Thomas v Orantes-Hernandez
2017 NY Slip Op 31008(U)
April 12, 2017
Supreme Court, Suffolk County
Docket Number: 18303/2012
Judge: William B. Rebolini

Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Lorenzo Thomas,

Plaintiff,

-against-

M. Orantes-Hernandez, Town of Islip and County of Suffolk,

Defendants.

Index No.: 18303/2012

Motion Sequence No.: 002; MD ✓
Motion Date: 2/10/16
Submitted: 4/13/16

Motion Sequence No.: 003; MD ✓
Motion Date: 2/29/16
Submitted: 4/13/16

Motion Sequence No.: 004; MD ✓
Motion Date: 3/2/16
Submitted: 4/13/16

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Clerk of the Court

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Upon the following papers numbered 1 to 123 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 13; 36 - 98 (and Memorandum of Law dated January 22, 2016); 102 - 116; Answering Affidavits and supporting papers, 14 - 26; 27 - 33; 99 - 101; 117 - 118; 119 - 121; Replying Affidavits and supporting papers, 34 - 35; 122 - 123; it is

ORDERED that the motion by defendant Town of Islip, the motion by defendant County of Suffolk, and the motion by defendant M. Orantes-Hernandez are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendant Town of Islip for summary judgment in its favor is denied; and it is further

ORDERED that the motion by defendant County of Suffolk for summary judgment in its favor is denied; and it is further

ORDERED that the motion by defendant M. Orantes-Hernandez for summary judgment in his favor is denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Lorenzo Thomas as a result of a motor vehicle accident which occurred on November 12, 2011, at the intersection of Third Street and Third Avenue, in the Town of Islip, New York. The accident allegedly occurred when a rented U-Haul vehicle operated by defendant M. Orantes-Hernandez struck plaintiff's vehicle in the intersection. Accordingly to plaintiff's deposition testimony, his vehicle was traveling southbound on Third Street, where there was no traffic control device controlling his lane of travel, and was struck by the vehicle operated by defendant Orantes-Hernandez, which was traveling westbound on Third Avenue. Plaintiff alleges that defendants Town of Islip and County of Suffolk were negligent in failing to replace a missing stop sign controlling his lane of travel at the intersection.

Defendant Town of Islip now moves for summary judgment in its favor on the ground that it lacked prior written notice of the missing stop sign. The Town submits, in support, copies of the pleadings, the transcripts of the deposition testimony of plaintiff and Peter Kletchka, and Town of Islip Department of Public Works service notices. In opposition, defendant Orantes-Hernandez argues that the Town failed to submit evidence from someone with personal knowledge that the stop sign was replaced prior to the accident and that the Town had prior written notice based on the service notes. He submits, in opposition, copies of the pleadings, the transcripts of the deposition testimony of plaintiff and Peter Kletchka, and Town of Islip Department of Public Works service notices. Also in opposition, plaintiff argues that traffic signs do not fall within the requirement for prior written notice and that the Town had constructive notice of the missing stop sign. Plaintiff submits, in opposition, a discovery demand, portions of the transcripts of the deposition testimony of Peter Kletchka, an uncertified police report, and the verified complaint in the case of Guatemala v Rodriguez, assigned index number 12-35465.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*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]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New***

York Univ. Med. Ctr., *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***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, evidence must be viewed in the light most favorable to the nonmoving party (*see* ***Chimbo v Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Pearson v Dix McBride, LLC***, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]; ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

Where a municipality has enacted a prior written notice law, it may not be subjected to liability for injuries caused by a defect which comes within the ambit of the law unless it has received prior written notice of the alleged defect, or an exception to the prior written notice requirement applies (*see* ***Conner v City of New York***, 104 AD3d 637, 960 NYS2d 204 [2d Dept 2013]; ***Masotto v Village of Lindenhurst***, 100 AD3d 718, 954 NYS2d 557 [2d Dept 2012]; ***Braver v Village of Cedarhurst***, 94 AD3d 933, 942 NYS2d 178 [2d Dept 2012]). The Court of Appeals has recognized only two exceptions to the prior written notice requirement, namely, where the municipality created the defect through an affirmative act of negligence, or a special use confers a special benefit upon the municipality (*see* ***Yarborough v City of New York***, 10 NY3d 726, 853NYS2d 261 [2008]; ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]).

Pursuant to Town Law § 65-a and the Town of Islip Code, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect in Town property, the Town must be given prior written notice of the defect. Section 47A-3 of the Town of Islip Code states, in relevant part:

> No civil action shall be maintained against the Town of Islip or any of its employees for damages or injuries to persons or property sustained by reason of any highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb or other property owned or maintained by the Town of Islip being defective, out of repair, unsafe, dangerous or obstructed unless written notice of such defective, out of repair, unsafe, dangerous or obstructed condition of such highway, street, bridge, culvert, sidewalk, crosswalk, highway or street marking, traffic sign, signal or device, tree, tree limb, or other property was actually given to the Town Clerk or Commissioner of Public Works and there was

> a failure or neglect within a reasonable time after the giving of such notice to repair or remove the defect, danger, obstruction or condition complained of.

