

**IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN**

MANAURIS MERCADO,	)	
	)	
Plaintiff,	)	CASE NO. ST-09-CV-123
	)	
v.	)	ACTION FOR DAMAGES
	)	
GOVERNMENT OF THE VIRGIN ISLANDS,	)	
	)	
Defendant.	)	

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CHRISTIAN, ADAM G., Judge

MEMORANDUM OPINION

(Filed: January 5, 2012)

I. Summary.

The Court is asked to determine whether Manauris Mercado is entitled to partial summary judgment on the liability portion of his negligence claim against the Government of the Virgin Islands. After reviewing the record, the Court finds that Plaintiff has not provided any evidence that the Government had actual or constructive notice of the allegedly defective drain cover at issue. Further, Plaintiff has not demonstrated that, at this point in the proceeding, *res ipsa loquitur* applies to his claim. Therefore, Plaintiff's motion for partial summary judgment will be denied.

II. Analysis.

a. Summary judgment standard.

Under FED. R. CIV. P. 56,¹ a party may move a court to summarily resolve claims or defenses in his favor. “The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”² A genuine dispute exists “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.”³ When faced with a motion for summary judgment, courts “must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party’s favor.”⁴ The moving party always bears the initial burden of demonstrating that there is no genuine issue of material fact.⁵ If the movant meets this responsibility, then the onus shifts to the non-moving party to do more than “show that there is some metaphysical doubt as to material facts.”⁶ However, if the movant fails to achieve its initial burden, the trial court is obligated to deny the motion for summary judgment.⁷

b. Applicable undisputed facts based on presented discovery.

In support of Mr. Mercado’s summary judgment motion, and as required by the pertinent rule,⁸ he presents a statement of undisputed facts. The facts contained therein are partly based on Plaintiff’s request for admissions and written interrogatories which were propounded on August 6, 2009,⁹ but not answered by the Government until January 20, 2011.¹⁰ Plaintiff contends that the facts set forth in his requests for admissions are deemed admitted due to the Government’s failure to timely respond. However, he also relies on facts derived from some of the Government’s belated responses to his interrogatories.

Under the Federal Rules of Civil Procedure, a party may request an admission of fact from the opponent, who must admit, deny with specificity, or object to each requested admission.¹¹ The party who is served with a request for admission has thirty (30) days from the date of service to provide a written answer or objection to the request, otherwise the matter is

¹ Rule 56 of the Federal Rules of Civil Procedure is applicable in this Court pursuant to Superior Court Rule 7 because it does not conflict with any local procedural rule.

² FED. R. CIV. P. 56(a).

³ *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248 (1986).

⁴ *Maduro v. Am. Airlines, Inc.*, S. Ct. Civ. No. 2007/029, 2008 WL 901525 at *3 (V.I. Feb. 28, 2008).

⁵ *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

⁶ *Airlines Reporting Corp. v. Belfon*, Civil Action No. 2003/146, 2010 WL 3664065 at *23 (D.V.I. Sept. 16, 2010) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)).

⁷ *E.g., Security Ins. Co. of Hartford v. Old Dominion Freight Line, Inc.*, 391 F.3d 77, 83 (2d Cir. 2004) (citations omitted).

⁸ FED. R. CIV. P. 56(c)(1).

⁹ *See*, Notice of Serving Plaintiff’s Interrogatories to Defendant’s (sic) and Request (sic) for Admissions, which was filed on August 6, 2009.

¹⁰ *See*, Notice of Service of Defendant Government of the Virgin Islands’ Response to Plaintiff’s Request for Admissions and Interrogatories.

¹¹ FED. R. CIV. P. 36(a)(1). Rules 26 through 37 of the Federal Rules of Civil Procedure govern the discovery process in the Superior Court pursuant to SUPER. CT. R. 39(a).

deemed admitted.¹² All discovery requests must be signed by counsel of record.¹³ If discovery requests are not signed, the receiving party is not obligated to respond, and the Court is directed to strike the unexecuted discovery if the propounding party is notified of the deficiency and fails to cure the same.¹⁴

Here, Plaintiff attaches to his statement of undisputed facts requests for admissions that are undated and not signed. Also, the certificate of service is not dated or executed. The Government was not under a duty to respond to this discovery in light of these defects. Nevertheless, the Government responded to these deficient discovery requests. Rather than direct the parties to re-serve and re-answer this discovery, and set this litigation back by several years, the Court deems the act of responding as the Government waiving the deficiencies in Plaintiff's propounded discovery. The Court will use the Government's admissions as undisputed facts for purposes of Plaintiff's pending motion. With respect to the Government's belated responses to Plaintiff's interrogatories, Mr. Mercado did not file any motion to compel while the discovery was outstanding. Moreover, he is using some of those responses to substantiate his motion for partial summary judgment. The Court concludes that Plaintiff has waived the right to challenge the lateness of the Government's responses to the interrogatories and will accept the submitted responses as undisputed facts. The Court also will accept the factual allegations contained in the affidavit Plaintiff attached to his motion.

