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

PRESENT: KAREN S. SMITH PART 62
Justice

CARLTON TUCKER and ANTOINETTE TUCKER

- v -

THE CITY OF NEW YORK

INDEX NO. 101463/04
MOTION DATE 6/18/09
MOTION SEQ. NO. 003
MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to summary judgment

FILED
JUN 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

	PAPERS NUMBERED
Notice of Cross Motion — Affidavits — Exhibits ...Memorandum	1
Answering Affidavits — Exhibits – Memorandum	2
Replying Affidavits — Memorandum	3

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ORDERED that this motion by defendant City of New York for summary judgment dismissing plaintiff's complaint pursuant to CPLR § 3212, is granted for the reasons stated more fully below.

Plaintiff brought this action to recover for injuries he allegedly suffered after he was thrown from his bicycle as a result of a defect in a tree well. The parties appeared for a final compliance conference on November 20, 2008, after which defendant City of New York made this motion seeking summary judgment dismissing plaintiff's complaint pursuant to CPLR § 3212.

As an initial matter, plaintiff contends that this motion is untimely and should be denied without consideration. Plaintiff filed the Note of Issue on or about March 3, 2006, however additional discovery issues arose and the parties continued to appear for compliance conferences, notwithstanding the Note of Issue. When the parties appeared on June 12, 2008, the Court ordered that dispositive motions be made no more than 60 days from the date of the final compliance conference. The last conference was held on November 20, 2008. Plaintiff argues that the motion was required to be made no later than January 19, 2009, which is exactly 60 days from November 20, 2008. As defendant points out in its reply papers, however, January 19, 2009 was a legal holiday and, therefore, the motion was timely made on January 20, 2009.

According to plaintiff, on May 2, 2003 he was riding his bicycle on the sidewalk on 139th Street in Manhattan, New York, when he was forced to swerve to avoid pedestrians. His bicycle entered the tree pit located in front of the premises known as 118 West 139th Street, New York, New York. Plaintiff alleges in his Notice of Claim that there was a height differential of approximately three inches between the floor of the tree pit and the surrounding sidewalk. In addition, plaintiff testified that at the time of the accident, there were black plastic bags at the base of the tree, which allegedly obstructed his ability to see the tree or the dirt in the tree well. Although the Notice of Claim states that plaintiff was caused to "trip" by the allegedly defective condition, at his EBT, plaintiff testified that he was caused to be thrown from his bicycle, suffering serious physical injuries.[1]

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

[1] Antoinette Tucker, Carlton's wife, also asserts a derivative claim.

Defendant City of New York now moves for summary judgment dismissing plaintiff's complaint, pursuant to CPLR § 3212. 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 [1980]). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). According to the City of New York, plaintiff's complaint must be dismissed because there is no evidence that the City caused or created the condition, or that the City was given prior written notice of the alleged defect, which notice is required by NYC Administrative Code § 7-201(c)(2).

At the time of the plaintiff's accident, the premises at 118 West 139th Street, New York, New York was owned by the City of New York. The building was part of a program run by the New York City Housing Preservation and Development Agency wherein the tenants were permitted to manage the building through a tenant association. Adrice Miles, who was employed by the City as a building coordinator assisting the tenant association, testified that he never received or saw any complaints about defects regarding the sidewalk, nor did he or anyone else associated with the building engage any contractor to work on the sidewalk since 2001.

The City of New York also submits the EBT transcript of William Steyer, Director of Forestry for the New York City Parks Department in Manhattan. Steyer testified that the Department's Street Tree Division plants most trees, and the Forestry Department prunes dead trees, removes stumps, conducts emergency removal of fallen trees and hanging branches, and sometimes plants trees. Tree wells, according to Steyer, can be installed privately or by contractors hired by the City. The Forestry Department only does inspections in response to a complaint about a tree well. Steyer conducted a search for complaints regarding the subject tree well, and found none. He also testified that there was no record of inspections being done. Barbara Nickels testified on behalf of the Street Tree Division. She also searched for complaints regarding the subject tree well and found none. Finally, the City of New York submits the affidavit of Pearline Clark, a Department of Transportation employee. Clark states that she conducted a search of the Department's records for complaints, permits, repair orders, violations, contracts, and other documents for the subject tree well for two years prior to and including the date of plaintiff's accident, and no documents were found. Clark did locate a map created by the Big Apple Map Corporation which was filed with the Department on October 25, 2002, which the City submits on this motion, which does not indicate any defects in the sidewalk abutting 118 West 139th Street, New York, New York.

Plaintiff opposes the motion, contending that Administrative Code § 7-201(c)(2), the prior written notice statute, does not apply to a defect in a tree well, as the tree well is not part of a "street" or a "sidewalk", citing to *Vucetovic v Epsom Downs, Inc.*, 2008 NY Slip Op 04901 (April 17, 2008). According to Administrative Code § 7-201(c)(2),

> No civil action shall be maintained against the City for damage to property or injury to person or death sustained in consequence of 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 . . . condition was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice. . . .

Plaintiff points out that the *Vucetovic* court found that the tree well falls outside the definition of "sidewalk" after an examination of several sections of the Administrative Code, and argues that finding otherwise here would lead to a "bizarre result."

In *Vucetovic*, the plaintiff was injured when he tripped and fell over raised portions of a tree well while walking down the sidewalk in Manhattan. Prior to September 14, 2003, the City of New York was generally liable for accidents caused by a sidewalk defect, and a property owner could only be held liable under certain conditions, including when it caused or created the defect. Administrative Code § 7-210, which became effective

on September 14, 2003, shifted liability for accidents caused by sidewalk defects to the abutting property owner and imposed a specific duty on the owner to maintain the sidewalk.[2] The trial court in *Vucetovic* analyzed the relevant sections of the Administration Code which defined the term "sidewalk" to determine whether a tree well should be considered part of the "sidewalk" for purposes of this shift in liability to the abutting property owner.[3] Justice Gische held that a tree well is not part of the sidewalk for purposes of § 7-210, writing,

> Had the legislature intended to shift responsibility (and therefore tort liability) to the property owner for anything that is part of, or located on, a sidewalk (such as a tree well) it could and should have so articulated.

(2006 NY Slip Op 30210[U], New York County, September 18, 2006). The Appellate Division, First Department affirmed Justice Gische's decision and order, also noting that Administrative Code § 18-104 entrusts the Department of Parks and Recreation with exclusive management of the City's trees and noted that that section refers to the trees as "in streets", and "thus something separate and distinct from streets." (*Vucetovic v Epsom Downs, Inc.*, 2007 NY Slip Op 06577 [September 6, 2007]; *aff'd* at 2008 NY Slip Op 04901 [June 3, 2008]).

Although there is not a wealth of case law on the subject of the statutory requirement for prior written notice as it applies to defects in tree wells, it is clear that courts have applied Administrative Code § 7-201(c)(2) to such defects. (*See Blye v Manhattan & Bronx Surface Transit Operating Authority*, 124 AD2d 106, 108 [1st Dept 1987] [prior written notice to City required under Administrative Code § 394a-1.0[d], later § 7-201(c)(2)]). While plaintiff urges this Court to adopt the *Vucetovic* court's understanding that the term "sidewalk" excludes tree wells, plaintiff is mistaken that such an exclusion would therefore exempt defects in tree wells from the requirement for prior written notice. The language of Administrative Code § 7-201(c)(2) is broader than the statutes discussed in *Vucetovic*, and it explicitly requires prior written notice of any defect on the sidewalk or "encumbrances thereon or attachments thereto" in order to hold the City of New York liable for same. Plaintiff cites to no case law in which it has been held that tree wells in streets or sidewalks are not subject to the provisions of § 7-201(c)(2). Further, other courts have applied similar prior written notice laws to defects in tree wells. (*See, e.g., Kiernan v Thompson*, 73 NY2d 840, 842 [1988] [allegation of affirmative negligence in creating defect in tree well obviates need to prove compliance with Ithaca's prior written notice law]); *Fuhrmann v City of Binghamton*, 2006 NY Slip Op 5877, * 2 [3d Dept, July 20, 2006] ["Inasmuch as it is undisputed that the City had never received prior written notice of the allegedly defective condition (in the tree well), summary judgment in its favor was, therefore, properly granted."]). There appears, therefore, no basis for constraining the application of the prior written notice law in the manner sought by plaintiff.

The City of New York has made a *prima facie* showing of its entitlement to judgment as a matter of law, as there is no evidence that the City received prior written notice of the alleged defect that caused plaintiff's injuries. Plaintiff has failed to raise an issue of material fact in this regard through the submission of admissible evidence.

Accordingly, it is

ORDERED that this motion by defendant City of New York for an order granting it summary judgment dismissing plaintiff's complaint pursuant to CPLR § 3212, is granted; it is further

ORDERED that defendant serve a copy of this decision and order with notice of entry upon all parties and upon the Clerk of the Court (60 Centre), within 30 days of entry hereof; it is further

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[2] The Court notes that, as plaintiff's accident occurred on May 2, 2003, Administrative Code § 7-210(c)(2) was not yet in effect.

[3] Administrative Code § 7-201, at issue here, was not discussed in any of the *Vucetovic* decisions.

ORDERED that upon service of a copy of this decision and order with notice of entry, the Clerk of the Court is directed to enter judgment in favor of the City of New York dismissing the complaint in its entirety.

The foregoing constitutes the decision and order of this court. Any arguments or relief sought not address herein have nonetheless been considered and rejected.

Dated: June 17, 2009

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

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION
Check if appropriate: ☐ DO NOT POST ☐ REFERENCE