Perkins v County of Tompkins
2017 NY Slip Op 31802(U)
August 25, 2017
Supreme Court, Tompkins County
Docket Number: 2014-0037
Judge: Eugene D. Faughnan
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[* 1]

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tompkins County Courthouse, Ithaca, New York, on the 20th day of June, 2017.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TOMPKINS COUNTY

CHRISTOPHER PERKINS, by and through KATHLEEN PERKINS, as Guardian of his Person and Property,

Plaintiffs,

-vs-

COUNTY OF TOMPKINS, ROBERT L. ZIMMER, JR., as Administrator of the Estate of ROBERT L. ZIMMER, SR., deceased, ROBERT L. ZIMMER JR., ROBERT L. ZIMMER, JR. d/b/a FINGER LAKES MASONRY FLM

Defendants.

DECISION

Index No. 2014-0037
RJI No. 2014-0509-C

ROBERT L. ZIMMER, JR., as Administrator of the Estate of ROBERT L. ZIMMER, SR., deceased,

Third-party Plaintiff,

-vs-

JOSEPHINE HINES and the COUNTY OF TOMPKINS,

Third-party Defendants.

[* 2]

APPEARANCES:

COUNSEL FOR PLAINTIFFS:	DEMPSEY & DEMPSEY By: Catherine Dempsey, Esq. 561 Franklin Street Buffalo, NY 14202
COUNSEL FOR DEFENDANT/ THIRD PARTY PLAINTIFF ROBERT L. ZIMMER, SR.:	COSTELLO, COONEY & FEARON, PLLC By: James J. Gascon, Esq. 5701 West Genesee Street Camillus, NY 13031
COUNSEL FOR DEFENDANTS ROBERT L. ZIMMER, JR. and ROBERT L. ZIMMER JR. d/b/a FINGER LAKES MASONRY FLM:	Paul Tavelli, Esq. 405 North Tioga Street Ithaca, NY 14850
COUNSEL FOR DEFENDANT/ THIRD PARTY DEFENDANT COUNTY OF TOMPKINS:	COUNTY ATTORNEY'S OFFICE By: William Troy, III, Esq. 125 East Court Street Ithaca, NY 14850
COUNSEL FOR THIRD PARTY DEFENDANT JOSEPHINE HINES:	LAW OFFICE OE KEITH D. MILLER By: Keith D. Miller, Esq. 1000 7th North Street, Suite 120 Liverpool, NY 13088

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court upon a motion by the Estate of Robert L. Zimmer Sr. ("Defendant")[1] dated February 14, 2017 wherein Defendant seeks Summary Judgment pursuant to CPLR §3212.

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[1]Defendant/Third Party Plaintiff Robert L. Zimmer, Sr. passed away during the pendency of this action, and Robert L. Zimmer, Jr., also a named Defendant, was appointed Administrator of the Estate. For purposes of this Decision, the Court is referring to Mr. Zimmer, Sr., or his Estate, as Defendant.

[* 3]

The facts are not in significant dispute. Defendant is the owner of real property located on South Main Street, Groton, New York, Tompkins County. The property has a driveway accessing South Main Street. The driveway is located at the northerly portion of Defendant's property and south of a "blind curve". Because of the curve, Defendant had a limited view of southbound traffic but a long line of sight for northbound traffic. When leaving his driveway to go south on South Main Street, Defendant would routinely enter the roadway by the northbound lane facing south, before moving into the southbound lane. This was presumably calculated to avoid a collision with any southbound traffic coming around the blind curve.

On August 15, 2012, Christopher Perkins ("Plaintiff") was operating a motorcycle southbound on South Main Street. Defendant, planning to proceed south on South Main Street, left his driveway in the northbound lane but heading in a southerly direction. Plaintiff came around the blind curve and drove off the road, striking a telephone pole. Plaintiff alleges that he left the road in reaction to seeing Defendant in the northbound lane facing in the wrong direction.

Defendant seeks Summary Judgment dismissing the Complaint. Defendant argues that Plaintiff has not pled any claim for premises liability and even if he had, under these circumstances, no liability may be found as a matter of law. Defendant further argues that his actions (driving on the wrong side of the road), admittedly in violation of Vehicle and Traffic Law §1120, were not the proximate cause of this accident.

Plaintiff argues that the complaint is sufficient in asserting a claim as to premises liability, and from the early stages of the case, plaintiff has asserted the premises liability claim, as further amplified in his bill of particulars. Plaintiff further asserts that the Defendant knew that his driveway's location created an inherently dangerous situation, and that he was under a duty to correct the defect. Finally, Plaintiff argues that question of proximate cause is, in most instances, reserved to the finder of fact and should not be the basis for summary finding.

Sufficiency of Pleadings on the question of premises liability

Generally, pleadings must be specific enough "to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR §3013; *see Johnson v. Verona Oil, Inc.*, 36 AD3d 991, 993 (3rd Dept. 2007); *cf. Eklund v. Pinkey*, 27 AD3d 878, 879 (3rd Dept. 2006); *Hassan v. Schweizer*, 277 AD2d 797, 800 (3rd Dept. 2000). "It is well settled that a bill of particulars is intended to amplify the pleadings, limit the proof, and prevent surprise at trial. . . . Whatever the pleading pleads, the bill must particularize . . . . A bill of particulars may not be used to allege a new theory not originally asserted in the complaint." *Darrisaw v. Strong Mem. Hosp.*, 74 AD3d 1769, 1770 (3rd Dept. 2010), *affd* 16 NY3d 729 (2011)[internal quotation marks and citations omitted]. However, a bill of particulars may be considered in determining the "sufficiency of a pleaded cause of action." *Alami v. 215 E. 68th St. L.P.*, 88 AD3d 924, 925-926 (2nd Dept. 2011) *quoting* Siegel, NY Prac § 238, at 401 (4th ed).

In the present matter, Plaintiff identifies Defendant of the owner of the property from which he entered the road, as well as the driver of the vehicle. The complaint specifically alleges Defendant's negligence in that he "pulled onto the roadway when it was not safe to do so" (Complaint ¶ 13). The complaint further alleges that "[t]he accident was caused solely by the negligence of defendants..." without further specifying the nature of that negligence. (Complaint ¶ 17). In his bill of particulars dated September 26, 2014[2], Plaintiff specifies Defendant's negligence as, among other things, "failing to locate/relocate the driveway at 801 South Main Street so that vehicles exiting the driveway would have a clear view of vehicles traveling south on South Main Street."

In light of the foregoing, Court finds that Plaintiff's complaint is sufficiently broad to encompass a claim for premises liability. Although the complaint could have been more specific with regard

[2]Plaintiff's bill of particulars was served approximately 8 months after the commencement of this action.

to the nature of the claims of negligence, the Court concludes that the bill of particulars amplifies the claim by providing specific allegations of negligence, including premises liability. Further, the Defendant has been aware for considerable time of the nature and extent of the claimed negligence. The Defendant had ample opportunity to seek dismissal pursuant to CPLR §3211, of any claim for premises liability as early as September of 2014. However, upon such a motion, Plaintiff would have likely moved to amend the complaint. Effectively, Defendant is asking the Court to grant summary judgment on a claim he says was not made. In light of the fact that the bill of particulars was served in a reasonably short time after commencement, the Defendant cannot now argue surprise at trial. *See generally, Jones v. LeFrance Leasing Ltd. Partnership*, 61 AD3d 824 (2nd Dept. 2009). Therefore, the Court concludes that the claim for premises liability has been sufficiently alleged.

Summary Judgment

When seeking summary judgment, the movant must make a *prima facie* case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). "When faced with a motion for summary judgment, a court's task is issue finding rather than issue determination *(see, Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404) and it must view the evidence in the light most favorable to the party opposing the motion, giving that party the benefit of every reasonable inference and ascertaining whether there exists any triable issue of fact." *Boston v. Dunham,* 274 AD2d 708, 709 (3rd Dept. 2000); *see, Boyce v. Vazquez*, 249 AD2d 724, 726 (3rd Dept. 1998).

1. Premises Liability

"In order to sustain a cause of action for negligence, a court must first determine, as a matter of law, that the defendant owed a duty to the plaintiff." *Daversa v. Harris*, 167 AD2d 810, 811 (3rd Dept. 1990); *see*, *Pulka v. Edelman*, 40 NY2d 781, 782 (1976); *Palsgraf v. Long Is. R. R. Co.*, 248 NY 339 (1928); *Matthews v. Scotia-Glenville School Sys*., 94 AD2d 912 (3rd Dept. 1983), *lv denied* 60 NY2d 559; *Donohue v. Copiague Union Free School Dist*., 64 AD2d 29, 33 (2nd Dept 1978), affd 47 NY2d 440 (1979). "In the absence of a duty, there is no breach and without a breach there is no liability." *Pulka* at 782. "Negligence in the air, so to speak, will not do." *Id. citing* Pollock, Torts (13th ed), p.468.

"A landowner has a duty to exercise reasonable care under the circumstances in maintaining its property in a safe condition." *Kush v. City of Buffalo*, 59 NY2d 26, 29 (1983). Generally, "a landowner's duty to warn of a latent, dangerous condition on his property is a natural counterpart to his duty to maintain his property in a reasonably safe condition." *Galindo v. Town of Clarkstown*, 2 NY3d 633, 636 (2004). However, a landowner's duty does not extend to hazards not located on his property. *Martino v. Stolzman*, 18 NY3d 905 (2012).

