

Colvin v Town of Smithtown

2013 NY Slip Op 30094(U)

January 10, 2013

Sup Ct, Suffolk County

Docket Number: 09-956

Judge: W. Gerard Asher

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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 3-23-12
ADJ. DATE 10-1-12
Mot. Seq. # 002 - MD

-----X
MICHELLE and EDWARD COLVIN, as Co-
Administrators of the Estate of RYAN COLVIN,

Plaintiffs,

- against -

TOWN OF SMITHTOWN and LAURA
MONGEAU, As Administrator of the Estate of
ROBERT UNGERER,

Defendants.
-----X

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Upon the following papers numbered 1 to 50 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 13 - 44; 45 - 48; Replying Affidavits and supporting papers 49 - 50; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Town of Smithtown for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and all cross claims is denied.

This is an action to recover damages for the wrongful death of Ryan Colvin on March 15, 2008 at approximately 3:44 a.m. in a motor vehicle accident that occurred at the end of Old Dock Road in Kings Park, New York. The accident occurred when a vehicle operated by Robert Ungerer, in which Colvin was a passenger, drove off of the boat ramp at the end of Old Dock Road into the Nissequogue River.¹

¹ A related action entitled Laura Mongeau, as Administrator of the Estate of Robert A. Ungerer, plaintiff, v. Town of Smithtown, defendant under Index number 957/2009 was joined for trial solely on the issue of liability by order of this Court (Jones, J.) dated January 25, 2010.

Ungerer and Colvin drowned. Colvin's body and the vehicle were recovered from the River at approximately 7 a.m. and 8 a.m., respectively, that same morning. Ungerer's body was recovered from the River on April 22, 2008. Plaintiffs Michelle and Edward Colvin, co-administrators of Colvin's estate, allege that the accident occurred due to the negligent design, placement and maintenance of the roadway, dock and boat ramp and the signs in the vicinity leading to the dock and boat ramp which are operated by the Town of Smithtown (Town).

Defendant Town now moves for summary judgment dismissing the complaint² and all cross claims on the grounds that the development and design of the boat ramp and signs were in accordance with state traffic engineering standards and that the area was well-lit and that any alleged negligence by the Town was not the proximate cause of the subject accident. The Town asserts that Colvin and Ungerer were intoxicated at the time of the accident and that their impairment prevented them from observing the perceptible boat ramp and signs and that the operation of the vehicle while intoxicated was the sole proximate cause of the accident.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). "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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d 557, 562, 427 NYS2d 595).

The Town's submissions indicate that between 1984 and 1985 the Town repaired the end of Old Dock Road and replaced the boat ramp so that Old Dock Road ended at the top of the boat ramp, which sloped down into the Nissequogue River; that approaching the end of Old Dock Road, approximately 1/3 mile from the end of the road, there was one "No Outlet" sign at its intersection with St. Johnland Road and then three signs at the point where the road ended at the boat ramp, one indicating "Dead End" and two "End of the Roadway Marker" signs as well as highway and high-intensity lighting; and that said design, sign placement and lighting did not change prior to the subject accident. The deposition testimony of non-party witness Lauren Staffieri reveals that Colvin and Ungerer arrived at her home in Commack, New York at approximately 10:30 p.m. on March 14, 2008 with red plastic cups filled with some dark liquid in their hands, that they joined her and her friends in playing "beer pong" until about midnight when two twelve pack cases of beer were finished, at which time Colvin was "pretty drunk" but Ungerer did not appear to be intoxicated. Ms. Staffieri testified that Colvin and Ungerer subsequently drove to a nearby diner with some of her friends, and then dropped off her friends at her

² To the extent that defendant seeks summary judgment in the related action under Index number 957/2009, that request is not properly before this Court as the motion has been made under the incorrect index number. The request for relief must be made by motion in the appropriate action under index number 957/2009.

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home between 2:30 and 3 a.m. According to Ms. Staffieri, it was raining, dark and a little foggy; Colvin and Ungerer did not exit the vehicle upon their return to her home; and her friend Caitlin Daniele asked her at the door what was the best way for Colvin and Ungerer to return home to Centereach and they discussed taking Indian Head Road which would lead them to Route 25A, Main Street. The deposition testimony of non-party witness Steven Tarolli, the Suffolk County Police Officer in the Marine Bureau Division who assisted in the retrieval of the vehicle from the River, indicates that a half-full bottle of "Bacardi" rum as well as Coke bottles fell from the vehicle when it was lifted out of the water. The Town's submissions also reveal that there was a similar accident one year prior on August 18, 2007 in which an individual with a blood alcohol level of .31 percent drove off of the same boat ramp and was retrieved from the River, and the individual later plead guilty to operating a motor vehicle under the influence of alcohol.

Francis J. Mooney, P.E., a professional engineer in the Town Engineering Department between the years 1974 through 1992 states in his affidavit dated January 31, 2012 that he designed the boat ramp and roadway at the end of Old Dock Road and that he personally oversaw their construction in 1984 to 1985. He indicates that the use of barriers and/or guardrails was not required and would be improper as they would defeat and compromise the proper and reasonable use of the area and boat ramp causing inefficiency and problems. Mr. Mooney opines with a reasonable degree of engineering certainty that there was no reasonable danger of vehicles driving down Old Dock Road and down the boat ramp into the Nissequogue River nor any history of such an occurrence, and that the design and construction of the end of the roadway and boat ramp was safe, properly designed and constructed based on all necessary requirements and good and acceptable engineering standards from the project's completion in 1985 up to and including March 15, 2008.

Anthony Cannone, a Traffic Engineer in the Town Department of Traffic Safety opines with a reasonable degree of engineering certainty in his affidavit dated February 14, 2012 that the subject accident did not occur as a result of negligent highway design, sign placement or any unsafe or hazardous condition on the roadway. He explains that he personally installed the signs on Old Dock Road and maintained them up to and including the date of the incident and periodically performed visual inspections, surveys and studies of the roadway, and that the signs were installed as recommended by the New York State Uniform Traffic Control Devices Manual together with the exercise of his professional judgment as a traffic engineer. Mr. Cannone indicates that the map exhibits and photographs attached to the motion papers accurately represent the end of Old Dock Road and the subject boat ramp as they existed on the date of the subject incident. He avers that on said date there were no barriers, obstructions or guardrails on the physical roadway and travel lanes at the end of Old Dock Road as they were improper and not required given the history and conditions of the subject roadway. Mr. Cannone describes the lighting of the area as consisting of 10 to 15 high intensity highway light stanchions on the right side up to the area of the boat ramp brightly lighting the roadway and adjacent parking lot, a high-intensity light in the area of the boat ramp, which are on from dusk till dawn and which were all operational on the date of the accident. According to Mr. Cannone, vehicles driving toward the boat ramp when using headlamps cause the signs near the boat ramp to "light up" due to the reflective materials placed on the signs. He also states that he learned of the 2007 accident during the pendency of this action and opines that even if it had come to his attention sooner, under no circumstances would it have required a change or alteration of the existing signs. He concludes by opining with a reasonable

degree of engineering certainty that on March 15, 2008 Old Dock Road had proper, correct and safe signs, and design and was free of hazards.

David Flynn of the Town Department of Planning states in his affidavit dated February 14, 2012 that although he personally heard of the 2007 accident, no design plan to change or redesign the roadway or boat ramp would have been required for this single accident where the road and ramp had existed for over 20 years without accidents or complaints. In addition, he states that at no time prior to the subject incident was there any plan to redesign the end of Old Dock Road and the boat ramp in order to address safety issues, accident history or any concerns that the roadway was dangerous or hazardous.

By affidavit dated February 3, 2012, Brian E. Pape, Ph.D. indicates that he was engaged by the Town to provide his opinions and comments concerning clinical, analytical and forensic toxicology. He states that upon review of various documents including the notice of claim, complaints, bill of particulars, police accident report, police report for fatal motor vehicle accident, police department death report, autopsy reports and related toxicology reports of Colvin and Ungerer as well as case-related photographs, it is his opinion that at the time of the accident Ungerer had a blood alcohol concentration (BAC) greater than 0.10 percent and Colvin had a BAC greater than 0.15 percent. He also opines that the results do not provide evidence that the delay in recovering Ungerer's body resulted in an increase in BAC test results. Dr. Pape further opines with a reasonable degree of scientific certainty that the subject accident occurred as a result of the intoxication of the driver, Ungerer.

The submissions of plaintiffs Colvin in opposition to the motion include the affidavit dated April 24, 2012 of Nicholas Bellizzi, a professional engineer with training and experience in traffic engineering, highway engineering and civil engineering. Mr. Bellizzi opines that the design of Old Dock Road at the time of the subject incident made it highly likely and foreseeable that at some point a vehicle would travel from Old Dock Road into the Nissequogue River, unless prevented from doing so. He explains that the design of the roadway's approach to the River was direct with no detour, curve or deviation and that there were no barriers in place to contain a vehicle traveling at virtually any speed. In addition, he opines with a reasonable degree of engineering certainty that the boat ramp area was designed, constructed, installed and erected in contravention of good and accepted safety standards concerning deep body of water hazards as indicated in the New York State Department of Transportation Highway Design Manual. He also opines with a reasonable degree of engineering certainty that had a redesigned street to the boat ramp or a proper and adequate guide rail or barrier been erected at the subject site, such as a concrete Jersey Barrier, the vehicle would not have gone into the water. Mr. Bellizzi further opines that Old Dock Road was not properly "signed" in accordance with specified provisions of the New York State Department of Transportation Manual of Uniform Traffic Control Devices inasmuch as it did not have a "Dead End" sign at the end of the street or a supplemental "Dead End" sign on the right side of the street immediately beyond the intersection with St. Johnland Road, and that although a "Dead End" sign was placed near the start of the boat ramp, there was no indication specifically as to where the road would end.

Plaintiffs Colvin's submissions also include the deposition testimony of non-party witness Caitlin Helen Daniele of June 21, 2011 indicating that she was with Ms. Staffieri and Ungerer and Colvin on March 14, 2008, that when Ungerer drove her home in his vehicle at approximately 1:37 a.m.

on March 15, 2008 he was sober but that Colvin was “buzzed,” and that Ungerer thereafter drove her, Colvin and another friend to the diner at which time she did not observe any bottles of liquor or soda on the floor of the vehicle. According to Ms. Daniele there was no drinking of alcoholic beverages in the vehicle or at the diner. Plaintiff’s expert, Charles Wetli, M.D., board certified in anatomical, clinical and forensic pathology indicates in his affirmation dated April 8, 2012 that although he does not dispute the post-mortem toxicology results for Ungerer as set forth in Dr. Pape’s affidavit, he strongly disagrees with his conclusion that there is no evidence that the delay in recovering Ungerer’s body resulted in an increase in BAC test results. According to Dr. Wetli, BAC levels can be significantly elevated as a result of postmortem decomposition, especially when there is a long postmortem interval. He maintains that the delay in recovering Ungerer’s body renders any opinions as to the amount of alcohol that he may have consumed and the actual level of his BAC at the time of the accident speculative and unreliable. Dr. Wetli opines with a reasonable degree of medical certainty that Ungerer’s actual BAC levels at the time of the accident were significantly lower than those found at the time of his autopsy, which occurred 48 days after the accident.

The conflicting expert affidavits submitted by the parties reveal issues of fact as to whether the Town breached its duty to maintain the end of Old Dock Road in a reasonably safe condition by failing to redirect the road or place a barrier as allegedly required by the New York State Department of Transportation Highway Design Manual and/or failing to properly place signs in accordance with the New York State Department of Transportation Manual of Uniform Traffic Control Devices (see *Boyd v Trent*, 262 AD2d 260, 261, 690 NYS2d 732 [2d Dept 1999]; *Appelbaum v County of Sullivan*, 222 AD2d 987, 989, 635 NYS2d 349 [3d Dept 1995]), and whether the failure to do so was a proximate cause of the accident (see *McIntosh v Village of Freeport*, 95 AD3d 965, 943 NYS2d 234 [2d Dept 2012]). The adduced evidence also raises questions of fact regarding whether the Town affirmatively created or had constructive notice of a dangerous condition, and whether the operation of the vehicle was the sole proximate cause of the accident (see *O’Buckley v County of Chemung*, 88 AD3d 1140, 931 NYS2d 717 [3d Dept 2011]; *Ferguson v Sheahan*, 71 AD3d 1207, 896 NYS2d 245 [3d Dept 2010]; *Hill v Town of Reading*, 18 AD3d 913, 795 NYS2d 126 [3d Dept 2005]; *Appelbaum v County of Sullivan*, 222 AD2d 987, 635 NYS2d 349 [3d Dept 1995]).

Accordingly, the instant motion is denied.

Dated: January 10, 2013

W. Grand Ashe
J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION