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SUPERIOR COURT OF NEW JERSEY
CAPE MAY-LAW DIVISION

Robert Chapman **Plaintiff**	:	**Civil Action**
v.	:	**DOCKET NO.: CPM L 7-16**
Wildwoods Boardwalk Special Improvement District et al. **Defendants**	:	**Order**

THIS MATTER having come before the Court on the motion of Defendants to bar the July 7, 2017 expert report out-of-time; and the Court having heard argument and considered the papers submitted; and for good cause shown;

IT IS ON THIS 17th day of November, 2017 ORDERED that:

1. The motion of Defendants, the City of Wildwood, Wildwoods Boardwalk Special Improvement District, Management Corporation, and Wildwood Business Improvement District, Management Corporation, to bar the July 7, 2017 expert report out-of-time pursuant to R. 4:17-7 is granted.
2. The July 7, 2017 expert report of William Brogan is hereby barred from being presented at the time of trial. William Brogan is further barred from testifying at the time of trial.

J. Christopher Gibson, J.S.C.

Memorandum of Decision is attached.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: Robert Chapman v. Wildwoods Boardwalk Special Improvement District et al.

DOCKET NO.: CPM-L-7-16

NATURE OF APPLICATION: DEFENDANTS' MOTION TO BAR EXPERT REPORT AND TESTIMONY OF PLAINTIFF'S EXPERT AT THE TIME OF TRIAL

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The Complaint for this matter was filed on January 7, 2016. The discovery end date was May 24, 2017. There were two prior extensions in this matter for a total of 450 days of discovery. Neither trial nor arbitration has been set for this matter. Defendants, the City of Wildwood, Wildwoods Boardwalk Special Improvement District, Management Corporation, and Wildwood Business Improvement District, Management Corporation, now move to bar the expert report and trial testimony of Plaintiff's expert, Bill Brogan, pursuant to R. 4:17-7.

The Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYSIS

R. 4:17-7, which pertains to amending discovery by way of interrogatories, provides:

> [I]f a part who has furnished answers to interrogatories thereafter obtains information that renders such answers incomplete or inaccurate, amended answers shall be served not later than 20 days prior to the end of the discovery period[.] ... Amendments may be allowed thereafter only if the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment shall be disregarded by the court and adverse parties.

MOVANTS' POSITION

Defendants, the City of Wildwood, Wildwoods Boardwalk Special Improvement District, Management Corporation, and Wildwood Business Improvement District, Management Corporation, request that this Court bar Plaintiff's July 7, 2017 expert report of Bill Brogan as out-of-time pursuant to R. 4:17-7. Defendants further seek to bar Bill Brogan from testifying at the time of trial.

While the expert report is dated July 7, 2017, the expert report was not served until July 17, 2017. See Defendants' Exhibit A. Prior to this submission, Plaintiff never identified a liability expert nor supplied any expert information. Plaintiff did not attempt to extend the discovery date. Accordingly, Defendants seek to bar this expert report as out-of-time pursuant to R. 4:17-7.

OPPOSITION

Plaintiff asserts that the expert report could not have been served earlier due to outstanding discovery. Specifically, Plaintiff notes a May 1, 2017 Notice of Deposition of four individuals believed to have knowledge of general maintenance of the boardwalk as a whole. See Plaintiff's Exhibit G. Defendants only produced two of these four individuals on July 17, 2017. Thus, Plaintiff submits that it was not able to produce an expert report earlier due to the late production of these witnesses.

REPLY

Defendants note that Plaintiff never certified that the "information requiring the amendment [to Interrogatories] was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date." R. 4:17-7. Defendants argue that there is no explanation for the delay of the submission of the expert report.

SUR-REPLY

Defendant further provides support for their argument to bar Plaintiff's expert report and testimony of Bill Brogan that Plaintiff provided the expert report on July 17, 2017, three days prior to the July 20, 2017 arbitration. Defendant cites R. 4:24-1(c), which prohibits the extension of discovery once a date for arbitration has been set, unless exceptional circumstances are shown. Defendant argues that exceptional circumstances have not been shown as discovery ended on May 24, 2017 and the arbitration took place on July 20, 2017.

DISCUSSION

Defendants are entitled to bar the July 7, 2017 expert report of Bill Brogan as out-of-time pursuant to R. 4:17-7. Likewise, Bill Brogan may not testify at the time of trial.

The discovery end date for this matter was May 24, 2017. Twenty-three days prior to, on May 1, 2017, Plaintiff Notices for Deposition four individuals believed to have knowledge of general maintenance of the boardwalk as a whole. See Plaintiff's Exhibit G. Two of the four individuals were deposed on July 17, 2017, which was outside of the discovery period and only three days before the arbitration date for this matter. At no point did Plaintiff move to extend discovery to obtain this fact discovery, move to compel the discovery, or otherwise take any other action to ensure that the submitted expert report would not be time-barred. Interestingly, upon review of the expert report, there is no indication that these two individuals affected Mr. Brogan's findings in any way.

In submitting the expert report of Bill Brogan on July 17, 2017 out-of-time, Plaintiff did not certify that the expert report could not have been produced earlier after due diligence. R. 4:17-7 is clear in its necessity for a certification of due diligence:

> Amendments may be allowed thereafter *only if* the party seeking to amend certifies therein that the information requiring the amendment was not reasonably available or discoverable by the exercise of due diligence prior to the discovery end date. In the absence of said certification, the late amendment *shall be disregarded* by the court and adverse parties.

(emphasis added).

It is true that Best Practices permit time constraints to "yield to exceptional circumstances and fundamental litigation fairness." Comment 1.1 to R. 4:17-7 (Pressler & Verniero 2017), citing Brun v. Cardoso, 390 N.J. Super. 409, 419 (App. Div. 2006). Plaintiff asserts that the late production of fact witnesses for depositions should permit the inclusion of the late expert report. Plaintiff neither moved to reopen and extend discovery, nor provided a certification of due diligence when serving the report, accordingly, the Court does not find this to constitute exceptional circumstances that warrant waiving the mandate of R. 4:17-7. Further, on February 6, 2017, the Court granted Defendant's unopposed motion to extend discovery. The Court's order established a special deadline for discovery. At no point was the Court advised that an expert report was forthcoming or that the depositions of any individuals were necessary and remained incomplete. Accordingly, Defendants' motion is granted.

CONCLUSION

The motion is opposed.

The motion of Defendants, the City of Wildwood, Wildwoods Boardwalk Special Improvement District, Management Corporation, and Wildwood Business Improvement District, Management Corporation, to bar the July 7, 2017 expert report out-of-time pursuant to R. 4:17-7 is granted.

The July 7, 2017 expert report of William Brogan is hereby barred from being presented at the time of trial. William Brogan is further barred from testifying at the time of trial.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

November 17, 2017

J. Christopher Gibson, J.S.C.

SUPERIOR COURT OF NEW JERSEY
CAPE MAY-LAW DIVISION

Robert Chapman **Plaintiff**	:	**Civil Action**
v.	:	**DOCKET NO.: CPM L 7-16**
Wildwoods Boardwalk Special Improvement District et al. **Defendants**	:	**Order**

THIS MATTER having come before the Court on the motion of Defendant for Summary Judgment; and the Court having heard argument and considered the papers submitted; and for good cause shown;

IT IS ON THIS 15th day of November, 2017 ORDERED that:

1. Defendant, Wildwoods Boardwalk Special Improvement District, et al.'s Motion for Summary Judgment is granted.
2. FURTHER ORDERED that a copy of this Order be served on all parties within five (5) days.

J. Christopher Gibson, J.S.C.

Memorandum of Decision is attached.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
CAPE MAY COUNTY

CASE: **Robert Chapman v. Wildwoods Boardwalk Special Improvement District et al.**

DOCKET NO.: **CPM-L-7-16**

NATURE OF APPLICATION: **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

MEMORANDUM OF DECISION ON MOTION

NATURE AND BACKGROUND OF MOTION

The complaint in this matter was filed on January 7, 2016. The discovery end date was May 24, 2017. There have been four hundred fifty (450) days of discovery. There have been two (2) previous extensions of discovery. Arbitration was scheduled for July 20, 2017.

