[* 1]

SHORT FORM ORDER

INDEX No. 06-16995

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 1/31/08
ADJ. DATE 2/21/08
Mot. Seq. # 001 - MD
002 - XMD

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ROBERT F. BRENNAN and JOAN BRENNAN,

Plaintiffs,

- against -

RENATE GAGLIANO, METROPOLITAN TRANSPORTATION AUTHORITY, MTA LONG ISLAND BUS, METROPOLITAN SUBURBAN BUS, LONG ISLAND RAILROAD and "JOHN/ JANE DOE," said name being fictitious, the person being an operator of a vehicle for co-defendant,

Defendants.

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ROBERT F. BRENNAN and JOAN BRENNAN,

Plaintiffs,

- against -

TOWN OF ISLIP, COUNTY OF SUFFOLK "JILL/JAMES DOE," said name being fictitious, this person being an operator of a vehicle for co-defendant,

Defendants.

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Action No. 1 - Index No. 06-02443

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Action No. 2 - Index No. 06-16995

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Upon the following papers numbered 1 to 51 read on this motion and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 11 ; Notice of Cross Motion and supporting papers 12 - 33; Answering Affidavits and supporting papers 34 - 47; Replying Affidavits and supporting papers 48 - 51 ; Other _; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by the County of Suffolk, defendant in Action No. 2, and this cross motion by the Town of Islip, defendant in Action No. 2, for summary judgment dismissing the complaint and cross-claims against them are denied.

This is an action[1] to recover damages for personal injuries allegedly sustained by plaintiff Robert F. Brennan, then 75 years of age, on April 25, 2005, when his bicycle collided with an automobile owned and operated by Renate Gagliano in the parking lot of the Long Island Railroad station near the intersection of Montauk Highway and Oakdale-Bohemia Road in Oakdale, New York. A derivative cause of action is asserted on behalf of Mr. Brennan's spouse, plaintiff Joan Brennan. The gravamen of the plaintiffs' claims against defendant County of Suffolk and defendant Town of Islip is that they contributed to the cause of the subject accident because the County was negligent in illegally parking one of its buses within the parking lot thereby obscuring Ms. Gagliano's view of plaintiff's bicycle prior to the collision, and the Town was negligent in the ownership, maintenance and/or control of the parking lot itself. Discovery is not yet complete in this action and neither the County nor the Town have produced representatives for deposition.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see,* ***Rotuba Extruders, Inc. v Ceppos***, 46 NY2d 223, 413 NYS2d 141[1978]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (***S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.***, 34 NY2d 338, 341, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (***Benincasa v Garrubbo***, 141 AD2d 636, 637, 529 NYS2d 797 [1988]).

Defendant County seeks summary judgment on the basis that it bears no culpability for the plaintiff's accident because its buses were not the proximate cause of the plaintiff's accident. In essence, defendant County contends that even if it owned the bus in question, and even if that bus was illegally parked, the County is not liable for the plaintiff's accident because "the evidence conclusively shows that the bus did not and could not obstruct either party's view." In support thereof, defendant County relies primarily upon counsel's affirmation and the deposition testimony given by plaintiff Robert Brennan, Renate Gagliano and non-party eyewitness Virginia Lamonica.

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[1] By Order dated December 26, 2007, this Court granted summary judgment in favor of all the defendants in Action No. 1 except for defendant Gagliano who remains in that action.

Plaintiff testified that he was riding his bicycle westbound on Montauk Highway and turned left into the train station in order to cut through the station's parking lot to get to Oakdale-Bohemia Road. He also testified that he saw a bus somewhere in the vicinity of the station house but could not recall exactly where it was situated. The next thing he remembers is waking up in the hospital and has no recall of the happening of the collision.

Renate Gagliano testified that she had been traveling southbound on Oakdale-Bohemia Road and that she entered the parking lot of the train station intending to cut through the station and avoid a backup at the traffic signal at the intersection of Montauk Highway, and then proceed eastbound on Montauk Highway. She also testified that when she first entered the lot she saw a parked bus located in front of her and people getting off of the bus in front of the train station. Ms. Gagliano then testified that she never saw plaintiff riding his bicycle at any time prior to the accident and was behind the bus when she hit plaintiff. When she stopped her vehicle after the impact, no portion of her vehicle was past the rear of the bus. The front of her vehicle was approximately two to three car lengths from the rear of the bus.

Non-party Virginia Lamonica testified that she witnessed the accident. She observed the Gagliano vehicle enter the parking lot out of the corner of her eye. She then heard a noise and looked back towards the Gagliano's vehicle and observed that it was stopped. Plaintiff came from the left side of the Gagliano vehicle over to the right. After Lamonica heard the noise and observed the Gagliano vehicle stopped in the parking lot, she saw a bus stopped about three to five car lengths in front of the Gagliano vehicle. She testified that the bus was several car lengths in front of the Gagliano vehicle when the impact occurred.

It is well-settled that owners of improperly parked vehicles may be held liable to plaintiffs injured by negligent drivers of other vehicles, depending on the determinations by the trier of fact of the issues of foreseeability and proximate cause unique to the particular case. This rule is not limited to statutory violations but also applies to circumstances evidencing ordinary negligence (***Boehm v Telfer***, 250 AD2d 975, 672 NYS2d 959 [1998]). Moreover, issues of proximate cause are generally to be decided by the finder of fact (*see* ***Derdiarian v Felix Contr. Corp.***, 51 NY2d 308, 434 NYS2d 166 [1980]; ***Bingham v Louco Realty***, 36 AD3d 845, 829 NYS2d 194 [2007]). Furthermore, "because the determination of legal causation turns upon questions of foreseeability and what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve" (***Kriz v Schum***, 75 NY2d 25, 34, 550 NYS2d 584 [1989], *quoting* ***Derdiarian v Felix Contr. Corp.***, *supra* at 315; *see* ***Bingham v Louco Realty***, *supra*).

Here, the Court finds that defendant County has not made a *prima facie* showing of entitlement to summary judgment. Defendant County has failed to submit an affidavit by a person having knowledge of the facts or other evidentiary proof of probative value with regard to the ownership of the bus in question, or with regard to whether the bus was properly parked at the time of plaintiff's accident. Thus, the County has not demonstrated as a matter of law that it was not negligent (*see* ***Jordan v Aviles,*** 288 AD2d 347, 734 NYS2d 89 [2001]). Moreover, contrary to defendant County's contention, the Court does not find the deposition testimony relied upon by the County to be sufficient to eliminate all triable issues of fact with regard to the issue of proximate cause, as such testimony is not unequivocal regarding whether Ms. Gagliano's view of plaintiff's bicycle was obscured by the bus prior to the collision (*see* ***id.; Dery v***

DeCostole Carting, Inc., 281 AD2d 508, 722 NYS2d 57 [2001]). Accordingly, the motion by defendant County for summary judgment is denied.

The cross motion by defendant Town of Islip for summary judgment is similarly deficient and is therefore also denied. The Town has not supported its application for summary judgment with an affidavit by anyone with personal knowledge of the facts relating to the ownership of the bus in question and whether it was lawfully parked at the time of the accident. Thus, the Town has not made a *prima facie* showing of entitlement to summary judgment for any negligence arising out of the ownership or operation of the bus. In addition, defendant Town relies upon the County's submissions of deposition testimony to substantiate its claim that the bus did not obstruct Ms. Gagliano's view of the plaintiff's bicycle. As stated hereinabove, the Court finds such testimony insufficient to eliminate all triable issues of fact with regard to the issue of proximate cause.

Defendant Town also maintains that it cannot be held liable for any defective condition of the parking lot because it did not have the prior written notice of any such defect as required by Town Law § 65-a[1] and Town of Islip Code § 47A-3. "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" (***Scafidi v Town of Islip,*** 34 AD3d 669, 824 NYS2d 410 [2006]). Inasmuch as defendant Town has not submitted any such affidavit or any other proof of probative value on this issue, it has failed to establish its *prima facie* entitlement to judgment as a matter of law on the grounds that it had no prior written notice of the alleged defect. In any event, the Town has not addressed the plaintiffs' claim that prior written notice was not required as the accident was the result of the Town's failure to properly regulate traffic flow within the parking lot (*see e.g.,* ***Kiamie v Town of Huntington,*** 166 AD2d 634, 561 NYS2d 62 [1990]; ***Lopez v New York City Housing Authority,*** 149 AD2d 342, 539 NYS2d 749 [1989]; ***Tully v Town of North Hempstead,*** 93 AD2d 834, 461 NYS2d 53 [1983]).

In view of the foregoing, the Court concludes that neither of the moving defendants have established their entitlement to summary judgment. Accordingly, the motion by defendant County and cross motion by the defendant Town for summary judgment are denied.

Dated: 4/30/2008

Hon. Joseph Farneti
Acting Justice Supreme Court

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**