In the present matter, there is no allegation that the driveway itself was in some way defective. Rather, Plaintiff argues that the location of the driveway in relation to the blind curve on South Main Street was the dangerous condition which gives rise to Defendant's duty. However, the defect, if any, is in the curve of the road, and the lack of any sign warning of Defendant's driveway. The Defendant had no ownership or control of the road and therefore cannot be found to have any duty arising from the location of his driveway.

Moreover, it is undisputed that defendant did not create or locate the subject driveway. Defendant concedes that he was aware of the dangers the location of his driveway posed. However, "foreseeability should not be confused with duty." *Pulka* at 785. Foreseeability "is applicable to determine the scope of duty - only after it been determined that there is a duty" *Id.* Here, although there may have been some danger with the location of the driveway, Defendant

was not under a duty to keep the road safe, and therefore, cannot be liable regardless of possible forseeability of injuries.

For the reason set forth herein, the Defendant's motion for summary judgement with regard to premises liability is **GRANTED**.

2. Driver Negligence

The Court reaches a different conclusion with regard to the claims against the Defendant as the driver of a motor vehicle. Defendant, as the movant, bears the initial burden to submit evidentiary proof in admissible form demonstrating his entitlement to judgment as a matter of law. *Overocker v. Madigan*, 113 AD3d 924, 925 (3rd Dept. 2014). The proponent of summary judgment may not satisfy his burden by pointing to deficiencies in the nonmoving party's proof. *Id.*

Defendant argues even if he violated V&T law §1120, there is no proof that Defendant's position in the northbound lane facing south was the proximate cause of the accident. He argues that Plaintiff's excessive speed, and failure to remain in his lane, are the proximate causes of the accident. Defendant points to fact witnesses who speculate that had the Plaintiff remained in his lane of travel, there would have been no accident. However, Defendant offers no evidence from an expert, and relies on the speculation of witnesses and the alleged deficiencies in Plaintiff's proof. On a motion for summary judgment, it is the movant's burden to come forth with evidence, in admissible form, to support his request for a summary finding. The Court concludes that the Defendant has failed to make a prima facie showing entitling him to summary judgment regarding negligence in the operation of the motor vehicle.

Even if Defendant had made a prima facie showing, the Court would have been compelled to deny his motion for summary judgement regarding the operation of a motor vehicle. "Typically, the question of whether a particular act of negligence is a substantial cause of the plaintiff's injuries is one to be made by the factfinder, as such a determination turns upon questions of

foreseeability and "what is foreseeable and what is normal may be the subject of varying inferences." *Kriz v. Schum*, 75 NY2d 25, 34 (1989), *quoting Derdiarian v. Felix Constr. Corp* , 51 NY2d 314, 315 (1980); *Hain v. Jamison*, 28 NY3d 524, 529 (2016) The trier of fact could reasonably conclude that Plaintiff was inattentive, traveling too fast or reacted in an unreasonable way when confronted with Defendant's vehicle in northbound lane facing south. However, the trier of fact could also reasonably conclude that the Plaintiff was fearful of Defendant moving into his lane of traffic and reacted reasonably to the emergency situation presented. Or the trier of fact could reasonably conclude that the proximate cause of the accident was a combination all of these factors, as accidents may have more than one proximate cause. *Rivera v. Fritts*, 136 AD3d 1249, 1251 (3rd Dept. 2016).

In opposition to Defendant's motion, Plaintiff offers an affidavit of John A. Serth, Jr. (Serth) a professional engineer with experience in highway engineering and accident reconstruction. Serth opines that Plaintiff was presented with an emergency situation and had approximately 1-1.5 seconds to react. He opines that Plaintiff was unable to brake while in the turn and instead brought the motorcycle into the upright position allowing him to brake but resulting in leaving the road and striking the telephone pole. Serth provided no measurements or other objective evidence to support his opinion regarding Plaintiff's reaction time. However, he does provide some evidence which calls into question non-party witnesses estimation of Plaintiff's speed.

Defendant correctly points out that Serth provides very little in the way of proof beyond his interpretation of deposition testimony as a professional engineer. However, Serth's opinions are largely of the same quality as those relied upon by the Defendant. In comparing the proof offered by each side, the Court can only conclude that significant questions of fact remain.

The Court concludes that the Defendant has failed to make a prima facie showing to support his claim for summary judgment. The Court further concludes that there are questions of fact regarding proximate cause which preclude a summary finding. Therefore, Defendant's motion for summary judgment regarding the claim for driver negligence is **DENIED**.

Conclusion

In summary, based upon the foregoing, Defendant's motion to dismiss any claim with respect to premises liability is GRANTED; however, Defendant's motion to dismiss Plaintiff's complaint alleging driver negligence is DENIED.

This constitutes the **DECISION** of the Court. Defendant is to submit a Proposed Order, on notice to all parties, within 30 days of the date of this Decision. The transmittal of copies of this Decision by the Court shall not constitute notice of entry (see CPLR 5513).

Dated: August 25, 2017
Ithaca, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice