

Faulknor v Gina's Trucking Inc.
2017 NY Slip Op 33472(U)
March 7, 2017
Supreme Court, Westchester County
Docket Number: Index No. 62389/2015
Judge: Charles D. Wood
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To commence the statutory time period for 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
COUNTY OF WESTCHESTER**

-----X
DIANA FAULKNER,

Plaintiff,

-against-

**DECISION & ORDER
Index No. 62389/2015
Sequence No. 2**

**GINA'S TRUCKING INC. and RORY J. JENKINS,
COUNTY OF WESTCHESTER, VILLAGE OF
CROTON ON HUDSON, AND TOWN OF
CORTLANDT,**

Defendants.

-----X
WOOD, J.

The following papers were read and considered in connection with moving defendant Town of Cortlandt's ("Town") motion for summary judgment:

- Town's Notice of Motion, Counsel's Affirmation, Exhibits.
- Plaintiff's Counsel's Affirmation in Opposition, Exhibits.
- Town's Counsel's Reply Affirmation.

This action arises from a motor vehicle accident which occurred on July 7, 2015, wherein plaintiff/pedestrian was hit by defendant Gina Trucking Inc. tractor trailer as she attempted to cross the entrance ramp of Route 9 South at its intersection with Croton Point Avenue in the County of Westchester. Plaintiff opposes the motion.

Upon the foregoing papers, the motion is decided as follows:

It is well settled that a proponent of a summary judgment motion must make a “prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v. Prospect Hospital, 68 NY2d 320,324 [1986]).

According to the complaint, the Town’s culpability for the subject accident includes, that there was a lack of painted crosswalks at said intersection; there were no traffic control devices controlling traffic entering onto Route 9 South; and/or no traffic control devices controlling pedestrian traffic crossing said intersection; and failure to add proper signs warning motorists and pedestrian traffic. The Town served an Answer with Cross-Claim to the

complaint. The Town also asserted an Answer to the Cross-Claim of the County of Westchester.

In support of the Town's motion, it offers the Affidavit of Jeff Coleman, Director of the Department of Environmental Services for the Town, which includes highways. Coleman attests that he is fully familiar with the roads and properties owned and/or maintained by the Town. Coleman asserts that: "The location of the accident as described by the plaintiff and more particularly the Route 9 South Entrance Ramp at or near the intersection of Croton Point Avenue is not owned, controlled, or maintained by the town of Cortlandt". Counsel for the Town proffers that this is confirmed by the GIS map of County and State roads found on the Westchester County website (Pages from this site are attached as Exhibit I). Counsel continues that Croton Avenue is depicted in blue indicating that it is a County Road. Route 9, including the ramps are depicted in red indicating that it is an interstate, state road or parkway. Counsel offers an Inter Municipal Agreement between the County of Westchester and the Village of Croton showing that the roadway at issue is neither owned nor controlled by the Town.

Based upon the foregoing, the evidence submitted by the Town established that the Town did not own or control the roadway at issue. Thus, the Town has demonstrated a prima facie entitlement to summary judgment. Generally "a municipality cannot be held liable for the failure to maintain in a reasonably safe condition a road it does not own or control unless it affirmatively undertakes such a duty" (Carlo v Town of E. Fishkill, 19 AD3d 442, 442-43 [2d Dept 2005]).

Plaintiff's opposition to the motion was insufficient to raise a triable issue of fact as to whether the Town assumed control of the subject highway, or affirmatively undertook a duty to maintain it. Furthermore, plaintiffs' mere hope that discovery might lead to relevant evidence or

that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant, did not provide a basis for denial of the motion (Carlo v Town of E. Fishkill, 19 AD3d at 443). No other party has submitted opposition to the instant motion.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

NOW, therefore, it is hereby

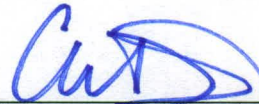
ORDERED, that the motion by the defendant Town of Cortlandt for summary judgment dismissing the complaint and all cross claims asserted against it is granted; and it is further

ORDERED that the Town shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service on NYSCEF within five (5) days of service; and it is further

ORDERED, that the remaining parties are directed to appear on

April 4th, 2017, at 9:15 A.M. in courtroom 1600, the Settlement Conference Part, Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

Dated: March 7, 2017
White Plains, New York



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Justice of the Supreme Court

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