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

PRESENT: CYNTHIA S. KERN J.S.C. PART 52

Index Number : 112462/2007

HANDWERKER, ALEXIS

VS

CITY OF NEW YORK

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. 112462/07

MOTION DATE

MOTION SEQ. NO. 003

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 decided in accordance with the annexed decision

FILED
SEP 23 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/22/10

CK

CYNTHIA S. KERN J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

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ALEXIS HANDWERKER,

Plaintiff,

Index No. 112462/07

-against-

DECISION/ORDER

THE CITY OF NEW YORK and NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION,

Defendants.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross Motion and Answering Affidavits.....	2
Affirmations in Opposition to the Cross-Motion.....	3
Replying Affidavits.....	4
Exhibits.....	5

Plaintiff commenced the instant action to recover damages for personal injuries she allegedly sustained when she was struck by a falling tree branch at Stuyvesant Square Park on July 16, 2007. Defendants the City of New York and the New York City Department of Parks and Recreation (together, the "City") move for summary judgment on the grounds that the City had no notice, constructive or actual, or any defect in the tree. Plaintiff cross-moves to strike the City's answer or other sanctions for spoliation of evidence because the City failed to preserve the entire tree. For the reasons set forth more fully below, the City's motion for summary judgment is denied and plaintiff's cross-motion to strike defendant's answer is also denied.

The relevant facts are as follows. On July 16, 2007, plaintiff was struck by a falling tree branch as she sat on a bench at Stuyvesant Square Park. Kenneth Pragl, an employee of the NYC Department of Parks and Recreation (the "Parks Department") who held the title Park Supervisor, testified that Parks Department employees, including him, conducted inspections of the trees at Stuyvesant Square Park. Mr. Pragl testified that he did not have any special training for his job as Parks Supervisor and that he was not trained to determine if a tree was sick or healthy. He would make a visual observation of the trees from his position on the ground and report any dangling or dead limbs. Steve DiGiovanni, a Principal Park Supervisor whom Mr. Pragl reported to, testified that the Parks Department's goal was to inspect Stuyvesant Square Park once a week. He also testified that he or his employees would inspect the trees by examining them visually while walking through the park and that they look for dead or hanging branches but that they do not knock or tap on the tree. He also stated that he did not have any training in the identification of tree illnesses or tree disease. William Steyer, the Director of Forestry in the Borough of Manhattan (Forestry is a division of the Parks Department), testified that he or his employees would also inspect trees if prompted by a work order alerting them to a problem or if they were in the area. They would visually examine the tree and examine its branching, structure, roots, and look for holes, cracks or any evidence of fungus, disease or open wounds. Christine Dailey, the assistant gardener assigned to that park testified that she noticed "nothing unusual" about the tree. After the incident, she put her hand into part of the tree and found that it was "gooey," an indication of decay. The Parks Department had removed hanging limbs from the subject tree in July 2002 and September 2003, trimmed the canopy in October

2005 and pruned a limb in November 2005.

After the incident, the Parks Department saved parts of the tree, specifically, the limb that fell and the first three feet of trunk. The broken limb was not kept in its entirety. Plaintiff's attorney wrote to Corporation Counsel the day after the incident, informing it that plaintiff intended to sue and instructing it to "preserve any and all portions of the tree, tree limb, park bench and/or fencing removed from the scene..." That letter is stamped received on July 25, 2007, 9 days after the incident. The City states that by then, the rest of the tree had been disposed of. Plaintiff submitted an affidavit from her mother stating that, on the evening of the incident, the Parks Department's Manhattan Borough Commissioner William Castro assured her and her husband that the tree would be preserved. Mr. Castro states in a signed and notarized affidavit, but which is not sworn to under the penalties of perjury, that he does not remember making any such promise.

Plaintiff submits the affidavits of three experts. The three experts reviewed the preserved parts of the tree and photographs of the accident scene, as well as Parks Department records. Wayne Cahilly of Cahilly's Horticultural Services found, among other things, that the tree had "external evidence of stress conditions in the form of a heavy crop of water-sprouts" and that water-sprouts are "symptomatic of an underlying, negative condition." He also found that the subject limb itself was infested with carpenter ants and bark-boring beetles, although the latter might have infested the limb after it fell. He also concluded that the tree had "old, decaying pruning wounds in the region of failure." H. Dennis P. Ryan, an arborist, submitted an initially unsigned affidavit, in which he concluded that decay was obvious from photographs and that "an experienced arborist standing on the ground would have had no difficulty in identifying the decay

present in this tree well before the incident." Mr. Ryan does not specify what these outward signs of decay were. The court notes that Mr. Ryan's affidavit was initially unsigned as he was on vacation but a signed affidavit attesting to the truth of his report was submitted with plaintiff's reply papers. Mr. Ryan also states in his affidavit that he visited the City's Randall Island facility where it stored the preserved portions of the tree on August 28, 2007 and that opposing counsel was present during this visit. Finally, plaintiff submits the report of Terry A. Tattar, a professor of microbiology with expertise in trees. He opines that the tree "had weak architecture..., a cavity opening from an old wound" below a fork in the trunk and "extensive epicormic sprouting" and that these were all external indicators of structural defect. All three experts state that they were hampered in their analysis by the City's failure to preserve the entire tree.

The City is obligated to make a "reasonable inspection" of the tree. *Harris v Village of East Hills*, 41 N.Y.2d 446, 449 (1977). If a reasonable inspection would have revealed the dangerous condition of the tree, liability attaches. *See id.* In other words, the City is liable if it had actual or constructive notice of the dangerous condition of the tree. *See id.* Whether the inspection was reasonable is a question for the jury. *See id.* In Harris, the jury found that the village's procedure of inspecting the trees from a patrol car, without viewing the trees from the back, was reasonable. The court held that it could not say such a procedure was "unreasonable as a matter of law" and that the jury's determination "must stand." *Id.* at 450.

In the instant case, the City makes out a prima facie case that it had no actual or constructive notice of a defect in the tree. Christine Dailey, the assistant gardener who worked in the park every day, testified that she regularly made a visual inspection of the tree and that there

was "nothing unusual" about it. This is sufficient to establish the City's prima facie case.

However, plaintiff raises an issue of fact as to whether the City had notice of the defect based on the submission of experts' affidavits. Those affidavits raise a question of fact as to whether any problem with the tree was visible and whether the City's inspection of the subject tree was reasonable. *See Harris*, 41 N.Y.2d at 449-50. The City's employees all testified that there was no visual indication that the tree was decayed or had other defects. However, plaintiff's experts Mr. Cahilly and Dr. Tattar testified that the tree did have visible signs of decay, including numerous water-sprouts, weak architecture and pruning wounds. Those affidavits raise an issue of fact as to whether the City would have had constructive or actual notice of the defective condition of the subject tree and whether the inspection performed by the City was "reasonable." These are questions of fact for the jury. The court need not address plaintiff's argument that the City is held to a higher standard than any other landowner because, even under the "reasonable inspection" standard cited above, the court finds that there is an issue of fact.

Defendant's contention that the experts' affidavits must be disregarded as these experts were not previously disclosed to the City is without merit. It is within the court's discretion whether to preclude expert evidence on the grounds of failure to give timely disclosure. *See* CPLR 3101(d); *Martin v Triborough Bridge and Tunnel Auth.*, 73 A.D.3d 481 (1st Dept 2010); *LaMasa v Bachman*, 56 A.D.3d 340 (1st Dept 2008). Preclusion is generally granted only if the nondisclosure was "willful or prejudicial to the party seeking preclusion." *See Martin*, 73 A.D.3d 481. In *Martin*, the First Department held that the trial court "properly exercised its

discretion" in refusing to preclude expert evidence where there was no evidence that the delay in expert disclosure was willful or prejudicial. *Id.* Moreover, in that case, the expert was not disclosed until during the trial. Nevertheless, the First Department upheld the trial court's refusal to impose any sanction. *See id.* The City cites only non-binding Second Department precedent to support its argument that the expert affidavits should be disregarded.

In the instant case, the court similarly declines to impose any sanctions and, as reflected above, has considered plaintiff's experts' affidavits. There is no evidence that plaintiff willfully failed to disclose the names of its experts and, in fact, her contention that the City knew that she had retained at least one of these experts, Mr. Ryan, is unrefuted.

The court now turns to plaintiff's cross-motion to strike the City's answer. Striking a defendant's answer as a sanction for spoliation is not appropriate where the absence of the missing or destroyed evidence is "not fatal to plaintiff's ability to present her case." *Melendez v City of New York*, 2 A.D.3d 170 (1st Dept 2003). Despite the missing portions of the tree, plaintiff's experts all state that, based on the preserved portions of the tree and photographs, there were external indications of decay which should have put the City on notice of a problem with the tree. Therefore, plaintiff is able to make out a case without the striking of defendant City's answer. Her motion to strike the City's answer is denied. In the alternative, plaintiff moves for an adverse inference charge. This motion is denied without prejudice. Plaintiff may make this motion at trial.

Accordingly, the City's motion for summary judgment is therefore denied. Plaintiff's cross-motion to strike the City's answer is also denied, but she may renew her motion for other sanctions, such as an adverse inference charge, at trial. The court declines to search the record

and grant plaintiff summary judgment as requested. This constitutes the decision and order of the court.

Dated: 9/22/10

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.