Iacone v Passanisi
2010 NY Slip Op 31970(U)
June 30, 2010
Sup Ct, Nassau County
Docket Number: 1993/09
Judge: Karen V. Murphy
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 17 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

x

NICOLLETTE ANN IACONE, by her Co-Guardians, NICHOLAS J. IACONE and LORIANN IACONE, individually,

Plaintiff(s),

-against-

SAL W. PASSANISI, JR., COUNTY OF NASSAU, MICHAEL PICCOLI, THOMAS PICCOLI, ANTHONY GRASSI and GERALYN GRASSI,

Defendant(s).

x

Index No. 1993/09

Motion Submitted: 6/9/10
Motion Sequence: 001, 002

The following papers read on this motion:

Notice of Motion/Order to Show Cause........................XX
Answering Papers...XXXX
Reply...XX
Briefs: Plaintiff's/Petitioner's.......................................
Defendant's/Respondent's.................................

Defendants', Anthony Grassi and Geralyn Grassi (collectively referred to hereinafter as "Grassi"), motion, pursuant to CPLR § 3212, for an Order of this Court, granting them summary judgment dismissal of plaintiffs' complaint is denied. Similarly, defendants', Michael Piccoli and Thomas Piccoli (collectively referred to hereinafter as "Piccoli"), cross motion, pursuant to CPLR § 3212, for an Order of this Court, granting them summary judgment dismissal of plaintiffs' complaint is also denied.

This action arises out of a motor vehicle accident that occurred on September 8, 2007 at approximately 9:30 p.m. at the intersection of Oceanside Road and Erwin Place in Oceanside, New York. Oceanside Road runs in an approximate north-south direction. Erwin Place runs approximately east-west. The intersection of Oceanside Road and Erwin Place is

a T-intersection with Erwin Place intersecting at Oceanside Road at the easterly side of Oceanside Road. At the time of the accident, defendant, Sal W. Passanisi ("Passanisi") was operating his motor vehicle and heading northbound on Oceanside Road. Plaintiff, Nicolette Ann Iacone ("Iacone") was operating her vehicle westbound on Erwin Place and was attempting to make a left hand southbound turn from Erwin Place onto Oceanside Road when the impact occurred. Plaintiff's travel was governed by a stop sign on Erwin Place. At this intersection, Oceanside Road is slightly curved so that a vehicle traveling north on Oceanside Road, such as the defendant Passanisi's vehicle, would be driving on a bend as he approached the subject T-intersection.

At his oral examination before trial, Passanisi testified that he had consumed alcohol prior to on the day of the accident. He testified that ultimately he pled guilty to driving while under the influence of alcohol and that he was sentenced upon that conviction. Passanisi stated at his deposition that he was also prosecuted and pled guilty to vehicular assault in the 2nd degree, a class E felony. He admitted that he was operating a motor vehicle while having 0.09 of 1% or more by way of alcohol in his blood. His license was subsequently revoked.

At his sworn EBT, Passanisi also testified as follows:

Q: Do you remember telling the police, quote, "I admit I was going a little fast" did you tell that to the police?
A: I did.

He further stated:

Q: . . . As you go back a football field [a hundred yards] from that intersection, when you're a football field away, if you're heading northbound, as you were on Oceanside [Road], do you have a clear view of the intersection of Erwin [Place]?
A: You do not.
Q: Why not?
A: Because of the curve.
Q: What distance would you have to be from the intersection as you're traveling northbound to have a view of the intersection with Erwin?
A: 25, 30 feet.
Q: What, if anything, obstructed your view of the intersection of Erwin as you drove on Oceanside that evening?
A: The telephone pole.
Q: In addition to the telephone pole, is there anything else that obstructed–
A: The bush, the [speed limit] sign.

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Q: Let me finish. As you approached in a northbound direction, I think you testified that you had some limited – I forgot the exact word you said, but there was a limited amount of distance that you could see the intersection –

A: Yes.

Q: –correct?

A: Yes.

Q: What I'm asking you is what it was that limited your view of the intersection?

A: The bushes.

Q: Okay.

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Q: The same question, is there anything in this photograph that shows anything that might have obstructed your vision on the day of the accident?

A: The bushes (indicating), the sign and the box.

The box to which Passanisi was referencing was "a gray box near the 25 mile per hour sign, yellow sign that is in the middle of the photograph." Passanisi testified that as a result of the impact, the front portion of his vehicle came into contact with the center of plaintiff's vehicle on the driver's side.

Defendants Anthony and Geralyn Grassi are the owners of the premises known as 3036 Erwin Place, which sits on the south-east corner of said T-intersection. The property is also known as Tax Lot 373 in Oceanside, New York. The front of the Grassi home faces Erwin Place. Defendants, Michael and Thomas Piccoli are owners as tenants in common of the premises known as 3045 Oceanside Road. This property is also known as Tax Lot 374 in Oceanside, New York. The Piccoli home is adjacent to the Grassi home. The front of the Piccoli home faces Oceanside Road. Along the border between the Piccoli home and the Grassi home, there is a hedgerow which Passanisi identified in his deposition as "the bushes."

Insofar as is relevant for the purposes of the within motions for summary judgment dismissal, plaintiffs claim that the Grassis and Piccolis were both negligent and careless in, *inter alia*, "failing to keep the hedges properly trimmed to permit maximum view of the roadway south of the intersection of Oceanside Road and Erwin Place." Plaintiffs also claim in their bill of particulars that defendants violated, *inter alia*, the following:

- Town of Hempstead Building Zone Ordinance, Article VII, §74. Fences;

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- Town of Hempstead Building Zone Ordinance, Article XXXI, §312. Fences and planting screens.

Said provisions read as follows:

§ 74. Fences. [Effective 3-28-1975; 9-22-2009]
A fence, not exceeding six feet in height, shall be permitted on the rear lot line and those linear portions of the side lot lines enclosing a rear yard; provided, however, that the six-foot fencing and its relationship to the street fronting upon the premises shall not exceed a greater distance frontward to the street than the front building line of the dwelling; provided that any fencing frontward of the front building line shall be no greater than four feet in height, and of a type which does not substantially obstruct line of sight, and provided that there shall be compliance with § 311 of Article XXXI of this ordinance, with respect to clear sight triangles.

Insofar as is relevant herein, subsection F of §312 of Article XXXI reads, in pertinent part, as follows:

§312. Fences and planting screens.

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E. On any interior lot where a fence, planting screen or open fence shall be erected along a road or highway, the permitted height thereof measured from the existing elevation of the center of the highway opposite the fence shall not exceed four (4) feet in height when the location of the fence shall exceed toward the street a greater distance than the streetside building line of any buildings located on the adjoining plot or plots except when authorized by the Board of Zoning Appeals, pursuant to Article XXVII hereof. [Effective 3-28-1975]

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F. On any corner lot where a fence, planting screen or open fence not controlled by § 311 hereof shall be erected along a road or highway, the height thereof measured from the existing elevation of the center of the highway opposite the fence shall not exceed four (4) feet when the location of the fence shall exceed toward the street a greater distance then the streetside building line of any buildings located on the corner lot except when authorized by the Board of Zoning Appeals, pursuant to Article XXVII hereof. [Effective 3-28-1975]

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Notably, the term "planting screen" is used to describe "a continuous evergreen" fence structure (*see*, ***Town of Hempstead Building Zone Ordinance, Article XXXI, §312[A][3]***).

In support of their motion, the Grassi defendants maintain that they do not own the hedges that plaintiffs have referred to; that the subject hedgerow is not located on their property and that it is not under their ownership, control or maintenance. In support of their cross motion, the Piccoli defendants maintain that "[t]he defendant's hedges cannot be a proximate cause of the accident" because "[t]he accident occurred on the lanes of the roadway beyond the point where the hedges could possibly obstruct, the plaintiff had a stop sign, and co-defendant Passanisi pleaded guilty to causing plaintiff's injury(ies) due to being under the influence of alcohol. Further, the curvature of the road, the signage, and a traffic control box located at the edge of the bushes closest to the street would be the reasons for any alleged construction, not the porous hedges running along the property line." The Piccoli defendants also submit that as neither defendant Michael Piccoli nor Thomas Piccoli ever resided at the house in question, neither of them had notice of any alleged condition and neither had a duty to trim the hedges.

Counsel for the plaintiffs maintains that as a result of the injuries sustained by Nicolette Iacone, she is unable to recall the events concerning the accident. This Court notes at the outset that Nicolette has yet to testify at her sworn examination before trial which counsel for the defendant, County of Nassau, claims was scheduled for June 15, 2010. In the absence of plaintiff's sworn testimony surrounding the happening of this accident, including the alleged obstructionist hedges, this Court denies defendants' motions for summary judgment as premature (***Smith v. City of New York,*** 133 A.D.2d 818, 520 N.Y.S.2d 195 [2d Dept., 1987]).

The motion and cross motion are also denied because both moving defendants have failed to demonstrate that the Town of Hempstead Building Zone Ordinances do not apply to them. As stated above, plaintiffs' claims against the moving defendants relate to their alleged failure to keep the hedges on their property properly trimmed so as to permit maximum view of the T-intersection. In that regard, while it is true that generally "[p]roperty owners have no common-law duty to control the vegetation on their property for the benefit of public highway users" (***Weitz v. McMahon***, 252 A.D.2d 581, 676 N.Y.S.2d 212 (2d Dept., 1998); ***Ingenito v. Robert M. Rosen, P.C.***, 187 A.D.2d 487, 488, 589 N.Y.S.2d 574 [2d Dept., 1992]), the ordinances alleged by the plaintiffs to have been breached by the moving defendants relate to "Fences" and "Fences and Planting screens." Defendants have failed to show that the shrubbery at issue did not constitute a "planting screen" within the meaning of the Town's Ordinances (see, ***Town of Hempstead Building Zone Ordinance, Article XXXI, §312[A][3]***).

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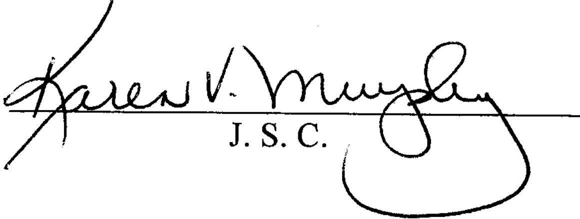
Furthermore, it must be noted that to establish a prima facie case of negligence, plaintiff must show that "defendant's negligence was a substantial cause of the events which produced the injury" (***Derdiarian v. Felix Contr. Co.***, 51 N.Y.2d 308, 315, 414 N.E.2d 666, 434 N.Y.S.2d 166 [1980]). An interruption of the nexus between defendant's negligence and plaintiff's injury by the act of a third party may affect defendant's liability. An intervening act will be deemed a superseding cause and will serve to relieve defendant of liability when the act is of such an extraordinary nature or so attenuates defendant's negligence from the ultimate injury that responsibility for the injury may not be reasonably attributed to the defendant (***Martinez v. Lazaroff***, 48 N.Y.2d 819, 399 N.E.2d 1148, 424 N.Y.S.2d 126 (1979); ***Kingsland v. Erie County Agric. Soc.***, 298 N.Y. 409, 84 N.E.2d 38, 10 A.L.R.2d 1 (1949); ***Perry v. Rochester Lime Co.***, 219 N.Y. 60, 113 N.E. 529 [1916]).

In this case, Passanisi's operation of his motor vehicle while under the influence of alcohol is clearly an intentional and criminal act and, thus arguably may be deemed by the trier of fact to be a superseding cause of plaintiff's injuries, thereby relieving the moving defendants herein of liability (***Perry v. Rochester Lime Co., supra***).

Therefore, in light of these factual issues, this Court herewith denies the Grassis and the Piccolis respective motions for summary judgment dismissal of plaintiffs' complaint (***Winegrad v. New York Univ. Med. Center***, 64 N.Y.2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]).

The foregoing constitutes the Order of this Court.

Dated: June 30, 2010
Mineola, N.Y.



J. S. C.

ENTERED
JUL 20 2010
NASSAU COUNTY
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