The Town failed to establish a prima facie case of entitlement to summary judgment in its favor. Contrary to the Town's assertions that there was no prior written notice of the missing stop sign, section 47A-3 of the Code is invalid as applied to missing traffic signs (*see* General Municipal Law § 50-e; ***Walker v Town of Hempstead***, 84 NY2d 360, 618 NYS2d 758 [1994]; ***Alexander v Eldred***, 63 NY2d 460, 483 NYS2d 168 [1984]; ***Doremus v Incorporated Village of Lynbrook***, 18 NY2d 362, 275 NYS2d 505 [1966]; ***Sicignano v Town of Islip***, 41 AD3d 830, 838 NYS2d 655 [2d Dept 2007]; ***Herrera v Moran***, 272 AD2d 374, 707 NYS2d 217 [2d Dept 2000]; ***Bova v County of Saratoga***, 258 AD2d 748, 685 NYS2d 834 [3d Dept 1999]; ***Ramundo v Town of Guilderland***, 142 AD2d 50, 534 NYS2d 543 [3d Dept 1988]). Having determined that defendant Town of Islip failed to meet its prima facie burden, it is unnecessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Defendant County of Suffolk also moves for summary judgment in its favor on the ground that it did not own the situs of the accident. The County submits, in support, copies of the pleadings, various discovery demands; the affidavit of Paul Morano, John Donovan, and Rence Ortiz; the transcripts of the deposition testimony of Paul Morano and Peter Kletchka; a notice of claim; and Suffolk County road record cards. In response, plaintiff submits a stipulation of discontinuance signed by counsel to plaintiff.

CPLR 3217 (a) (2) provides in pertinent part that "[a]ny party asserting a claim may discontinue it without an order...by filing with the clerk of the court before the case has been submitted to the court or jury a stipulation in writing signed by the attorneys of record for all parties..." (*see also* ***C.W. Brown, Inc. v HCE, Inc.***, 8 AD2d 520, 779 NYS2d 514 [2d Dept 2004]). The stipulation of discontinuance with prejudice acts as a release within the meaning of General Obligations Law §15-108 (*see* ***Tereshchenko v Lynn***, 36 AD3d 684, 828 NYS2d 185 [2d Dept 2007]; ***Hanna v Ford Motor Co.***, 252 AD2d 478, 675 NYS2d 125 [2d Dept 1998]). Thus, the released defendant is relieved from liability to any other entity for contribution, and the co-defendants are generally entitled to a reduction of any verdict in the plaintiff's favor against them by the amount they are able to establish is the equitable share of damages attributable to the released defendants at the trial of this action (*see* ***Tereshchenko v Lynn***, *supra*; ***Dembitzer v Broadwall Management Corp.***, 6 Misc 3d 1035[A], 800 NYS2d 345 [New York City Ct 2005]).

In response to the County's motion for summary judgment, plaintiff concedes that the subject intersection is fully within the Town of Islip. In addition, plaintiff submits a stipulation of discontinuance with prejudice dated March 18, 2016, signed by counsel for the plaintiff, discontinuing the action against County of Suffolk, which constitutes a release under General Obligations Law § 15-108 (*see* ***Tereshchenko v Lynn***, *supra*; ***Hanna v Ford Motor Co.***, *supra*; ***Fleck v City of New York***, 21 Misc3d 1146[A], 875 NYS2d 820 [Sup Ct, New York County 2008]). Therefore, the County's motion for summary judgment is denied, as moot.

Defendant Orantes-Hernandez also moves for summary judgment in his favor on the ground that he was not negligent and was not the proximate cause of the accident, because he had the right-of-way and was entitled to assume plaintiff would yield. Orantes-Hernandez submits, in support, copies of the pleadings, a certified police report, the transcript of his deposition testimony, and two photographs. In opposition, defendant Town of Islip and plaintiff argue that Orantes-Hernandez failed to avoid the collision. Plaintiff submits, in opposition, the transcript of the deposition testimony of Orantes-Hernandez.

