Manzella v County of Suffolk
2016 NY Slip Op 30301(U)
February 4, 2016
Supreme Court, Suffolk County
Docket Number: 12-4042
Judge: W. Gerald Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 12-4042
CAL. No. 14-01310MV

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 6-13-14 (001)
MOTION DATE 8-19-14 (002)
MOTION DATE 12-10-14 (003)
ADJ. DATE 7/28/15
Mot. Seq. # 001 -MG
002 - MD
003 - MG

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SHANNON MANZELLA,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF SMITHTOWN and KAREN CHOUINARD,

Defendants.

----------X

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Upon the following papers numbered 1 to 49 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11,12-21, 22-39, ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 40-43 ; Replying Affidavits and supporting papers 44-45, 46-47, 48-49 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant Karen Chouinard ("Chouinard") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted; and it is further

ORDERED that the motion by defendant County of Suffolk ("County") for an order pursuant to CPLR 3211 and 3212 granting summary judgment dismissing the complaint and all claims or cross-claims insofar as asserted against it is denied; and it is further

ORDERED that the motion by defendant Town of Smithtown ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted.

This is an action to recover damages for injuries allegedly sustained by the plaintiff, Shannon Manzella ("Manzella"), as a result of a motor vehicle accident which occurred on February 11, 2011, at approximately 4:30 p.m., at the intersection of Terry Road and Elizabeth Avenue, in the Town of Smithtown, County of Suffolk. The accident occurred when the vehicle operated by the plaintiff Manzella was struck by the vehicle driven by the defendant Chouinard, while was attempting to make a left hand turn onto Terry Road.

Defendant Chouinard now moves for summary judgment in her favor, on the ground that she did not breach any duty owed to the plaintiff for the accident which gave rise to this action. Defendant Chouinard submits, her attorney's affirmation, a copy of the pleadings, a copy of the deposition transcripts of the plaintiff and the defendant Chouinard, a copy of the deposition transcript of Robert Medwig as a witness for the defendant Town, and a copy of the deposition transcript of Edward Stegmeier as a witness for defendant County. Defendant County has also moved for summary judgment dismissing the complaint and all claims or cross-claims insofar as asserted against it. Defendant County submits, its attorney's affirmation, a copy of the pleadings, a copy of the deposition transcripts of the plaintiff and the defendant Chouinard, a copy of the deposition transcript of Robert Medwig as a witness, the affidavit of John Donovan, sworn to July 23, 2015 and the affidavit of Timothy Laube, sworn to July 14, 2014. Defendant Town also moves for summary judgment dismissing the complaint and all claims or cross-claims. Defendant Town submits, *inter alia*, its attorney's affirmation, a copy of the pleadings, a copy of the deposition transcripts of the plaintiff and the defendant Chouinard, a copy of the deposition transcripts of Robert Medwig, Paul Morano, Vincent Matula and Edward Stegmeier as witnesses, the affidavit of Vincent Puleo, sworn to on November 10, 2014and the affidavit of Vincent Matula, sworn to on November 24, 2014. In opposition plaintiff submits her attorney's affirmation, six photographs, and the affidavit of Nicholas Bellizzi, sworn to September 8, 2014.

Plaintiff testified that on February 11, 2011, just prior to the accident, she had left work and was intending to drive to a class at Suffolk Community College. She was operating a 2004 Hyundai Elantra on Elizabeth Avenue at its intersection with Terry Road when she was involved in the subject accident. At the time of the accident she was using ear buds and speaking, hands free, with her mother on her cell phone. There was no traffic control devices governing Terry Road at that intersection. There was a stop sign governing her lane of travel on Elizabeth Avenue. She stopped at the stop sign "for a few seconds." Plaintiff intended to make a left hand turn onto Terry Road. Her view to the left was obstructed by a five (5) foot snow mound. The snow mound had been there for at least a week because she had observed another

accident at the intersection the week before. She "inched out" three times to try and see around it. At no point prior to the accident did she see the Chouinard vehicle. She pulled out into the intersection and collided with the vehicle operated by the defendant Chouinard. Plaintiff stated that she was driving approximately 5 miles per hour at the time of the collision. She did not know the speed defendant Chouinard's vehicle at the time of the impact.

Defendant Chouinard testified that on February 11, 2011 she was returning home from work, operating a 2002 Acura on Terry Road at its intersection with Elizabeth Avenue when she was involved in the subject accident. The speed limit on Terry Road was 30 miles per hour, and, having just turned right onto Terry Road, she was traveling approximately twenty five (25) miles per hour at the time of the accident. Her direction of travel was not governed by any traffic control devices at the time of the accident. She only observed the plaintiff's vehicle seconds before the collision occurred. Upon observing the plaintiff's vehicle literally pull right out into the intersection, she braked, but did not have time to swerve. She could not estimate plaintiff's speed at the time of the accident, but described it as "just like when someone juts out" and "not slowly coming out." She did not observe the plaintiff take any evasive action. She did observe the "snow mound" referred to by the plaintiff.

Edward Stegmeier testified as a witness for defendant County. He is a highway zone supervisor for the County and the zone he supervises the area of the accident at Terry Road and Elizabeth Avenue. Terry Road is a County Road, Elizabeth Avenue is a Town road. He sends out workers and trucks to perform snow removal activities and additionally checks the roads to see their condition and will occasionally move equipment from one location to another as needed. He did not recall inspecting the subject intersection prior to February11, 2011. When he does go out to inspect snow removal operations, he does not take any formal noted or record. There is no formal training for snow removal. There are no regulations or rules as how to to make snow piles or where to put them other than common sense.

Robert Medwig testified as a witness for the defendant Town. He is the highway general supervisor and has held that position for seven years. He investigated snow removal activities for the year of the subject accident and spoke to the operator involved in plowing the area, Vincent Matula. Terry Road is owned by the County and Elizabeth Avenue is owned by the Town. He is unaware of any complaints regarding the subject area on or prior to February 11, 2011. He performed a search of the daily records kept by snow crew leaders for the subject time frame and found no complaints. Snow plowing by the Town does not obstruct the view of cars on Elizabeth Avenue or Terry Road.

Vincent Matula testified as a witness for the defendant Town. He is employed by the Smithtown highway department as a heavy equipment operator for the last fourteen years. He is responsible for plowing Elizabeth Avenue, which he believes is owned by the Town. He was the sole person responsible for plowing Elizabeth Avenue the winter of the subject accident. He would put his plow down right at the corner as he turned from Terry Road onto Elizabeth Avenue and plowed away from Terry Road in a westerly direction. He did not have to make piles of snow when he plowed. He did not see any large piles of snow at the subject intersection and was not aware of the County creating any snow piles there. In his affidavit, Mr Matula stated that at no time did he create any snow piles at the subject intersection. Town snow plows are used to push snow from the center of the roadway down the street at an angle. Thus, he pushes the snow away from the intersection. When pushing with his snow plow the maximum height does not exceed three feet.

He has no knowledge of the alleged five foot mound, but can definitively state that it was not caused by himself or the Town.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 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. Med. Ctr.***, *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]). As 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, 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]).

Vehicle and Traffic Law §§ 1142(a) states:

> Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

Vehicle and Traffic Law §§ 1172(a) states:

> Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

The defendant Chouinard established her prima facie entitlement to judgment as a matter of law by presenting uncontroverted evidence that plaintiff proceeded into the intersection without having a clear view of the traffic on Terry Road and without yielding the right-of-way after a stop sign demonstrated that she violated Vehicle and Traffic Law §§ 1142(a) and 1172(a) (*see* ***Luke v McFadden***, 119 AD3d 533, 987 NYS2d 909 [2d Dept 2014]; ***Amalfitano v Rocco***, 100 AD3d 939, 954 NYS2d 644 [2d Dept 2012]; ***Garrett v Manaser***, 8 A.D.3d 616, 779 N.Y.S.2d 565 [2d Dept 2004]). Such violations constitute negligence as a matter of law (*see* ***Zhubrak v. Petro***, 122 A.D.3d 922, 923, 998 N.Y.S.2d 85 [2d Dept 2014]; ***Johnson v. Ahmed***, 63 AD3d 1108, 883 NYS2d 249 [2d Dept 2009]; ***Perez v. Paljevic***, 31 AD3d 520, 818 NYS2d 581

[2d Dept 2006]). Moreover, it is clear that the plaintiff driver failed to operate her vehicle with due care and to maintain control over her vehicle to avoid the collision (*see*, Vehicle and Traffic Law § 1129 [a]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; ***Napolitano v Galletta***, 85 AD3d 881, 925 NYS2d 163 [2d Dept 2011]; ***Chepel v Meyers***, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]). Furthermore, a driver is negligent if he or she fails to see that, which through proper use of the senses, should have been seen (***Heath v Liberato***, 82 AD3d 841, 918 NYS2d 353[2d Dept 2011]). Here, the plaintiff admitted that she did not see the defendant's vehicle before attempting to make a left turn. Finally, plaintiff did not raise an issue of fact as to defendant's negligence based on plaintiff's and plaintiff's expert's bare speculation, not based on the record, that defendant f must have been speeding. Plaintiff testified that she did not know how fast defendant was going and defendant testified that she was proceeding between 25 and 30 miles per hour. (*see* ***Cadeau v Gregorio***, 104 AD3d 464, 961 NYS2d 106 [1st Dept.2013]; ***Dominguez v CCM Computers, Inc.***, 74 AD3d 728, 729, 902 NYS2d 163[2d Dept 2010]; ***Szczotka v Adler***, 291 AD2d 444, 737 NYS2d 121 [2d Dept 2002]).

Defendant Town has established its prima facie entitlement to judgment as a matter of law by presenting evidence that it did not have prior written notice of the alleged dangerous condition and that it did not affirmatively create said condition.

Section 245-13 0f the Town Code of the Town of Smithtown states:

> No civil action shall be maintained against the Town of Smithtown for damages or injuries to person or property sustained by reason of any highway, bridge, culvert, sidewalk, sewer, manhole or appurtenance or curb being defective, out of repair, unsafe, dangerous or obstructed or due to any missing highway sign or the failure to provide by ordinance or otherwise for the erection of any highway sign unless written notice of such defective, unsafe, dangerous or obstructed condition shall be filed with the Town Clerk at least 15 calendar days prior to the event giving rise to the alleged claim.

"A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841[2d Dept 2014]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). "Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a sidewalk defect" (***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; *see also* ***Gonzalez v Town of Hempstead***,124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; ***Chirco v City of Long Beach***, 106 AD3d 941, 943, 966 NYS2d 450 [2d Dept 2013]). The affidavit of Vincent Puleo, the Town Clerk of the Town of Smithtown, states that the he performed a search of the records maintained by his office for the

period of June 21, 2010 through February 12, 2011 regarding the presence of snow, or other obstruction, which could impair the visibility of motorists traveling on or at the intersection of Terry Road and Elizabeth Avenue. It further states that his office did not receive any written notice prior to February 12, 2011 regarding the presence of snow, or other obstruction, which could impair the visibility of motorists traveling on or at the intersection of Terry Road and Elizabeth Avenue. Thus , defendant Town that it did not have the required prior written notice. As noted above, only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property [not an issue herein]. The testimony of Town employee Vincent Matula is sufficient to establish that the defendant Town did not create the alleged dangerous condition (*see* ***Gonzalez v Town of Hempstead***, *supra*; ***Forbes v City of New York***, *supra*). Defendant Town is thus entitled to summary judgment herein.

Suffolk County Charter § C8-2A provides, in relevant part, that:

> No civil action shall be maintained against Suffolk County or any of its departments, agencies, offices, districts, boards, commissions or subdivisions for damages or injuries to a person or property sustained by reason of any (a) highways; (b) roads; © streets; (d) parking lots and parking fields; (e) bridges;... street lighting; (q) drains and drainage structures; ® sidewalks; (s) walkways; (t) boardwalks; (u) crosswalks and underpasses; (v) sewers; (w) manholes; (x) curbs; (v) gutters; (z) trees and tree limbs; (aa) street markings; (bb) traffic signs, signals or traffic control devices; ... under the jurisdiction of the County, on account of that structure or thing enumerated above, in whole or in part, allegedly being in a defective condition, out of repair, unsafe, dangerous or obstructed ..., unless the County has received written notice within a reasonable time before said injury or property damage was sustained, ... Such written notice shall specify the particular place and nature of such defective, unsafe, dangerous, or obstructed condition or the particular location of the snow or ice. Such notice shall be made in writing by certified or registered, mail to the Clerk of the Suffolk County Legislature, who shall forward a copy to the County Attorney.

Based upon the affidavits of John Donovan and Timothy Laube submitted with regard to the search of County records, defendant County has established its prima facie entitlement to summary judgement by proffering proof, in the form of testimony and affidavits, that it had no prior written notice of any alleged defect or dangerous condition.

However, in response, plaintiff allege that there is an issue of fact as to whether or not the County had constructive notice of the subject dangerous condition and that the County created the dangerous condition. The first claim is based upon Highway Law § 139. Under Highway Law § 139 (2), a county can enact a prior written notice statute that provides that it may not be subjected to liability for injuries caused by an improperly maintained highway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*see* ***Gold v County of Westchester***, 15 AD3d 439,

440, 790 NYS2d 675 [2d Dept 2005]). Notwithstanding the existence of a prior written notice statute, a County may be liable for an accident caused by a defective highway condition where the County has constructive notice of the condition (***Napolitano v Suffolk County Dept. of Pub. Works***, 65 AD3d 676, 677, 884 NYS2d 484 [2d Dept. 2009]; ***Moxey v County of Westchester***, 63 AD3d 1124, 883 NYS2d 80 [2d Dept. 2009]; ***Phillips v. County of Nassau***, 50 AD3d 755, 856NYS2d 172 [2d Dept. 2008]). However, Highway Law § 139(1) states, in relevant part: "[w]hen, by law, a county has charge of the repair or maintenance of a road, highway, bridge or culvert, the county shall be liable for injuries to person or property...sustained in consequence of such road, highway, bridge or culvert being defective, out of repair, unsafe, dangerous or obstructed existing because of the negligence of the county, its officers, agents or servants." To constitute constructive notice, the dangerous condition must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit the defendant to discover and remedy it (***McMahon v Gold***, 78 AD3d 908, 910 NYS2d 561 [2d Dept 2010]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). Testimony by the plaintiff indicates that the snow mound was in place for at least a week prior to her accident. Thus there is an issue of fact as to whether or not the County is chargeable with constructive notice herein. Furthermore, the prima facie showing a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings (***Miller v Village of East Hampton***, 98 AD3d 1007, 951 NYS2d 171 [2d Dept 2012]; ***Carlucci v Village of Scarsdale***, *supra*). The plaintiff having also alleged that the defendant County created the dangerous condition which led to the plaintiff's injuries, it was incumbent upon said defendant to eliminate all triable issues of fact as to whether it created the condition. This defendant County has failed to do. None of the testimony or other evidence submitted by the County is sufficient to establish that the County did not create the dangerous condition. This is an issue of fact which must be resolved at trial.

Based upon the foregoing, the motion by defendant Karen Chouinard for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is granted. The motion by defendant County of Suffolk for an order pursuant to CPLR 3211 and 3212 granting summary judgment dismissing the complaint and all claims or cross-claims insofar as asserted against it is denied. The motion by defendant Town of Smithtown ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted.

Dated: Feb. 4, 2016

W. Gerard Asher

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**