Bekas v Tjornhom
2016 NY Slip Op 30421(U)
March 3, 2016
Supreme Court, Suffolk County
Docket Number: 27641/2010
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

Spiro Bekas and Carol Bekas, his wife,

Plaintiffs,

-against-

Laurie Tjornhom and Wayne Tjornhom,

Defendants.

Action No. 1

Index No.: 27641/2010

Attorneys [See Rider Annexed]

Laurie Tjornhom and Wayne Tjornhom,

Third-Party Plaintiffs,

-against-

The Town of Huntington,

Third-Party Defendant.

Third-Party Action

Elaine Robinson, as Administratrix of the Estate of Ulysses Taylor, deceased,

Plaintiff,

-against-

Laurie Tjornhom, Wayne Tjornhom, Spiro Bekas, Care & Comfort Associates, Inc., Town of Huntington, Brendan Higgins, Tracy Higgins and County of Suffolk,

Defendants.

Action No. 2

Index No.: 26218/2010

Motion Sequence No.: 004; MD
Motion Date: 1/15/15
Submitted: 4/22/15

Timothy Shanahan, as Executor of the Estate of Lorraine Shanahan, deceased, and Lorraine Shanahan individually,

Plaintiff,

-against-

Lauren Tjornhom, Wayne Tjornhom, Care & Comfort Associates, Inc., Spiro N. Bekas, Town of Huntington, County of Suffolk, Brendan Higgins and Tracy Higgins,

Defendants.

Action No. 3

Index No.: 40811/2010

Spiro Bekas and Carol Bekas,

Plaintiff,

-against-

Town of Huntington, Brendan Higgins and Tracy Higgins,

Defendants.

Action No. 4

Index No.: 36462/2011

Upon the following papers numbered 1 to 22 read upon this motion for summary judgment: Notice of Motion and supporting papers, 1 - 6; Answering Affidavits and supporting papers, 7 - 18; Replying Affidavits and supporting papers, 19 - 22; it is

ORDERED that the motion by defendants, Brendan and Tracy Higgins, for summary judgment dismissing the complaints in Action 2, Action 3 and Action 4 is denied.

Four actions involving fatalities as a result of a motor vehicle accident between an ambulette operated by plaintiff/defendant Spiro Bekas ("Bekas") and owned by defendant Care & Comfort Associates, Inc. (hereinafter "Bekas/Care" when referred to collectively), and an SUV operated by defendant/third-party plaintiff Laurie Tjornhom and owned by defendant Wayne Tjornhom ("Tjornhom") were joined for trial by order of this Court dated February 8, 2011. It is well-settled that where a joint trial has been ordered, each action maintains its separate identity, requiring separate motions with separate orders and judgments rendered in each (*see* ***Brian Wallach Agency, Inc. v Bank of New York***, 75 AD2d 878 [2d Dept 1980]; ***Padilla v Greyhound Lines, Inc.***, 29 AD2d 495, 497 [1st Dept 1968]). Moreover, in the actions at bar, a stipulation executed by counsel for

each of the parties, so ordered by this court in December 2013, explicitly sets forth that "all motions interposed in any of the four actions joined for trial bear but a single caption reflecting the action in which said motion is made..."

Here, the defendants Brendan and Tracy Higgins (hereinafter collectively referred to as the "Higgins defendants"), improperly make one motion seeking summary judgment in Action 2, Action 3 and Action 4. To preserve the resources of the court, a decision will be rendered in this procedurally improper motion and a copy of the order placed in the file of each action. However, failure to comply with the statute and the so ordered stipulation will result in the denial of any improperly filed future motion without regard to the substantive sufficiency of the moving papers.

The motor vehicle accident occurred on April 28, 2010 at the intersection of Third Avenue and Third Street in Huntington, New York. At the subject intersection, Third Street, which runs north and south, is controlled by a stop sign, whereas Third Avenue, which runs east and west, is a through street not controlled by any traffic device. The accident occurred when Tjornhom, traveling southbound on Third Street, collided in the intersection with the ambulette traveling westbound on Third Avenue. As a result of the impact, a parked vehicle was hit and the ambulette flipped over onto its roof. At the time of the accident, Ulysses Taylor and Lorraine Shanahan were passengers in the ambulette and suffered injuries which resulted in their deaths.

Bekas commenced Action 1 to recover damages for personal injuries, alleging that Tjornhom was negligent in the operation of the SUV for failing to obey the stop sign controlling her lane of travel on Third Street, and for failing to yield to the ambulette which was already in the intersection. Tjornhom admits that she did not stop as she did not see the stop sign but alleges that it was obscured by foliage from a tree, and that the failure to properly maintain the tree was the proximate cause of the accident. The Tjornhom defendants commenced a third-party action against the Town of Huntington (the "Town") for negligence and indemnification.

Elaine Robinson, as administratrix of the estate of Ulysses Taylor, deceased, commenced Action 2, and Timothy Shanahan, as executor of the estate of Lorraine Shanahan, deceased, and Lorraine Shanahan, individually (collectively hereinafter referred to as the "Shanahans"), commenced Action 3 against the Tjornhom defendants and Bekas/Care, alleging negligence in the ownership and operation of their respective vehicles, and against Brendan and Tracy Higgins (collectively the "Higgins defendants"), the owners of the property upon which the tree is located, the Town of Huntington (the "Town") and the County of Suffolk (the "County") for negligence with regard to the stop sign and maintenance of the tree. By order of this Court dated September 25, 2013, Action 2 and Action 3 were dismissed as against the County of Suffolk only. Robinson alleges that the Higgins defendants were negligent in failing to properly maintain the tree and allowing foliage to obscure the stop sign. Thereafter, Bekas commenced Action 4, making essentially the same allegations against the Town and the Higgins defendants.

