

Pagliuca v County of Suffolk

2008 NY Slip Op 30060(U)

January 8, 2008

Supreme Court, Suffolk County

Docket Number: 0009277/2004

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 8-22-07
ADJ. DATE 10-22-07
Mot. Seq. # 001- MD
002- XMG
003- XMG

-----X
PATRICK PAGLIUCA, as Executor of the Estate :
of KATHLEEN PAGLIUCA, deceased, and :
PATRICK PAGLIUCA, individually, :
: :
: :
Plaintiff, :
: :
- against - :
: :
COUNTY OF SUFFOLK, TOWN OF ISLIP, :
MICHAEL DADDIO and RILEY LEASING :
CORP., :
: :
Defendants. :
-----X

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Upon the following papers numbered 1 to 14 read on this motion and cross motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 3 ; Notices of Cross Motion and supporting papers 4 - 6; 7 - 9 ; Answering Affidavits and supporting papers 10 - 11 ; Replying Affidavits and supporting papers 12 - 13 ; Other: 14 - Correspondence dated 9/25/07 by defendant Daddio's counsel withdrawing motion #001 ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#001) by defendant Daddio for summary judgment dismissing all claims interposed in this personal injury/wrongful death action commenced by the plaintiff is denied as the motion was rendered academic on September 25, 2007, when it was withdrawn by counsel for the moving defendant upon the discontinuance of the plaintiff's claims against said moving defendant; and it is further

ORDERED that the cross-motion (#002) by defendant County of Suffolk and separate cross-motion (#003) by defendant Town of Islip for summary judgment dismissing all claims interposed in this action against them are granted.

Plaintiff commenced this action to recover damages sustained as a result of the personal injuries and wrongful death of the plaintiff's wife who died as a result of a motor vehicle accident that occurred at approximately 8:40 a.m. on February 21, 2003, at 1965 Smithtown Avenue in Ronkonkoma, NY. At the time of the accident, the plaintiff's decedent was operating her vehicle in a northerly direction on Smithtown Avenue which afforded two travel lanes in each direction. A middle turning lane separated the north travel lanes of the roadway from the south travel lanes. Defendant Daddio testified at his deposition that he was operating a tractor trailer truck and traveling south on Smithtown Avenue at the time of the accident. The weather conditions were clear but it had snowed heavily a few days prior to the date of accident. Snow that had been cleared from the roadway was piled along its sides. As he traveled in the left, southbound travel lane of Smithtown Avenue, defendant Daddio saw the vehicle operated by the plaintiff's decedent suddenly crossover the turning lane and enter the southbound lane of travel where it collided with defendant Daddio's truck.

The roadbed of Smithtown Avenue was owned by the defendant County of Suffolk at the time of the subject accident. Pursuant to a written agreement with defendant, Town of Islip, dated December 21, 1990, said Town agreed to maintain Smithtown Avenue. At its deposition, the Town of Islip acknowledged that it was obligated to maintain Smithtown Avenue in February of 2003 and that such obligation included the duty to remove snow and ice from the roadway and to sand and salt same. The Town of Islip also testified that the day before the subject accident, it had received notice of a snow condition on Smithtown Avenue at its intersection with Second Avenue which is situated one-quarter mile from the site of the subject accident. A written record generated by the Suffolk County Police Department on the date of the accident reveals that an icing condition existed on the Smithtown Avenue overpass of the Long Island Railroad in the early morning hours of February 21, 2003, and that notice thereof was forwarded to the Town of Islip which responded by sanding the roadway. The situs of this icing condition on the overpass was .9 miles from the situs of the plaintiff's accident.

By his complaint, the plaintiff claims that the municipal defendants were negligent with respect to their ownership, management, maintenance, control, operation, design, construction and repair of the roadway where the subject accident occurred. In his bill of particulars, the plaintiff amplifies said claims with allegations of improper design of the curvature of the roadway, an improper posted speed limit and a failure to erect barriers between the north/south travel lanes. Plaintiff further claims that the municipal defendants permitted ice to form, exist and remain on the surface of the subject roadway and failed to remove accumulated ice and snow said roadway.

Defendant Daddio moved for summary judgment and the municipal defendants cross-moved for the same relief in their favor. Daddio's motion was, however, withdrawn after plaintiff, Patrick Pagliuca, in both his representative and individual capacities, discontinued all claims asserted in his complaint against defendant Daddio. The motion-in-chief (#001) interposed by defendant Daddio is thus denied as moot.

The cross-motions for summary judgment submitted by the municipal defendants are premised on claims that the absence of their receipt of prior written notice of the purportedly dangerous and defective

condition of the roadway warrants dismissal of the plaintiff's claims and all cross-claims.. The municipal defendants further claim that dismissal of the plaintiff's complaint is warranted because the conduct of the plaintiff's decedent while operating her vehicle under the prevailing road and weather conditions at the time of the accident was the sole proximate cause of said accident. The municipal defendants also claim that the plaintiff's notice of claim is defective as to the location of the accident and incomplete with respect to the plaintiff's negligent design claims and his claims of dangerous roadway conditions due to the existence of snow and ice. In opposition, the plaintiff claims that the defendants had actual notice of the defective condition of the roadway and/or created said condition. The plaintiff also claims that questions of fact regarding whether the conduct of defendant Daddio contributed to the occurrence of the accident exist which preclude a finding that the sole proximate cause of the accident was the negligence of the plaintiff's decedent. The plaintiff further claims that any defect or omission in the notice of claim was cured by the testimony given by the plaintiff at the hearing held pursuant to GML §50-H and/or waived by the defendants.

It is well settled that where, as here, municipal defendants have enacted prior written notice statutes they may not be subjected to liability for injuries caused by a dangerous or defective roadway or sidewalk unless they have received prior written notice of the dangerous or defective condition complained of by the plaintiff or an exception to the prior written notice requirement applies (*Griesbeck v County of Suffolk*, 44 AD3d 618, 843 NYS2d 162 [2007]; *Cendales v City of New York*, 25 AD3d 579, 807 NYS2d 414 [2005] and the cases cited therein). Here, the submissions of both the County and the Town established, *prima facie*, that they did not receive written notice of the existence of any dangerous or defective condition of the roadway whereat the subject accident occurred prior to the occurrence of said accident.

To avoid dismissal of his claims for recovery of that are predicated upon the purportedly dangerous and defective condition of the subject roadway, plaintiff was required to raise a triable issue of fact with respect to the defendant's receipt of prior written notice or to demonstrate that an exception to the prior written notice statute is applicable. The only two exceptions to the statutory rule requiring prior written notice are cases wherein the municipality caused or created the subject defect or hazzard through an affirmative act of negligence or where a special use confers a special benefit upon the municipality (*Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Delgado v County of Suffolk*, 40 AD3d 575, 835 NYS2d 379 [2007]; *Berner v Town of Huntington*, 304 AD2d 513, 757 NYS2d 585 [2003]).

Plaintiff's assertion that both the County and the Town had actual notice of the defective icing condition of the roadway and that such notice satisfied the written notice statutes is rejected as unmeritorius. Controlling case authorities have repeatedly held that actual notice of an alleged hazardous condition does not obviate the requirement that the municipality be in receipt of written notice of said condition prior to the occurrence of the accident (*Ferreira v County of Orange*, 34 AD3d 724, 825 NYS2d 122 [2006]; *Mahler v Incorporated Village of Port Jefferson*, 18 AD3d 450, 794 NYS2d 435 [2005]; *Silva v City of New York*, 17 AD3d 566, 793 NYS2d 478 [2005]; *Lysohir v County of Suffolk*, 10 AD3d 638, 781 NYS2d 693 [2004]. Plaintiff's claim that the Suffolk County Police report of the early morning icing condition at the Long Island Railroad overpass situated nearly a mile away from the site of the subject accident satisfied the written notice requirements codified by the municipal defendants is similarly rejected as unmeritorius (*Librizzi v Town of Huntington*, 34 AD3d 755, 826 NYS2d 117; *see also, Lang v County of Sullivan*, 184 AD2d 981, 585 NYS2d 609 [1992]). Equally unavailing is the plaintiff's claim that the complaint received by the Town of Islip on the day prior to the subject accident

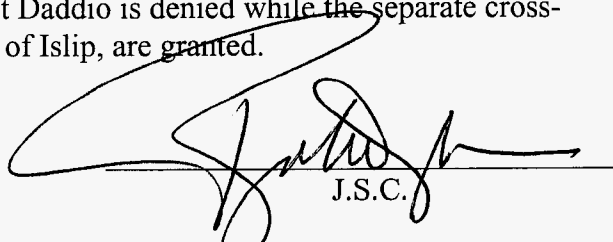
regarding accumulated snow on the roadway of Smithtown Avenue at its intersection with Second Avenue constituted prior written notice of the purportedly dangerous condition of the roadway one quarter mile away from the site of the subject accident. Prior written notice statutes require receipt of written notice of the particular condition about which the plaintiff complains (*Hampton v Town of North Hempstead*, 298 AD2d 556, 748 NYS2d 675 [2003]). Telephone or oral complaints reduced to writing by Town employees have been held not to satisfy prior written notice statutes (*Akcelik v Town of Islip*, 38 AD3d 483, 831 NYS2d 491 [2007]; *Peloso v County of Putnam*, 6 AD3d 411, 774 NYS2d 355 [2004]; *Dalton v City of Saratoga Springs*, 12 AD3d 899, 784 NYS2d 702 [2004]; *Cennare v Town of Smithtown*, 303 AD2d 351, 755 NYS2d 651 [2003]). Here, there was no evidence that the complaint recorded by the Town was generated by a written complaint.

The plaintiff's further claim that the defendants are liable notwithstanding the absence of prior written notice because each engaged in affirmative acts of negligence which caused or created the hazardous condition of the roadway are unsupported by any evidence and/or legally insufficient. The failure to remove ice from roads or to salt and sand them as well as a failure to warn of a dangerous snow or ice condition are not affirmative acts of negligence (*Buccellato v County of Nassau*, 158 AD2d 440, 550 NYS2d 906 [1990]; *Camera v Barrett*, 144 AD2d 515, 534 NYSd 395 [1988]). Nor is there any obligation on the part of a municipality to clear *all* snow and ice from a particular roadway after undertaking the clearing and sanding of other portions of said roadway (*Fruzzo v Incorporated Village of Rockville Centre*, 274 AD2d 499, 711 NYS2d 185 [2000]; *Woll v Village of Rockville Centre*, 205 AD2d 683, 613 NYS2d 640 [1994]; *Albanese v Town of Hempstead*, 176 Ad2d 697, 574 NYS2d 788 [1991]). The plaintiff thus failed to raise a question of fact regarding the municipal defendant's receipt of the required written notice or that such notice was not required under the circumstances of this case.

The submissions of the municipal defendants also established, *prima facie*, that the plaintiff's claims of defective design and /or construction of the subject roadway are not actionable. Review of the plaintiff's notice of claim reveals that no allegations of negligent design or construction of the roadway whereat the subject accident occurred are set forth therein. The record is devoid of any evidence tending to establish any breach of a duty owing from the municipal defendants to adequately design, construct and maintain the subject roadway in a reasonably safe condition (see, *Friedman v State of New York*, 67 NY2d 271, 502 NYS2d 669 [1986]; *Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 810 NYS2d 147 [2006]). Nor does the record contain any evidence regarding what caused the plaintiff's decedent to lose control of the vehicle she was operating and to suddenly cross-over the middle turning lane and collide with defendant Daddio's oncoming vehicle. Under these circumstances, it cannot be said that negligence, if any on the part of the municipal defendants, was a substantial factor in bringing about the accident (*Stuart-Bullock v State of New York*, 33 NY2d 418, 353 NYS2d 953 [1974]).

In view of the foregoing, the motion by defendant Daddio is denied while the separate cross-motions by defendants, County of Suffolk and the Town of Islip, are granted.

Dated: JAN 08 2008



J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION