

Ducoing v Tuthill

2009 NY Slip Op 30512(U)

March 4, 2009

Supreme Court, Suffolk County

Docket Number: 06-31009

Judge: Jeffrey Arlen Spinner

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 21 - SUFFOLK COUNTY

P R E S E N T :

Hon. JEFFREY ARLEN SPINNER
Justice of the Supreme Court

MOTION DATE 11-21-08 (001)
MOTION DATE 10-15-08 (002)
ADJ. DATE 1-17-09
Mot. Seq. # 001 - MD
002 - MG

-----X
RAYMOND DUCOING and PATTY DUCOING, :
: :
: :
Plaintiffs, :
: :
- against - :
: :
JEFFREY A. TUTHILL, TOWN OF :
BROOKHAVEN and ANNA KELLY, :
: :
Defendants. :
-----X

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Upon the following papers numbered 1 to 21 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; 5 - 8; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9 - 11; 12 - 14; Replying Affidavits and supporting papers 15 - 16; 17 - 19; 20 - 21; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (001) by defendant, Anna Kelly, for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing plaintiff's complaint and all cross claims, is denied; and it is further

ORDERED that the motion (002) by defendant, Town of Brookhaven, for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing plaintiff's complaint and all cross claims, is granted; and it is also

In negligence action, plaintiff, Raymond Ducoing alleges that he sustained personal injuries on June 27, 2006 at the intersection of Tipton Drive East and Amarr Drive, in the Town of Brookhaven, New York after his motorcycle struck a vehicle owned and operated by defendant, Jeffrey Tuthill. Plaintiff alleges that defendant, Anna Kelly, was negligent in failing to maintain the foliage on her property, located at 3 Amarr Drive, which borders the corner of Amarr Drive and Tipton Drive East, causing an obstruction to motorists. Plaintiff further alleges that the Town of Brookhaven (hereinafter referred to as "the Town") was negligent in failing to maintain the foliage on its right of way which is located on defendant Kelly's property. Plaintiff, Patty Ducoing, alleges a derivative cause of action. Defendants Kelly and the Town move separately for summary judgment dismissing the action and all cross claims.

In support of their motions, defendants submit, among other things, the pleadings, bill of particulars and copies of examination before trial transcripts of the plaintiff, defendant Kelly, non-party Suzanne Mauro, non-party Louis Pulsonetti, and defendant Tuthill. Defendants also submit a certified copy of the police accident report and copies of memoranda by the Town Clerk and Superintendent of Highways. Plaintiff alleges in the bill of particulars that defendants were careless, reckless and negligent in the ownership, operation, management, maintenance and control of the corner of Tipton Drive East and Amarr Drive by failing to provide plaintiff with a safe place to travel, by allowing a roadway hazard to exist and failing to inspect and correct said hazard.

Plaintiff testified at his General Municipal Law §50-h hearing that he lived on Tipton Drive at the time of the accident. He stated that the motorcycle that he was operating on the date of the accident was registered in his wife's name. He stated that although he did not have a motorcycle license he was experienced in operating a motorcycle. On the date of the accident, his intention was to ride the motorcycle to the end of the block in the neighborhood and to return home shortly. He did not wear a helmet. When he pulled out of his driveway, he turned left, heading west, to the intersection with Amarr Drive. He stated that he was driving at 20 to 25 miles per hour. As he approached the intersection, he maintained a constant speed. Approximately thirty feet before reaching the intersection, he observed defendant Tuthill's vehicle making a sharp left turn in the intersection onto Tipton Drive. Plaintiff stated that defendant's vehicle was traveling at approximately 10 to 15 miles per hour. Plaintiff stated that he hit the brake and proceeded into a controlled slide to the ground. He stated that he was unconscious at the time of impact and has no recall after that point. He further stated that he did not see Tuthill's vehicle sooner because there was overgrowth at the corner of Amarr and Tipton. During his examination before trial, plaintiff testified that he was traveling up to 34 miles per hour prior to observing defendant's pickup truck. At the point that he saw the truck, he remained at a constant speed of 30 miles per hour prior to braking.

Defendant Tuthill testified at his deposition that he was driving to his home, located at 40 Presford Drive, approximately three blocks from the site of the accident. He was traveling on Amarr Drive at the time of the accident. He stopped at the edge of Tipton and Amarr and was able to see approximately 200 feet to the left down the eastbound lane of Tipton. He was able to partially see approximately 60 to 70 feet to the right down the westbound lane of Tipton, however there was an overgrowth of trees and bushes on the corner property at Amarr and Tipton. He started to enter the

intersection, looked left again and saw no vehicles. He proceeded ten feet into the intersection and stopped. He could then see an additional 100 feet of the westbound lane of Tipton to the right. After the second stop in the intersection, he saw a motorcycle approximately 60 to 70 feet away from his truck. Defendant stopped in the intersection and four to five seconds later, the motorcycle struck his truck. He observed the operator of the motorcycle apply his brakes but they locked. The motorcycle began to fishtail and the operator was thrown from the motorcycle and the motorcycle hit the truck at the center of the front bumper. Defendant estimated the speed of the oncoming motorcycle to be approximately 45 miles per hour. Defendant stated that he did not have a problem with the shrubs and trees at the corner and never made complaints about visibility at the corner.

Defendant Kelly testified at her deposition that she lived at 3 Amarr Drive, which is located at the corner of Amarr Drive and Tipton Drive East, for two years. She stated that a nine foot strip along the road belonged to the Town of Brookhaven and she believed that it was the responsibility of the Town to maintain it. She received no requests from the Town to maintain or trim the trees or shrubbery, there had been no accidents at her corner. She also stated that she had received no complaints from the neighbors that the trees or shrubbery obstructed their view. She stated that she mows approximately five feet of the nine foot strip once or twice per month. She installed a fence around her property and is unclear how far it overlaps the nine foot strip.

Ms. Suzanne Mauro testified at her deposition that she is employed by the Town as a principal clerk in the Highway Department. She processes the claims made against the Town and researches the records. She conducted a search of records for the three years prior to the accident and found no prior written notice of any site obstruction, foliage problems or tree trimming requests at that location. She stated that the Town owns a right of way nine feet from the paved road at the subject corner. She stated that there was no program to maintain the shrubs in the right of way, but that the department would respond to complaints. She stated that there were no complaints about the foliage at that corner.

Mr. Louis Pulsonetti testified at his deposition that he is employed by the Town as the Highway General Supervisor of the Town Highway Department. He is in charge of a zone which includes the intersection at Tipton Drive East and Amarr Drive. He had no records with respect to this location. He recalled being at the location when the department paved all the roads in that neighborhood. He states that, in general, the highway department does not prune trees that are located on private property and overhang the roadway. They would contact the resident and ask them to trim the trees after a work order is generated. He stated that he never received a work order to tell defendant Kelly to trim any trees at this intersection. He further stated that his employees performed street sweeping in that area in March, 2006, but that no maintenance work was performed on the foliage at that location in June, 2006.

The certified police report revealed that defendant Tuthill stated that he was traveling southbound on Amarr Drive when he came to Tipton Drive East, stopped, looked both ways and proceeded to turn left and head east on Tipton Drive East when he saw plaintiff speeding toward him. Defendant stated that he stopped and observed plaintiff lose control of his motorcycle and fall off. The motorcycle struck defendant's vehicle and then plaintiff struck defendant's vehicle.

A memorandum from the Superintendent of Highways to the Town Attorney on March 1, 2007,

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reveals that the Town Highway Department does maintain and have jurisdiction over the incident location. The records were checked for the three years prior to the event and they do not reflect any written notice of a problem with foliage or a sight obstruction at this intersection. The records further revealed that one permit was issued to install a driveway apron in 2004.

In opposition, plaintiff's counsel affirms that defendant Kelly was in violation of Brookhaven Town Code §85-57B which provides as follows:

fences, hedges or other densely growing shrubbery along a public street shall not exceed 2 ½ feet in any point within a radius of 30 feet of the corner formed by any intersecting streets. Fences may be of open woven wire or other such design as will not obstruct sight visibility.

In addition, plaintiff's counsel points out that Brookhaven Town Code §85.378 requires landowners to maintain their hedges, shrubs, etc. to a height of 2 ½ feet on corner lots. Plaintiff also claims that the Town was negligent in failing to correct the overgrowth pursuant to Brookhaven Town Code §49-2 which provides that the Town has the right to direct agencies to repair or maintain trees, plantings, or fences after the owner fails to maintain these items after notification by the Town.

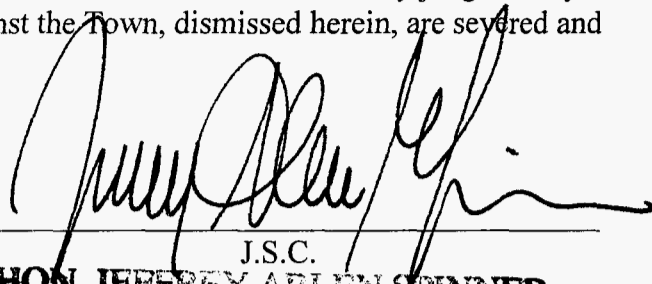
Liability is predicated only on a failure of defendant to remedy the danger presented after actual or constructive notice of the condition (*see, Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 622 NYS2d 493 [1994]; *Murphy v Conner*, 84 NY2d 969, 622 NYS2d 494 [1994]). Moreover, a general awareness that a dangerous condition might exist is legally insufficient to constitute notice of the specific condition which caused the injury (*Baumgartner v Prudential Ins. Co. of Am.*, 251 AD2d 358, 674 NYS2d 84 [2d Dept 1998]). A homeowner such as defendant Kelly has no common-law duty to prevent vegetation growing on her property from creating a visual obstruction to users of a public roadway (*see, Agostino v Masi*, 28 Ad3d 501, 813 NYS2d 491 [2d Dept 2006]). However, where a specific regulatory provision imposes upon property owners a duty to prevent vegetation from visually obstructing the roadway, proof of noncompliance with the regulatory provision may give rise to tort liability for any damages proximately caused thereby (*see, Lubitz v Village of Scarsdale*, 31 AD3d 618, 819 NYS2d 92 [2d Dept 2006]).

Here, defendants have demonstrated, prima facie, that they had no notice of the foliage overgrowth or that it was a traffic hazard. Neither defendant Kelly nor the Town received any complaints that the foliage caused a traffic problem at the subject intersection. In addition, the Town has demonstrated that an extensive search of its records revealed that there was no written notice that the foliage within its nine foot right of way at that intersection was obstructing the view of motorists. Plaintiff has failed to raise an issue of fact that the Town had a duty to him inasmuch as there was no evidence of a special relationship creating a municipal duty to exercise care for the benefit of a particular class of individuals, and therefore no liability may be imposed upon the Town for failure to enforce the Town Code (*see, Sanchez v Liberty*, 42 NY2d 876, 397 NYS2d 782 [1977]). However, plaintiff has raised an issue of fact regarding whether defendant Kelly failed to comply with Brookhaven Town Codes §§ 85.378, 85-57B (*Lubitz v Village of Scarsdale, supra*).

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Accordingly, the motion by defendant Kelly is denied. The motion for summary judgment by the Town is granted. As a result, the plaintiff's claims against the Town, dismissed herein, are severed and plaintiffs' remaining claims shall continue.

Dated: MAR 04 2009



J.S.C.
HON. JEFFREY ARLEN SPINNER

 FINAL DISPOSITION X NON-FINAL DISPOSITION