SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

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CHRISTINE KENNEY,

Plaintiff,

-against-

COUNTY OF NASSAU and NATALIE A. NELSON a/k/a NATALIE A. THOMAS,

Defendants.

----------x

MICHELE M. WOODARD
J.S.C.
TRIAL/IAS Part 12
Index No.: 20686/08
Motion Seq. Nos.: 01 & 02

DECISION AND ORDER

Papers Read on this Motion:

Defendant County of Nassau's Notice of Motion	01
Plaintiff's Opposition	xx
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Defendant Nelson's Notice of Motion	02
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In motion sequence number one, Defendant County of Nassau ("County") moves by Notice of Motion for an order granting them summary judgment dismissing the Plaintiff's complaint and cross claims against them. In motion sequence number two, Defendant Natalie A. Nelson a/k/a Natalie A. Thomas ("Ms. Nelson") moves for summary judgment pursuant to CPLR §3212 dismissing the complaint on the basis that she did not breach any duty owed to the Plaintiff.

Plaintiff commenced this action for personal injuries allegedly sustained on August 24, 2007 on or about 10:00 a.m. while traveling northbound in front of 246 Piping Rock Road at or near the intersection with Pinkwood Lane, Matinecock, New York. Plaintiff alleges she lost control of her bicycle due to a defect in the public roadway. Plaintiff veered left, fell into the road and was struck by Ms. Nelson's vehicle that had been traveling northbound and behind plaintiff.

Ms. Nelson states that she is not responsible for the plaintiff's alleged injuries due to the emergency doctrine since plaintiff and her bicycle suddenly fell in the path of Ms. Nelson's vehicle.

The County contends that it received no prior written notice pursuant to Nassau County Administrative Code § 512.4.0(e). The County offers the sworn affidavits of William Mahoney, a County Department of Public Works Equipment Supervisor, Glen Cove Garage Facility, and

Veronica Cox, an employee of the Bureau of Claim and Investigation of the Nassau County attorney's office (see Exhibits D and E respectively annexed to County's motion; the affidavits are dated January 14, 2010 and March 25, 2009).

Mr. Mahoney states he drove the northbound road by 246 Piping Road for years and inspects same many of times (see Exhibit H, p. 46 annexed to County's motion) and found no defects. He also did a search for written notice in the area of the incident, and he was not aware of any written complaints in the area of the incident prior to August 24, 2007.

Ms. Cox stated she did a search for prior written notices to the County in the areas of the incident for five years prior to the incident of August 24, 2007 and her search revealed no such written notices.

It is well settled that a municipality has the obligation to design, construct, and maintain its highways in a reasonably safe condition in light of expected traffic conditions. *Tomassi v Town of Union*, 46 NY2d 91 (1978). Likewise, it has long been established that the entity is under an absolute and non-delegable duty to maintain its roads and highways in a reasonably safe condition and that liability will be imposed for injuries resulting from breach of that duty. *(See Friedman v State of New York*, 67 NY2d 271 [1986]; *Lopes v Rostad*, 45 NY2d 617 [1978]; *Fiege v State of New York*, 189 AD2d 748 [2d Dept 1993]: *D'Alessio v State of New York*, 174 AD2d 791 [3d Dept 1991]. A municipality's obligation to maintain its highways is not confined to vehicular traffic alone. *(Sanford v State*, 94 AD2d 857 [3d Dept 1983]). The State is also required to provide pedestrians and other users of the highway with a reasonably safe place to travel. *Id.*

The obligation to maintain its highways in a reasonably safe condition is not limited to the travel portion of the highway. When the entity undertakes to provide a paved strip or shoulder alongside the roadway, it must also maintain the shoulder in a reasonably safe condition for all foreseeable uses. *(Bottalico v State*, 59 NY2d 302 [1983]). This duty to maintain the shoulder has been extended to both pedestrians and bicyclists. *(See, e.g., Sanford, supra; Cruz v City of New York*, 201 AD2d 606 [2d Dept 1994]). It has been held that "[i]njuries arising from a traveler's use of an improperly maintained roadway shoulder may be compensable through application of general principles of negligence and comparative negligence." (*Terwilliger v State*, 96 AD2d 688 [3d Dept 1983]). Thus, the County's obligation is clear. Ms. Thomas contends the "emergency doctrine" is available to her as a defense.

A defendant cannot properly rely on the emergency doctrine in support of a summary

judgment motion in a personal injury suit where the defendant failed to plead the emergency doctrine as an affirmative defense, and the facts relating to the emergency were known only to the defendants (emphasis added) *(Franco v G. Michael Cab Corp.*, 71 AD3d 1082 [2d Dept 2010]).

Here, the facts relating to the incident are, from the record herein, known to all the parties - plaintiff and co-defendants alike. There is no unfair surprise involved (*see Bello v Transit Authority of New York City*, 12 AD3d 58 [2d Dept 2004]) even though Ms. Nelson did not properly plead the emergency doctrine.

Under the emergency doctrine when a party is found with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the action to be reasonably so disturbed that the person must make a speedy decision without weighing alternate courses of conduct, the person may not be negligent if the actions taken are reasonable and prudent in the emergency context (*Smith v Philips,* 74 AD3d 782 [2d Dept June 2010]; *Cancellaro v Shults*, 68 AD3d 1234 [3d Dept 2004]) providing the person has not created the emergency (*Caristo v Sanzone*, 96 NY2d 172 [2001]).

The existence of an emergency and the reasonableness of a response to it generally present issues of fact (*see Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443 [2d Dept 2005]).

When a driver of an automobile approaches another while from the rear, he or she is bound to maintain a reasonable safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle pursuant to Vehicle and Traffic Law § 1129(a) (*Krakowska v Niksa*, 298 AD2d 561 [2d Dept 2002]; *Buicceri v Frazeri,* 297 AD2d 304 [2d Dept 2002]).

A rear end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle (*Tutrani v County of Suffolk,* 10 NY3d 906 [2008]), and such a collision impose a duty of explanation on the operator (*Hughes v Cai*, 55 AD3d 671 [2d Dept 2008]; *Gregson v Terry*, 35 AD3d 358 [2d Dept 2006]; *Belitsis v Airbone Express Freight Corp.*, 306 AD2d 507 [2d Dept 2003]).

Here, the bicycle and plaintiff were not, technically, traveling directly in front of Ms. Nelson's vehicle (when they - the bike and Ms. Kenney - were both upright).

When the fall occurred, both the bike and Ms. Kenney fell into the path of Ms. Nelson's vehicle.

A bicycle does not have the protection of an automobile's body, its seat belts and air bags,

etc.

Bicyclists have the same rights as automobile drivers to the use of the streets and are subject to the general rules of the road, the Vehicle and Traffic Law providing that bicyclists upon roadways must be granted all of the rights and are subject to all of the duties, with certain exceptions, applicable to motorists. Principles of comparative negligence thus apply to accidents between motorists and bicyclists. (*Banchella v Moser*, 156 AD2d 324 [2d Dept 1989]).

When questions of fact are raised by conflicting evidence on the issues of the parties' negligence, such questions of fact are for the jury's determination *(see Gabrielli v Brio*, 140 AD2d 948 [4 Dept 1988]).

Here, we are dealing with an automobile and a bicycle.

Should Ms. Nelson have slowed down and kept an "eye' on plaintiff and her bicycle with a view towards acting – plaintiff fell? Was plaintiff negligent? What about the condition of the road and the traffic conditions? When plaintiff fell, what was the appropriate course of conduct for Ms. Nelson?

Firstly, credibility of witnesses, truthfulness and accuracy of testimony, whether contradicted or not, and the significance of the weakness and discrepancies are all issues for the trier of facts. (*Lelekakis v Kamamis*, 41 AD3d 662 [2d Dept 2007]; *Pedone v B&B Equipment Co. Inc.*, 239 AD2d 397 [2 Dept 1987]).

Any varying accounts of the incident must be considered, evaluated and determined by the trier of facts. As such, Ms. Nelson's application for summary judgment, motion sequence number two is **denied**.

General Municipal Law § 50-e(4) permits localities to require prior notice of defective, unsafe, dangerous or obstructed condition on any street, highway, bridge, culvert, sidewalk or cross walk as a condition to the commencement of an action to recover damages (*see Walker v Town of Hempstead*, 84 NY2d 360 [1994]).

As noted, Nassau County has enacted Administrative Code § 12.4.0(e). When a municipality has enacted a prior written notice, neither actual notice nor constructive notice of the defective sidewalk removed the requirement to comply with the prior written notice requirement (*McCarthy v City of White Plains*, 54 AD3d 828 [2d Dept 2008]).

The fact that Nassau County was about to repaint the road is of no moment. It does not negate the within notice requirement.

Prior written notice of an alleged defect is a necessary prerequisite to imposing liability upon a municipality for an allegedly defective and/or dangerous sidewalk condition (*Brooks v Village of Babylon*, 251 AD2d 526 [2d Dept 1998]).

As noted, neither actual or constructive notice of a given defect is sufficient to overcome the requirement of prior written notice *(Caramancia v City of New Rochelle*, 268 AD2d 496 [2d Dept 2000]).

Also, the plaintiff contends the County's search by Mr. Mahoney and Ms. Cox was not complete or thorough enough. The court must disagree. From an objective point of view (the plaintiff's counsel's subjective point of view, no investigator would be thorough enough), the County conducted and made a reasonable effort to locate prior written notice and found none.

A municipality makes a *prima facie* showing of its entitlement to judgment as a matter of law by establishing that it neither received the requisite prior written notice of the alleged defect, nor bore responsibility for the creation of the alleged defect (*Amabile v City of Buffalo*, 93 NY2d 471 [1999]).

The photographs offered (see Exhibit G annexed to County's motion and Exhibit A annexed to plaintiff's affirmation in opposition) show a line created by wear and tear of the roadway.

Prior written notice was required herein for the alleged conditions of the roadway and none was given. Thus, County must succeed in its motion and their application for summary judgment is **granted**. It is hereby

ORDERED, that the parties are directed to appear for a Pretrial Conference in DCM on September 9, 2010 at 9:30 a.m..

This constitutes the Decision and Order of the Court.

DATED: August 11, 2010
Mineola, N.Y. 11501

ENTER:

HON. MICHELE M. WOODARD
J.S.C.

H:\Kenney v Cty of Nassau & Nelson GLM.wpd