Robinson also alleges that the Town was negligent as it has the non-delegable duty to maintain the tree in the event the property owners fail to do so, and that it was further negligent in

the design, construction and maintenance of the sidewalk, including the failure to properly position the stop sign to prevent obstruction, and/or in improperly planting the tree and not maintaining it.

The Shanahans allege that Tjornhom failed to yield the right-of-way to the ambulette; that Bekas failed to use reasonable care and observe the Tjornhom vehicle and to take reasonable actions to avoid the collision; that Mr. Higgins failed to use reasonable care when some time prior to the accident he trimmed the tree obscuring the stop sign; and that the Town of Huntington failed to use reasonable care to maintain its traffic signs.

Discovery has been completed and the note of issue filed. The Higgins defendants now move for summary judgment dismissing the complaints in Action 2, Action 3 and Action 4 as asserted against them on the grounds that they had no duty to maintain or otherwise prevent obstructions to the stop sign, as that non-delegable duty belonged to the Town. The Bekas/Care defendants separately move for summary judgment in Action 1 on the issue of liability on the grounds that Bekas was not negligent in the operation of the ambulette, and for summary judgment dismissing Action 2 and Action 3 as asserted against them on the ground that Bekas was not negligent with respect to the manner in which Taylor and Shanahan were secured inside the ambulette.

In support of their motion, the Higgins defendants argue that they did not have a duty to maintain or prevent obstructions to the subject stop sign. It is their contention that the Town has the non-delegable duty to maintain the stop sign.

The municipality has a duty to maintain its roads and highways in a reasonably safe condition (*see* ***Stiuso v City of New York***, 87 NY2d 889, 639 NYS2d 1009 [1995]; ***Carrillo v County of Rockland***, 11 AD3d 575, 782 NYS2d 668 [2d Dept 2004]), which includes a responsibility to trim the growth of foliage within a roadway's right-of-way to ensure the visibility of stop signs (*see* ***Nichols-Sisson v Windstar Airport Service, Inc.***, 99 AD3d 770 952 NYS2d 223 [2d Dept 2012]; ***Finn v Town of Southampton***, 289 AD2d 285, 734 NYS2d 215 [2d Dept 2001]). A property owner is not under a common-law duty to control vegetation on its property from obstructing the view of motorists at an intersection (*see* ***Clementoni v Consolidated Rail Corp.***, 8 NY3d 963, 836 NYS2d 507 [2007]; ***Meloe v Gardner***, 40 AD3d 1055, 840 NYS2d 72 [2d Dept 2007]; ***Kolkmeyer v Westhampton Taxi & Limo Serv.***, 261 AD2d 587, 690 NYS24 675 [2d Dept 1999]; ***Ingenito v Robert M. Rosen, PC***, 187 AD2d 487, 589 NYS2d 574 [2d Dept 1992]). It is only in those cases where the property owner is under a statutory or regulatory obligation to prevent vegetation from visually obstructing the roadway that liability may attach by reason of the property owner's failure to comply therewith (*see* ***Lubitz v Village of Scarsdale***, 31 AD3d 618, 819 NYS2d 92 [2d Dept 2006]; ***Deutsch v Davis***, 298 AD2d 487, 750 NYS2d 84 [2d Dept 2002]; ***Perlak v Sollin***, 291 AD2d 540, 737 NYS2d 660 [2d Dept 2002]).

Here, triable issues of fact exist as to whether the Higgins defendants violated the duty created by Town of Huntington Code (the "Code") § TC6-7 and, if so, whether such violation was a proximate cause of the accident (*see* ***Noller v Peralta***, 94 AD3d 833, 941 NYS2d 703 [2d Dept 2012]; ***Perlak v Sollin***, *supra*). This section of the Code provides that if a tree "located on private

property creates a vision obstruction to the operator of any motor vehicle seeking to enter onto or leave a Town road, such shall be deemed to be a violation of the Code." The Higgins defendants have failed to establish that they were not in violation of the Code. Although they deny that the tree was on their property, in their respective depositions the Higgins defendants could not confirm that the tree did not belong to them, and they have not proffered a survey. Their testimony simply established that the tree existed when they moved in several years prior to the accident. Similarly, the testimony of Alfred Gorski, the tree foreman employed by the Town on the day of the subject accident, does not shed any light on whether the tree was planted by the Town and/or on Town property.

It is established law that violation of an ordinance is "evidence of negligence which the jury could take into consideration with all other evidence on the subject" (***Major v Waverly & Ogden***, 7 NY2d 332, 226, 197 NYS2d 165 [1960], adopted by ***Elliot v City of New York***, 97 NY2d 730, 724 NYS2d 397 [2001]). Code § TC6-7 imposes a duty on property owners that may give rise to tort liability for damages proximately caused by its violation (*see* ***Lubitz v Village of Scarsdale***, *supra*; ***McSweeney v Rogan***, 209 AD2d 386, 618 NYS2d 430 [2d Dept 1994]). The Higgins defendants have failed to make out a *prima facie* case entitling them to summary judgment dismissing the complaints as asserted against them in Action 2, Action 3 and Action 4. Thus, having failed to satisfy their initial burden, the motion must be denied regardless of the sufficiency of the plaintiffs' opposition papers (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]).

Accordingly, the motion is denied.

Dated: March 3, 2016

William B Rebolini

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

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

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Clerk of the Court

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