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SHORT FORM ORDER

INDEX No. 08-43883
CAL No. 11-00729MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 8-16-11
ADJ. DATE 10-25-11
Mot. Seq. # 001 - MG

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JOSE L. TORRES, JR.,

Plaintiff,

- against -

MICHELLE SCONGERELLA,

Defendant.

LAW OFFICES OF JOSEPH DELISO & ASSOCIATES
Attorney for Plaintiff
8004 Fifth Avenue
Brooklyn, New York 10007

RUSSO APOZNANSKI & TAMBASCO
Attorney for Defendant/Third-Party Plaintiff
875 Merrick Avenue
Westbury, New York 11590

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MICHELLE SCONGERELLA,

Third-Party Plaintiff,

- against -

ROY M. PUNTERVOLD and THERESA G. PUNTERVOLD,

Third-Party Defendants.

ANDREA G. SAWYERS
Attorney for Third-Party Defendants
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Melville, New York 11747

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion (001) by the third party defendants Puntervold dated July 22, 2011, and supporting papers numbered 1-14; Opposition by the third party plaintiff dated August 9, 2011 and supporting papers numbered 15-17 ; and Reply dated September 6, 2011 and supporting papers numbered 1-19 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that motion (001) by the third-party defendants, Roy M. Puntervold and Teresa G. Puntervold for summary judgment dismissing the third-party complaint asserted by the defendant/third-party plaintiff, Michelle Scongerella, is granted and the third-party complaint and the counter claims asserted by the third-party defendants are dismissed.

The plaintiff, Jose L. Torres, Jr., seeks damages for personal injuries claimed to have been sustained on July 4, 2008, on Chenango Drive, at or near its intersection with Gardiner Drive in Bay Shore, New York, when the motor vehicle owned and operated by the defendant/third-party plaintiff, Michelle Scongerella, allegedly, unlawfully and negligently, went through a stop sign, striking his vehicle. In the third-party complaint, the defendant/third-party plaintiff, Michelle Scongerella, seeks contribution/indemnification and judgment over and against the third-party defendants, Roy M. Puntervold and Teresa G. Puntervold, on the bases that they negligently maintained their premises at 105 Chenango Drive, Bay Shore in a dangerous and unsafe condition in violation of Islip Town Code 68-404, and that they had actual and constructive notice of said unsafe and dangerous condition. Such condition consisted of the overgrowth of bushes, shrubs, trees, and vegetation on their premises, which obstructed and blocked the view of the intersection by the defendant/third-party plaintiff, thus causing the within accident. The third-party defendants have asserted counterclaims for indemnification and contribution with judgment over against the third-party plaintiff.

The third-party defendants seek summary judgment dismissing the third-party complaint on the bases that the third-party defendants did not own the bushes, trees, and/or shrubs that abut the property at 105 Chenango Drive, Bay Shore, which vegetation allegedly impeded the view of traffic traveling southbound on Gardiner Drive as the defendant/third-party plaintiff traveled on Chenango Drive. They allege they had no duty or responsibility to maintain the same.

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 eliminate any material issues of fact from the case (***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]).

In support of this motion, the third-party defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, third-party summons and complaint, the answers served in response to the complaint and third-party complaints, the plaintiff's verified bill of particulars, and the third-party plaintiff's bill of particulars; the unsigned but certified transcript of the examination before trial of Jose Torres dated December 10, 2010; the signed and certified copy of the transcript of the examination before trial of Michelle Scongerella dated December 10, 2010; the signed transcripts of the examinations before trial of Roy M. Puntervold and Teresa G. Puntervold each dated February 17, 2011; copies of five photographs; a survey dated July 13, 2011 with a sight triangle added July 14, 2011; and the affidavit of Albert W. Tay dated July 19, 2011.

Jose L. Torres, Jr. testified to the extent that he was involved in an automobile accident on July 4, 2008 while he was driving his Gulf GTI Volkswagon on Gardiner Drive in a southerly direction. He described Gardiner Drive as a two lane road, one lane in each direction, and stated that it intersects with Chenango. He had stopped for a stop sign one block before reaching the intersection with Chenango Drive, and shifted from first to second gear, traveling about twenty five miles an hour prior to the accident occurring. There were no

vehicles traveling in front of his vehicle, and he saw no northbound traffic in the oncoming lane. He described Gardiner as a straight road in a residential neighborhood. At the intersection of Gardiner and Chenango, Gardiner continued straight across Chenango. As he was proceeding southbound on Gardiner, there was a house located at the northwest corner intersection with Chenango. There were bushes to his right on Chenango Drive and a bush hung over the roadway, but he did not know how far. He was involved in the accident with a vehicle traveling in an eastbound direction on Chenango, coming from his right. The intersection was controlled with a stop sign on Chenango. Gardiner Drive was not controlled by a traffic device. When he was about thirty feet from the intersection with Gardiner, he could see the stop sign. There was no vehicle stopped at the stop sign, and there were no vehicles which could be seen about three car lengths down Chenango. The bush or tree that was at the corner did not block his view in any way. He first saw the defendant's vehicle to his right a split second prior to the accident after he entered the intersection. The front of the defendant's vehicle struck the rear passenger side and quarter panel of his vehicle, causing his vehicle to slide sideways, hit the curb, then strike a pole on the left southbound side of the intersection, causing his vehicle to flip three times. He could not estimate the speed of the defendant's vehicle at the time of impact. The weather was clear.

Michelle Scongerella testified to the extent that she was driving a 2008 Acura at the time of the accident. She was en route to a friend's house located on Chenango Drive, and had been there about ten times previously. She testified that she was familiar with the intersection of Chenango Drive and Gardiner Drive as she had traveled the same route on those other occasions. On the date of the accident, she traveled for about three blocks on Chenango Drive, which she described as a two way street, with a single lane in each direction. She continued that she knew the stop sign was there based upon her experience of having traveled down that roadway, and that there was no stop sign or other traffic control device controlling traffic on Gardiner. She testified that prior to the accident, there was nothing which prevented her from seeing the stop sign. As she approached the intersection, she was traveling about twenty five miles per hour, began to slow down, and stopped at the stop sign. She looked to her left, and then to her right, and was able to see Gardiner Drive. To her left, she stated, there was a huge tree or bushes which prevented her from seeing more than about twenty-five to thirty feet down Gardiner. She moved her vehicle forward to get a better view by inching up and coming to another stop beyond the stop sign. She did not know how far past the stop sign the front of her vehicle was, but stated her vehicle was protruding beyond the stop sign. She was then able to see further down Gardiner. She did not see anything to her left, then looked to her right. She testified that her vehicle was struck by the plaintiff's vehicle before she could look to her left again. She did not see the plaintiff's vehicle at any time before the impact, and thought it came from her left. The impact was to the nose and left front of her vehicle, and the whole front came off. She contends that at the time of the impact, her vehicle was not moving.

Roy Puntervold testified to the extent that he has resided at the property located at 105 Chenango Drive, Bay Shore for twenty eight years and owns it with his wife Teresa. He described Chenango Drive as running east and west, with a stop sign controlling traffic on Chenango Drive where it intersects with Gardiner Drive. There is no stop sign for traffic traveling on Gardiner Drive. He was at home when the motor vehicle accident occurred on July 4, 2008. Through his living room window, he saw a car traveling eastbound on Chenango Drive. He stated that "basically, the car slowed down and kept going." He continued that it was traveling about twenty miles per hour, then slowed to about ten to fifteen miles per hour. He stated that it "just caroused by," and added that it did not stop at the stop sign. He thought that it was about halfway into the intersection as he looked away and heard a crash. He saw the car on Chenango hitting the little car, which, upon impact, started to roll, hit the telephone pole, rolled over about five times, taking out the neighbor's fence and another neighbor's mail box, coming to a stop about three feet from the second telephone pole. He believed the little car flipped about four or five times before stopping. Following some inconsistent testimony, Puntervold finally testified that he never saw the plaintiff's vehicle prior to the accident and was therefore not able to tell its speed prior to

the contact with the defendant's car. He thought that the little car tried to avoid the car going through the stop sign as the little car was on the wrong side of the road at the place of contact.

Puntervold testified that about three days after the accident, he hired Anderson Tree Service to cut down a tree just to the right of the white fence because he had a major problem with kids smoking pot and drinking beer between the trees and the fence. He stated he was afraid the kids would set the yard on fire and that he found broken bottles and condoms there. During the years that he lived in his home, he trimmed the tree and his neighbor, Anderson Tree Service, also trimmed it. He stated that the pine tree located one foot inside of his fence was thirteen feet from the road, and fifty-seven feet north of the intersection of Gardiner and Chenango, when it was cut down. The branches, which were about five and a half feet off the ground and extended to about five feet from the intersection. All the other trees, six scrub oaks, were located outside his fence to the east side of his property. He had them removed when he had the pine tree cut down. There is no sidewalk or cement curb to the east of his property. He testified that he drove eastbound on Chenango Drive to the intersection with Gardiner Drive once or twice a day. When he stopped at the stop sign, situated about eighteen feet from the intersection, he had to move up a little bit to the corner to clear the trees to his left so he could see about two and a half houses, or 250 to 260 feet, down the road. When he did that, the section between the front tire and the bumper of his vehicle were in the southbound lane of Gardiner. He never made any complaints about the location of the stop sign at the intersection, but he did make complaints to the Town of Islip and the Suffolk County Highway Department requesting that a four way stop sign be placed at the intersection because no one stops at the one stop sign and everyone speeds down Gardiner. Puntervold also testified that about five to ten years ago, the school district asked him to remove trees from that corner because there was a bus stop there and the school district felt the trees obstructed traffic. He stated, however, that the Town of Islip removed two trees and the stumps.

Teresa Puntervold testified to the extent that she and her husband have lived in their home at 105 Chenango Drive for twenty eight years. The house had been previously owned by her husband's mother and father, and that they purchased the home from them in 2005. Prior to July 4, 2008, the subject trees were cut by her husband and by LIPA. The trees were there for as long as she could remember.

In order to recover damages for negligence, it must be shown that the defendant owes a duty of care to the plaintiff. Whether a duty exists is for the court to decide. Forseeability of injury does not determine the existence of a duty. It is the responsibility of the courts to fix the bounds of duty, where logic, science, and policy all play an important role. Forseeability is used to determine the scope of duty, only after it has been determined that there is as duty (***Ingenito v Rosen, P.C.***, 187 AD2d 487, 589 NYS2d 574 [2d Dept 1992]). Here, it is determined that the third-party defendants have established, prima facie, their entitlement to judgment as a matter of law by demonstrating that they owed no duty to the defendant/third-party plaintiff with respect to her claim that the vegetation obscured her view at the intersection of Chenango Drive and Gardiner Driver.

There is no common-law duty of a landowner to control the vegetation on his property for the benefit of users of a public highway (***Ingenito v Rosen, P.C.***, supra). However, the third-party plaintiff asserts that the third-party defendants violated the Islip Town Code §68-404, thus imposing a duty upon them to control the vegetation on their property. Town of Islip Code §§ 68-404 and 68-405 prohibits a property owner from permitting foliage along the roadway to grow in excess of three feet, thereby creating a visual obstruction to a motorist's view. Violation of these ordinances imposes a duty on the property owner that could give rise to tort liability for damages proximately caused by their violation (*see*, ***Deutcsh v Davis***, 298 AD2d 487, 750 NYS2d 84 [2d Dept 2002]). It has been established by the evidentiary proof, namely, the affidavit of Albert W. Tay, as supported by the survey, that the third-party defendants did not own the property where the foliage which is

claimed to have obstructed the view at the intersection, was growing. None of the foliage from the pine tree on their property obstructed the view at the intersection or was located within the sight triangle.

Albert W. Tay avers that he is a New York State Licensed Professional Land Surveyor and has attached a copy of a survey for 105 Chenango Drive, Bay Shore, New York, conducted to determine the location of trees and/or tree stumps which abut the Gardiner Drive side of the property. He indicates that the property is located on the northwest corner of the intersection of Chenango Drive and Gardiner Drive, Bay Shore, with a stop sign controlling the eastbound direction of travel on the southwest corner of Chenanco Drive. He avers, that based upon the observations made during the survey, there is evidence of three trees (two tree stumps and one remaining tree) which abut the subject property on the Gardiner Drive side of the property, and that all three trees and/or tree stumps are situated in the right-of-way of Gardiner Drive and not within the metes and bounds of the premises known as 105 Chenango Drive, Bay Shore. Tay also states that he reviewed the photographs marked as various exhibits at the deposition, and which have been submitted in support of the motion. He further avers that the tree stumps or tree are not located within the line of the sight triangle as described in Section 68-404 of the Islip Town Code.

The defendant/third-party plaintiff, in opposing this motion with an attorney's affirmation and a photograph, has failed to raise a triable issue of fact to preclude summary judgment from being granted to the third-party defendants. The defendant/third-party plaintiff, by counsel, submits merely conclusory assertions and has failed to submit an affidavit from a surveyor, or other qualified expert, demonstrating that the tree which the third-party defendants had removed from their property violated Islip Town Code §68-404, or that it or the other subject foliage was located within the metes and bounds of the plaintiff's property at 105 Chenango Drive, Bay Shore, thus giving rise to duty and possible liability in this action.

Accordingly, motion (001) is granted and the third-party complaint and the counter claims asserted in the third-party answer are dismissed.

Dated: 2/3/12

Peter H. Mayer
PETER H. MAYER, J.S.C.