The Court has carefully and thoroughly reviewed the moving papers and attached exhibits submitted by the parties with this motion.

LEGAL ANALYIS

R. 4:46-2(c), which governs motions for summary judgment, provides, in pertinent part, that:

> the judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences

> therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

A genuine issue of material fact must be of a substantial, as opposed to being of an insubstantial nature. Brill v. Guardian Life Ins. Co. 142 N.J. 520, 529 (1995). "Substantial" means "[h]aving substance; not imaginary, unreal, or apparent only; true, solid, real," or, "having real existence, not imaginary[;] firmly based, a substantial argument." Ibid. (internal citations omitted). Disputed facts which are immaterial, fanciful, frivolous, gauzy, or merely suspicious are insubstantial, and hence do not raise a genuine issue of material fact. Ibid. (internal citations omitted); see also Hoffman v. Asseenontv.Com, Inc., 404 N.J. Super. 415, 426 (App. Div. 2009) (requiring opposition to a motion for summary judgment to have "competent evidential material beyond mere speculation and fanciful arguments").

Additionally, R. 4:46-5 provides, in pertinent part, that

> when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the pleading, but must respond by affidavits meeting the requirements of R. 1:6-6 or as otherwise provided in this rule and by R. 4:46-2(b), setting forth specific fact showing there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered, unless it appears from the affidavits submitted, for reasons therein stated, that the party was unable to present by affidavit facts essential to justify opposition, in which case the court may deny the motion, may order a continuance to permit additional affidavits to be obtained, depositions to be taken or discovery to be had, or may make such order as may be appropriate.

See also Brill, 142 N.J. at 529 (holding that the burden shifts to the non-movant to "come forward with evidence that creates a genuine issue as to any material fact challenged" after the movant has provided sufficient evidence for summary judgment). In determining whether a genuine issue of material fact exists, the motion judge must "engage in an analytical process essentially the same as that necessary to rule on a motion for a directed verdict: 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Id. at 533. This weighing process "requires the court to be guided by the same evidentiary standard of proof—by a preponderance of the evidence or clear and convincing evidence—that would apply at the trial on the merits when deciding whether there exists a 'genuine' issue of material fact." Id. at 533-34. In short, the motion judge must determine "whether the competent evidentiary materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 540.

MOVANT'S POSITION

Defendant, the City of Wildwood, first argues that it is entitled to summary judgment as a matter of law as there has been no compliance with the notice requirements of the Tort Claims Act, N.J.S.A. § 59:4-3. Defendant maintains that it did not have any actual and/or constructive notice of any defective conditions of the boardwalk.

Second, Defendant argues that any actions or inactions on Defendant's part concerning the alleged dangerous condition of the boardwalk was not "palpably unreasonable," and that under the Tort Claims Act, liability may not be imposed upon a public entity for negligent execution of its duties in the absence of tangible facts demonstrating the requisite actual or constructive awareness of the danger on the part of the entity. Defendant maintains that the boardwalk is inspected daily by the Public Works department carpenters, who are equipped to make immediate repairs or maintenance to the boardwalk if they observe any defective condition. Defendant asserts that the boardwalk is an important part of Wildwood's economy, and that if a section of the boardwalk is noticed to be defective, it is repaired immediately or replaced.

Lastly, Defendant argues that summary judgment is an appropriate remedy in absence of any genuine issue as to any material fact.

OPPOSITION

Plaintiff, Robert Chapman, first argues that the requirement that a public entity have actual or constructive notice is not applicable where public employees through neglect or wrongful act or omission within the scope of their employment create a dangerous condition. Plaintiff asserts that whether a public employee created a dangerous condition through negligent acts or omissions may be an issue of fact that must be decided by a jury.

Plaintiff asserts that Defendants were negligent in installing the boards on the boardwalk by nailing them to the support beams, instead of

using screws, which is the way currently utilized on the boardwalk, and is the way Plaintiff alleges corrective action was taken on the place Plaintiff was allegedly inured. Plaintiff argues that as such, the notice requirements should not apply in this case, or in the alternative, that Defendants had constructive notice of the dangerous condition. Plaintiff also argues that the question of palpable unreasonableness is a question for the jury.

Plaintiff asserts that the area where the alleged incident occurred on the Wildwood Boardwalk is an area traversed by millions of people both as pedestrians and on bicycle. Plaintiff argues that the area is in disrepair, and that its condition was noted by the responding Police Officer. Plaintiff additionally asserts that the General Supervisor of the Public Works, Robert Anderson, admitted that the area where the alleged injury occurred looks to be in disrepair, and that a two inch raised board, such as the one documented in the injury report, presents a tripping hazard.

Plaintiff additionally asserts that Mr. Anderson went on to state that the Public Works employees drive trucks on the boardwalk when conducting these inspections, which can lead to breaking or cracking of the boards. Plaintiff argues that the disrepair was caused by the daily driving of the boardwalk by these vehicles, over the course of time.

Plaintiff lastly presents the report of his expert William Brogan, who has worked in the construction and maintenance industry for forty (40) plus years. Plaintiff states that Mr. Brogan's report claims that the boardwalk where this incident allegedly occurred was admittedly in disrepair and was in

a dangerous condition at the time of the alleged incident. Mr. Brogan's report additionally states that the condition had existed for a length of time, such that the Defendants either knew or should have known of the dangerous condition, and had sufficient time to fix it.

REPLY

Defendant argues that the deposition of Robert Anderson, the Supervisor of Public Works, described the area where Plaintiff allegedly fell as worn, but not broken. Defendant also argues that just because the original boardwalk was nailed down does not indicate a dangerous condition within the meaning of Title 59. Defendant states that when the boards are replaced, they are now screwed down. Defendant goes on to argue that the City of Wildwood employs approximately four to five carpenters who inspect the boardwalk daily and perform repairs. If a defect is observed, then it is repaired immediately. Defendant further maintains that it did not possess actual and/or constructive notice of the raised board in question prior to the time of Plaintiff's fall.

DISCUSSION

Defendant, Wildwoods Boardwalk Special Improvement District, is entitled to Summary Judgement, and its Motion is therefore granted.

The Court recognizes that in New Jersey, the guiding principles of the TCA is that immunity is the general rule and liability the exception. See generally Coyne v. NJDOT, 182 NJ 481, 488 (2005). The Tort Claims Act, N.J.S. § 59:4-2(b) provides "[a] public entity is liable for injury caused by a

condition of its property if the plaintiff establishes that the property was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:... a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

N.J.S.A. § 59:4-3(b) provides that "[a] public entity shall be deemed to have constructive notice of a dangerous condition...only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character."

The Supreme Court of New Jersey held that "[o]nly if plaintiff can prove these elements do we turn to the next step: whether the public entity . . . 'had actual or constructive notice of the dangerous condition' within 'a sufficient time' before the accident that it could 'have taken measures to protect against [it.]'" Polzo v. Cnty. of Essex, 209 N.J. 51, 65 (2012). Further, "if plaintiff has met all of these elements, the public entity still will not be liable unless the public entity's failure to protect against the dangerous condition can be deemed 'palpably unreasonable.'" Ibid. (quoting N.J.S.A. § 59:4-2). "When a public entity acts in a palpably unreasonable manner, it should be 'obvious that no prudent person would approve of its course of

action or inaction.'" Id. at 76 (quoting Muhammad v. N.J. Transit, 176 N.J. 185, 195-96 (2003).

For the Court to grant Summary Judgment pursuant to R. 4:46-2(c), there must be no genuine dispute of material fact so that judgment must be granted as a matter of law. Defendant argues that it had neither actual nor constructive notice of the condition of the Wildwood Boardwalk, and that it is immune from liability under the Tort Claims Act. Plaintiff argues that Defendants had actual and constructive notice because of the daily inspections of the boardwalk by the Public Works employees.

