

Decided on June 5, 2008

Supreme Court, Queens County

Karin Kuhland, etc.

against

The City of New York, et al.

280002003

Phyllis Orlikoff Flug, J.

Plaintiff Karin Kuhland commenced this action on December 3, 2003 as guardian of the person and property of Derek W. Kuhland, her son, age 31, seeking to recover damages for personal injuries sustained by Mr. Kuhland. Plaintiff alleges that on December 4, 2000, at approximately 12:35 A.M., Derek Kuhland was walking across Queens Boulevard, in Queens, New York, at or near the east side of the intersection with 55th Avenue, which was controlled by a traffic signal. Derek Kuhland was struck by an automobile owned and operated by defendant Roberto M. Lewis, traveling eastbound on the main roadway portion of Queens Boulevard. Plaintiff alleges, among other things, that defendant City negligently failed to design, maintain and control Queens Boulevard at the intersection of 55th Avenue in a reasonably safe condition for pedestrians, such that Kuhland, was caused to be struck by a motor vehicle owned by defendant Lewis. Plaintiff further alleges that defendant City had actual notice of the dangerous and defective conditions relative to the crossing of Queens Boulevard by pedestrians there, and permitted the condition to exist and cause injury. Plaintiff also asserts that defendant Lewis negligently operated the motor vehicle on the day of the accident at an excessive rate of speed.

Defendant City seeks summary judgment dismissing the complaint and cross claims asserted against it. Plaintiff opposes the motion.

Summary judgment may be granted only where there are no triable issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Sillman v Twentieth Century-Fox*

Film Corp., 3 NY2d 395 [1957]). "The party moving for summary judgment bears the initial burden of making a prima facie showing of its entitlement to judgment as a matter of law' (*Holtz v [*2]Niagara Mohawk Power Corp.*, 147 AD2d 857, 858 [1989])" (*Fresh Meadow Country Club, Inc. v Village of Lake Success*, 158 AD2d 581 [1990]). Once there is a prima facie showing, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to show the existence of material issues of fact which require a trial of action (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, where the moving party fails to make a prima facie showing, the motion must be denied regardless of the sufficiency of the opposing party's papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985], *supra*).

Defendant City argues that the claims against it are time-barred under General Municipal Law § 50-i(1)(c).

Plaintiff failed to commence this action against defendant City within the year-and-90-day statute of limitations period set forth in General Municipal Law § 50-i (*see Campbell v City of New York*, 4 NY3d 200, 203 [2005]). The statute of limitations set forth therein, however, is subject to the tolls provided in CPLR 208. CPLR 208 provides for a toll of the statute of limitations where the person entitled to commence an action is under a disability (*see Costello v North Shore University Hosp. Center for Extended Care and Rehabilitation*, 273 AD2d 190 [2000]). "An individual will be considered disabled if that person is "unable to protect [his or her] legal rights because of an overall inability to function in society" (*Costello v North Shore University Hosp. Center for Extended Care and Rehabilitation, supra*).

As a result of the accident, Derek Kuhland became a quadriplegic, and has been hospitalized and treated, inter alia, for traumatic brain injury. This uncontroverted evidence and plaintiff's appointment as a guardian for him, entitles plaintiff to the benefit of this toll (*see Schulman v Jacobowitz*, 19 AD3d 574 [2005]). That plaintiff filed a notice of claim on February 9, 2001, as a proposed guardian ad litem for Derek Kuhland, did not extinguish the toll (*see Costello v North Shore University Hosp. Center for Extended Care and Rehabilitation, supra*)^[FN1].

Defendant City also asserts that there is no evidence its actions or inactions were a proximate cause of the accident. At the outset, the court notes that in making this motion, defendant City makes no mention of the theory upon which plaintiff's case is premised, i.e., that the City negligently failed to provide pedestrians with a reasonably safe place to travel when crossing Queens Boulevard and 55th Avenue, and failed to correct a defective and dangerous condition in relation to its design, [*3]control and maintenance of the crosswalk and the traffic and pedestrian signals there, except to argue that such theory was not raised by plaintiff in the first notice of claim. This procedural tactic is disingenuous, and an attempt to shift the burden away from defendant City to make a prima facie showing that it was not negligent in its design, maintenance and control of the crosswalk and the traffic and pedestrian signals. In fact, plaintiff's allegations in the complaint that defendant City negligently caused and permitted a dangerous and defective condition to exist for pedestrians crossing the intersection and cause injury, are sufficiently related to the claim of negligent design and maintenance set forth in the first notice of

claim (*see Lopez v New York City Housing Authority*, 16 AD3d 164 [2005]).

