

**D'Agostino v Faigelman**

2011 NY Slip Op 33568(U)

December 28, 2011

Supreme Court, Suffolk County

Docket Number: 08-00042

Judge: W. Gerard Asher

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SHORT FORM ORDER

INDEX No. 08-00042

CAL. No. 10-02582MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 32 - SUFFOLK COUNTY

**PRESENT:**

Hon. W. GERARD ASHER  
Justice of the Supreme Court

MOTION DATE 4-28-11 (#001)  
MOTION DATE 4-25-11 (#002)  
ADJ. DATE 8-2-11  
Mot. Seq. # 001 - MG  
# 002 - MD

-----X  
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Plaintiffs,

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- against -

CHRISTINE MALAFI  
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JEFFREY FAIGELMAN, SS  
TRANSPORTATION CORP., COUNTY OF  
SUFFOLK and TOWN OF HUNTINGTON,

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Huntington, New York 11746

Defendant.  
-----X

Upon the following papers numbered 1 to 45 read on this motion for summary judgment; Notice of Motion (001) and supporting papers 1 -10; Notice of Motion (002) and supporting papers 20 - 28 Notice of Cross Motion and supporting papers   ; Answering Affidavits and supporting papers 11 - 43; Replying Affidavits and supporting papers 18 - 45; Other   ; (and after hearing counsel in support and opposed to the motion) it is,

**ORDERED** that the motion by defendant Town of Huntington for summary judgment and the motion by defendants Jeffrey Faigelman and SS Transportation Corp. for summary judgment are consolidated for the



purposes of this determination; and it is further

**ORDERED** that the motion (001) by defendant the Town of Huntington for an order granting summary judgment dismissing the complaint and all cross-claims asserted against it is granted; and it is further

**ORDERED** that the motion (002) by defendants Jeffrey Faigelman and SS Transportation Corp. for an order granting summary judgment dismissing the complaint is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiffs, Frank D'Agostino and Sandy Ramos, personally and derivatively, in a motor vehicle accident on April 25, 2007 involving a vehicle owned by defendant SS Transportation and operated by defendant Jeffrey Faigelman. The collision allegedly occurred at the intersection of Deer Park Road West (hereinafter "Rte 35") and DeForest Road, in Huntington, New York. Northern State Parkway exits into Deer Park Avenue (Rte 231), which splits into Deer Park Road West (Rte 35) and Deer Park Road East (Rte 66). DeForest Road crosses both, forming a triangle. As plaintiff traveled south on Rte 35 and attempted to make a left turn onto DeForest Road, defendant Faigelman, who was traveling north on Rte 35, struck plaintiffs' vehicle.

Defendant Faigelman and SS Transportation move (002) for summary judgment dismissing the complaint on the issue of liability. In support thereof, they submit the pleadings, a police accident report, the Department of Motor Vehicles report, aerial photographs from Google map, the Suffolk County Department of Public Works pavement marking plan, Frank D'Agostino's deposition, and Richard Wanat's deposition on behalf of the Town of Huntington. They contend D'Agostino's failure to maintain vigilance and to exercise caution while making a left turn was the sole proximate cause of the accident.

In opposition, plaintiffs contend that the Town of Huntington and County of Suffolk were negligent in designing the roadway, failing to maintain sufficient lighting, and failing to control the flow of high volume traffic with a traffic device and appropriate signage. In support thereof, plaintiffs submit a bill of particulars, D'Agostino's testimony, an accident diagram, photographs, complaints submitted to the Town, and Faigelman's deposition testimony. Plaintiffs argue that the roadway was winding, and the heavy traffic volume flowing from the Northern State Parkway onto Rte 231 and into Rte 35 created a dangerous roadway. Plaintiffs contend that Faigelman's speed combined with these factors prevented him from seeing Faigelman's vehicle until it was too late.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 925 [1980]).

"The driver of a vehicle intending to turn to the left within an intersection or onto an alley, private road or driveway shall yield the right of way to any vehicle approaching from the opposite direction, which is within the intersection or so close as to constitute an immediate hazard" (Vehicle & Traffic Law § 1141). Violation of the statute is negligence per se unless the plaintiff comes forward with a reasonable

explanation.

Plaintiff testified that it was raining at the time of the accident, and his windshield wipers were on, slightly obstructing his view. He stated that traffic was light, and there were no traffic signals at the intersection. He testified that the road curves in a southeasterly direction. He intended to make a left turn at Deforest Road in order to go north on Deer Park Road East (Rte 66). He signaled and came to a gradual stop before the intersection, three or four feet from where there is a break in the double yellow lines, remaining there for approximately five to 10 seconds. He then moved two to three feet, traveling at a rate of only one mile per hour. He testified that he could see 25 to 30 feet ahead of him, but that the road is winding so he could not see any traffic coming northbound beyond that point. Plaintiff did not see Faigelman's vehicle until two seconds before contact between the vehicles, when it was five to ten feet away. He states that the approximate speed of defendants' vehicle was 40 to 50 miles per hour as it came around the corner. The front of Faigelman's vehicle struck the front passenger side of D'Agostino's vehicle. After the accident, Faigelman asked plaintiff why he proceeded into the intersection, to which he replied that he could not see Faigelman's vehicle until the moment of impact.

Faigelman testified that he is employed as a taxi cab operator at Orange and White Taxi Corp., however, defendant SS Transportation is listed as the owner of the taxi cab on the registration and insurance card. He testified that he saw plaintiffs' vehicle 100 to 150 yards ahead stopped in the southbound lane at the intersection of Rte 35 and Deforest Road. When his taxi cab was 5 to 10 feet away, plaintiff began to turn left. Faigelman states that there is a traffic light at the split between Rte 35 and Deer Park Avenue East (Rte 66), and the light was green when he traveled through it. He states that D'Agostino's vehicle was sitting at the intersection of DeForest Road, about 100 feet past the traffic light that was green. He observed that D'Agostino had been stopped at the DeForest intersection for approximately five or six seconds, when he observed him begin to move immediately before the impact. Plaintiff's vehicle moved across the intersection about 5 to 10 feet. He states that at the moment of impact his vehicle was traveling at 35 miles per hour. Faigelman testified that he could see clearly and that the lighting was sufficient.

Here, (002) defendants Faigelman and SS Transportation established their prima facie entitlement to summary judgment by demonstrating that plaintiff violated Vehicle and Traffic Law §1141 when he attempted to make a left turn into the path of the Faigelman vehicle, without yielding the right of way, and under circumstances when the turn could not be made with reasonable safety (*see Sureda v Diamonti*, 300 AD2d 572, 751 NYS2d 874 [2d Dept 2002]; *Pryor v Reichert*, 265 AD2d 470, 696 NYS2d 525 [2d Dept 1999]). Moreover, since defendant Faigelman had the right of way, it entitled him to anticipate that D'Agostino would obey the traffic law which required him to yield (*see Russo v Scibetti*, 298 AD2d 514, 748 NYS2d 871 [2d Dept 2002]; *Cenovski v Lee*, 266 AD2d 424, 698 NYS2d 868 [2d Dept 1999]; *Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2d Dept 2000]).

However, in opposition, plaintiffs argue that Faigelman was speeding and failed to use caution, which contributed to the cause of the accident. Faigelman testified that although he observed plaintiffs' vehicle 100 feet away from the intersection where the accident occurred, he kept his foot over the brake observing D'Agostino's next move, but did not slow down or apply the brake until impact. In view of the foregoing, plaintiffs' raise material issues of fact which include whether Faigelman was speeding and failed to use caution, contributing to the cause of the accident, and whether conditions existed at the time of the collision requiring Faigelman to either reduce his speed or keep a more careful lookout upon entering an

intersection (see *Anderson v Miller*, 263 AD2d 643, 692 NYS2d 816 [2d Dept 2000]).

Accordingly, the motion (002) for an order granting summary judgment to defendants Faigelman and SS Transportation is denied.

Defendant, the Town of Huntington (hereinafter "the Town") also moves (001) for an order granting summary judgment dismissing plaintiffs' complaint and all cross-claims against it. In support thereof, the Town submits the pleadings, the notice of claim, the General Municipal Law §50(h) hearing transcript, and the deposition transcripts of Frank D'Agostino, and Richard Wanat, an engineer employed by the Town. The Town contends that it does not own, maintain or control the roadway where the accident occurred and that the only possible claim against it involves the issue of sufficient lighting at the site of the accident. The Town contends that even if there was insufficient street lighting, a municipality does not have a duty to maintain existing street lights absent a dangerous defect in the roadway, and that there were no unusual defects at the site of the accident that would impose a duty on the Town to maintain street lights (Highway Law §327, 328).

Highway law §327 provides that the town board of any town, subject to the approval of the Commissioner of Transportation, may from time to time provide for lighting dangerous portions of any road or highway and of bridges located thereon. The town board may provide for the care of such lights in such manner as it may deem proper, and the town board may, in its discretion, at any time discontinue the lighting of any road, highway or bridge, or any portion thereof. In the absence of any duty to provide lighting, and in view of a town's authority pursuant to statute to discontinue, at any time, any lights which the town, in its discretion, chose to install, there can be no liability for failure to maintain such lighting once installed.

The Deputy Director of General Services, Richard Wanat, an engineer, employed by the Town testified that the Town replaced lights in response to complaints by residents when lights are malfunctioning. He testified that the site of the accident is equipped with nine street lights, seven of which are 250 watts and the remaining two with 150 watts.

Arvind Vora, testified on behalf of the County of Suffolk that the Town is responsible to install street light poles, to maintain them, and to install the bulb.

Here, the Town established its prima facie entitlement to summary judgment dismissing plaintiffs' complaint against it. A municipality is only required to provide street lighting in certain situations, where there is a defect or where there is some excavation, defect or obstruction in the street (*Mastro v Maiorino*, 174 AD2d 654, 571 NYS2d 515 [2d Dept 1991]; Highway Law §327). The adduced evidence demonstrates that the Town provided lighting and maintained it; and no defect existed at the site of the accident which required additional lighting.

In opposition, plaintiffs contend that the intersection between Deer Park Avenue and DeForest Road is the site of many accidents, that many complaints have been made to the Town and that the Town is aware of the defective design and hazardous nature of the roadway. Plaintiffs argue that the combination of the curvature of the roadway and the nature of the traffic volume from the Northern State Parkway posed a hazard, placing a greater responsibility on the Town to provide a well lit roadway. However, plaintiffs

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failed to proffer evidence that a dangerous or hazardous condition existed at the site of the accident, or that the roadway was not adequately illuminated. The complaints made to the Town and submitted with the instant application do not pertain to lighting. Plaintiff did not proffer any expert testimony as to any defective or hazardous design of the roadway. D'Agostino testified that traffic was light at the time of the accident; thus, the flow of traffic was not a significant issue. Therefore, plaintiff failed to demonstrate that D'Agostino was not the sole proximate cause of the accident, and, thus, failed to raise a material issue of fact.

Accordingly, defendant Huntington's motion for an order granting summary judgment dismissing plaintiffs' complaint is granted. The action is severed and continued against the remaining defendants Faigelman, SS Transportation and County of Suffolk.

The defendant Town of Huntington is directed to serve a copy of this order with notice of its entry upon the calendar clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the CCP calendar for the next available date.

Dated: Dec. 28, 2011

W. Gerard Ashe  
J.S.C.

       FINAL DISPOSITION      X   NON-FINAL DISPOSITION