if the affidavit is unevasive and direct and swears unequivocally to the contrary of what the opposing

side attests - and of course assuming that the issue reflected on is material - the motion judge will ordinarily have no choice but to deny the motion and leave the matter to a trial. Credibility, in short, if it is a key factor in the motion papers, will require denial of the motion." *See* McKinney's CPLR Rule 3212:6 Credibility as Factor.

The first case cited by defendant Scheurer in support of its argument that the Court should assess the credibility of plaintiff due to their contention that his testimony is incredible as a matter of law, *Krupp v. Aetna Life & Casualty Co.*, 103 A.D.2d 252, 479 N.Y.S.2d 992 (2d Dept. 1984), also held that the credibility of person possessed of exclusive knowledge of the facts should not be determined by affidavits in weighing a motion for summary judgment. In the second case cited by defendant Scheurer in support of same, *MRI Broadway Rental, Inc. v. United States Mineral Products Company*, 242 A.D.2d 440, 662 N.Y.S.2d 114 (2d Dept. 1997), the Court held that "[i]t is well recognized that a 'shadowy semblance of an issue is not enough to defeat [summary judgment]'; nor is a court required to shut its eyes to the patent falsity of a defense." This applied to the fact that in the *MRI Broadway Rental, Inc.* matter the Court held that "[d]efendants should not be burdened with the obligation to prove the accrual date under plaintiff's theory of contamination, particularly where, as here, as plaintiff must concede under his proofs, contamination has not yet occurred and the date of contamination cannot be ascertained."

It is evident that the issue of "credibility" in these cases differs from the case at bar. In the case before the Court, defendants are asking the Court to assess the credibility of plaintiff based upon the theory that his testimony differs from their theory of the case. Defendants claim that the only way the monument could have fallen and caused plaintiff's injuries was if, according to defendant Scheurer, the monument was intentionally pushed over in an act of vandalism, and, according to defendant TOH, the damages were caused by the culpable conduct of plaintiff. This differs from plaintiff's testimony. Defendants, by asking the Court to rule on plaintiff's credibility and discount his testimony as incredible, are in fact asking the Court, in its summary judgment decision, to rule that their theory of the case is the truth. This is not the proper role of the Court with respect to deciding summary judgment motions. The burden on the court in deciding a summary judgment motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County, supra*; *Daliendo v. Johnson, supra*. *See also Glick & Dolleck, Inc. v. Tri-Pac Export*

Corp., 22 N.Y.2d 439, 293 N.Y.S.2d 93 (1968) (holding that "[t]he court may not weigh the credibility of the affiants on a motion for summary judgment unless it clearly appears that the issues are not genuine, but feigned").

Based upon all of the above, the Court finds the existence of material issues of fact and hereby denies defendant Scheurer's motion for summary judgment (Motion Seq. No. 01) and denies defendant TOH's motion for summary judgment (Motion Seq. No. 02)

All parties shall appear for trial in Nassau County Supreme Court, Central Jury Part on December 7, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:

Denise L. Sher

DENISE L. SHER
A.J.S.C.

Dated: Mineola, New York
September 28, 2010