Defendant City, furthermore, disingenuously states that in making this motion, it does not rely upon an argument that the proximate cause, or the superseding cause, of the accident was Derek Kuhland's intoxication at the time of the accident, or defendant Lewis's speeding. Yet, defendant City offers, among other things, a copy of the pleadings, an excerpt of the transcript of the testimony of plaintiff at the General Municipal Law § 50-h hearing, affidavits of George Bruno and Rafigur Rahman, two non-party witnesses, excerpts of the transcripts of the deposition testimony of investigating police officer, James Ryder, of the New York City Police Department (NYPD) and defendant Lewis, the NYPD accident record, and the ambulance call report of the Fire Department of New York, and the affidavit of its expert witness, Adhi N. Sharma, M.D. Defendant City asserts that such offering shows that the accident was caused by Derek Kuhland's negligence in crossing Queens Boulevard against the traffic signal, and defendant Lewis's negligence in operating his vehicle at an excessive speed and failing to avoid striking Kuhland.

It is well settled that a municipality has the duty to design, construct and maintain its highways in a reasonably safe condition in view of traffic conditions to be expected as well as a host of other criteria (*see Friedman v State of New York*, 67 NY2d 271 [1986]; *Tomassi v Town of Union*, 46 NY2d 91, 97 [1978]). That duty is satisfied when the thoroughfare is reasonably safe for those who obey the rules of the road (*see Tomassi*, 46 NY2d at 97). The municipality, however, is also under a continuing obligation to review and revise traffic safety plans in light of the actual operation of such plans and significant changes to circumstances (*see Atkinson v Oneida County*, 59 NY2d 840 [1983], *rearg denied* 60 NY2d 587 [1983]; *Gutelle v City of New York*, 55 NY2d 794 [1981]). Thus, once a municipality is made aware of a dangerous traffic condition, it must undertake reasonable study thereof with an eye toward alleviating the danger (*see Friedman v State of New York*, 67 NY2d at 284). The municipality breaches its duty if it knows of the dangerous condition and permits a dangerous or potentially dangerous condition to exist and cause injury (*see Nowlin v City of New York*, 81 NY2d 81 [1993]; *Thompson v City of New York*, 78 NY2d 682, 684-685 [1991]).

These obligations are not confined to vehicular traffic alone. The municipality must provide pedestrians with a reasonably safe place to travel and the failure to correct a dangerous or defective condition in relation to its highway, after constructive notice, establishes negligence (*see Sanford v State of New York*, 94 AD2d 857 [1983]; *Meeke v State of New York*, 17 Misc 2d 288 [1959]). It is equally well established that a municipality is not an insurer of the safety of its roadways (*see [*4] Tomassi v Town of Union*, 46 NY2d at 97; *Levi v Kratovac*, 35 AD3d 548 [2006]; *Chunhye Kang-Kim v City of New York*, 29 AD3d 57 [2006]).

Plaintiff has established that defendant City was aware since at least the 1990s, that speeding vehicles were a problem along Queens Boulevard and that its traffic light sequencing along Queens Boulevard led to speeding vehicles. Defendant City further was aware that the Queens Community Boards actively sought improvements for pedestrian safety there since the early 1980s. Defendant City, moreover, admittedly did not change the timing of the traffic control signal and pedestrian signals at the intersection of Queens Boulevard and 55th Avenue during the 15-year period between 1985 and 2000. In addition, with respect to the issue of the

