DECISION AND ORDER

FILED & ENTERED
7/19/13

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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PETER POVEROMO and TRICIA POVEROMO,

Plaintiff,

-against-

THE TOWN OF CORTLANDT, DANIEL W. DONDERO and KAROL A. DONDERO,

Defendants.
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Motion Date: 7/12/13
INDEX NO.: 55879/11

The following papers numbered 1 to 18 were read on this motion by defendant the Town of Cortlandt for an Order pursuant to CPLR 3211, subdivision (a), paragraph 7, dismissing this action for failure to state a cause of action, and on this motion by defendants Dondero for summary judgment dismissing the complaint and cross-claims.[1]

Papers Numbered

Notice of Motion - Affirmation (Svensson) - Exhs. (A-N) 1-3
Notice of Motion - Affirmation (Code) - Exhs.(A-G) 4-6
Answering Affirmation (Randazzo) - Addendum to Affirmation (Randazzo) - Exhs.(A-D) - Affidavit (P. Poveromo) - Affidavit (Pucino) - Exhs.(1-5) - Exh. 7-13

[1]The various "sur-replying" papers submitted have not been considered or read.

Answering Affirmation (Randazzo) - Exhs. (1-4) 14-15
Answering Affirmation (Svensson) 16
Replying Affirmation (Svensson) 17
Replying Affirmation (Code) 18

Upon the foregoing papers, it is hereby Ordered that these motions are disposed of as follows:

Plaintiffs commenced this action seeking to recover for personal injuries allegedly sustained by Peter Poveromo ("plaintiff"), on June 5, 2012, at approximately 11:00 a.m., as a result of his being struck by a vehicle.[2] According to plaintiff's deposition testimony, he is a self-described experienced motorcycle rider and the accident day had been sunny and dry; he had been wearing a helmet, goggles and full clothing. Plaintiff had been riding in the Town of Cortlandt Manor, planning to visit Town Hall, and at a certain point in his travel he had realized that he had made a wrong turn. Driving north on Waterbury Parkway's southern leg, a road plaintiff never previously had traveled upon, plaintiff had intended to turn left onto Waterbury Parkway's northern leg where Waterbury Parkway intersects with Fairview Place; there is no traffic control device at the point.[3]

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[2]The owner/driver of that vehicle, Nigel Feriera, is not a defendant in this action, it being represented to the Court that said individual(s) had settled with plaintiffs prior to commencement of this action.

[3]This road configuration is referred to as "wide-throated Y-type intersection."

As plaintiff had approached the Waterbury Parkway/Fairview Place intersection, traveling 5 to 10 miles per hour, yellow stripping on the road had directed him to travel more towards the right, which he had found "confusing" because Waterbury Parkway actually continues to the left. Plaintiff stated that he had looked to his left but that he could not see up Waterbury Parkway because of a row of bushes on his left, located approximately 50 feet north of the intersection, had obscured his view. Plaintiff stated that he then had looked to the right roadway, i.e., up Fairview Place, but that he similarly could not see up Fairview Place because a large evergreen tree had obscured his view. Plaintiff states that he slowly had moved forward, looking first to his right and then again to his left, whereupon he suddenly had been struck by a vehicle coming from his left on Waterbury Parkway. Plaintiff had testified that he did not see the oncoming vehicle until about one second before it struck him. According to plaintiff, "if the tree had not been to my right impeding my view as it did I would have been able to get that second look to my left without having to move out into the intersection as far as I did and I would have been able to see the car be (sic) and would not have been struck."

Plaintiffs commenced this action, alleging that defendant Town of Cortlandt ("Town") is charged with the affirmative duty to keep its roadways safe and free from hazards, that the Town had been

obligated to perform a safety traffic study to determine if its roadways were safe and free from hazards and that it had failed to do so, that the Town negligently had re-striped Waterbury Parkway, and that the Town had been negligent in permitting the row of bushes and the 25 foot high evergreen tree to exist which clearly and openly obstructed the visibility of vehicles traveling from the south leg of Waterbury Parkway and which had existed for such a long period of time that the Town knew or should have known of their existence and had failed to do anything to remedy the dangerous condition existing at that intersection. According to plaintiffs, prior notice to the Town of the dangerous condition is not a condition precedent to suit because the Town had created the dangerous condition, and/or had actual or constructive knowledge of same, and the fact that the offending evergreen tree had been planted in the Town's right of way and obscured the Fairview Place and the row of bushes violated Cortlandt Code §307-18(E) made it foreseeable that the intersection posed a danger to all on the roadway.

Defendants Dondero live at 67 Fairview Place. Defendant Daniel Dondero ("defendant") had testified that he had planted the subject evergreen tree in 1989, three feet from the roadway, at which time it had been approximately 10 feet tall, and he had admitted that he let nature take care of it, and that he never

previously had trimmed the tree until some time subsequent to plaintiff's accident. At the time of plaintiff's accident, the tree had grown to approximately 25 to 30 feet in height. Defendant had testified that, prior to plaintiff's accident, he never had been informed by anyone that the tree had presented a sight distance problem, nor had he personally ever experienced such problem. Defendant Dondero had testified that he never had been issued any violation for obstruction of vision with respect to the subject tree, and that he was unaware of any other accidents having occurred at the subject intersection.

Jeffrey Coleman, Director of Environmental Services, had testified that he was responsible for overseeing the Town's roads and that he had conducted a road inspection program to identify roadway conditions.

Christopher Pritchard, General Foreman of the Highway Department for defendant Town of Cortlandt ("Town"), had testified that his duties include riding the roadways to identify hazards, including trees that have fallen, are leaning, broken or presenting "sight issues," and to report same to his supervisors. According to Mr. Pritchard, he had traveled the subject Waterbury Parkway/Fairview Place intersection "a hundred times" but that he never had found any site distance obstruction at that location. Following the report of the subject accident, Mr. Pritchard had

testified that he had gone to the accident site several times and was unable to identify any existing hazards, although he eventually had spotted a tree that had been situated 7 to 8 feet behind the curb. Although he did not observe anything wrong with or dangerous about the tree, he had decided to err on the side of caution and have this tree, which was smaller than and situated to the right of the subject evergreen tree, trimmed by his employees. Mr. Pritchard denied his having previously caused the larger subject evergreen to be trimmed although he testified that it appeared as though it previously had been trimmed. No complete records of the work allegedly performed by the Highway Department are kept and no work records pertaining to the trimming of the smaller evergreen tree post-accident were produced.

Defendant Town presently is moving for an Order pursuant to CPLR 3211 dismissing the complaint arguing that plaintiffs have not stated a viable cause of action because the record at bar establishes that the Town did not have prior written notice of any allegedly dangerous limited sight condition existing at the subject intersection, that the Town had not created the allegedly dangerous condition, that the Town had not performed any work upon the subject area shortly before the accident and that in any event the Town is entitled to qualified immunity regarding plaintiffs' claim of negligent road design and with respect to any action or inaction

regarding the bushes and tree's trimmings which is a discretionary governmental function.

At bar is defendant Town's dispositive motion seeking dismissal of the complaint as against it, the Town arguing that it did not have any prior written notice of the allegedly dangerous defect or dangerous condition, that the Town had not created said condition through any affirmative negligent act, that the Town did not have constructive knowledge of and defective or dangerous condition in the roadway, that it did not have notice of any defective road design, that the Town is exempt from liability under the Public Duty Rule and that the sole cause of plaintiff's accident had been his failure to have yielded the right of way to the vehicle which struck him.

Presently, defendants Dondero are moving for summary judgment dismissing the complaint and cross-claims arguing that no prima facie case of negligence by them has been established since, firstly, there is no common law duty of a landowner to control vegetation on his/her property for the benefit of users of a public highway and, secondly, in any event, plaintiff's testimony establishes that any alleged site problem that had been created by the Donderos' offending tree on the right was not a substantial factor in causing this accident because the vehicle which had struck plaintiff had come from plaintiff's left.

Plaintiffs oppose both motions. According to plaintiffs, however, the subject tree actually is planted just 3 feet from the roadway, with cascading branches onto the roadway itself causing not only a visual obstruction but the additional hazard of vehicles having to move over to avoid hitting the branches. Plaintiff complains that the Town had in place a plan for inspection of roads but that Mr. Pritchard inexplicably and negligently repeatedly had failed to recognize the serious site hazard presenting by the evergreen tree, that the Town had ordinances in place regarding sight distance, specifically §307-18 (E),[4] and that it had failed to follow its own laws by either having the Donderos trim the tree or by trimming it itself.

Plaintiffs offer the expert affidavit of Nicholas P. Pucino, a licensed engineer qualified in the field of highway engineering, maintenance, traffic safety and accident analysis. Mr. Pucino has reviewed the entirety of the record at bar and personally had inspected the accident site. He also has reviewed historical maps of the subject intersection which show that, as of March 31, 2004,

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[4]This Code section states:

> At all street intersections in all districts, no obstructions to motorist vision exceeding three feet in height above street pavement level shall be erected or maintained on any lot with the triangle formed by the street lines of such lot and a line drawn between points along such street line 30 feet distant from their point of intersection.

there had been no striping on the southern leg of Waterbury Parkway. As a result of the new striping thereafter performed by the Town, apparently without its first having undertaken a study of sight-lines, Mr. Pucino not only finds that a greater safety hazard was created "because it brought the obstruction from the evergreen tree into greater play," but that the Manual of Uniform Traffic Control Devises called for the placement of a stop line and stop sign which would have instructed motorists to come to a full stop and where to pull up to maximize the available sight distance. Additionally, Mr. Pucino finds that the tree appears to be within the setback controlled by the Town and that the Town should have caused the obstructing evergreen on the Donderos' property to have been pruned, his measurements of said tree with its extensive branching establishing that said tree violated Cortlandt Code §307-18 (E).

In sum, Mr. Pucino opines with a reasonable degree of engineering certainty that the accident resulted from inadequate sight distance for plaintiff to safely enter the intersection, which sight impediment primarily had been caused by the Donderos' large evergreen tree on the right corner of Fairview Place, that the Town had exacerbated this limited sight condition by its failure to enforce the Code's requirement for sight lines at intersections and its striping of the southern leg of Waterbury

Parkway without the benefit of its undertaking a traffic study which should have been performed by a traffic engineer and, if performed, would have revealed the necessity for additional traffic control devices at the intersection which, if in place, would have prevented plaintiff's accident.

In order for liability to be found, it first must be established that a duty of care had been owed by defendants to plaintiff, and this is a legal question to be determined by the Court in the first instance; if such a duty is found to exist, only then doe the Court address whether the ensuing accident had been foreseeable and whether the alleged negligence had been a substantial factor in causing the injury. See Ingenito v. Robert M. Rosen, P.C., 187 A.D.2d 487 (2nd Dept. 1992).

Addressing the summary judgment motion of defendants Dondero first, it long has been settled that there is no common law duty owed by a landowner to control naturally occurring vegetation on his property for the benefit of users of a public highway which are not maintained by the property owner. See Meloe v. Gardner, 40 A.D.3d 1055 (2nd Dept. 2009); Wheeler v. Buxton Equipment Co., Inc., 292 A.D.2d 521 (2nd Dept. 2002); Ingenito v. Robert M. Rosen, P.C., 187 A.D.2d 487 (2nd Dept. 1992). However, where a specific regulatory provision imposes upon property owners a duty to prevent vegetation from visually obstructing the roadway, proof of

noncompliance with the regulatory provision may give rise to tort liability for any damages proximately caused thereby. See Lubitz v. Village of Scarsdale, 31 A.D.3d 618 (2nd Dept. 2006). Defendants Donderos' motion for summary judgment is denied as there is an issue of fact as to whether defendants Dondero in fact previously had maintained the subject evergreen and whether they had been negligent in the maintenance of said tree by violating Cortlandt Code §307-18 (E) and, if so, whether such violation had been a proximate cause of the subject accident. See Noller v. Peralta, 94 A.D.3d 833(2nd Dept. 2012); Deutcsh v. Davis, 298 A.D.3d 487 (2nd Dept. 2002); Perlak v. Sollin, 291 A.D.2d 540 (2nd Dept. 2002).

Defendant Donderos' argument that their evergreen tree, situated on the intersection's right corner, necessarily had nothing to do with plaintiff's crash since the vehicle that had struck plaintiff had come from plaintiff's left is rejected, since such an oversimplified reading of the record fails to acknowledge plaintiff's expert's opinion that the configuration of the intersection and the markings thereon along with the presence of the large evergreen had resulted in plaintiff's having entered further into the intersection in order to ensure clearance from his right, and that it was at that point, just as plaintiff again had turned his head to look left that he had been struck by a vehicle coming from his left.

Addressing next the Town's dispositive motion, a governmental body has a non-delegable duty to maintain its roads in a reasonably safe condition and liability will flow from the failure to correct a hazardous condition or to warn of its existence. See Sanchez v. Lippincott, 89 A.D.2d 372, 373-374 (4th Dept. 1982). This duty is independent of its duty not to create a defective condition. See Kiernan v. Thompson, 73 N.Y.2d 840 (1988). "[T]he duty of a municipality to maintain its roadways in a reasonably safe condition extends to trees which are adjacent to the road and which could reasonably be expected to pose a danger to travelers (citation omitted)," Hillard v. Town of Greenburgh, 301 A.D.2d 572 (2nd Dept. 2003), see, also Harris v. Village of East Hills, 41 N.Y.2d 446, 449 (1977), as well as to other conditions which reasonably could be expected to result in injury to the public. See Ferrigno v. County of Suffolk, 60 A.D.3d 726 (2nd Dept. 2009); Figueroa-Corser v. Town of Cortlandt, 107 A.D.3d 757 (2nd Dept. 2013); Sanchez v. Lippincott, supra; Rinaldi v. State of New York, 49 A.D.2d 361 (3rd Dept. 1975).

The Court finds that, although prior written notice had not been afforded the Town, plaintiff nevertheless has succeeded in raising an issue of fact regarding the narrow exception to the prior written notice requirement wherein prior written notice is excused when a municipality has or should have knowledge of a

defective or dangerous condition because it inspected the subject area shortly before the accident, and here the record at bar unequivocally establishes that Town employee Mr. Pritchard's job had been to drive around the Town's streets identifying dangerous conditions thereon and that he had admitted having driven by the accident location hundreds of times without his supposedly having observed the allegedly dangerous limited sight condition caused by the Donderos' large evergreen tree. See Krach v. Town of Nassau, 217 A.D.2d 737 (3rd Dept. 1995); Giganti v. Town of Hempstead, 186 A.D.2d 627 (2nd Dept. 1992); Klimeck v. Town of Ghent, 114 A.D.2d 614 (2nd Dept. 1985). Accordingly, defendant Town's motion for dismissal whether pursuant to CPLR 3211 or CPLR 3212 is denied.

The Town however correctly maintains that the row of bushes located approximately 50 feet from the accident intersection falls outside the ambit of Cortlandt Code §307-18(E) and that, with respect to the large evergreen on Donderos' property, absent a special relationship creating a municipal duty to exercise care for the benefit of a particular class of individuals, no liability to the municipality attaches based upon any violation of Cortlandt Code §307-18(E) and/or its failure to have enforced same. See O'Connor v. City of New York, 58 N.Y.2d 184, 189 (1983); Noller v. Peralta, 94 A.D.3d 830 (2nd Dept. 2012); Lubitz v. Village of Scarsdale, 31 A.D.3d 618 (2nd Dept. 2006).

The Court also rejects defendant Town's arguments that plaintiff's claims against the Town necessarily must be dismissed based upon the governmental function immunity defense which shields public entities for discretionary decisions and actions undertaken and there otherwise existing no special relationship between the Town and plaintiff. See Valdez v. City of New York, 18 N.Y.3d 69, 75-76 (2011); Haddock v. City of New York, 75 N.Y.2d 478, 484-485 (1990); see, also Sebastian v. State, 93 N.Y.3d 790 (1999). Here, the Court agrees with plaintiff that, in defense of its road design and striping, defendant Town has failed to demonstrate entitlement to the qualified immunity defense because there is no proof presented regarding whether the road design/striping decisions had resulted following adequate study. See Weiss v. Fote, 7 N.Y.2d 579, 587 (1960); Fan Guan v. State of New York, 55 A.D.3d 782, 783-784 (2nd Dept. 2008).

Additionally, while the Town claims that no liability may be imposed upon it based upon plaintiff's claim of negligent and/or defective road design and/or striping of the road since the Town had no prior written notice of said allegedly negligent road condition, the Court finds plaintiff's claim to be outside the purview of the prior written statute because plaintiff is arguing that the Town affirmatively had created said dangerous site condition, which allegedly had caused plaintiff to ride further to

the right to stay within his striped lane, and which consequently had caused him to pull further into the roadway in order to try and obtain better visibility, at which point he immediately had been struck by an oncoming vehicle. Although the record does include evidence of the absence of any prior accidents at that intersection, as well as Mr. Pritchard's testimony that he had failed to observe at any time any dangerous road condition at that intersection, same simply raises triable issues of fact as to whether Waterbury's southern leg creates a dangerous intersection condition due to its road design and/or striping, along with the presence of the large evergreen tree, all of which allegedly cause traveling vehicles to move to the left and forward in order to improve their right sight visibility but which then causes risk of injury of oncoming vehicles from the left.

Finally, notwithstanding defendant Town's urging that the sole proximate cause of the crash had been plaintiff's failure to have abided Vehicle and Traffic Law section 1141, and to have yielded the right of way to the vehicle traveling south on Waterbury Parkway instead of attempting to turn left in front of him, the Court notes that there can be more than one proximate cause of an accident and that a triable issue of fact exists regarding whether the Town's negligence, if any, had been a proximate cause of this accident.

Any additional arguments not specifically addressed and/or analyzed above have been considered and rejected or not found worthy of separate comment.

The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30 a.m., on October 7, 2013.

Dated: July 19, 2013
White Plains, New York

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J.S.C.

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