Saltalamacchia v Town of E. Hampton
2018 NY Slip Op 32604(U)
October 12, 2018
Supreme Court, Suffolk County
Docket Number: 07-10123
Judge: Sanford N. Berland
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SHORT FORM ORDER

INDEX No. 07-10123
CAL. No. 17-00937MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD N. BERLAND
Acting Justice Supreme Court

MOTION DATE 11-1-17
ADJ. DATE 2-20-18
Mot. Seq. # 008 - MD
009 - MD

THOMAS SALTALAMACCHIA,

Plaintiff,

- against -

TOWN OF EAST HAMPTON,

Defendant.

BRIAN J. DAVIS, ESQ.
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COPY

Upon the following papers numbered 1 to 33 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1 - 23 ; Notice of Cross Motion and supporting papers 24 - 31 ; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers 32 - 33 ; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (008) by the defendant for summary judgment dismissing the complaint, and the motion (009) by the plaintiff for summary judgment on the issue of liability are consolidated for the purposes of this determination; and it is

ORDERED that the motion by defendant for summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion by the plaintiff for summary judgment on the issue of liability is denied.

The plaintiff Thomas Saltalamacchia commenced this action to recover damages for personal injuries allegedly caused by a single-motorcycle accident that occurred on April 2, 2006, on Town Lane in East Hampton, New York. The accident allegedly occurred when the motorcycle that the plaintiff was riding left the roadway as plaintiff attempted to negotiate a sharp curve. The plaintiff alleges, among other things, that defendant Town of East Hampton (the "Town") negligently designed, maintained, and constructed the roadway; that it failed to place correct warning signs on the road sufficient to alert users to the full extent

of the curve and instead posted noncompliant, improper and inadequate signs that misrepresented both the direction and the severity of the curve, thereby creating a dangerous condition on the road; and that such negligence on the part of the Town was a proximate cause of his accident and resulting injuries.

The Town now moves for summary judgment dismissing the plaintiff's complaint on the ground that its alleged failure to post proper or adequate signs was not the proximate cause of the plaintiff's accident. In support of its motion, the Town submits the deposition transcripts of the plaintiff and a non-party witness, as well as a transcript of the plaintiff's testimony pursuant to General Municipal Law § 50-h ("50-h hearing"). The plaintiff opposes the motion, and cross-moves for summary judgment on the issue of liability.

As an initial matter, the court notes that the plaintiff's cross-motion was untimely. The court's records show that the note of issue in this matter was filed on May 24, 2017; thus, the 120-day deadline to file the cross motion was September 21, 2017, and the plaintiff's motion is dated October 24, 2017. Nevertheless, "an untimely cross motion for summary judgment may be considered by the court where, as here, a timely motion for summary judgment was made on nearly identical grounds" (***McCallister v 200 Park, L.P.***, 92 AD3d 927, 928, 939 NYS2d 538 [2d Dept 2012]; ***Bicounty Brokerage Corp v Burlington Ins. Co.***, 101 AD3d 778, 780 [2d Dept 2012]; ***Grande v Peteroy***, 39 AD3d 590, 592 [2d Dept 2007]).

The plaintiff's testimony at the 50-h hearing in January 2007 was largely, but not entirely, the same as his deposition testimony taken over three-and-a-half years later. The plaintiff testified that he was born in 1963, he started riding a motorcycle when he was in high school, he possessed a Class M license, and he rode approximately 3,000 miles on the subject motorcycle before the accident. On the day of the accident, the plaintiff and several other people were riding as a group. The group stopped for lunch at approximately noon, and plaintiff testified that he did not consume any alcohol. After lunch, they traveled west on Town Lane, and stopped at a cul-de-sac where the roadway ended. The men stretched and talked before returning eastbound on Town Lane. While riding, the plaintiff observed that the speed limit was 20 miles per hour. He was shown two photographs of road signs along Town Lane, and he acknowledged that both photographs depicted signs that he observed along the miles-long route before he approached the curve where the accident occurred. Both signs bore directional arrows, one showing a moderate curve to the right and then a straightening of the road, the other showing a moderate curve to the left and then a straightening of the road, along with a speed limit warning of 20 miles per hour and a "driveway" warning sign. Plaintiff testified that he slowed down to the posted 20 miles per hour as he approached the second sign, the one that bore the moderate curve to the left; when the road "opened up again," proceeding in a straight direction down a hill, he returned to a 25 to 30 mile per hour speed. The road then curved to the right, however, and then sharply to the left; plaintiff applied his brakes but was unable to keep his motorcycle upright on the roadway and he was thrown from it as it traveled into the adjoining area. Another rider, who had been traveling behind plaintiff but who had lost sight of him on the curved and hilly section of the road, stopped and came to plaintiff's aid.

At his 50-h hearing, plaintiff testified that immediately before the accident, he was traveling between 25 and 30 miles per hour because the road had "opened up," and at his deposition, he testified that he was traveling approximately 20 miles per hour or less. There were some riders ahead of the plaintiff, but when

he approached the curve, he could not see the riders. After the roadway opened up, the plaintiff traveled down a hill and saw a "stop ahead" sign. Shortly after observing the stop ahead sign, he approached the bottom of the hill where there was a "90-degree swoop," which was not "marked." When the plaintiff applied his brake, he was ejected from the motorcycle, landed "on the back of [his] neck," and the motorcycle went into a gully. The plaintiff testified that he did not observe any potholes in the road, the signs that he saw were not in disrepair, and it was a clear day.

John Shultz testified that although he was riding his motorcycle behind the plaintiff when the accident occurred, he did not witness the accident. He lost sight of the plaintiff for approximately two seconds when the plaintiff rode through the curve. Shultz testified that the plaintiff "couldn't negotiate the street," and although initially he offered the opinion that plaintiff was "driving too quickly for the conditions," he also testified that he did not believe that speed had "anything to do with the accident, " that "we weren't proceeding very quickly," and that plaintiff wasn't able to negotiate the curve because "he didn't realize that the turn was going to be so severe . . . . "In fact, plaintiff and Shultz were the last two riders in the group. The roadway was "challenging" because it had a lot of turns. The plaintiff was "possibly" traveling 30 miles per hour, and Shultz found it "odd" that the plaintiff had his feet on "the cruising bars instead of [the] control bars" when he approached the curve. The roadway was "well marked," and when he arrived at the top of he hill before the curve, Shultz stopped because he could not see "where the road went." He observed one road sign that indicated that the speed limit was 20 miles per hour, and he recalled that another showed an arrow that indicated a severe turn. Shultz believed that the plaintiff had traveled with the group on the same roadway prior to the accident on at least one occasion, and when the group stopped for lunch at approximately noon, each rider, including the plaintiff, had at least one alcoholic beverage.

In support of his cross-motion and in opposition to the Town's motion, the plaintiff submits his own affidavit, in which he states that while traveling eastbound on Town Lane, he observed a "posted yellow warning sign that indicated that there would be an 'easy' curve to the left and then back to the right." He also observed that the speed limit was reduced from 30 miles per hour to 20 miles per hour. Approximately four-tenths of a mile after the sign, the roadway had a "hairpin turn to the left." He states that the road first curved right and then "hard" left, without warning. Because he was not familiar with the roadway, the sign completely confused him and caused him to be unprepared for the sharp turn to the left inasmuch as the sign warned of a curved roadway but was placed four-tenths of a mile before any curve and the curves of which it warned - a "slight" turn to the left followed by a "slight" turn to the right - were virtually the opposite of the actual roadway configuration - "an easy right but with a hard almost 90 degree turn to the left." The plaintiff states that "if the road had been properly marked, I would have had proper warning and I would not have had the accident."

In an affidavit, Steven Cane, a licensed engineer in the State of New York, avers that he reviewed the police report, visited the scene of the accident, and performed scientific tests to determine within a reasonable degree of scientific certainty that the accident was caused by incorrect and inadequate road signs. He stated that a W1-7 curve sign was incorrectly placed at the accident site in violation of the New York State Manual of Uniform Traffic Control Devices (MUTCD or 17 NYCRR 231), whereas a W1-9 sign would have been more appropriate, and at minimum, a W1-5 sign should have been used. The W1-7 sign

incorrectly indicated a change of direction of less than 45 degrees; the last curve, where the accident occurred, however, encompassed over a 90-degree change in direction. Further, because "the terrain conceals the end of the turn," there should have been single-arrow (W1-11) or chevron (W1-13) signs on the curve itself, to "provide additional emphasis" and "to indicate the abrupt nature of the curve." Cane concluded that the Town's incorrect and inadequate signage caused the plaintiff's accident.

At a deposition, Scott King testified that he was the highway superintendent for the Town, and in that position - to which he was elected subsequent to plaintiff's accident - he was responsible for the maintenance of the roads and signs for the Town. He further testified that although at the time of plaintiff's accident, he was the Town's Deputy Highway Superintendent, his responsibilities at that time did not include roadway signage.[1] He testified that if the Town received a complaint about a roadway, it would "investigate and correct, if necessary," and that the MUTCD would be used to determine the proper curve warning signs for roadways within the Town. The Town had not, however, received any complaint about the subject roadway prior to the plaintiff's accident.

Summary judgment helps "expedite all civil cases by eliminating . . . claims which can properly be resolved as a matter of law" (***Andre v Pomeroy***, 35 NY2d 361, 364, 362 NYS2d 131 [1974]). A party seeking summary judgment has the burden of "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68NY2d 320, 324, 508 NYS2d 923, 925 [1986]; *see* ***Granados v Cox***, 43 AD3d 391, 392, 840 NYS2d 427, 428 [2d Dept 2007]). The motion must be "supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions" (CPLR 3212 [b]). Failing to make a prima facie showing will result in the motion's denial, "regardless of the sufficiency of the opposing papers" (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 852, 487 NYS2d 316 [1985]). If the movant establishes a prima facie case of entitlement to summary judgment, the burden shifts to the party opposing the motion to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact" (***Zuckerman v City of New York***, 49 NY2d 557, 562, 427 NYS2d 595, 597 [1980]).

"Although the State[, county, or municipality] is not an insurer of the safety of persons using its highways, it may be held liable for injuries arising by reason of its failure to give adequate warning, by signs or otherwise, of dangerous conditions and hazards on its highways" (***Ventola v New York State Thruway Auth.***, 142 AD2d 674, 675, 531 NYS2d 23 [2d Dept 1988]). "Generally, the absence of a warning sign cannot be excluded as a cause of an ensuing accident unless it is found that the accident would nevertheless have happened" (***Koester v State***, 90 AD2d 357, 362, 457 NYS2d 655 [4th Dept 1982] [internal quotation

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[1] Mr. King answered "no" when first asked if he had received "any specific training with regards to roadways and signage prior to becoming the Superintendent of Highways for the Town of East Hampton." Later in his deposition, however, he testified that the he had received "[o]n the job" training from the prior Superintendent of Highways, who, with respect to "[a]ny sign recommendations or write-ups . . . would bring me along and show me the process," but would not ask his opinion concerning signage nor otherwise involve him in deciding on the selection of appropriate signage.

marks omitted]). A finding that the accident would have happened regardless of a warning sign "can only be made if the driver's awareness of the physical conditions prescribed the same course of action as the warning sign would have" (***Koester v State***, 90 AD2d 357, 362, 457 NYS2d 655 [4th Dept 1982] [internal quotation marks omitted]; ***Gilberto v Town of Plattekill***, 279 AD2d 863, 864, 719 NYS2d 384 [3d Dept 2001]). Additionally, if the driver, by reason of his recollection of prior trips over the same road actually had the danger in mind as he approached it on the highway, or if other signs gave adequate warning of the danger, the absence of a warning was not the approximate cause of the accident (***Gilberto v Town of Plattekill***, 279 AD2d 863, 864, 719 NYS2d 384). Importantly, "[t]he liability of a municipality begins and ends with the fulfillment of its duty to construct and maintain its highways in a reasonably safe condition, taking into account such factors as the traffic conditions apprehended, the terrain encountered, fiscal practicality and a host of other criteria" (***Tomassi v Town of Union***, 46 NY2d 91, 97, 412 NYS2d 842 [1978]; *see* ***Lopes v Rostad***, 45 NY2d 617, 623, 412 NYS2d 127 [1978]; ***Epstein v State***, 124 AD2d 544, 549, 507 NYS2d 689 [2d Dept 1986]).

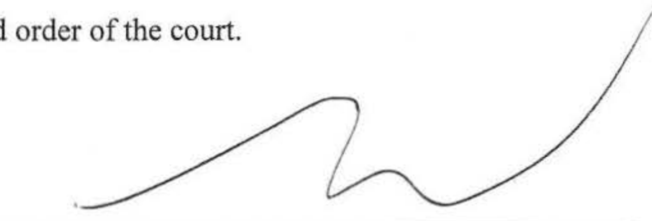
Here, the Town has failed to make a prima facie showing of entitlement to judgment as a matter of law. Although it is the Town's contention that on the undisputed facts, the Town's alleged failure to provide proper roadway signage was not the proximate cause of plaintiff's accident and resulting injuries, plaintiff's allegation is not solely that the signage was insufficient or inadequate, but that it was materially incorrect and misleading, misdescribing both the direction and the severity of the roadway's curves, particularly the direction and severity of the curve upon which plaintiff lost control of his motorcycle, which, he avers, "completely surprised" him and for which he "was not prepared" as a result of the allegedly incorrect and inadequate signage. Thus, although the Town argues, in effect, that it is irrelevant, with respect to proximate cause, whether or not the posted signage was accurate and proper because, in its view, "the sign that was posted provided warning and notice of the danger ahead" - *i.e.*, a "bend in the roadway" - and that therefore plaintiff was provided with "'all the warning, all the notice of danger'" (***Noller v. Peralta***, 94 A.D.3d 830, 832 [2d Dept 2012], *quoting* ***Applebee v State of New York***, 308 NY502, 508 [1955]) that proper signs would have provided, that argument does not address plaintiff's contention that it was the misdepiction of the direction and severity of the roadway's curves, and not the fact that the roadway curved, to which he attributes his inability to maintain control of his motorcycle. Thus, the issue here is significantly different from that in ***Noller v. Peralta***, *supra*, where plaintiff alleged that the defendant municipality had been negligent in failing to install stop signs at the intersection where he was injured when the vehicle he was driving collided with another vehicle that had also entered the intersection without stopping, but his own testimony showed that he was independently aware of the need to stop before proceeding into the intersection (*id.*, 94 AD2d at 832). Rather, the issue of proximate causation in the current action is more akin to that posed in ***Koester v State***, 90 AD2d 357 [4th Dept 1982], also involving an injured motorcyclist, where the appellate division found that "the absence of the curve sign was a substantial causative factor in the sequence of events which led to claimant's injury" (*id.* at 364). As the court observed, in answer to the State's contention that other safety devices - delineators, reflectors and pavement markings - were sufficient to guide plaintiff, who had traveled the same route twice before during daylight hours, but never at night, along the unilluminated curved entry ramp to the point where it merged with another ramp:

> The State failed in its duty to protect claimant against the event which in fact took place. A curve sign would have given claimant notice and reminded him of the oncoming curve while he was still a few hundred feet from the danger. It would have

> jogged his memory as to the severity and general configuration of the curve and alleviated the claimant's momentary confusion as to the highway layout immediately prior to the accident.

Koester v State, supra, 90 AD2d at 364. Here, the actual configuration of the roadway was concealed from plaintiff's view by the terrain (*compare* ***Stanford v State***, 167 AD2d 381 [2d Dept 1990]), and plaintiff alleges that the accident would not have occurred had proper, and not allegedly improper and incorrect, signage been posted by the Town. Whether that is so, or whether the accident and plaintiff's resulting injuries were entirely the result of other causes, and therefore would have occurred even if the signage plaintiff claims was required had been posted, involves contested factual issues that can only be resolved by the trier of fact. Thus, on the facts presented, the Town has failed to establish, prima facie, that its alleged negligence was not a proximate cause of plaintiff's accident. For like reasons, plaintiff's cross-motion is also denied.

The foregoing constitutes the decision and order of the court.



Dated: 10/12/2018

A.J.S.C.
Hon. Sanford Neil Berland

______ **FINAL DISPOSITION** __XX__ **NON-FINAL DISPOSITION**