admissibility of the affidavit of Nicholas Bellizzi, a professional engineer, plaintiff does not rely solely upon such expert affidavit, but rather points to the testimony of John Tipaldo, presently the New York City Department of Transportation director systems engineer, and formerly, in 2000, a DOT staff engineer, DOT traffic signal records, and the State of New York State DOT Manual of Uniform Traffic Control Devices § 230 *et seq.* (17 NYCRR 200) to provide evidence that the pedestrian clearance interval was insufficient for pedestrians crossing Queens Boulevard in accordance with the traffic and pedestrian signals, and there were inadequate safety islands. Therefore, notwithstanding that plaintiff failed to identify Mr. Bellizzi in pretrial disclosure, and served his affidavit after filing a note of issue (*see Gralnik v Brighton Beach Associates, LLC*, 3 AD3d 518 [2004]; *Dawson v Cafiero*, 292 AD2d 488, 489 [2002]; *Ortega v New York City Tr. Auth.*, 262 AD2d 470 [1999]; *Mankowski v Two Park Co.*, 225 AD2d 673 [1996]), the court, in an exercise of discretion, considered Mr. Bellizzi's affidavit in relation to this motion by defendant City.

Of the submissions offered by defendant City, the only ones which touch upon the issue of whether it breached its duty of designing and maintaining a reasonably safe place for pedestrians to cross Queens Boulevard at 55th Avenue in the relevant period, were the excerpts of the transcripts of the deposition testimony of P.O. Ryder and defendant Lewis.

P.O. Ryder testified that he conducted the accident investigation but admitted he could not recall the source of the information stated in his report indicating that Derek Kuhland was crossing Queens Boulevard against the light, from north to south. P.O. Ryder also testified that he routinely investigated the length of traffic lights at "every accident scene but I would only note if I felt that it was a contributing factor or if the cycle was unusual." He did not recall if there was a pedestrian "WALK/DON'T WALK" sign for pedestrians wishing to cross Queens Boulevard at the intersection of 55th Avenue either on the east or west side crosswalks, but admitted no determination had been made in this case as to whether Kuhland began to cross with a "WALK" sign before being struck by the vehicle. Defendant Lewis variously testified that Kuhland "was in the crosswalk," "on it," "in the bound of the crosswalk," and "But just barely, the outmost," at the time of impact with his vehicle. Defendant Lewis also testified that Kuhland "seemed very confused in the crossway and he rattled back, because I think the light changed on him, he tried to go back and change his mind, and that's when I crossed. So he came from behind cars, so I lost sight of him after that because there's a lot of traffic. That's when I found him on top of my hood." Such submissions do not establish that the traffic and pedestrian signals at the intersection of Queens Boulevard and [*5]55th Avenue were timed properly to allow Derek Kuhland with sufficient time to cross the entire intersection in accordance with the traffic light, or to show there were adequate medians or safety islands.

Under such circumstances, defendant City has failed to establish its entitlement to summary judgment by demonstrating its negligence was not a proximate cause of the accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986], *supra*; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853; *cf. Levi v Kratovac*, 35 AD3d 548 [2006], *supra*).

Even if it is established that defendant Lewis was negligent in operating his motor vehicle, defendant City has failed to establish as a matter of law that Lewis's negligence was not

a foreseeable consequence of the City's own alleged negligence, severing the causal connection between its alleged negligence and the accident (*see Nowlin v City of New York*, 81 NY2d 81 [1993], *supra*). Furthermore, to the extent defendant City offers the affidavits of Mr. Bruno and Mr. Rahman to prove that Derek Kuhland failed to follow the rules of the road, and crossed Queens Boulevard against the traffic signal, the testimony of defendant Lewis raises a triable issue of fact regarding such issue.

The motion is denied.

Dated: June 5, 2008

J.S.C.

Footnotes

Footnote 1: By decision and order dated March 21, 2006, the New York State Court of Claims determined, with respect to the operation of the toll for legal disability under Court of Claims Act § 10(5), relative to the filing of a notice of claim against the State of New York, that Mr. Kuhland's legal disability ended on May 14, 2003, when Karin Kuhland was appointed guardian for Mr. Kuhland pursuant to Mental Hygiene Law § 81. The Court of Claims Act is not involved in this action.