

Rosado v Bou

2007 NY Slip Op 33517(U)

October 22, 2007

Supreme Court, Suffolk County

Docket Number: 0003301/2005

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 7-9-07
ADJ. DATE 9-6-07
Mot. Seq. # 002 - MD
003 - XMG
004 - XMG

-----X
SERGIO ROSADO, :
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 :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 :
 JOSE BOU, POPTEE PATANJO, JOE DEL'S :
 AUTO BODY, INC. d/b/a JOE DEL'S AUTO :
 BODY, TOWN OF BROOKHAVEN, COUNTY :
 OF SUFFOLK and "JOHN DOE" AUTO BODY :
 MECHANIC, :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 68 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers 24 - 34; Answering Affidavits and supporting papers 35 - 57; Replying Affidavits and supporting papers 58 - 66; Other 67 - 68; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#002) for summary judgment by defendants Joe Del's Auto Body, Inc. and Poptee Patanjo is denied; and it is further

ORDERED that the cross-motion (#003) by Suffolk County is granted; and it is further

ORDERED that the cross-motion (#004) by the Town of Brookhaven is granted.

This is a negligence action arising out of an accident involving a vehicle operated by the defendant, Jose Bou, and a scooter operated by the plaintiff, Sergio Rosado, at the intersection of Montauk Highway and Weaver Avenue in Bellport, New York on April 20, 2004 at approximately 4:45 p.m.

Defendants Joe Del's Auto body, Inc. ("Joe Del's") and Poptee Patanjo ("Patanjo") have moved for summary judgment on the grounds there is no evidence of negligence on their part. They claim the alleged illegal parking of vehicles along Montauk Highway and Weaver Avenue was merely a "passive backdrop" furnishing the condition for the occurrence of the accident and that Bou's improper and negligent operation of his motor vehicle was the unforeseeable and superseding cause of the accident. In support, they offer, *inter alia*, the pleadings, plaintiff's deposition testimony, the deposition testimony of defendants' representatives, Jose Bou and Joseph Delquaglio, and an affidavit from Delquaglio.

Suffolk County has cross-moved for summary judgment on the grounds, *inter alia*, that the County did not maintain the portion of the roadway where the accident occurred. They also assert they never received prior written notice of the overgrown foliage alleged in plaintiff's complaint, nor were they responsible for maintaining that foliage. In support, they offer essentially the same evidence offered by the co-defendants as well as the additional deposition testimony of the County's representative Carmella Balbus.

Brookhaven has cross-moved for summary judgment on the grounds the Town never received any prior notice of the alleged dangerous condition. In support, they rely on the bill of particulars, the deposition testimony of Suzanne Mauro on behalf of the Town, and a portion of plaintiff's testimony.

On April 20, 2004, plaintiff Sergio Rosado was driving a Honda motor scooter westbound on Montauk Highway. As he was passing in front of Joe Del's Auto Body, he noticed cars parked on the shoulder of Montauk Highway as well as on the sidewalk. He also noticed some foliage on the northeast corner of the intersection. Bou was traveling southbound on Weaver Avenue when he struck Rosado.

Bou testified that when he approached the intersection, he looked to his left and his right. A stop sign controls traffic at the intersection. His view to the right was obscured by several vehicles that were parked on the shoulder of Montauk Highway. He testified that he initially backed up before proceeding into the intersection because he was unable to see the oncoming traffic. He stated that when he crept forward towards the intersection to get a better view of oncoming traffic, plaintiff's motor scooter (which was coming from Bou's right) hit his vehicle on the driver's side.

Defendant Joe Delquaglio testified on behalf of Joe Del's Auto Body on September 11, 2006. He has leased the property from the owner Poptee "Julie" Patanjo since 1999. At no time prior to the accident did anyone complain to him about cars parked along the shoulder of Montauk Highway or on

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the sidewalk outside his business. Del either performed the landscaping himself or hired someone to do it for him. He testified he never received any complaints about the bushes on the corner of his property.

Carmella Balbus testified on behalf of Suffolk County. Suffolk County has owned and maintained Montauk Highway since 1972. According to Ms. Balbus, the individual towns within Suffolk County erect “no stopping, no standing, and no parking” signs along the roadways within their jurisdiction. In particular, any signs in front of Joe Del’s Auto Body would be installed and maintained by the Town of Brookhaven, without any input from the County. Balbus also confirmed that she searched the records of the Department of Public Works from 1990 to the date of the accident, and found no complaints concerning that intersection.

Suzanne Mauro, a clerk for the Town of Brookhaven’s Highway Department testified that she is responsible for processing complaints or claims regarding the Town’s roadways. According to Mauro, the Town does not maintain Montauk Highway between Weaver and Davidson Avenue, however it does maintain the side street, Weaver Avenue. There had been no prior written notices of any prior complaints about that location within the past five years with respect to either the stop sign or overgrown vegetation.

The burden of a court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but merely to determine whether such issues exist (*Dyckman v Barrett*, 187 AD2d 553, 590 NYS2d 224 [1992]) and, if material facts are in dispute or if different inferences may reasonably be drawn from facts themselves undisputed, a motion for summary judgment must be denied (*Supan v Michelfeld*, 97 AD2d 755, 468 NYS2d 384 [1983]).

Defendants Joe Del’s and Patanjo maintain that there were absolutely no parking restriction signs along the corner of Montauk Highway and Weaver Avenue until October 2005, well after the accident. Further, they argue, none of the vehicles parked in front of Joe Del’s along Montauk Highway at any time before or after the accident were issued any tickets, violations, summonses or citations. In opposition, however, plaintiff has submitted photographs and the statements of several witnesses which raise triable issues of fact pertaining to the whether the location of the vehicles was a causative factor of the accident and whether the accident was caused by the negligence of the defendants (*see, Sitaras v James Ricciardi & Sons*, 154 AD2d 451, 452, 545 NYS2d 937[1989], *lv denied* 75 NY2d 708, 554 NYS2d 833, *Soulier v Hughes*, 119 AD2d 951, 953, 501 NYS2d 480 [1986]). In his affidavit, eyewitness Darrin Benincase states that he observed the accident and that it was evident to him that both plaintiff’s and Bou’s view of the roadway was blocked by the cars parked in front of Joe Del’s. Other witnesses confirm that Joe Del’s was a very busy shop, that all the vehicles being repaired generally could not fit within the confines of the property and were often parked and/or stored on the street, and employees of the shop often needed to direct customers in and out of the shop. Further, while there is no common-law duty of a landowner to control the vegetation on his or her property for the benefit of users of a public highway, Brookhaven Town ordinance 85-378 regulating the dimensions of shrubbery on a corner lot imposed a duty on the property owners that could give rise to tort liability.

Accordingly, defendants’ Joe Del’s and Patanjo’s motion (#002) for summary judgment is denied.

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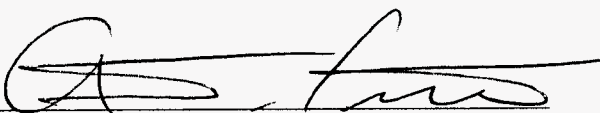
With respect to the County's cross-motion for summary judgment, it is well settled that a municipality which has enacted appropriate legislation may not be subject to liability for personal injuries resulting from a defect or hazard unless it has received actual written notice of the dangerous condition or its affirmative act of negligence proximately caused the accident (*see, Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]). This rule "comports with the reality that municipal officials are not aware of every dangerous condition on its streets and public walkways, yet imposes responsibility for repair once the municipality has been served with written notice of an obstruction or other defect" (*see, Poirer v City of Schenectady*, 85 NY2d 310, 624 NYS2d 555 [1995]). There are only two recognized exceptions to the statutory rule requiring prior written notice. They include where a municipality created the defect or hazard through an affirmative act of negligence (*see generally, Kiernan v Thompson*, 73 NY2d 840, 537 NYS2d 122 [1988]) and where a "special use" confers a special benefit upon the municipality (*see, Poirer v City of Schenectady, supra*).

Plaintiff has failed to state a viable claim against the County. First, plaintiff does not even attempt to establish that the County had prior written notice of the alleged overgrown foliage condition. There was no special benefit conferred upon the county which would exempt the plaintiff from compliance with the written requirement (*see, Poirer v City of Schenectady, supra*) nor any evidence that the County created the dangerous condition. Further, any claims with respect to the regulation of parking are misplaced. Accordingly, the motion (#003) for summary judgment by the County is granted.

Similarly, the Town of Brookhaven has made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that it did not receive the requisite prior written notice of the alleged defective condition (*Betzold v Town of Babylon*, 18 AD3d 787, 796 NYS2d 680 [2005]; *Khaghan v Rye Town Park Commission*, 8 AD3d 447, 778 NYS2d 313 [2004]; *Malone v Town of Southold*, 303 AD2d 651, 757 NYS2d 85 [2003]). The response of the co-defendants is insufficient to support a finding that any questions of fact exist (*see, Feinman v Cantone*, 192 AD2d 577, 596 NYS2d 135 [1993]). The failure of all the parties to complete discovery does not preclude the grant of summary judgment to the Town (*see, Gillinder v Hemmes*, 298 AD2d 493, 748 NYS2d 786 [2002]; *Bosio v Selig*, 165 AD2d 822, 560 NYS2d 196 [1990]).

Accordingly, the Town's motion for summary judgment is granted and the complaint and all cross claims against it are dismissed.

Dated: October 22, 2007



 J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION