SHORT FORM ORDER

INDEX No. 12-26482
CAL. No. 17-02274MV

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

PRESENT:

Hon. SANFORD N. BERLAND
Acting Justice Supreme Court

MOTION DATE 4-24-18
ADJ. DATE 6-19-18
Mot. Seq. # 003 - MD
004 - MotD

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PARRIE AANONSEN, as Parent and Natural Guardian of S.A., an Infant over the age of fourteen years, and PARRIE AANONSEN, Individually,

Plaintiffs,

- against -

NICHOLAS I. SCHNEIDER, LISA A. SCHNEIDER, TOWN OF BROOKHAVEN, and COUNTY OF SUFFOLK, WAYNE EATON and KATHLEEN EATON,

Defendants.

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Upon the following papers numbered 1 to 52 read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; 28 - 52; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 15 - 25; Replying Affidavits and supporting papers 26 - 27; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motions by defendants Wayne Eaton and Kathleen Eaton and by defendant Town of Brookhaven are consolidated for purposes of this determination; and it is further

ORDERED that the motion by defendants Wayne Eaton and Kathleen Eaton for summary judgment dismissing the complaint against them is denied; and it is further

ORDERED that the motion by defendant Town of Brookhaven for summary judgment dismissing the complaint and cross claims against it is granted in part and denied in part.

This is an action to recover damages for injuries allegedly sustained by infant plaintiff S.A. on June 3, 2011, when she was struck while riding her bicycle by a motor vehicle driven by defendant Nicholas Schneider. The accident occurred at the intersection of Park Road and Patchogue Drive in Rocky Point, New York. Plaintiff Parrie Aanonsen, suing individually and on behalf of her daughter, S.A., a 15-year-old at the time of the incident, claims that the Eaton defendants were negligent in the maintenance of their property. Plaintiff also claims that defendant Town of Brookhaven was "negligent, careless and reckless in failing and neglecting to erect or post a necessary stop sign or other traffic control device at the subject intersection."

The infant plaintiff testified both at her General Municipal Law § 50-h examination testimony and at her deposition that she was riding her bicycle from her house to a friend's house about "an hour before nightfall." According to the infant plaintiff, although stop signs controlled traffic on Park Road, there were no traffic control devices on Patchogue Drive. She testified that as she approached the stop sign on Park Road, she slowed down, but did not come to a complete stop. Infant plaintiff explained that a "big loop of bushes along [the] corner" created a blind spot, which blocked the view of traffic approaching from her left on Patchogue Drive. Despite looking to her left before entering the intersection, because of the blindspot, she could not see down Patchogue Drive. She proceeded into the intersection, intending to turn left onto Patchogue Drive, and was struck by Schneider's vehicle. Infant plaintiff also testified that she did not know if anyone had complained about the shrubs causing the blind spots prior to the accident but that she knew a neighbor had complained to the Town years earlier and just after the accident about the traffic control devices at the intersection.

By order dated November 25, 2014, the court (Asher, J. (ret.)) granted plaintiff's motion to consolidate this action with a related action arising from the same accident, *Parrie Aanonsen, as Parent and Natural Guardian of S.A., an Infant over the age of fourteen years, and Parrie Aanonsen, Individually, plaintiffs, v Wayne Eaton and Kathleen Eaton, defendants*, Index Number 14-6814. By stipulation of discontinuance dated May 3, 2017, plaintiffs discontinued the action against the County of Suffolk.

Defendants Wayne Eaton and Kathleen Eaton now move for summary judgment dismissing the complaint against them on the grounds that they had no duty to control the vegetation on their property. In support of their motion, they submit copies of the pleadings and discovery demands, the transcript of infant plaintiff's General Municipal Law § 50-h examination testimony and the transcripts of the depositions of the infant plaintiff and defendants Nicholas Schneider and Wayne Eaton. Plaintiffs oppose the motion, contending that the Eatons had a duty under both state and town law to maintain the foliage on their property so as not to obscure or obstruct roadway visibility at the intersection adjoining their property. They submit a copies of the bill of particulars, the certified police report, photographs, the transcript of the deposition testimony of Timothy Hawkins and an unsworn statement signed by Timothy Hawkins.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in

admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

It is well settled that "[p]roperty owners have no common-law duty to control the vegetation on their property for the benefit of public highway users" (***Szela v Courtier***, 278 AD2d 485, 486, 718 NYS2d 80 [2d Dept 2000], quoting ***Cain v Pappalardo***, 225 AD2d 1005, 1006, 639 NYS2d 570 [3d Dept 1996]; *see* ***Preux v Dennis***, 116 AD3d 942, 983 NYS2d 843 [2d Dept 2014]; ***Lubitz v Village of Scarsdale***, 31 AD3d 618, 819 NYS2d 92 [2d Dept 2006]; ***Agostino v Masi***, 28 AD3d 501, 813 NYS2d 491 [2d Dept 2006]; ***Kolkmeyer v Westhampton Taxi & Limo Serv.***, 261 AD2d 587, 690 NYS2d 675 [2d Dept 1999]). However, although the Eaton defendants had "no common-law or statutory duty to trim the foliage located on their property so as to enhance the visibility at the intersection" (***Agostino v Masi***, *supra*; *see* ***Preux v Dennis***, *supra*; ***Lubitz v Village of Scarsdale***, *supra*; ***Kolkmeyer v Westhampton Taxi & Limo Serv.***, *supra*), their submissions fail to establish the absence of any issue of fact with respect to whether they maintained the foliage on their property in accordance with the requirements of the Brookhaven Town Code and as to whether their alleged failure to comply with those requirements was a proximate cause of the accident and of the infant plaintiff's injuries. Thus, although the Eatons have shown that they were not in violation of the Town of Brookhaven Code § 38-4[1], or of Highway Law § 103-a[2], they have not demonstrated prima facie compliance with § 85-882[3] of the Brookhaven Town Code, which provides as

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[1] Brookhaven Town Code § 38-4 provides that "[n]o person shall do or cause to be done any act or thing which shall cause or contribute to a condition in, within or upon any highway, street, road, sidewalk, sidepath, passway or other public way of the Town of Brookhaven or maintained by it, which shall be dangerous to the health, safety or welfare or persons using the same or impair to the public use thereof or obstruct or tend to obstruct or render the same dangerous for passage." In contrast to Brookhaven Town Code § 38-4, discussed in text, *infra*, § 38-4 code does not impose a statutory duty on the Eatons to control the vegetation *on* their property (*see* ***Weitz v McMahon***, 252 AD2d 581, 676 NYS2d 212 [2d Dept 1998]).

[2] Highway Law § 103-a refers to "the affirmative action or acquiescence of a landowner in placing an obstruction in the highway or consenting to such placement" (***Wheeler v Buxton Indus. Equip. Co.***, 292 AD2d 521, 523, 740 NYS2d 73 [2d Dept 2002], *quoting* ***Cain v Pappalardo***, *supra at 1006*). Plaintiff, however, has not alleged that the overgrown vegetation occurred "within the bounds of the highway" or by other than natural means (*see* Highway Law § 103-a; ***Wheeler v Buxton Indus. Equip. Co.***, *supra*; ***Cain v Pappalardo***, *supra*).

[3] In their opposing papers, plaintiffs cite § 85-378 of the Brookhaven Town Code, an identically worded provision that, pursuant to § 85-376, ostensibly applies to properties "situate within bounds of the Fire Island National Seashore where the same lies within the Town of Brookhaven." (*But see* ***Rosado v Bou,*** 55 AD3d 710, 713 [2d Dept 2008], which affirmed the trial court's denial of the defendant premises occupier's summary judgment motion on the ground that there was an issue of fact as to whether the violation of § 85-378 by that defendant, whose premises appear to have been located outside the Fire Island National Seashore, was a proximate cause of the accident in which the plaintiff had been injured.). In any event, Section

follows:

> § 85-882 Visibility at intersections.
>
> On any corner lot, no wall, fence, barrier, structure, vehicle, pile, mound, hedge, tree, shrub, bush or other growth which may cause danger to traffic by obscuring or obstructing visibility at intersections shall exceed 2 ½ feet in height, measured from the existing elevation of the center line of any intersecting street, at any point within a radius of 30 feet of the apex of the corner formed by any intersecting streets.

Contrary to the Eatons' assertion, violations of such provisions can form the predicate for tort liability (*see, e.g.*, ***Rosado v Bou,*** 55 AD3d 710, 713 [2d Dept 2008]; ***Lubitz v Village of Scarsdale***, *supra;* ***McSweeney v Rogan***, 209 AD2d 386, 387 [2d Dept 1994]). Whether such a violation occurred here and, if so, whether it was a proximate cause of the accident and of the infant plaintiff's injuries are issues of fact that cannot be resolved on the current record. Accordingly, the Eaton's motion for summary judgment in their favor, dismissing the complaint against them, must be denied (*see* ***Rosado v Bou***, *supra*).

The Town of Brookhaven also moves for summary judgment dismissing the complaint - and cross-claims - against it on the grounds that it has qualified immunity in highway planning decisions; that its maintenance and control of the intersection where the accident occurred was not a proximate cause of the accident; and that it had no prior written notice of a vegetative obstruction in the area of the accident. In support of the motion, the Town submits copies of the pleadings, of plaintiffs' notice of claim and of the court's November 25, 2014 order (Asher, J. (ret.)); the transcript of the infant plaintiff's General Municipal Law § 50-h examination; the transcripts of the depositions of the infant plaintiff, defendant Nicholas Schneider, non-party Timothy Hawkins and former Town employee Lynn Weyant; and the affidavits of Town employees Marie Angelone and Linda Sullivan.

"A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies" (***Barnes v Incorporated Vil. of Port Jefferson***, 120 AD3d 528, 529, 990 NYS2d 841[2d Dept 2014]; ***Carlucci v Village of Scarsdale***, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; ***Wilkie v Town of Huntington***, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing ***Amabile v City of Buffalo***, 93 NY2d 471, 693 NYS2d 77 [1999]; ***Lopez v G&J Rudolph***, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]). "The only two recognized exceptions to a prior written notice requirement are the municipality's affirmative creation of a defect or where the defect is created by the municipality's special use of the property" (***Gonzalez v Town of Hempstead***, 124 AD3d 719, 720, 2 NYS3d 527 [2d Dept 2015]; ***Forbes v City of New York***, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). "Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a sidewalk defect" (***Velho v Village of Sleepy Hollow***, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; *see also* ***Gonzalez v***

85-882 appears to be the provision of general applicability within the Town of Brookhaven.

Town of Hempstead, *supra*; ***Chirco v City of Long Beach***, 106 AD3d 941, 943, 966 NYS2d 450 [2d Dept 2013]).

Section 84.1 A of the Brookhaven Town Code states as follows:

> Prior written notice required. No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, sidewalk . . . of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of.

The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a town is sufficient to establish that no prior written notice was filed (***Velho v Village of Sleepy Hollow***, *supra*; ***Petrillo v Town of Hempstead***, 85 AD3d 996, 998, 925 NYS2d 660 [2d Dept 2011]; ***Pagano v Town of Smithtown***, 74 AD3d 1304, 904 NYS2d 729 [2d Dept 2010]). Marie Angelone, the Town's Neighborhood Aide, states in her affidavit that her duties within the Town's Highway Department include "searching Highway Department records, maintained and kept in the regular course of its business, for work orders and/or prior written notice with regard to accident locations." Linda Sullivan, the Town's senior clerk typist, states in her affidavit that her duties within the Town's Clerk's Office include "logging of litigation pleadings and written notice(s) of defects and conducting searches of Town Clerk records, e.g., Town Clerk log book, index record book and files maintained and kept in the regular course of its business, to determine if the Town received prior written notice of defects at incident locations." Ms. Angelone and Ms. Sullivan aver that they each made a diligent search of their respective department's records for "any complaints" - "and/or work orders," in Ms. Angelone's case - "of an intersection obstructed by vegetation at the accident location of Park Road at or near the intersection of Patchogue Drive, Rocky Point," for three years prior to and including June 3, 2011, the date of the infant plaintiff's accident. Both affiants state that their respective searches did not reveal "any written complaints, written notifications and/or prior notices of claim to the Town concerning an intersection obstructed by vegetation at the accident location of Park Road at or near the intersection of Patchogue Drive, Rocky Point." As no papers were submitted in opposition, the portion of plaintiff's claim alleging negligent maintenance by the Town of vegetation at the subject intersection is dismissed.

A municipality owes a nondelegable duty adequately to design, construct and maintain its roadways in a reasonably safe condition (***Stiuso v City of New York***, 87 NY2d 889, 891, 639 NYS2d 1009 [1995];

Friedman v State of New York, 67 NY2d 271, 283, 502 NYS2d 669 [1986]; ***Gutelle v City of New York***, 55 NY2d 794, 795, 447 NYS2d 422 [1981]). One who is injured in a traffic accident can recover against a municipality if it is shown that its failure to install a traffic control or warning device was negligent under the circumstances, that this omission was a contributing cause of the accident and that there was no reasonable basis for the municipality's inaction (*see* ***Alexander v Eldred***, 63 NY2d 460, 483 NYS2d 168 [1984]). Nonetheless, the design, construction and maintenance of public highways is entrusted to the sound discretion of municipal authorities; thus, so long as a highway may be said to be reasonably safe for people who obey the rules of the road, the duty imposed upon the municipality is satisfied (*see* ***Tomassi v Town of Union***, 46 NY2d 91, 98, 412 NYS2d 842 [1978]). Moreover, with respect to highway design, the Courts must also accord qualified immunity to the municipality's highway planning decisions (*see* ***Friedman***, *supra* at 283–284; ***Turturro v City of New York***, 28 NY3d 469, 45 NYS3d 874 [2016]; ***Weiss v Fote***, 7 NY2d 579, 200 NYS2d 409 [1960]; ***Bresciani v County of Dutchess***, 62 AD3d 639, 878 NYS2d 410 [2d Dept 2009]). Thus, "a governmental entity may not be held liable for a highway safety planning decision unless it study of a traffic condition is plainly inadequate, or there is no reasonable basis for its traffic plan" (***Warren v Evans***, 144 AD3d 901, 902, 42 NYS3d 37 [2d Dept 2016]; *see* ***Turturro v City of New York***, *supra*; ***Friedman v State of New York***, 67 NY2d 271, 283, 502 NYS2d 669 [1986]; ***Affleck v Buckley***, 96 NY2d 553, 732 NYS2d 625 [2001]; ***Langer v Xenias***, 134 AD3d 906, 23 NYS3d 261 [2d Dept 2015]; ***Spanbock v Trzaska***, 287 AD2d 496, 731 NYS2d 229 [2d Dept 2001]), or there is evidence that "due care was not exercised in the preparation of the design" of the roadway (***Weiss v Fote***, *supra* at 586).

Consistent with these principles, a municipality may be held liable if, after being made aware of a dangerous traffic condition, it does not undertake an adequate study to determine what reasonable measures may be necessary to alleviate the condition (*see* ***Turturro v City of New York***, *supra*; ***Bresciani v County of Dutchess***, *supra*). Thus, after implementation of a traffic plan, a municipality is under a continuing duty to review and revise the plan in light of its actual operation and any significant changes in circumstances (***Demesmin v Town of Islip***, 147 AD2d 519, 520, 537 NYS2d 605 [1989]; *see* ***Gutelle v City of New York***, *supra*; ***Weiss v Fote***, *supra*; ***Langer v Xenias***, *supra*). Once a municipality is made aware that a dangerous traffic condition exists, "it must undertake reasonable study thereof with an eye toward alleviating the danger" (***Friedman v State***, *supra* at 284; *see* ***Ernest v Red Creek Cent. School Dist.***, 93 NY2d 664, 695 NYS2d 531 [1999]; ***Bresciani v County of Dutchess***, *supra*).

To establish entitlement to qualified immunity, a municipality must "demonstrate that the relevant discretionary determination by the governmental body was the result of a deliberate decision-making process" (***Ramirez v State***, 143 AD3d 880, 881, 39 NYS3d 220 [2d Dept 2016] [internal quotations omitted]; *see* ***Evans v State***, 130 AD3d 1352, 14 NYS3d 226 [3d Dept 2015]). The municipality must then demonstrate that its duly authorized public planning body had "entertained and passed on the very same question of risk as would ordinarily go to a jury" (***Warren v Evans***, *supra* at 902, quoting ***Weiss v Fote***, *supra* at 588). However, "a [municipality] is not the insurer of the safety of its roads, and 'no liability will attach unless the ascribed negligence of the [municipality] in maintaining its roads in a reasonable condition is a proximate cause of the accident'" (***Martinez v County of Suffolk***, 17 AD3d 643, 644, 794 NYS2d 98 [2d Dept 2005], quoting ***Stanford v State***, 167 AD2d 381, 382, 561 NYS2d 796 [2d Dept 1990]; *see also* ***Atkinson v Oneida County***, 59 NY2d 840, 464 NYS2d 747 [1983]; ***Noller v Peralta***, 94 AD3d 830941 NYS2d 700 [2d Dept 2012]; ***Levi v Kratovac***, 35 AD3d 548, 827 NYS2d 196 [2d Dept 2006]).

Here, the Town submitted the deposition testimony of Lynn Weyant, the Town's former director of traffic safety and streetlighting. Ms. Weyant testified that a complaint made to the Town would generate a case routing sheet and that a traffic study is always conducted, even if based upon a single complaint. She stated that "a traffic technician or an engineer would [then] go out to the field, observe existing signs and traffic conditions and make a recommendation for improvement."

Based upon a case routing sheet generated on November 22, 2004, by the Division of Traffic Safety, Ms. Weyant testified that the Town received a complaint requesting two "children in area" signs. Such signs were installed on Patchogue Drive on December 28, 2004. Based upon a case routing sheet generated on June 23, 2010, Ms. Weyant testified that Phil Popielaski of 68 Patchogue Drive made a request for a stop sign at Patchogue Drive and Park Road. However, the case routing sheet did not indicate the specific placement of the requested stop signs. She further testified that after the case routing sheet was generated, "[c]lerical set up a file and reviewed the crash data, indicating that there was zero accidents, and sent it to John Sullivan," the area's traffic engineer in the Division of Traffic Safety. Ms. Weyant explained that a traffic engineer would generally review the request and prioritize his or her investigation and review of the case. Based upon a work order created July 6, 2010, Ms. Weyant testified that a four-way intersection warning sign was installed on Patchogue Drive "in advance of Park Road" on September 8, 2010, after it had been approved by John Sullivan on August 25, 2010. She also testified that the decision to install the four-way intersection warning sign was based upon the 2010 traffic study.

Ms. Weyant further testified that she had independent knowledge of existing stop signs on Park Road, east and west of Patchogue Drive, before the 2010 request was made, and that a determination had been made that a stop sign was not needed on Patchogue Drive based upon a traffic study conducted by consultant company Nelson & Pope, which was reviewed by John Sullivan. Ms. Weyant testified that she was not aware of any accidents at the subject intersection between the 2010 study and the subject accident in June 2011. However, such testimony is insufficient to establish that the Town had a reasonable basis for determining that a stop sign was not necessary on Patchogue Drive at its intersection with Park Road. Ms. Weyant's testimony does not demonstrate that the 2010 study was adequate, as Ms. Weyant's testimony does not set forth the factors considered other than the approval from John Sullivan (*cf.* ***Spanbock v Trzaska***, *supra*; ***Affleck v Buckley***, 276 AD2d 507, 714 NYS2d 108 [2d Dept 2000]; ***Schuster v McDonald***, 263 AD2d 473, 692 NYS2d 721 [1st Dept 1999]; *compare* ***Langer v Xenias***, *supra*).

In addition, the Town's submissions failed to establish that the absence of a stop sign on Patchogue Drive controlling defendant Nicholas Schneider's lane of traffic was not a proximate cause of the accident (*see* ***McIntosh v Village of Freeport***, 95 AD3d 965, 943 NYS2d 234 [2d Dept 2012]). Triable issues of fact remain as to whether the accident would still have occurred had a stop sign controlling Nicholas Schneider's lane of traffic been present (*see* ***Langer v Xenias***, *supra*; ***McIntosh v Village of Freeport***, *supra*), as it cannot be stated as a matter of law that the absence of a stop sign "did not contribute to the happening of the accident by materially increasing the risk" (*see* ***Langer v Xenias***, *supra* at 908, quoting ***Brown v State***, 79 AD3d 1579, 1585, 914 NYS2d 512 [4th Dept 2010]).

Accordingly, the motion by defendants Wayne Eaton and Kathleen Eaton for summary judgment dismissing the complaint against them is denied, and the motion by defendant Town of Brookhaven for summary judgment dismissing the complaint and cross claims against it is granted in part and denied in part.

The foregoing constitutes the decision and order of the court.

Dated: 12/12/2018

HON. SANFORD NEIL BERLAND, A.J.S.C.

FINAL DISPOSITION **X** **NON-FINAL DISPOSITION**