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; ***Vainer v DiSalvo***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). A motorist is required to "see that which through proper use of [his or her] senses [he or she] should have seen" (***Bongiovi v Hoffman***, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; *see* ***Thompson v Schmitt***, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]). The operator of a vehicle with the right of way is entitled to assume that the opposing driver will obey traffic laws requiring him or her to yield (*see* ***Kassim v Uddin***, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]; ***Ducie v Ippolito***, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; ***Ahern v Lanaia***, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; ***Singh v Singh***, 81 AD3d 807, 916 NYS2d 527 [2d Dept 2011]; ***Dominguez v CCM Computers, Inc.***, 74 AD3d 728, 902 NYS2d 163 [2d Dept 2010]; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]; ***Gorelik v Laidlaw Tr., Inc.,*** 50 AD3d 739, 856 NYS2d 197 [2d Dept 2008]; ***Parisi v Mitchell***, 280 AD2d 589, 720 NYS2d 806 [2d Dept 2001]). However, "[a] driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection" (***Gause v Martinez***, 91 AD3d 595, 596, 936 NYS2d 272 [2d Dept 2012], quoting ***Todd v Godek***, 71 AD3d 872, 872, 895 NYS2d 861 [2d Dept 2010]; *see* ***Adobea v Junel***, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; ***Shui-Kwan Lui v Serrone***, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]). Nevertheless, as a matter of law, a driver is not comparatively negligent in failing to avoid the collision if he or she has a right-of-way and only has seconds to react to a vehicle that has failed to yield (*see* ***Foley v Santucci***, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; ***Ducie v Ippolito***, *supra*; ***Breen v Seibert***, *supra*; ***Bennett v Granata***, *supra*; ***Vainer v DiSalvo***, *supra*; ***Yelder v Walters***, *supra*). "There can be more than one proximate cause and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" (***Pollack v Margolin***, 84 AD3d 1341, 1342, 924 NYS2d 282 [2d Dept 2011]; *see* ***Regans v Baratta***, 106 AD3d 893, 965 NYS2d 171 [2d Dept 2013]; ***Shui-Kwan Lui v Serrone***, *supra*; ***Gause v Martinez***, *supra*; ***Lopez v Reyes-Flores***, 52 AD3d 785, 861 NYS2d 389 [2d Dept 2008]; ***Cox v Nunez***, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2005]).

The obligation of a driver to stop at a stop sign, imposed by Vehicle and Traffic Law §§ 1142 (a) and 1172 (a), does not apply if the "sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person" (Vehicle and Traffic Law § 1110 [b]). In that case, the driver's obligation to stop depends on whether the driver is aware that the intersecting highway is a through highway. A through highway is one which is given "preferential right of way" when intersecting highways are controlled by traffic-control signals, flashing red signals, stop signs, or yield signs (Vehicle and Traffic Law § 149). If plaintiff was aware that Third Avenue was a through

highway, the fact that the stop sign controlling Third Street traffic was missing is irrelevant and he would be held negligent (*see* ***Pabon v Scott***, 77 AD3d 1467, 908 NYS2d 516 [4th Dept 2010]; ***Plantikow v City of New York***, 189 AD2d 805, 592 NYS2d 755 [2d Dept 1993]; ***Mays v Weiman***, 73 AD2d 639, 422 NYS2d 751 [2d Dept 1979]; ***Villa v Vetuskey***, 50 AD2d 1093, 376 NYS2d 359 [4th Dept 1975]; ***Del Villano v Lasky***, 8 AD2d 924, 187 NYS2d 205 [3d Dept 1959]). If the plaintiff was not aware that Third Avenue was a through highway, the matter is governed by Vehicle and Traffic Law § 1140 concerning uncontrolled intersections. Vehicle and Traffic Law § 1140 (a) provides that "[t]he driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway," and that "[w]hen two vehicles enter an intersection from different highways at approximately the same time the driver of the vehicle on the left shall yield the right of way to the vehicle on the right."

Defendant Orantes-Hernandez failed to establish a prima facie case of entitlement to summary judgment. Defendant Orantes-Hernandez submits plaintiff's deposition testimony that he was unfamiliar with the area in which the subject accident occurred and that his driver's side door was hit by Orantes-Hernandez's front bumper, indicating that plaintiff's vehicle entered the intersection first. However, Orantes-Hernandez testified that his right front bumper came in contact with plaintiff's left front bumper, indicating that the vehicles entered the intersection simultaneously. Such conflicting testimony as to the facts surrounding the accident, including which vehicle entered the intersection first, is a triable issue of fact (*see* ***Chimbo v Bolivar***, *supra*; ***Benetatos v Comerford***, *supra*; ***Nevarez v S.R.M. Management Corp.***, 58 AD3d 295, 867 NYS2d 431 [1st Dept 2008]). Having determined that defendant Orantes-Hernandez failed to meet his prima facie burden, it is unnecessary to consider whether the papers in opposition are sufficient to raise a triable issue of fact (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Accordingly, the motions by defendants Town of Islip, County of Suffolk, and Orantes-Hernandez are denied.

Dated: 4/12/2017

William B. Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**