Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Cheryle Barone,	Index No.: 3189/2008
Plaintiff,	Motion Sequence No.: 003; MD Motion Date: 5/5/10 Submitted: 7/28/10
-against-	
The County of Suffolk, Town of Islip, Town of Brookhaven and Bayport-Blue Point Union Free School District,	Motion Sequence No.: 004; XMG Motion Date: 5/5/10 Submitted: 7/28/10
Defendants.	Attorneys/Parties [See Rider Annexed]

Upon the following papers numbered 1 to 36 read on this motion and cross motion for summary judgment: Notice of Motion and supporting papers, 1 - 12; Notice of Cross Motion and supporting papers, 13 - 23; Answering Affidavits and supporting papers, 24 - 31; Replying Affidavits and supporting papers, 32 - 34; 35 - 36.

The instant action seeks to recover damages for personal injuries sustained by the infant plaintiff at approximately 6:30 p.m. on March 20, 2004 when she was struck by an unknown motor vehicle while she was attempting to cross Nicholls Road near its intersection with Purick Street, in the Town of Islip, New York. It is undisputed that the infant plaintiff was within a marked cross walk at the time of the accident. It is likewise undisputed that Nicholls Road, also known as County Road 97, is owned by the defendant County of Suffolk. An elementary school belonging to the defendant Bayport-Blue Point Union Free School District is located in the vicinity of the intersection. The complaint alleges that the defendants County of Suffolk, Town of Islip (hereinafter the Town), Town of Brookhaven and Bayport-Blue Point Union Free school District are liable for the infant plaintiff's injuries as a result of their negligent operation, management, maintenance and control of the subject roadway. Specifically, the complaint alleges that the defendants were negligent in, *inter alia*, failing to maintain the roadway in a reasonably safe and proper condition, failing to provide a safe and proper passage across the roadway, failing to provide proper and adequate traffic control devices, failing to provide traffic lights, failing to provide pedestrian crossing lights, failing to provide crossing guards and failing to have proper street lighting.

A motion by the defendant Bayport-Blue Point Union Free School District, for dismissal of the complaint as asserted against it, was granted by order of this Court, dated August 18, 2008, finding said defendant owed no duty to the plaintiff. By stipulation of discontinuance dated July 29, 2009 the action was discontinued against the Town of Brookhaven.

The County of Suffolk now moves for summary judgment dismissing the complaint as asserted against it on the ground that it is entitled to qualified immunity. The County also argues that it is entitled to summary judgment as it owed no duty to provide overhead artificial lighting and crossing guards. Lastly, it argues that it is entitled to summary judgment as there is no basis to conclude that the complained of roadway defect was a proximate cause of the subject accident. The Town of Islip cross-moves for summary judgment dismissing the complaint and all cross-claims asserted against it on the ground that it did not owe a duty to maintain or design the subject roadway. The Town also contends that it cannot be held liable based on its failure to provide a crossing guard or artificial lighting as it does not owe a duty to provide such benefits.

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 demonstrate the absence of any material issues of fact (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557 [1980]). Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (see, Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]; Zuckerman v. City of New York, 49 NY2d 557 [1980]).

The County failed to demonstrate its *prima facie* entitlement to summary judgment. In support of the motion, the County submitted, *inter alia*, a police accident report, a letter from the Commissioner of Public Works to Legislator Brian Foley dated August 20, 2003, a letter from the Commissioner of Public Works to Legislator Brian Foley dated July 21, 2003, the affidavit of Arvind Vora and the infant plaintiff's 50-h hearing testimony.

A municipality owes to the public the absolute duty of keeping its streets in a reasonably safe condition (see, Friedman v. State, 67 NY2d 271 [1986]). While the design, construction, and maintenance of public highways is entrusted to the sound discretion of municipal authorities, the municipality has a duty to keep its highways reasonably safe for those who obey the rules of the road (see, Levi v. Kratovac, 35 AD3d 548 [2nd Dept., 2006]; Carrillo v. County of Rockland, 11 AD3d 575 [2nd Dept., 2004]). One who is injured in a traffic accident can recover against a municipality if it is shown that its failure to install a traffic control or warning device was negligent under the circumstances, that this omission was a contributing cause of the mishap, and that there was no reasonable basis for the municipality's inaction (see, Alexander v. Eldred, 63 NY2d 460 [1984]). The evidence submitted in support of the motion fails to establish that the County met its obligation

with respect to making the intersection at issue reasonably safe (see, McArthur v. Muhammad, 27 AD3d 532 [2nd Dept., 2006]; Scott v. City of New York, 16 AD3d 485 [2nd Dept., 2005]; Alcalay v. Town of North Hempstead, 262 AD2d 258 [2nd Dept., 1999]). To the contrary, there are triable issues of fact with respect to the reasonableness of the County's failure to install a traffic device at the intersection under all the attendant circumstances. In this regard, the evidence submitted included evidence that Nicholls Road has two lanes in each direction and a posted speed limit of 55 m.p.h. A painted crosswalk was present on Nicholls Road. At the time of the accident, there were no traffic control signals or traffic warning devices present. The infant plaintiff was attempting to cross Nicholls Road within the painted crosswalk at the time that she was struck. The evidence also included the affidavit of Arvind Vora, an employee of the Suffolk County Department of Public Works, which states that the intersection was closed to through traffic following a 1992 traffic study and that a 2003 traffic study indicated that the intersection should remain closed to through traffic. Furthermore, the evidence presented indicated that there was no lighting in the area of the cross walk and that the area was dark at night. Although a municipality is generally not liable for failure to install lighting, in certain situations, where there is a defect or some unusual condition rendering the street unsafe to the traveling public, a municipality may be required to provide lighting (cf., Thompson v. New York, 78 NY2d 682 [1991]; compare, Rios v. City of New York, 33 AD3d 780 [2nd Dept., 2006]; Lee v. Morris, 297 AD2d 626 [2nd Dept., 2002]). In a similar vein, there are triable issues of fact with respect to whether any negligence on the part of the County in failing to make the intersection reasonably safe was a proximate cause of the infant plaintiff's injuries (see, Ernest v. Red Creek Cent. Sch. Dist., 93 NY2d 664 [1999]; Scott v. City of New York, 16 AD3d 485 [2nd Dept., 2005]; compare, McFadden v. Village of Ossining, 48 AD3d 761 [2nd Dept., 2008]).

The County also failed to demonstrate its *prima facie* entitlement to summary judgment on the ground of qualified immunity (see, Bresciani v. County of Dutchess, 62 AD3d 639 [2nd Dept., 2009]). While the municipality's duty to keep its roadways in a reasonable safe condition is non-delegable, it is measured by the courts with consideration given to the proper limits on intrusion into the municipality's planning and decision-making functions (see, Friedman v. State, 67 NY2d 271 [1986]). Thus, in the field of traffic design engineering, the municipality will generally be accorded a qualified immunity from liability arising out of a highway planning decision (Bresciani v County of Dutchess, 62 AD3d 639 [2nd Dept., 2009]). Notwithstanding the foregoing, under this doctrine of qualified immunity, a governmental body may be held liable when its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan (see, Friedman v. State, 67 NY2d 271 [1986]; Carrillo v. County of Rockland, 11 AD3d 575 [2nd Dept., 2004]; Forsythe-Kane v. Town of Yorktown, 249 AD2d 505 [2nd Dept., 1998]). In addition, a municipality may be held liable if, after being made aware of a dangerous traffic condition, it does not undertake an adequate study to determine what reasonable measures may be necessary to alleviate the condition or, having determined what reasonable measures were necessary, it unjustifiably delays in taking them (see, Friedman v. State, 67 NY2d 271 [1986]; Bresciani v. County of Dutchess, 62 AD3d 639 [2nd Dept., 2009]). Moreover, after implementing a traffic plan, a municipality is under a continuing duty to review its plan in the light of its actual operation (see, Friedman v State, 67 NY2d 271 [1986]). Here, there remain issues of fact regarding the existence and adequacy of any traffic study or plan prepared by the County for the relevant area and of any review or revision thereof in light of the

actual operation of the plan and of any significant changes in the circumstances of the location (see, Scott v. City of New York, 16 AD3d 485 [2nd Dept., 2005]; Carrillo v. County of Rockland, 11 AD3d 575 [2nd Dept., 2004]; cf. Forsythe-Kane v. Town of Yorktown, 249 AD2d 505 [2nd Dept., 1998; see generally, Ernest v. Red Creek Cent. Sch. Dist., 93 NY2d 664 [1999]). Indeed, the County failed to tender copies of any of the traffic studies on which it allegedly relied in making its traffic planning decisions for the subject intersection (see, McArthur v. Muhammad, 46 AD3d 640 [2nd Dept., 2007]).

The County's failure to satisfy its *prima facie* burden required denial of its motion without regard to the sufficiency of the plaintiff's papers in opposition (see, Bresciani v. County of Dutchess, 62 AD3d 639 [2nd Dept., 2009]).

The cross-motion by the defendant Town of Islip for summary judgment dismissing the complaint and all cross claims asserted against it is granted. As a general rule, a municipality will not be held responsible for the negligent design of a highway it does not own or control (see, Ernest v. Red Creek Cent. Sch. Dist., 93 NY2d 664 [1999]; Horn v. Town of Clarkstown, 46 AD3d 621 [2nd Dept., 2007]; Carlo v. Town of E. Fishkill, 19 AD3d 442 [2nd Dept., 2005]; Hynes v. Town of Cornwall, 234 AD2d 423 [2nd Dept., 1996]). Moreover, a municipality cannot be held liable for the failure to maintain in a reasonably safe condition a road it does not own or control unless it affirmatively undertakes such a duty (see, Ernest v. Red Creek Cent. Sch. Dist., 93 NY2d 664 [1999]; Horn v. Town of Clarkstown, 46 AD3d 621 [2nd Dept., 2007]; Carlo v. Town of E. Fishkill, 19 AD3d 442 [2nd Dept., 2005]; Hynes v. Town of Cornwall, 234 AD2d 423 [2nd Dept., 1996]). Furthermore, the Vehicle and Traffic Law extends County authority to all County roads (Vehicle and Traffic Law §1651; Kovalsky v. Village of Yaphank, 235 AD2d 459 [2nd Dept., 1997]). Although sections of the Vehicle and Traffic Law give towns certain rights with respect to all roads, including County roads, none of these sections establish an affirmative duty of the Town to maintain any County road (Kovalsky v. Village of Yaphank, 235 AD2d 459 [2nd Dept., 1997], at 460; see, Ernest v. Red Creek Cent. Sch. Dist., 93 NY2d 664 [1999]). Here, the evidence submitted by the Town established that the Town did not own or control the roadway at issue (see, Cuzzo v. Town of Hempstead, 61 AD3d 921 [2nd Dept., 2009]; Molina v. Conklin, 57 AD3d 860 [2nd Dept., 2008]; Horn v. Town of Clarkstown, 46 AD3d 621 [2nd Dept., 2007]; Carlo v. Town of E. Fishkill, 19 AD3d 442 [2nd Dept., 2005]; Alcalay v. Town of North Hempstead, 262 AD2d 258 [2nd Dept., 1999]; Hynes v. Town of Cornwall, 234 AD2d 423 [2nd Dept., 1996]; Konstantatos v. County of Suffolk, 208 AD2d 889 [2nd Dept., 1994]). In opposition, the plaintiff failed to submit evidence sufficient to raise a triable issue of fact as to whether the Town assumed control of the subject highway or affirmatively undertook any duty to maintain it (see, Molina v. Conklin, 57 AD3d 860 [2nd Dept., 2008]; Horn v. Town of Clarkstown, 46 AD3d 621 [2nd Dept., 2007]; Carlo v. Town of E. Fishkill, 19 AD3d 442 [2nd Dept., 2005]).

Contrary to the plaintiff's contention, the Town cannot be held liable based on its failure to install lighting at the location of the accident. Highway Law § 327, entitled "Lighting roads, highways and bridges", provides, in pertinent part: "The town board of any town * * * may * * * provide for lighting dangerous portions of any road or highway * * * The board may, in its

discretion, at any time discontinue the lighting of any road, highway or bridge, or portion thereof." Thus, there is no duty on the part of the town to light the public roadway so as to support a cause of action sounding in negligence based on the lack of lighting (see, Mastro v. Maiorino, 174 AD2d 654 [2nd Dept., 1991]; Bauer v. Hempstead, 143 AD2d 793 [2nd Dept., 1988]). In a similar vein, the Court notes that the Town cannot be held liable based on its failure to provide a crossing guard. Providing crossing guards is one of the governmental functions which is within the discretion of a municipality (see, Molina v. Conklin, 57 AD3d 860 [2nd Dept., 2008]). In order to hold a municipality liable for the negligent performance of a governmental function, a plaintiff must establish that a special relationship with the municipality exists (see, Molina v. Conklin, 57 AD3d 860 [2nd Dept., 2008]). The evidence presented here demonstrates that the Town did not assume a special duty to post a crossing guard at the accident site (see, Vandewinckel v. Northport/East Northport Union Free Sch. Dist., 24 AD3d 432 [2nd Dept., 2005]; Carlo v. Town of E. Fishkill, 19 AD3d 442 [2nd Dept., 2005]).

In conclusion, the motion by the County of Suffolk for summary judgment dismissing the complaint and all cross claims asserted against it is denied and the cross motion by the Town of Islip for summary judgment dismissing the complaint and all cross claims asserted against it is granted. The claims dismissed herein against the Town of Islip are severed and the plaintiff's remaining claims shall continue.

Based on the foregoing, it is

ORDERED that the motion by the defendant County of Suffolk for summary judgment dismissing the complaint and all cross claims asserted against it (#003) is denied; and it is further,

ORDERED that the cross motion by the defendant Town of Islip for summary judgment dismissing the complaint and all cross claims asserted against it (#004) is granted.

Dated: October 7, 2010

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

RIDER

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Clerk of the Court