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SHORT FORM ORDER

INDEX No. 11-18295
CAL. No. 14-01491MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 1-28-15 (#002)
MOTION DATE 2-18-15 (#003)
ADJ. DATE 7-31-15
Mot. Seq. # 002 - MG
003 - MD

ANDREW JAMES ROSA, an incapacitated person, by JOANN M. ROSA, and JAIME M. ROSA, his parents and co guardians, and JOANN M. ROSA, individually,

Plaintiffs,

- against -

LAKEY E. HARRIS, TOWN OF BROOKHAVEN and VERIZON NEW YORK, INC.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion for summary judgment by the defendant Verizon New York Inc., dated December 12, 2014 and supporting papers (including Memorandum of Law); Notice of Motion for summary judgment by defendant Town of Brookhaven dated January 5, 2015 (2) Notice of Cross Motion by the , dated , supporting papers; (3) Affirmation in Opposition to defendant Verizon's motion by the plaintiffs dated March 23, 2015; affirmation in opposition to defendant Verizon's motion by defendant Lakey Harris dated June 18, 2015; affirmation in opposition by the plaintiffs to defendant Town's motion dated June 9, 2015 and supporting papers; (4) Reply Affirmation in further support by defendant Verizon, dated June 8, 2015; reply affirmation in further support by defendant Town dated July 30, 2015 and supporting papers; (5) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

ORDERED that the motion of defendant Verizon New York Inc. (seq. 002) and the motion of defendant Town of Babylon (seq. 003) are consolidated for purposes of this determination; and it is

ORDERED that the motion of defendant Verizon New York Inc. for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion of defendant Town of Brookhaven for summary judgment dismissing the complaint and cross claims against it is denied.

Plaintiff Joann Rosa, individually and on behalf of her son, plaintiff Andrew Rosa, commenced this action to recover damages for injuries suffered by her son on May 17, 2010, when he was struck by a vehicle driven by defendant Lakey Harris while riding a bicycle through the intersection of Adirondack Drive and Sunrise Place in Farmingville, New York.

The complaint and bill of particulars allege that defendant Lakey Harris was a proximate cause of plaintiff's injuries by his negligent operation and control of his vehicle. The bill of particulars further alleges defendants Town of Brookhaven and Verizon New York, Inc. were negligent in failing to properly maintain the shrubbery and foliage at the location of the accident, which allegedly obscured the views of both infant plaintiff and defendant Harris, creating a dangerous condition at the intersection. The Court notes that by order dated September 28, 2015, the undersigned, pursuant to a stipulation of the parties, amended the caption of this action to "Andrew James Rosa an incapacitated person, by Joann Rosa and Jaime Rosa, his parents and co guardians, and Joann Rosa, individually."

Defendant Verizon New York Inc. (Verizon) now moves for summary judgment dismissing the complaint and cross claims against it on the ground that it did not owe a duty to plaintiff Andrew Rosa, as it did not own or control the property at the location of the accident. In support of its motion, Verizon submits copies of the pleadings, the bill of particulars, and transcripts of the deposition testimony of defendant Lakey Harris, Robert Compitello, Lynn Weyant, Thomas Robert Gilbert, Kevin Gieger, and James Borneman. An affidavit of Dave Walsh, a former employee of Verizon, also is submitted.

Defendant Lakey Harris testified that on May 17, 2010, at approximately 4:00 p.m., he was driving his vehicle southbound on Adirondack Drive towards Sunrise Place in the Town of Brookhaven, when it collided with a bicyclist, plaintiff Andrew Rosa. Harris testified that on the date of the accident, the weather was clear, the roads were dry, and he was traveling at 25 mph. He testified that as he approached Sunrise Place, he looked towards his right and did not observe plaintiff until plaintiff crashed into the passenger side of his vehicle and onto the windshield. Harris testified that he was unable to see the roadway at the southwest corner of Adirondack Drive and Sunrise Place, because trees, shrubs, and bushes blocked his vision. Harris testified there was a stop sign controlling eastbound traffic on Sunrise Place, but there was no stop sign on Adirondack for his direction of travel. He testified that the stop sign was not visible, as the bushes, trees and shrubs covered it.

Robert Compitello testified on behalf of Verizon. He testified that he works as a right-of-way manager for properties owned by Verizon in the County of Suffolk, and that his duties include obtaining permits when work is conducted on roadways, and handling easements, insurance, security bonds, and property owner complaints. He testified that he keeps records of permit applications, and that he

searched those records back to 2007 and found no applications for permits at the subject location. Compitello testified that he had a survey prepared for the vicinity in which Verizon owns property, and that Verizon has wires on the east side of Adirondack Drive and the south side of Sunrise Place. He testified that Verizon and LIPA share utility poles located on the east side of Adirondack Drive. He testified that he conducted a search of his records back to 2007 and found that no work had been done on any of the wires or the poles. Compitello further testified that Verizon does not own any easements in the area of Adirondack Drive and Sunrise Place. He also testified that he keeps written records of complaints from private property owners, and that a search of those records pertaining to the area back to 2007 revealed none. He testified that Verizon owns an abandoned building several hundred feet north of Sunrise Place, and that any maintenance of that property is conducted by the real estate manager, who, at the time of the accident, was Dave Walsh. Compitello testified that Verizon does not conduct any tree trimming or maintenance on its property, and that such work is handled by the real estate manager. He testified that Verizon did not have a right-of-way at the southwest corner of the subject intersection. He further testified that the Town of Brookhaven had the right-of-way for that area.

Dave Walsh submitted an affidavit stating that he was a property manager for Verizon from 1995 until May 17, 2010. The affidavit states that the abandoned structure owned by Verizon was a non-functioning radio station that had not been utilized for several years. He states in his affidavit that he hired Global Special Services Inc. to cut grass and weeds at the facility. Walsh also states that Verizon did not own any property or have any facilities within the Town's right-of-way on Adirondack Avenue or Sunrise Place.

Lynn Weyant testified on behalf of the Town. She testified that she has been employed by the Town of Brookhaven since 1988 and is currently a consultant for the Highway Department. She testified that she was the director of traffic safety from 2004 until 2010, and that she handled issues involving rights-of-way, which she defined as an area of a roadway dedicated and maintained by the Town of Brookhaven Highway Department. She testified that the right-of-way included the lanes on the highway, which are 34 feet wide, and an additional 8 feet on each side. Weyant testified that she made those determinations by reviewing surveys and county tax maps, and that she has reviewed over one hundred surveys during her career. Weyant testified that the Town maintained the right-of-way along Adirondack Drive on the date of the subject accident, and that the right-of-way on the west side of Adirondack Drive ranged from 10.7 feet to 13.7 feet from the roadway to the abutting landowner's property. She testified that the Highway Department was responsible for trimming and maintaining the trees, bushes and shrubs in the Town's right-of-way. During her deposition, Weyant viewed photographs taken by the police on the date of the accident. She testified that the photographs accurately depict the foliage, bushes and shrubs at the subject area on the date of the accident and that they were in the Town's right-of-way. She testified that she could not see any stop signs.

Thomas Gilbert testified on behalf of the Town. He testified that he works in the Highway Department as a supervisor, and that his job includes supervising maintenance crews who perform tree trimming, lawn cutting, road maintenance and other duties for road safety. He testified that on the date of the accident, the Town maintained the right-of-way for the area where the subject accident occurred and that the Highway Department was responsible for the roadway and shrub maintenance at the subject area. Gilbert testified that there is a stop sign on Sunrise Place for eastbound traffic at the intersection

with Adirondack Drive. When presented with photographs of the subject intersection at the deposition, Gilbert testified he was unable to see the stop sign through the dense vegetation.

Kevin Geiger testified as a witness for the Town. He testified that he works for the Town in the Highway Department as a highway maintenance crew leader, and that he supervises all maintenance, mechanics, installation and repairs of street signs. Geiger, shown photographs of the accident scene taken by the police on the date of the accident, testified that such photographs accurately depicted the intersection of Adirondack Drive and Sunrise Place. He testified that the vegetation was dense and that he could not see the stop sign on Sunrise Place in the photograph. When asked if the area to the right of the Adirondack Drive, from north to south, was considered a sight obstruction, Geiger responded yes. He testified that he traveled through that area several times prior to the subject accident and that it had always been in the same condition. He testified that he did not put in a request for right-of-way work to be done to the area nor did he tell anyone there was a sight obstruction. Geiger testified that he knew how to read surveys and was shown a survey of the subject area. He testified that the right-of-way at the corner of Sunrise Place and Adirondack Drive is 10.7 feet and increases to 13 feet as it runs north to Summit Place.

James Borneman testified on behalf of the Town. He testified that he works for the Town as a traffic technician, and that his duties include inspecting roadways and collecting data for the traffic engineer. He testified that on May 25, 2010, he received instructions from the engineer to obtain a copy of the police accident report from the subject accident, which he did, and that on June 9, 2010, he was instructed to inspect the accident site and prepare a condition diagram regarding site distance issues at the subject site. He testified that he conducted his investigation on June 25, 2010, and, as a result of the inspection, he prepared a work order. Borneman testified that the foliage needed to be trimmed to increase visibility, as it created a sight distance obstruction at the right-of-way located in the area of the accident site.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hospital***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make 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]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, 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 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]). Premises liability for an injury caused by a

dangerous condition is predicated upon ownership, occupancy, control, or special use (***Russo v Frankels Garden City Realty Co.***, 93 AD3d 708, 940 NYS2d 144 [2d Dept 2012]; ***Ellers v Horwitz Family Ltd. Partnership***, 36 AD3d 849, 831 NYS2d 417 [2d Dept 2007]). A landowner has a nondelegable duty to maintain the property in a reasonably safe condition to prevent the occurrence of foreseeable injuries (*see* ***Nallan v Helmsley-Spear, Inc.***, 50 NY2d 507, 429 NYS2d 606 [1980]; ***Basso v Miller***, 40 NY2d 233, 386 NYS2d 564 [1976]). Notwithstanding, a landowner does not have a common law duty to control vegetation on its property from creating visual obstructions for the benefit of users of a public highway (***Preux v Dennis,*** 116 AD3d 942, 983 NYS2d 843 [2d Dept 2014]; ***Lubitz v Village of Scarsdale***, 31 AD3d 618, 819 NYS2d 92 [2d Dept 2006]). 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 by a violation (*id*).

Verizon established prima facie its entitlement to summary judgment through the deposition testimony demonstrating it did not have the right-of-way at the property where the subject accident occurred, and, thus, did not have a duty to maintain the foliage which allegedly obstructed the vision of Harris and Andrew Rosa as they approached the intersection (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923). The burden shifted to the parties opposing this motion to proffer evidence in admissible form sufficient to raise a genuine issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

Plaintiffs have not opposed the motion, as their counsel has affirmed that they are settling their claim with Verizon. The Town opposes Verizon's motion with one submission, an affirmation of counsel which is insufficient to raise a triable issue of fact. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). Counsel for the Town argues that Verizon is liable based upon its violation of §85-882 of the Town Code of Brookhaven, which requires landowners to maintain their hedges, shrubs, trees, bushes or growth to a height of 2 ½ feet on corner lots. However, neither the complaint nor the bill of particulars allege a violation of same (*see* ***Kwang Sik Kim v A & K Plastic Products, Inc.,*** 133 AD2d 219, 519 NYS2d 24 [2d Dept 1987]; ***Bouton v County of Suffolk***, 125 AD2d 620, 509 NYS 2d 846 [2d Dept 1986]; ***Sobel v Midchester Jewish Center***, 52 AD2d 944, 383 NYS2d 635 [2d Dept 1976]). Moreover, Verizon has established by its evidentiary proof, namely, the deposition testimony of its employees and the Town's employees, that Verizon did not own the property where the foliage which is alleged to have obstructed the view was growing. Accordingly, Verizon's motion for summary judgment dismissing the complaint and cross claims against it is granted.

The Town moves for summary judgment dismissing the complaint and the cross claims against it on the grounds that it did not have prior written notice of the alleged dangerous condition as required by section 84.1 of the Code of the Town of Brookhaven, and that the alleged dangerous condition was not a proximate cause of the accident. In support of the motion, the Town submits copies of the pleadings, the transcript of Lakey Harris' deposition testimony, and the affidavits of Lynn Weyant, Thomas Gilbert, and Linda Sullivan.

A municipality has the nondelegable duty of maintaining its roads and highways in a reasonably safe condition (***Wittorf v City of New York***, 23 NY3d 473, 479, 991 NYS2d 578 [2014]; ***Stiuso v City of New York***, 87 NY2d 889, 639 NYS2d 215 [1995]), and that duty extends to conditions adjacent to the highway (***Finn v Town of Southampton***, 289 AD2d 285, 286, 734 NYS2d 215 [2d Dept 2001]). However, a municipality that has enacted a prior written notice statute may not be subjected to liability for injuries caused by an obstructive condition which allegedly caused the accident unless it either has received written notice of the defect or an exception to the written notice requirement applies (*see* ***Poveromo v Town of Cortlandt***, 127 AD3d 835, 6 NYS3d 617 [2d Dept 2015]; ***Dutka v Odierno***, 116 AD3d 823, 983 NYS2d 405 [2d Dept 2014]; ***Forsythe-Kane v Town of Yorktown***, 249 AD2d 505, 672 NYS2d 355 [2d Dept 1998]; ***Levine v Sharon***, 160 AD2d 840, 554 NYS2d 274 [2d Dept 1990]). 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, 720, 2 NYS 3d 527 [2d Dept 2015]).

The Town of Brookhaven has enacted a prior written notice statute. Section 84.1 of the Code of the Town of Brookhaven provides as follows:

> No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, bridge, culvert or crosswalk of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of

Here, the complaint and the bill of particulars allege that the Town was negligent in failing to maintain the shrubbery and foliage located at the area of the subject accident, thus causing the view of plaintiff and defendant Harris to be obscured. Such obstruction of view falls within the purview of the Town of Brookhaven's code, thus requiring, as a condition precedent to the maintenance of this action, written notice to the Town of the alleged dangerous condition (*see* ***Dutka v Odierno***, 116 AD3d 823, 983 NYS2d 405; ***Dworkin v Ecolab, Inc.***, 283 AD2d 544, 725 NYS2d 218 [2d Dept 2001]). The Town's submissions fail to establish a prima facie case that it did not have the requisite notice of the site obstruction. The deposition testimony of Kevin Geiger, a highway maintenance crew leader, revealed that he had personal knowledge of the overgrown vegetation that caused a site obstruction, yet chose not to advise anyone in his department of the condition. He admitted that he traveled through the area several times prior to the subject accident and observed the dangerous condition, yet blatantly disregarded his duties as the head of maintenance to put in a request for work. Furthermore, the 1983 traffic study conducted for the subject area is further evidence that the Town was aware of the dangerous condition where the accident occurred, as the study recommended installing limited sight distance signs

along Adirondack drive. However, these warnings were also disregarded by the Town. "The purpose of a prior written notice provision is to place a municipality on notice that there is a defective condition on publicly-owned property which, if left unattended, could result in injury" (***Gorman v Town of Huntington***, 12 NY3d 275, 292, 879 NYS2d 379 [2009]). These provisions seek to balance a municipality's duty to maintain its roadways in a reasonably safe condition while recognizing "the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways" (***Poirier v City of Schenectady***, 85 NY2d 310, 314, 624 NYS2d 555 [1995]). Under the circumstances of this case, the reality is that the Town was aware of the dangerous condition, the site obstruction, well before the date of the accident, was aware that such condition was left unattended by its inaction, and, thus, it could foresee the potential for injury. The public has a right to rely on those it entrusts with maintaining its domain, and a municipality has a non-delegable duty towards those who rely on it. Therefore, the Town is estopped from asserting its notice statute as a shield for its liability. With respect to the Town's argument that its maintenance of the subject area was not a proximate cause of plaintiff's injuries, this issue is inappropriate for summary judgment. Generally, it is for the trier of fact to determine the issue of proximate cause. However, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts (*see* ***Howard v Poseidon Pools***, 72 NY2d 972, 534 NYS2d 360 [1988]; ***Velez v Mandato***, 129 AD3d 945, 12 NYS3d 172 [2d Dept 2015]; ***Scala v Scala***, 31 AD3d 423 818 NYS2d 151 [2d Dept 2006]). This court is unable to draw one conclusion from the Town's submissions. Accordingly, the Town's motion for summary judgment in its favor is denied.

Dated: February 22, 2016

PETER H. MAYER, J.S.C.

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION