Lehane v Town of E. Greenbush

2008 NY Slip Op 32188(U)

June 30, 2008

Supreme Court, Rensselaer County

Docket Number: 0202995/2008

Judge: George B. Ceresia

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STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

KAREN K. LEHANE,

Plaintiff,

-against-

TOWN OF EAST GREENBUSH, ALAN T. HEDGE, and MARYLOU HEDGE,

Defendants.

All Purpose Term
Hon. George B. Ceresia, Jr., Supreme Court Justice Presiding
RJI: 41-0143-2003 Index No. 202995

Appearances: The Proskin Law Firm
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DECISION/ORDER

George B. Ceresia, Jr., Justice

In this personal injury action, defendant Town of East Greenbush moves pursuant to

CPLR 3212 for summary judgment dismissing the complaint as against it. Plaintiff Karen K. Lehane opposes the motion as do defendants Alan T. Hedge and Marylou Hedge.

This action stems from an automobile accident that occurred on June 3, 2000 at approximately 10:50 a.m. at the intersection of Greenwood Drive (running east-west) and Johnny Circle (running north-south) in the Town of East Greenbush, New York. Plaintiff testified at an examination before trial that, at the time of the accident, she was traveling north on Johnny Circle towards Greenwood Drive, with the intent of crossing Greenwood Drive onto Johnny Place, when, at the intersection, she was struck on the front driver's side of her vehicle by a vehicle driven by defendant Alan T. Hedge (hereinafter defendant Hedge). Defendant Hedge was returning to his home traveling on Greenwood Drive when the accident occurred.

On August 22, 2001, plaintiff commenced this action by filing a summons and complaint against defendant Town of East Greenbush (hereinafter the Town) and defendants Alan T. Hedge and Marylou Hedge (the vehicle's purported owner). As relevant to this instant motion practice, plaintiff interposed a cause of action alleging:

> "Defendant Town of East Greenbush, its officers, employees and agents, negligently failed to place a warning sign or device anywhere at the intersection of Greenwood Drive and Johny [sic] Circle; failed to install and maintain warning signs to alert vehicles approaching the intersection of the dangerous area ahead; and failed to post a warning sign on Johnny Circle and Greenwood Drive that traffic was approaching an intersection" (Complaint at ¶ 19).

The Hedge defendants cross-claimed against the Town, seeking contribution and/or

indemnification. Following joinder of issue and discovery, and in timely compliance with the scheduling order in this action, the Town now moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and any cross claims as asserted against it. The plaintiff and the Hedge defendants oppose the motion.

To obtain summary judgment, a movant must establish his or her position "'sufficiently to warrant the court as a matter of law in directing judgment'" in his or her favor (Friends of Fur Animals, Inc. v Associated Fur Mfrs., Inc., 46 NY2d 1065, 1067 [1979], quoting CPLR 3212 [b]). The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any genuine material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The failure to make such a showing mandates denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

Once that showing is made, the burden shifts to the party opposing the motion for summary judgment to come forward with evidentiary proof in admissible form to establish the existence of material issues of fact which require a trial (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). In order to defeat a motion for summary judgment, the opponent must present evidentiary facts sufficient to raise a triable issue, and averments merely stating conclusions are insufficient (see Capelin Assoc. v Globe Mfg. Corp., 34 NY2d 338, 343 [1974]; Vitolo v O'Connor, 223 AD2d 762, 764 [3d Dept 1996]). A party

opposing summary judgment must assemble, lay bare and reveal his or her evidentiary proof in admissible form to establish a triable issue of fact (see Zuckerman, 49 NY2d at 562; Castro v. Liberty Bus Co., 79 AD2d 1014, 1014 [2d Dept 1981]). An opposing affidavit of an attorney without personal knowledge of the facts has no probative value and should be disregarded (see Noha v Gurda, Gurda, & Tatz, 178 AD2d 731, 732 [3rd Dept 1991]).

"Summary judgment is a drastic remedy and 'should not be granted where there is any doubt as to the existence of a triable issue'" (Sternbach v Cornell Univ., 162 AD2d 922, 923 [3d Dept 1990], quoting Moskowitz v Garlock, 23 AD2d 943, 944 [3d Dept 1965]). The focus is upon issue identification, not issue resolution, and all inferences and evidence must be viewed in a light most favorable to the party opposing the motion for summary judgment (see B-S Industrial Contrs., Inc. v Town of Wells, 173 AD2d 1053, 1054 [3d Dept 1991] [emphasis supplied]).

The Town contends that the complaint and all cross claims should be dismissed as to it since it has demonstrated that intersection at which the accident occurred was both constructed and maintained in a manner consistent with good and accepted highway design and engineering practice. Further, the Town maintains that a traffic control device was not warranted at the subject intersection. Instead, the Town contends that the accident was a result of the drivers' failure to observe what could or should have been observed since both drivers acknowledged that they had an unobstructed view of the intersection.

The Town "has a nondelegable duty to adequately design, construct and maintain its

roadways in a reasonably safe condition" (Chunhye Kang-Kim v City of New York, 29 AD3d 57, 59 [1st Dept 2006]; see Hough v State of New York, 203 AD2d 736, 736 [3d Dept 1994]). Furthermore, "it must be remembered that 'the [Town] is not the insurer of safety of its roads and that no liability will attach unless the ascribed negligence of the [Town] in maintaining its roads in a reasonable condition is the proximate cause of the accident" (Hough, 203 AD2d at 737). 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'" (Duger v Estate of Carey, 295 AD2d 878, 878-879 [3d Dept 2002], quoting Tomassi v Town of Union, 46 NY2d 91, 97 [1978]).

As to the Town's first argument, in support of its contention that the it was not negligent in either the construction or maintenance of the intersection, the Town submitted the affidavit of Linda M. Kennedy. Ms. Kennedy has served as either the Town Clerk or the Deputy Town Clerk for the Town of East Greenbush for the last 13 years. Ms. Kennedy averred that, as the custodian of records for the Town, she "conducted a thorough search of the Town's records and have found no complaints with regard to the intersection at Greenwood Drive and Johnny Circle, located in the Town" (Kennedy Affidavit at ¶ 4, Meyers Affidavit, Exhibit I).

In further support of its motion, the Town submitted the expert affidavit of Robert T. Hintersteiner, P.E., a Transportation Engineer licensed to practice in the State of New York. Mr. Hintersteiner noted that he inspected the subject intersection on April 14, 2008,

describing the intersection as follows:

> "Greenwood Drive was an east/west two lane roadway, 25 feet in width in a residential neighborhood, which runs from Columbia Turnpike (NYS Route 9) to Huntwood Lane. Johnny Circle was a north/south two lane cul-de-sac roadway, 28 feet in width, located on the south side of Greenwood Drive. The length of Johnny Circle is 275 feet to the end of the cul-de-sac" (Hintersteiner Affidavit at ¶ 10).

Further, the expert stated that, using the New York State Department of Transportation Manual of Uniform Traffic Control Devices (MUTCD) – which was the manual used to regulate traffic control devices at the time of the accident – he calculated the sight distance across the corners of the subject intersection. Using this measurement in conjunction with the posted speed limits for the subject streets, all of which the expert described in great detail in the affidavit, Hintersteiner opined:

> "It is my professional opinion, with a reasonable degree of engineering certainty, that the subject intersection had excellent sight distances and that the posted speed limited [sic] for Greenwood Drive was below the critical approach speed, as computed in the MUTCD, which did not require either a stop sign or a yield sign" (id. at ¶ 17).

The expert also averred:

> "If defendant Hedge would have kept a proper lookout, he would have been able to see the plaintiff's vehicle 260 feet away before entering the intersection. Conversely, if plaintiff would have kept a proper lookout, she would have been able to see defendant Hedge's vehicle at a distance of 260 feet away before entering the intersection.
>
> "It is also my professional opinion, with a reasonable degree of engineering certainty that the subject intersection was constructed and maintained in a manner consistent with good and accepted highway design and engineering practices. Furthermore, it is my professional opinion, with a reasonable degree of engineering certainty that the intersection was in conformance with

> the specifications and standards set forth in the State Department of Transportation Manual of Uniform Traffic Control Devices.
>
> "It is further my professional opinion, with a reasonable degree of engineering certainty that the intersection could be operated under the rules of the road for an uncontrolled intersection and that it was in a reasonably safe condition with excellent sight distance" (id. at ¶¶ 18-20).

The expert also opined that a traffic study of the intersection was not warranted, noting that his opinion in this matter was based upon his review of "deposition transcripts, discovery responses, photographs taken in this action, affidavit of Linda M. Kennedy, [his] inspection of the subject accident, and upon [his] education, training, knowledge and experience in highway and intersection design, and maintenance, and traffic signal design and operations" (id. at ¶ 22).

Based on the above-discussed submissions, the Town has met its prima facie burden of establishing that it constructed and maintained the subject intersection in reasonably safe condition (see Duger, 295 AD2d at 879; see also Owens v Campbell, 16 AD3d 1000, 1001 [3d Dept 2005], lv denied 5 NY3d 704). Furthermore, plaintiff and the Hedge defendants have failed to rebut this showing (see generally Zuckerman, 49 NY2d at 562). First, as the Town notes neither of these parties have provided any expert opinion opposing that presented by the Town. Further, as the Town acknowledges, it is not seeking qualified immunity based on an implementation of a Town traffic plan and any continued review of that plan (see generally Friedman v State, 67 NY2d 271 [1986]; Alexander v Eldred, 63 NY2d 460 [1984]). Rather, the Town bases its motion on the reasonably safe condition of

the subject intersection.

Moreover, the record also supports the Town's argument that the sole proximate cause of the accident was the conduct of the plaintiff and defendant drivers (see Owens, 16 AD3d at 1001-1002). As the record shows, plaintiff testified at her examination before trial (submitted in support of the Town's motion) that it was a clear day and she did not recall anything obstructing her view of the intersection. Further, plaintiff testified that she was looking straight – in the direction she was traveling – at the time of the accident, but had looked right and left prior to entering the intersection (see Lehane EBT Testimony at 29-30, Meyers Affidavit, Exhibit F). The examination before trial testimony of defendant (also submitted in support of the Town's motion) indicated that defendant was familiar with the subject intersection since he lived in the vicinity. Further, defendant noted that he saw plaintiff's car about a car length or so before the impact (see Hedge EBT Testimony at 15, id., Exhibit H). Evident from this testimony is that neither driver reported anything obscuring their vision of the intersection at issue and neither has submitted an affidavit in opposition so stating.

Accordingly, for the reasons discussed above, the Court grants the Town's motion for summary judgment dismissing the complaint and any cross-claims as asserted against it. Otherwise, the Court has considered the parties' remaining arguments and finds them either without merit or unnecessary to address given this Court's decision. Therefore, it is

ORDERED that the motion for summary judgment by defendant Town of East

Greenbush is granted; and it is further

ORDERED that the complaint and any cross-claims as asserted against defendant Town of East Greenbush are dismissed.

This shall constitute the decision and order of the Court. All papers are returned to the attorney for defendant Town of East Greenbush, who is directed to enter this Decision/Order without notice and to serve all attorneys of record with a copy of this Decision/Order with notice of entry.

Dated: June 30, 2008
Troy, New York

George B. Ceresia, Jr.
Supreme Court Justice

Papers Considered:

1. Notice of Motion dated April 30, 2008;
2. Affidavit of Danielle N. Meyers, Esq., sworn to April 30, 2008, with accompanying Exhibits A-I;
3. Expert Affidavit of Robert T. Hintersteiner, P.E., sworn to April 30, 2008, with accompanying Exhibits A-F;
4. Affirmation in Opposition of Marc D. Greenwald, Esq., affirmed May 14, 2008, with accompanying Exhibits A-D;
5. Affidavit in Opposition of Sean A. Tomko, Esq., sworn to May 13, 2008, with accompanying Exhibits A-C;
6. Reply Affidavit of Danielle N. Meyers, Esq., sworn to May 21, 2008, with accompanying Exhibits 1-3.