Consistent with TCA principles discussed above, the Court is required to analyze the condition of the boardwalk and whether it qualifies as dangerous in accordance with the Act. The responding Patrolman observed a "board that was sticking up about 2 inches higher than the other boards...". Photos were submitted of boards in the area of Plaintiff's fall. The photos show two boards, that are slightly elevated at the end of the plank.

The Plaintiff's testimony as to his fall is fairly general. In response to being asked to explain what happened Plaintiff stated, "Walking down the boardwalk and I'm watching all the traffic so I don't walk into anybody, because I was going towards the store, and I tripped. I just went down". Whan asked if his foot hit something Plaintiff answered, "It hit a board", but he could not recall which foot hit the board (Plaintiff dep p. 35 L19-24). After he composed himself, Plaintiff moved on, no ambulance was called.

Plaintiff further testified that, after he fell, he noticed "a board raised up". (Id. at p39 L13-15). Aside from claiming that the whole boardwalk in that area was in disrepair, Plaintiff conceded that he did not see the referenced board and the record does not reveal that Plaintiff knew whether this is the board that caused his fall. Plaintiff returned to the scene at some point to take pictures, though he does not recall when. When confronted with the photo of the two elevated boards Plaintiff was asked, "And just for the record, you've circled...in red the general area where you fell, correct?" Plaintiff's response, "I believe so." (Id. at p43 L8-12).

With that evidential backdrop, this Court can analyze the dangerousness of the two elevated boards but the Plaintiff has not established that it was one of these two boards that caused his fall. Presuming however, for the balance of the Court's analysis one of these elevated boards caused his fall, the Court finds the elevated board(s) are not in such a dangerous condition as to create a substantial risk of injury when the property is used with due care in a manner in which it is reasonably foreseeable that it will be used. Roman v. City of Plainfield, 388 NJ Super 527, 539 (AppDiv 2006) (quoting NJSA 59:41-1(a)).

Nonetheless, even if the Court were to find the condition to be dangerous, there is no evidence that Defendant had actual notice of the condition. Further, the condition shown in the picture that Plaintiff believes was the cause of the fall is not so obvious that it would have been discovered during the daily boardwalk inspections. Interestingly, Plaintiff's expert notes

in his report that he walked past the very spot of Plaintiff's fall on the very same day but offers no indication the condition was observed or noticed by him.

If, however, the Court presumes that Defendant was on constructive notice of the condition, the evidence in the record is insufficient to establish that Defendants failure to protect against this condition can be deemed palpably unreasonable or that no reasonable person would approve of Defendant's inaction regarding the condition.

The record presented to the Court does not establish a dangerous condition of which Defendants were on notice, be it actual or constructive. Even with the deficiencies in Plaintiff's testimony the Court can accept the argument that a dangerous condition existed but cannot accept the same regarding notice. There is insufficient evidence to create a genuine issue of fact as to whether Defendants had actual or constructive notice of the dangerous condition of the boardwalk.

With respect to Defendant's liability, "[t]he mere '[e]xistence of an alleged dangerous condition is not constructive notice of it.'" Sims v. City of Newark, 244 N.J. Super. 32, 44 (Law Div. 1990). "In the absence of evidence defendant had notice--actual or constructive--of the nature of the defect identified by plaintiff, the unavoidable conclusion is plaintiff cannot meet her burden under the TCA." See Polzo, supra, 209 N.J. at 66. Therefore, there is no genuine dispute of material fact, and Defendant's Motion for Summary Judgment is granted.

CONCLUSION

The motion is opposed.

Defendant, Wildwoods Boardwalk Special Improvement District, et al.'s Motion for Summary Judgment is granted.

An appropriate form of order has been executed. Conformed copies of that order will accompany this memorandum of decision.

November 15, 2017

J. Christopher Gibson, J.S.C.