Based on these undisputed facts, it appears that on February 11, 2009, Mr. Mercado was walking on the street between the Tramway and Buccaneer Mall in the Havensight area of St. Thomas, U.S. Virgin Islands, when he stepped on an iron drain cover.¹⁵ Plaintiff claims that as he stepped on the drain cover, it flipped up causing his foot to drop into the drain.¹⁶ Plaintiff did not see any problem with the drain cover and there were no warning signs in the vicinity.¹⁷ Mr. Mercado further contends that, as a result of this incident, he suffered lacerations to his leg from a protruding reinforcing bar in the drain, and also received contusions, strains, and other forms of physical injuries.¹⁸ Due to these lacerations and other injuries, Plaintiff required several stitches and bandages, was given medication, and had to use crutches.¹⁹ On March 9, 2009, Mr. Mercado filed a Complaint for damages against the Government, alleging that it was negligent in failing to properly maintain the drain and its cover, and is therefore liable for the damages he sustained.

The undisputed facts also reveal that the Government was properly served and that Plaintiff has complied with the provisions of the Virgin Islands Tort Claims Act ("VITCA").²⁰ The discovery provided by Plaintiff also indicates that the Government: 1) is presently unaware

¹² FED. R. CIV. P. 36(a)(3).

¹³ FED. R. CIV. P. 26(g)(1).

¹⁴ FED. R. CIV. P. 26(g)(2).

¹⁵ Manauris Mercado Affidavit at ¶ 2. The Court notes that various paragraphs in the affidavit contain legal conclusions in addition to facts. The Court will disregard the legal conclusions and rely solely on the facts asserted therein.

¹⁶ *Id.* at ¶ 3.

¹⁷ *Id.* at ¶ 4.

¹⁸ *Id.* at ¶ 6.

¹⁹ *Id.*

²⁰ Plaintiff's Requests for Admissions at ¶¶ 1 and 2, which the Government has admitted.

of any witnesses to the incident; 2) has no current knowledge as to what transpired; 3) is not aware whether there were warning signs in the area at the date in question; and 4) lacks a written maintenance policy for the particular drain and cover.²¹ Based on this information, Plaintiff contends that there is no genuine issue of material fact that the Government breached its duty of maintaining the drain and its cover in a safe condition. He further argues that partial summary judgment in his favor is warranted under the doctrine of *res ipsa loquitur*. The Court addresses both propositions below.

c. There are genuine issues of material fact on whether the Government had actual or constructive notice of any defects in or around the drain cover.

The Court first notes that Plaintiff served his motion on the Government on February 22, 2011. However, Defendant did not file its opposition brief until April 7, 2011, even though it was due on March 17, 2011. Defendant did not request an extension of time to file its opposition, provide any reason for its delayed submission in the body of the opposition, and there is no reason appearing to the Court which justifies the delay. In the absence of even a slight attempt to explain the delay, or an obvious reason appearing in the record, the Court will not entertain the Government's response.²² However, Plaintiff is not entitled to summary judgment simply because it is unopposed.²³ Rather, he must still meet his burden of demonstrating the absence of genuine material factual issues and his entitlement to judgment as a matter of law.²⁴

The elements of a negligence suit in the Virgin Islands are: 1) establishment of a duty; 2) breach of that duty; 3) causation of injury; and 4) damages.²⁵ Mr. Mercado relies on *Nevis v. Government*,²⁶ to support his contention that the Government had a duty to maintain the drain cover, and that it breached said legal obligation. In *Nevis*, this Court, sitting under its prior designation, clearly stated that the Department of Public Works ("Public Works") is an executive department in the Government that has a "continual duty to maintain the sidewalk and to repair all deficiencies which foreseeably could endanger...pedestrians."²⁷ The Court agrees, based on *Nevis* and other statutory provisions,²⁸ that the Government, through Public Works, had a duty to maintain the drain cover which was on the public road or public sidewalk on which Mr. Mercado was walking. However, this is as far as *Nevis* assists Mr. Mercado.

Importantly, in *Nevis*, the trial court was sitting as a trier-of-fact at a trial wherein testimony and other evidence was heard and admitted. At this juncture of this proceeding, however, this tribunal is limited to determining whether any issue of fact exists which can only be resolved by a trier-of-fact at trial. Thus, the result of the *Nevis* opinion cannot be reached in this matter based on the posture of the case. However, the legal precedent that the Government

²¹ Government's responses to Plaintiff's interrogatories nos. 6, 7, 15, 16, and 18.

²² See, *Martinez v. Columbian Emeralds, Inc.*, 51 V.I. 174, 189-191 (V.I. 2009).

²³ *Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168, 174-175 (3d Cir. 1990).

²⁴ *Id.*

²⁵ *White v. Spenceley Realty, LLC*, S.Ct. Civ. No. 2008-0065, 2010 WL 4961792 at *3 (V.I. July 28, 2010).

²⁶ 26 V.I. 162 (Terr. Ct. 1991).

²⁷ *Id.* at 164 (citing V.I. CODE ANN. tit. 31, § 1 (2003)).

²⁸ See, V.I. CODE ANN. tit. 3, § 138(a)(4) (2003).

must have had constructive or actual knowledge of the defective drain cover in order to be liable for breaching its duty of care, which was followed in *Nevis*, is applicable to this matter.²⁹ A municipality has constructive notice when a problem has existed for a period of time prior to the accident, and the problem was so obvious that the Government, when exercising its duty of care, should have discovered the problem and the potential for harm.³⁰ Alternatively, the Government has actual notice when the proper authority “has been expressly informed in writing or by oral complaint of the defect.”³¹

Plaintiff’s motion correctly notes that the Government needed to have constructive or actual notice of the defective drain cover to be liable for his injuries. He even lists factors that courts consider when addressing whether or not there was constructive notice. What the motion is missing, however, are record facts demonstrating that the Government had actual or constructive notice. Simply stating that Defendant knew or should have known of a dangerous condition is conclusory and does not discharge Plaintiff’s initial burden on the notice issue at this summary judgment stage. Importantly, the Appellate Division of the District Court of the Virgin Islands recently reaffirmed the principle that a possessor of real property is liable for injuries suffered due to a dangerous condition thereon only if the possessor has actual or constructive notice of the hazardous circumstance.³² Actual or constructive notice on the part of the landowner is an essential element of Mr. Mercado’s present action,³³ but he has not presented undisputed facts which demonstrate that the Government had any notice, of either type, of the dangerous condition of the drain cover. Because there are genuine fact issues on this essential element of Plaintiff’s negligence claims, his motion for summary judgment must be denied.

d. Plaintiff is not entitled to partial summary judgment under the doctrine of *res ipsa loquitur*.

Mr. Mercado contends that the facts he has presented are sufficient to grant him partial summary judgment on the basis of *res ipsa loquitur*. This doctrine allows an inference of negligence when “(a) the event is of a kind which ordinarily does not occur in the absence of negligence; (b) other responsible causes, including the conduct of the plaintiff and third persons, are sufficiently eliminated by the evidence; and (c) the indicated negligence is within the scope of the defendant’s duty to the plaintiff.”³⁴ *Res ipsa loquitur* allows a trier-of-fact to draw an inference from the evidence if the three conditions are met. But, “A *res ipsa loquitur* case is ordinarily merely one kind of case of circumstantial evidence, in which **the jury** may reasonably infer both negligence and causation from the mere occurrence of the event and the defendant’s

²⁹ *Nevis v. Government*, 26 V.I. at 164-167 (citations omitted).

³⁰ *Id.*

³¹ *Id.*

³² *Joseph v. Speedy Gas, Inc.*, D.C. Civ. App. No. 2007-0008, 2011 WL 6181205 (D.V.I. App. Div. Dec. 12, 2011) (affirming summary judgment in favor of defendant property owner where there were no facts demonstrating that defendant had actual or constructive knowledge of a dangerous condition under sections 343 and 344 of the Restatement (Second) of Torts).

³³ *Id.* at * 3 and * 7.

³⁴ RESTATEMENT (SECOND) OF TORTS § 328D (1965), which is applicable pursuant to 1 V.I.C. § 4.

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relation to it.”³⁵ As noted above, the Court is not sitting as a trier-of-fact when deciding Plaintiff’s summary judgment motion.

Further, Plaintiff has not produced any facts relative to whether any third persons may have caused the conditions under which the drain cover moved when he stepped on it. Although he argues that the Government had exclusive control, he also notes that the cover is on a public road or sidewalk. Thus, many persons other than designated government employees may have had access to the cover and altered its condition prior to the incident. It may be that at trial Plaintiff will present circumstances where *res ipsa loquitur* can be appropriately invoked. However, the Court cannot conclude that he has demonstrated the absence of genuine and material factual issues at this point in the proceedings to warrant partial summary judgment in his favor.

III. Conclusion.

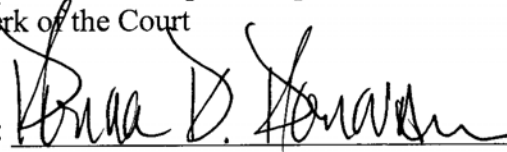
Plaintiff has not shown that the Government had any notice of the defective drain cover that is alleged to have caused Mr. Mercado’s injuries. Further, *res ipsa loquitur* cannot be applied at this stage of the proceedings based on Plaintiff’s presentation to the Court. Plaintiff has not met his initial burden of demonstrating that there is no genuine issue of material fact. Thus, he is not entitled to judgment in his favor, and his motion for partial summary judgment will be denied in an order of even date.

Dated: January 5, 2012


Hon. Adam G. Christian
Judge of the Superior Court
of the Virgin Islands

ATTEST:

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 
Donna Donovan
Acting Court Clerk Supervisor 1/5/12

³⁵ *Id.* at comment b (Emphasis added). See also, *Mendez v. Hovenssa, LLC*, 49 V.I. 826, 832 (D.V.I. 2008) (“When *res ipsa loquitur* applies, the jury may infer that a plaintiff’s harm was caused by the defendant’s negligence.”) (Emphasis added).