Sarro v County of Nassau

2008 NY Slip Op 31900(U)

June 27, 2008

Supreme Court, Nassau County

Docket Number: 3524-04/

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present:
HON. DANIEL PALMIERI
Acting Justice Supreme Court

---x TRIAL TERM PART 48

NANCY E. SARRO, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF THEODORE SARRO, AN INFANT UNDER THE AGE OF FOURTEEN (14) YEARS,

Plaintiff,

INDEX NO.: 13524/04

MOTION DATE:6-16-08
SUBMIT DATE: 6-26-08
SEQ. NUMBER - 005

-against-

COUNTY OF NASSAU, INCORPORATED VILLAGE OF ISLAND PARK, TOWN OF HEMPSTEAD AND IRENE X. GKLOTSOS,

Defendants.

---x

The following papers have been read on this motion:

Notice of Motion, dated 5-19-08..1
Affirmation in Opposition, dated 6-18-08..........................2
Affirmation in Opposition, dated 6-19-08..........................3
Reply Affirmation, dated 6-24-08......................................4

The motion of defendant County of Nassau (County) for summary judgment pursuant to CPLR §3212 is granted. The complaint and all cross claims against the County, including the cross claims for contribution by defendant Village of Island park (Village) are dismissed.

On September 26, 2003, the infant plaintiff, a pedestrian on Parma Road, a thoroughfare owned and maintained by the Village, was struck at a location 200 feet north of the intersection with Sagamore Road, by a vehicle operated by defendant Gklotsos.

Although it is not disputed that Parma Road is owned and maintained by the Village, liability against the County is predicated primarily on the theory that a special relationship to the defendant was created when, as a result of a letter written by plaintiff's mother to the County police department sometime in 2002, complaining of vehicles speeding in the area, a police officer came to her home and in response to her complaint about speeding and failure to stop at stop signs. She stated she was told that "he would .... he would try to keep a car in the area" and in substance that he would make others at the precinct aware. The letter to the County has not been found by any of the parties and the identity of the police officer has never been ascertained. Plaintiff has submitted an affidavit from a police sergeant that after a search of records he did not find any complaints and that it is impossible to learn the identity of the police officer who might have visited plaintiff.

Plaintiff also posits that because the County is responsible for providing police services in the Village, and has loaned speed monitoring signs to the Village, liability on the part of the County exists. This claim may be disposed of quickly. Although labeled by plaintiff as "joint enterprise liability" and "borrowed servant" theory, plaintiff has presented no facts to support such a premise. Absent here are any facts to show a concerted action or course of conduct between the County and the Village which could have led to the accident. See *Rodriguez v. City of New York*, 35 AD3d 702 (2d Dept. 2006). There is thus no merit to this contention.

Defendant Village contends that its cross claim for contribution against the County should survive even a dismissal of plaintiff's claims, because dismissal would be based on a special defense peculiar to the County, relying on *Mowczan v. Bacon*, 92 NY3d 281 (1998).

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957); *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept.1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines,* 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the complaint or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.,* 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993). If a party defends a motion by resort to CPLR 3212(f), that is, the party has a defense sufficient to defeat the motion but that the facts cannot yet be stated, that party must be able to make some showing that such facts do in fact exist; mere hope that discovery may reveal those facts is insufficient. *Companion Life Ins. Co. v All State Abstract Co.,* 35 AD3d 519 (2d Dept. 2006). Nor can mere speculation serve to defeat the motion. *Pluhar v Town of Southhampton,* 29 AD3d 975 (2d Dept. 2006); *Ciccone v Bedford Cent. School Dist.,* 21 AD3d 437 (2d Dept. 2005).

However, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.,* 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.,* 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for

summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries,* Inc., 198 AD2d 330 (2d Dept. 1993).

The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *See Village Bank v Wild Oaks Holding, Inc.*, 196 AD2d 812 (2d Dept. 1993); *Barclays Bank of N.Y. v Sokol,* 128 AD2d 492 (2d Dept. 1987), such as when the affidavit in opposition clearly contradicts earlier deposition testimony. *Central Irrigation Supply v Putnam Country Club Assocs., LLC,* 27 AD3d 684 (2d Dept. 2006).

Applying these well-established principles to the case at bar, the Court finds that the submission by the County establishes entitlement to judgment thus shifting the burden to the opponent plaintiff to rebut the movants' case by submitting proof in evidentiary form showing the existence of triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557 (1980); *Friends of Animals v. Associated Fur Manufacturers, Inc.*, 46 NY2d 1065 (1979). Here, plaintiff has failed to establish the existence of triable issues of fact, the motion by the County therefore is granted and summary judgment is granted in favor of the County.

Municipalities are immunized from liability to third persons arising out of the performance of discretionary acts, and a municipality is not liable for the injurious consequences of an action even if resulting from negligence or malice. Such immunity can

be overcome upon a showing of a special relationship between the injured party and the municipality with the heavy burden imposed upon the injured party to establish the existence of such a relationship. *Abraham v. City of New York*, 39 AD3d 21 (2d Dept. 2007); *See also Rodriguez v. County of Rockland*, 43 AD3d 1026 (2d Dept. 2007).

The current body of law on this issue stems from *Garrett v. Holiday Inns Inc.*, 58 NY 2d 253 (1983), *Cuffy v. City of New York*, 69 NY2d 255 (1987), and *Pelaez v. Seide*, 2 NY3d 186 (2004).

A special relationship between an injured party and a municipality can be formed:

1. when the municipality violates a statutory duty enacted for the benefit of a particular class of persons;
2. when the municipality voluntarily assumes a duty that generates justifiable reliance by the person who benefits from the duty; or
3. when the municipality assumes a positive direction and control in the face of a known blatant and dangerous safety violation. *Pelaez, at* 199.

To base a relationship on a breach of a statutory duty requires the governing statute to authorize a private right of action. No such claim is made here and there is no statutory authorization of a private right of action. *Abraham v. City of New York, Supra at 25*; *Okie v. Village of Hamburg*, 196 AD2d 228 (4th Dept. 1994). A statute enacted for the health and safety of the community at large does not confer a special duty on an injured person, *Marino v. Dwyer Berry Construction Corp.*, 146 AD2d 748 (2d Dept. 1989) *cf. Mclean v. City of New York*, 14 Misc. 3d 922 (Sup. Ct. NY Cty 2007) [special statutory duty found in favor of children in day care facility].

The second alternative, voluntary assumption of a duty also fails. Here, there is no voluntary assumption of any duty by the County and certainly no reliance by the plaintiffs upon performance by the County of any act. The facts disclose that the plaintiff was well aware of the dangers from the traffic in the area.

The requisites for finding a special relationship based on the second alternative noted above, *i.e.* voluntary assumption of a duty are set out in *Pelaez v. Seide, supra* 202. These requirements are (1) an assumption by the municipality through promises or actions of an affirmative duty to act on behalf of the injured party, (2) knowledge on the part of the municipality's agents that inaction could lead to harm, (3) some form of direct contact with the injured party and, (4) that party's justifiable reliance on the municipality's affirmative undertaking (*citing Cuffy v. City of New York, supra*).

Included in such requirements, but notably absent here, are the requirements of a promise or action in favor of the individual plaintiff, and justifiable reliance by the plaintiff on such affirmative undertaking. At best, the assurances of the police officer amounted to no more that a promise of stepped-up enforcement of existing traffic laws, which inure to the benefit of the public at large, not just to the injured plaintiff. Moreover, there is no evidence of any kind indicating that the infant was injured because he had relied on these assurances in traversing the roadway in question.

It is true that the County may not avoid responsibility based on the failure to provide written notice of the problem if a special duty to the plaintiff has been created. *Cf DeLuca v. County of Nassau*, 207 AD2d 428 (2d Dept. 1994); *Poirer v. Schenectady*, 85 NY2d 310

(1995); *Mastrianni v. County of Suffolk*, 91 NY2d 198 (1997); *Ferrante v. County of Nassau*, 301 AD2d 565 (2d Dept. 2003). However, the present case is clearly distinguishable from those where a duty was found.

Cases such as *Taino v. City of Yonkers*, 43 AD3d 401 (2d Dept. 2007), where the deceased was told that a police car was on the way to protect him from his assailant and *Etienne v. New York City Police Department*, 37 AD3d 647 (2d Dept. 2007) where decedent was told that "help was on the way" provide no avenue of liability to plaintiff. In both of these cases there was immediate and direct communication in close temporal proximity to the injury causing event and a positive promise of assistance.

Thus, the Court finds that there was no assumption by the County through promises or actions of an affirmative duty to act on behalf of the plaintiff, no knowledge, other then generalized information of traffic violations in the area, that inaction could lead to harm and no proof of justifiable reliance on the County's affirmative undertaking. *Cuffy v. City of New York, supra*; *see also Laratro v. City of New York*, 8 NY3d 79 (2006).

In addition to the foregoing, there has been no showing that the presence of additional police protection in the area would have been sufficient to prevent this accident, as it is quite clear that liability, if there be any, lies with other parties and not the County.

Finally, there can be no liability based on item 3 above, the assumption by the County of direction and control in the face of a known blatant and dangerous safety violation such as was present in *Smullen v. City New York*, 28 NY2d 66 (1971) [open contraction site trench]. Plaintiff does not meet these latter requirements, as there is no evidence that the

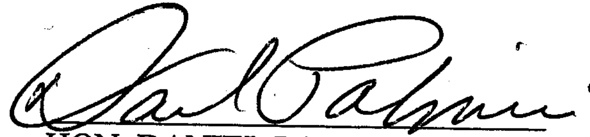
County assumed control of the area from the Village. Since there is no dispute that the County does not own and is not responsible for Parma Road, liability may not be based upon that theory. *Monteleone v. Inc., Village of Floral Park*, 123 AD2d 312 (2d Dept. 1986).

The contention of the Village that the County should remain liable to the Village for contribution also fails, notwithstanding, *Mowczan v. Bacon, Supra*. CPLR Article 14, which enunciates principles of equitable contribution among multiple tortfeasors, ensures that defendants have their own right of apportionment based on degrees of fault. Here, unlike in *Mowczan*, the plaintiff's cause of action fails because, as a matter of substantive law, this Court has determined that plaintiff has no cause of action against the County because the County was not negligent, not because of some unique defense available only to the County. Hence, if the County is not negligent as to the plaintiff, it cannot also be simultaneously negligent as to the Village. The critical requirement for apportionment by contribution is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought. That requisite, which is absent here, is the presence of a duty running from the contributing party to the party seeking contribution. *Raquet v. Braun*, 90 NY2d 177 (1997); *Johnson City Central S.D. v. Fidelity and Deposit Co. Of Md.*, 272 AD2d 818 (3rd Dept. 2000). The Village has not directed this Court to any evidence that demonstrates the presence of a duty running from the County to the Village. *See Linares v. United Management Corp.*, 16 AD3d 382 (2d Dept. 2005). Since the sole support for the cross claim by the Village to the County is the alleged negligence of the County, the cross claim must also be dismissed.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: June 27, 2008



HON. DANIEL PALMIERI
Acting Supreme Court Justice

ENTERED

JUL 01 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE

TO: **Jay D. Umans, Esq.**
Attorney for Plaintiffs
90 Merrick Avenue, 5th Floor
East Meadow, NY 11554

Law Offices of Stanley E. Orzechowski, P.C.
Co-Counsel for Plaintiffs
542 North Country Road
St. James, NY 11780

Lorna B. Goodman
County Attorney
By: James N. Gallagher
Attorney for County of Nassau
One West Street
Mineola, NY 11501

Joseph J. Ra, Esq.
Town Attorney
Town of Hempstead
Attorney for Co-Defendant Town of Hempstead
One Washington Street
Hempstead, NY 11550

Law Office of John Humphreys
Attorneys for Co-Defendant Incorporated Village of Island Park
3 Huntington Quadrangle, Ste. 102S
P.O. Box 9028
Melville, NY 11747