

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

PETER N. HANG,

Plaintiff,

v.

CITY OF HOUSTON, TEXAS

Defendants.

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CIVIL ACTION NO. H-05-1411

MEMORANDUM AND RECOMMENDATION

Defendant City of Houston moves for summary judgment (Dkt. 55) on Plaintiff Peter N. Hang's negligence claim.¹ Hang has not filed a timely response. The motion should be granted.

Background

Hang alleges that he slipped and fell on a public sidewalk outside of the Houston Museum of Fine Arts on April 26, 2003 and suffered physical injury.² Hang asserts that the City of Houston is liable for his injury due to the dangerous condition of the sidewalk.

The City asserts that it is entitled to summary judgment because (1) there is no liability against a government entity on a premises liability claim; and (2) there is no liability for gross

¹ The district court referred this case to this magistrate judge for pretrial management (Dkt. 6).

² Hang filed this case on April 21, 2005. After a lengthy abatement due to Hang's poor health, the case was reinstated in late July 2007. Since that time, Hang has repeatedly failed to meet his discovery obligations and has apparently been out of contact with his counsel.

negligence (assuming it was pleaded) because the City was not on notice of a dangerous condition; the public sidewalk did not pose an unreasonable risk to Hang; the plaintiff caused his own injuries; and the City is immune pursuant to the Recreational Use statute.³

Summary Judgment Standards

Summary judgment is appropriate if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The party moving for summary judgment has the initial burden to prove there are no genuine issues of material fact for trial. *Provident Life & Accident Ins. Co. v. Goel*, 274 F.3d 984, 991 (5th Cir. 2001). Dispute about a material fact is “genuine” if the evidence could lead a reasonable jury to find for the nonmoving party. *In re Segerstrom*, 247 F.3d 218, 223 (5th Cir. 2001). “An issue is material if its resolution could affect the outcome of the action.” *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 310 (5th Cir. 2002).

A summary judgment movant who bears the burden of proof on a claim must establish each element of the claim as a matter of law. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). If the movant meets this burden, “the nonmovant must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial.” *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (quoting *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951, 954 (5th Cir. 1995)). In determining whether a genuine issue of material fact exists, the court views the evidence and draws inferences in

³ Because the notice issue is fully dispositive, the court need not address the City’s other arguments.

the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Analysis

There is no dispute that Hang did not pay to walk on the public sidewalk.⁴ Therefore, the City cannot be liable to Hang for ordinary negligence. *Graff v. Harris Cty.*, 877 S.W.2d 82, 85 (Tex. App. – Houston [1st Dist.] 1994, writ denied). The City owed Hang a duty of care equivalent to that a private person owes to a licensee on private property. TEX. CIV. PRAC. & REM. CODE § 101.022(a). The duty owed to a licensee is not to injure the licensee willfully, wantonly, or through gross negligence. *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 237 (Tex. 1992).

“Willful and wanton disregard means that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it. It is synonymous with gross negligence.” *Little v. Needham*, 236 S.W.3d 328, 334 (Tex. App. – Houston [1st Dist.] 2007, n.p.h.) (internal citations omitted). Gross negligence is the entire want of care which raises the conclusion that the act or omission was the result of conscious indifference to the welfare of the injured party. *Burk Royalty Co. v. Walls*, 616 S.W.2d 911, 920-22 (Tex. 1981). “What lifts ordinary negligence into gross negligence is the mental attitude of the defendant . . . in other words, the plaintiff must show that the defendant knew about the peril, but his acts or

⁴ Defendant’s Ex. E, plaintiff’s response to requests for admission Nos. 25, 26.

omissions demonstrated that he didn't care." *Id.* at 922. A duty to warn of a dangerous condition arises only where the licensor has actual knowledge of the condition likely to cause injury and the licensee is not. *Payne*, 838 S.W.2d at 237; *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974).

The City has presented evidence that it did not have notice of the allegedly dangerous condition of the sidewalk. The City had no work orders or requests for repairs for that sidewalk between April 26, 2000 and April 26, 2003.⁵ The City had no complaints to its 311 complaint service between the inception of that service on August 27, 2001 and the date of the incident.⁶ The manager of the division responsible for maintaining the trees along the sidewalk has no record of any complaints regarding the trees creating an unlevel sidewalk in that area.⁷ In order to survive summary judgment, Hang must present sufficient evidence to create a fact issue as to the City's knowledge of the allegedly dangerous condition. Hang has not offered any evidence at all. Therefore, the City is entitled to summary judgment.

Conclusion

The court recommends that the City's motion for summary judgment (Dkt. 55) be granted and Hang's claims be dismissed with prejudice.

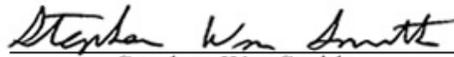
⁵ Defendant's Ex. 4, Affidavit of Howard Hilliard; Defendant's Ex. 5, Affidavit of Brenda Kirkling.

⁶ Defendant's Ex. 6, Affidavit of Jeannie Holmes.

⁷ Defendant's Ex. 8, Affidavit of Victor Cordova.

The parties have ten days from service of this Memorandum and Recommendation to file written objections. Failure to file timely objections will preclude appellate review of factual findings or legal conclusions, except for plain error. *See* FED. R. CIV. P. 72.

Signed at Houston, Texas on March 3, 2008.



Stephen Wm Smith
United States Magistrate Judge