

Bonilla v State of New York

2018 NY Slip Op 31230(U)

March 9, 2018

Court of Claims

Docket Number: 127843

Judge: Gina M. Lopez-Summa

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STATE OF NEW YORK COURT OF CLAIMS

MARLON BONILLA,

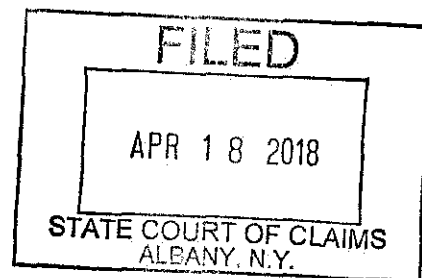
Claimant, DECISION

-v-

THE STATE OF NEW YORK,¹

Claim No. 127843

Defendant.



BEFORE: HON. GINA M. LOPEZ-SUMMA
Judge of the Court of Claims

APPEARANCES: For Claimant:
Nora Constance Marino, Esq.

For Defendant:
Hon. Eric T. Schneiderman, Attorney General
By: Alex Freundlich, Assistant Attorney General

A bifurcated trial concerning the issue of liability only was held in this matter. The subject claim arose on August 5, 2014 at approximately 9:30 p.m. when claimant, Marlon Bonilla, was operating a motorcycle on the Long Island Expressway (LIE). At that time claimant's motorcycle came into contact with a pothole located on the painted white lines separating the High Occupancy Vehicle (HOV) lane and the regular lanes of traffic on the eastbound portion of the LIE between Exits 38 and 39. At that location the LIE has three regular lanes of traffic with an additional HOV lane. There is also a 2 foot wide striped dividing area between the HOV lane and the regular lanes of traffic.

¹ The caption has been amended, *sua sponte*, to reflect the State of New York as the only properly named defendant.

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Claimant testified that on the evening of August 5, 2014 he was operating his motorcycle on the eastbound portion of the LIE in order to bring paperwork from his office in Great Neck to his supervisor's home in Syosset. He described the weather that night as being warm and dry. Mr. Bonilla testified that he entered the LIE at Exit 33 and gradually made his way across the regular lanes of traffic to the HOV lane. He explained that he learned in his motorcycle driving courses that the HOV lane was safer to drive in. Mr. Bonilla testified that as he was driving he observed an emergency vehicle approaching in his mirror. He described the emergency vehicle as a white SUV with red and blue flashing lights on top.

In response to seeing the emergency vehicle, claimant slowed down and moved to his right which put him within the striped pavement area dividing the HOV lane from the regular lanes of traffic. He testified that he continued to drive at approximately 20 mph within the striped pavement area because there was no exit to the regular lanes of traffic. Claimant stated that he believed that exiting the HOV lane outside of a dedicated exit was not permitted.

Claimant testified that he drove within the striped area for approximately 30-40 seconds while he waited for the emergency vehicle to pass. He stated that during this time, his front tire went down into a pothole. He explained that he felt as if he was driving on a different surface and that his front tire hit a wall. He stated that his motorcycle stopped dead in its tracks and he went over the handlebars and landed on the ground. Claimant testified that after he got up he moved his motorcycle out of the way of traffic. He also testified that after the accident he took pictures of the pothole as well as the cracked pavement around the pothole with his iPhone. Claimant stated that there were no other potholes in the immediate vicinity of his path of travel.

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He described the pothole as approximately 2 feet in length and 1 foot wide and he estimated that its depth was 4-6 inches deep or deep enough for his front wheel to stop. Claimant explained that he did not take any guesses of the depth during prior depositions. However, upon reflection he believed that his motorcycle could drive over potholes 1-3 inches in depth so he estimated that the pothole was over 3 inches.

Hill Karl-Otto, a Nassau County police officer assigned to the Highway Patrol Unit, testified that he responded to claimant's motorcycle accident after receiving a 911 call. He explained that once he arrived at the scene of the accident he shut down the left lane of traffic. Claimant then informed Officer Karl-Otto that he had hit a pothole which caused him to fall off his motorcycle. Officer Karl-Otto testified that he observed the accident scene which he described as having grooves and lines in the striped area between the HOV lane and the regular lanes of traffic. He explained that in his opinion the area of the accident did not contain a significant pothole. He further testified that it is common to see distressed pavement in this area. Officer Karl-Otto filled out a police report and indicated that defective pavement was a contributing factor to claimant's accident.

Nicholas Bellizzi, a licensed engineer testified on behalf of claimant that he reviewed photographs, deposition transcripts, photo logs, the police accident report and discovery items in forming his opinions. He described the conditions in the photographs as a pothole or rut where the surface asphalt and pavement markings are gone. He described the condition as an elongated oval shape located on a pavement seam. Mr. Bellizzi explained that seams are potential weak spots in pavement because they never bond together when the pavement is being installed. He testified that the defects shown in the photographs would not be a hazard to four wheel vehicles

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but are particularly hazardous to two wheel vehicles. He explained that a motorcycle's linear stability would be impacted if the front tire decelerates and the rear tire does not. This occurs when the front wheel of a motorcycle strikes a pothole which slows or stops only the front tire. The rear wheel is still moving and lifts when the front wheel slows or stops which causes the driver to be thrown over the handlebars.

Mr. Bellizzi testified that potholes or ruts form when water gets into small cracks in the pavement and freezes. The frozen water expands and places pressure on the asphalt which causes the asphalt to deteriorate and crumble. This process is continuous when temperatures go below freezing, typically from December through February and is known as the freeze-thaw cycle. Mr. Bellizzi testified that it has been his experience that the majority of potholes form in the winter due to the freeze-thaw cycle and due to external factors such as snowplows. For a pothole to form in the spring and/or summer months an external factor is necessary because water does not expand when it evaporates. Additionally, potholes can form if a repair is not done appropriately, for example, a patch could become dislodged.

Mr. Bellizzi testified that although he could not state with any specificity how long the subject pothole existed, he opined that the subject pothole was consistent with formation during the winter months. He explained that potholes with rounded edges and an absence of debris are indicative of potholes that have been in existence for a period of time. He explained that there is a progression of pothole formation that begins with pavement cracks and then missing pieces of pavement around the cracks. When enough pavement is missing a pothole with sharp edges and asphalt pieces at its bottom forms. Over time, the debris is cleared from the bottom of the

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pothole and pothole edges smooth. The progression timeline depends upon the temperature and the freeze-thaw cycle.

Mr. Bellizzi testified that the pothole that caused claimant's accident had not been repaired or patched because there were no signs of asphalt residue which would be darker than the pavement. Additionally, there was no indication that the white lines had been repainted. He explained that the darker images along the borders of the rut, visible in the photograph, are not asphalt patches because you can see the stones from the asphalt along the border. An asphalt patch would be black and darker than what is depicted in the photographs.

Dominick Iannolo, a Highway General Foreman at the New York State Department of Transportation at the time of the accident, was deposed on January 12, 2017 and portions of his testimony were read into the record. Mr. Iannolo set forth that his duties included delegating work to his crew of 14 workers which could include, paving, road maintenance, guardrail repair and pothole repair. He testified that he and his crew were responsible for the Long Island Expressway between exits 38 and 39. Mr. Iannolo explained that he would drive the roads at approximately 50 mph in order to determine if there were any potholes which needed repairs. If he determined that repairs were necessary he would call in his crew to make the repairs. He also set forth that he learns of potholes through motorist calls, the police department and internal logs. He testified that his crew fills potholes with hot asphalt which is then tampered down. He explained that after the winter ends, he stays on top of pothole repair by checking the roadways and waiting for complaints. He stated that in his experience potholes were caused by temperature fluctuations, snowplows and the age of the roadway. When shown a photograph of the pothole and the area around it, he testified that he did not recall seeing any of those defects.

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Additionally, Mr. Iannolo testified at trial in this matter on behalf of defendant. He stated that he drives a Department of Transportation pick-up truck with lights everyday to look for potholes, debris and damaged guide rails. He explained that he drives 50-55 miles per hour in the right lane so that he can keep up with the speed of motorists on the highway. He typically begins between 9:30 a.m. and 10:00 a.m. because traffic has lessened at that time. He also drives in the HOV lane 1-2 times per month looking for debris. He testified that he would be able to see a pothole in the striped lines between the HOV and regular lanes of traffic while driving 50 mph in the right lane. If he sees a big pothole, he will have his crew repair it immediately.

Joseph Sutera, a Pavement Manager at the New York State Department of Transportation at the time of the accident and for the last 20 years, testified on behalf of defendant that he is involved with rating roadways, setting up capital projects for roadway restoration and designing roadways. He explained that when roads are installed the pavement is installed in layers with a glue like substance in between the layers. While the specifications may differ for the lower levels of pavement, the top layer of asphalt is 2 inches in depth.

When shown photographs of the pothole and the area surrounding it, he testified that he observed only the top 2 inch layer of asphalt because the stone size in the top layer is 12 mm and the stone size in the photos was consistent with the stone size in the surrounding area. Mr. Sutera testified that if the pothole had been deeper than 2 inches, different stones would be visible because under the top asphalt layer the stone size increases to 25 mm. He stated that the condition shown in the photographs is not one that would be repaired.

The State of New York has a duty to maintain its roadways in a reasonably safe condition and the breach of that duty can result in liability to the defendant if the ascribed negligence in

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maintaining the road is a proximate cause of the accident (*Wittorf v City of New York*, 23 NY3d 473 [2014]). In addition, the State has a nondelegable duty to properly design, construct and maintain its roadways in a condition which is reasonably safe for those who use them (*Friedman v State of New York*, 67 NY2d 271 [1986]). This obligation extends to motorcycleists (*Coss v State of New York*, 11 Misc 2d 856, *affd* 8 AD2d 682 [4th Dept 1959]). However, the State is not an insurer of the safety of its roadways, and the mere fact that an accident resulting in injury occurred does not render the State liable (*Tomassi v Town of Union*, 46 NY2d 91 [1978]; *Brooks v New York State Thruway Auth.*, 73 AD2d 767 [3d Dept 1979], *affd* 51 NY2d 892 [1980]). The State's roadways include the shoulders and the State is required to keep its shoulders in a reasonably safe condition, even for those who may negligently drive onto them (*Bottalico v State of New York*, 59 NY2d 302 [1983]).

In order to recover damages for a breach of this duty, a claimant must establish that defendant created or had actual or constructive notice of the dangerous condition and that it failed to take reasonable measures to correct the condition (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]). When an alleged dangerous condition is at issue, a claimant must show that the State had actual or constructive notice of the condition and failed to act reasonably to remedy the dangerous condition (*Timcoe v State of New York*, 267 AD2d 375 [2d Dept 1999]).

“To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it” (*Lee v Bethel First Pentecostal Church of Am.*, 304 AD2d 798 [2d Dept 2003]). Whether or not a dangerous or defective condition exists on the property of another so as

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to create liability depends upon the facts and circumstances of each case (*Trincere v County of Suffolk*, 90 NY2d 976 [1997]). The width, depth, elevation, irregularity and appearance of the defect along with the time, place and circumstances of the injury are all factors to be taken into consideration when analyzing whether the defect was a dangerous condition so as to create liability (*id.*).

The Court finds, based upon the credible evidence presented at trial, that claimant failed to establish that the rutted pavement in the roadway was a dangerous condition for motorists.

Claimant also failed to establish notice of a dangerous condition to defendant in this matter. There was no evidence presented to suggest that defendant created this condition or knew of a specific pothole located between the HOV and left lanes between exits 38 and 39 on the Long Island Expressway. The evidence established that Mr. Iannolo would drive along the Long Island Expressway to make a visual inspection for potholes and other defects. Mr. Iannolo did not observe the pothole in question prior to the subject accident. This type of routine inspection also does not constitute the kind of specific inspection, focused upon the area in question, required to justify the finding of constructive notice (*Brzytwa-Wojdat v Town of Rockland, Sullivan County*, 256 AD2d 873, 874 [3d Dept 1998]). Although the pothole was in a highly trafficked area which would increase the likelihood of potholes, a “general awareness” that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]). Additionally, the Court notes that there was no evidence presented of any previous complaints regarding a defective condition nor records of any prior accidents in the area in question.

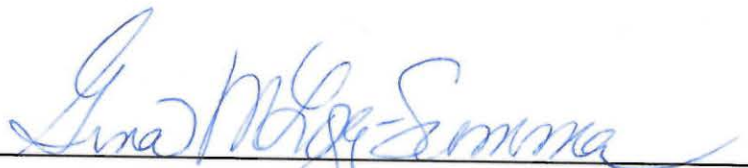
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Therefore, based upon the foregoing, the Court finds that claimant has failed to prove, by a preponderance of the credible evidence, his claim against defendant in this action. Accordingly the claim is hereby dismissed in its entirety. Any motions upon which the Court had previously reserved or which remain undecided are hereby denied.

The Chief Clerk of the Court is hereby directed to enter said Judgment accordingly.

**Hauppauge, New York
March 9, 2018**



**GINA M. LOPEZ-SUMMA
Judge of the Court of Claims**