Moisa v Cunningham
2012 NY Slip Op 31500(U)
June 4, 2012
Supreme Court, Suffolk County
Docket Number: 08-9923
Judge: Jeffrey Arlen Spinner
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SHORT FORM ORDER

INDEX No. 08-9923
CAL No. 11-02296MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 3-14-12
ADJ. DATE 5-2-12
Mot. Seq. # 001- MD
002 - MG

STACIE MOISA and BRENT MOISA,

Plaintiffs,

- against -

WILLIAM J. CUNNINGHAM and TOWN OF HUNTINGTON,

Defendants.

JEFFREY S. LISABETH, ESQ.
Attorney for Plaintiffs
54 Willis Avenue
Mineola, New York 11501

DESENA & SWEENEY, ESQS.
Attorney for Defendant Cunningham
1383-32 Veterans Memorial Highway
Hauppauge, New York 11788

JOHN J. LEO, ESQ., TOWN ATTORNEY
Attorney for Defendant Town of Huntington
100 Main Street
Huntington, New York 11743

Upon the following papers numbered 1 to 41 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 ; Notice of Cross Motion and supporting papers 14 - 31 ; Answering Affidavits and supporting papers 32 - 34; 35 - 36 ; Replying Affidavits and supporting papers 37 - 38; 39 - 41 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that defendant William J. Cunningham's motion for summary judgment dismissing the complaint is denied; and it is further

ORDERED that defendant Town of Huntington's cross-motion for summary judgment, dismissing the complaint and all cross-claims, is granted.

The basic facts are, apparently, not in dispute. The motor vehicle accident underlying plaintiff's complaint occurred on July 3, 2007 at approximately 3:55 p.m. on a day that was reportedly dry and clear. The car driven by plaintiff Stacie Moisa (hereinafter "plaintiff") was proceeding south on Daly Road in the Town of Huntington. Defendant Cunningham was proceeding north on Daly Road. Upon

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arriving at the intersection of Daly Road and Wicks Road, which was owned and controlled by the Town of Huntington, plaintiff turned left onto Wicks Road colliding with defendant Cunningham's vehicle. There was no traffic control device at the subject intersection.

Defendant Cunningham has moved for summary judgment on the issue of liability, claiming that plaintiff made the left turn without slowing and that he had no time to react. He refers the court to the statement of an independent witness (Zawadzki) on the police report, which stated that plaintiff's vehicle made the turn at a high rate of speed without slowing. Defendant Cunningham also refers to Vehicle & Traffic Law §1143, arguing that plaintiff violated said section for failing to yield the right of way to Cunningham, giving him no time to respond.

The defendant Town of Huntington ("defendant Town") has cross-moved for summary judgment, arguing that plaintiff's claims that the Town was negligent in the design of the road, the implementation of the Town Code and traffic plan, and the failure to place a traffic control device at the Daly Road/Wicks Road intersection cannot survive this cross-motion, as a matter of law. The Town argues that it has qualified governmental immunity for traffic safety design and planning, that there was no prior written notice of a defective condition, as required by Town Law §65-a(1), and that there was no evidence that the Town created a dangerous condition that was the proximate cause of plaintiff's injuries. The Town attaches an affidavit from an employee in the Town Clerk's Office, swearing that a search of the records reflects no written notice of a roadway defect in the accident location for a period of five years prior to the accident herein. There is also an affidavit from a Town Highway Project Assistant in the Town Highway Superintendent's Office, who having conducted a search of the records, failed to find any complaints of a roadway defect or any records of work performed by the Town with regard to road design changes. In addition, the deposition transcript and affidavit of a Town Traffic Engineer in the Department of Transportation and Traffic Safety (Kusko) reflect that his review of the accident reports received by the Town from the Suffolk County Police Department reveals seven accidents over a ten year period at the subject location. Kusko also attests that there is no evidence of missing road markings or street signs, nor is there any evidence of roadway reconstruction or redesign during the same ten year period. He concludes that the subject intersection is reasonably safe for drivers who obey the rules of the road (Affidavit of Bradley Kusko, p. 2, ¶8).

The Town's cross-motion is opposed by both defendant Cunningham and plaintiff. Defendant Cunningham argues that plaintiff has testified that the roadway is "very curvy" and that there was a limited sight distance, that she could see no more than fifty (50) feet down the road and was already making her turn before she saw defendant Cunningham's vehicle, reflecting that the curvature of the road and limited sight distance should be considered contributing factors to the accident. Defendant Cunningham also argues that the seven accidents in ten years should be considered notice of the defective condition at the intersection of Daly and Wicks Road. It is noted that this defendant has also argued that plaintiff's actions or inactions were the sole proximate cause of the accident in question (Cunningham Reply Affirmation, p. 4, ¶12).

Plaintiff's opposition stresses the curves in the road and limited sight distance, adopting defendant Cunningham's opposition to the Town's cross-motion. She also opposes Cunningham's motion for summary judgment by arguing that there are triable issues of fact as to when Cunningham

saw plaintiff's vehicle with its left turn signal on and whether he failed to slow down sufficiently under the circumstances, citing Vehicle & Traffic Law §1180(e).

In reply, the Town argues that plaintiff's testimony at her 50(h) hearing and at her deposition contain conflicting statements, that the proximate cause of the accident was plaintiff's failure to observe or yield the right of way to oncoming traffic, that plaintiff has failed to properly specify the defective condition at the intersection of which defendant Town had notice or created, and that even after the note of issue has been filed, there has been no expert witness disclosure or evidence that would divest the Town of its qualified immunity.

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 (*see*, ***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]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Ctr.,*** *supra*). Once this showing has been made, however, 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 (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York,*** *supra*).

A municipality owes to the public the absolute duty of keeping its streets in a reasonably safe condition (*see*, ***Friedman v State***, 67 NY2d 271, 502 NYS2d 669 [1986]). While the design, construction, and maintenance of public highways is entrusted to the sound discretion of municipal authorities, the municipality has a duty to keep its highways reasonably safe for those who obey the rules of the road (*see*, ***Levi v Kratovac***, 35 AD3d 548, 827 NYS2d 196 [2d Dept, 2006]; ***Carrillo v County of Rockland***, 11 AD3d 575, 782 NYS2d 668 [2d Dept, 2004]). One who is injured in a traffic accident can recover against a municipality if it is shown that its failure to install a traffic control or warning device was negligent under the circumstances, that this omission was a contributing cause of the mishap, and that there was no reasonable basis for the municipality's inaction (*see*, ***Alexander v Eldred***, 63 NY2d 460, 483 NYS2d 168 [1984]). The papers submitted in opposition to the Town's cross-motion fail to raise any triable issues of fact with respect to the Town's position that it was not negligent and met its obligation to make the intersection at issue reasonably safe (*see*, ***McArthur v Muhammad***, 27 AD3d 532, 810 NYS2d 352 [2d Dept, 2006]; ***Scott v City of New York***, 16 AD3d 485, 791 NYS2d 184[2d Dept., 2005]; ***Alcalay v Town of North Hempstead***, 262 AD2d 258, 690 NYS2d 739[2d Dept, 1999]). In fact, plaintiff produces only her attorney's affirmation in opposition to defendants' motion and cross motion.

The parties assert that the road had a 30 m.p.h. speed limit and that the road was "curvy" with nothing more to establish that the Town failed to maintain the road in a reasonably safe condition. No evidence, such as an expert witness, has been produced that would allow the court to conclude that seven traffic accidents over the course of ten years, in and of itself, requires action on the part of the Town to address a problematic situation. Further, neither plaintiff nor defendant Cunningham have raised triable issues of fact with respect to whether negligence, if any, on the part of the Town in failing to make the

intersection reasonably safe was a proximate cause of the plaintiff's injuries (*see*, ***Ernest v Red Creek Cent. Sch. Dist.***, 93 NY2d 664 695 NYS2d 531[1999]; ***Scott v City of New York***, *supra*; ***McFadden v Village of Ossining***, 48 AD3d 761, 854 NYS2d 141 [2d Dept, 2008]).

Accordingly, the Town's cross motion for summary judgment, dismissing plaintiffs' complaint and any cross-claims against it is granted.

With respect to defendant Cunningham's motion for summary judgment, Vehicle and Traffic Law § 1143 provides that "[t]he driver of a vehicle about to enter or cross a roadway ***from any place other than another roadway*** (emphasis added) shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed" (*see also*, ***Gandolfo v DeMasi***, 28 AD3d 606, 813 NYS2d 527 [2d Dept 2006]. Vehicle & Traffic Law §1141 provides that a driver turning left within an intersection 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. Whether §1141 applies herein is unclear from the facts presented to the court for its consideration. Based on the facts and circumstances recited to the court on the papers supporting and opposing the motions herein, triable issues of fact exist concerning the comparative liability of the parties. The referenced V&TL sections are not dispositive of the situation before the court. Further, there may be more than one proximate cause of an accident (***Cox v Nunez***, 23 AD3d 427, 805 NYS2d 604 [2005]). For instance, evidence that a driver may have been negligent in failing to yield to a vehicle (*see*, Vehicle and Traffic Law § 1143) does not establish that defendant was free of comparative fault (*see*, ***Calcano v Rodriguez***, 91 AD3d 468, 936 NYS2d 185 [2012]; ***Singh v Doo Jae Lee***, 76 AD3d 555, 907 NYS2d 252 [2010]).

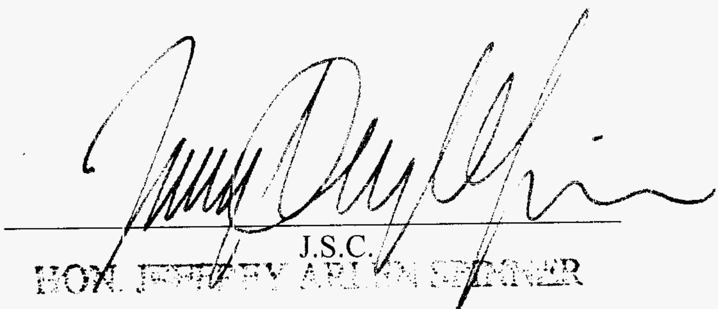
It is axiomatic that the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility. Further, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see*, ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). While the statement made by the nonparty witness (Zawadzki) is compelling, his credibility and ability to gauge plaintiff's relative speed under the circumstances should be assessed by the trier of fact in conjunction with other factors concerning the parties' contribution to the accident (see ***Kolivas v. Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]; ***Knepka v. Tallman***, 278 AD2d 811, 718 NYS2d 541 [4th Dept, 2000]).

Although plaintiff testified during a deposition that she stopped before entering the intersection and proceeded slowly into it before observing defendant's car approaching, as indicated, a nonparty witness recalls that she was traveling at a high rate of speed and did not slow down. Defendant testified that, while traveling at the speed limit, he saw plaintiff's car from some 500 feet away and observed her turn on her left turn signal as she approached the intersection, but that he (defendant Cunningham) did not slow down. He claims that he had no time to react before the front of his vehicle made contact with the passenger side of plaintiff's vehicle (Cunningham Deposition Transcript, p. 34). Viewing the evidence in a light most favorable to the plaintiff, there are triable issues of fact, sufficient to defeat summary judgment; to wit, whether the defendant had adequate time to perceive and react to the presence of the plaintiff's vehicle, whether the defendant failed to use reasonable care to avoid a collision, and whether such failure, if any, contributed to the accident (*see* ***Steiner v Dincesen***, ___

AD3d ___, 2012 NY Slip Op 03438 [2012]; ***Bonilla v Gutierrez***, 81 AD3d 581, 915 NYS2d 634 [2011]).

Thus, for the reasons set forth herein, defendant Cunningham's motion for summary judgment dismissing the complaint is denied.

Dated: JUN 04 2012



J.S.C.

HON. JEFFREY ARLEN SPINNER

_____FINAL DISPOSITION __X__ NON-FINAL DISPOSITION