

**Antaki v Mateo**

2010 NY Slip Op 33408(U)

November 15, 2010

Supreme Court, Nassau County

Docket Number: 11164/09

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

ENTERED <sup>scr</sup>  
IN  
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

Present:

HON. DANIEL PALMIERI  
Acting Justice Supreme Court

-----X

RICHARD ANTAKI, as administrator of the Estate  
of GLORIA ANTAKI, deceased, and RICHARD  
ANTAKI, Individually,

Plaintiff,

-against-

RAMIRO MATEO, KILKENNY CONSTRUCTION  
CO., INC., THE COUNTY OF NASSAU and THE  
NASSAU COUNTY POLICE DEPARTMENT,

Defendants.

-----X

RAMIRO MATEO and KILKENNY CONSTRUCTION  
CO., INC.,

Third-Party Plaintiffs,

-against-

COMMANDER ELECTRIC, INC., COMMANDER  
ELECTRIC MAINTANANCE CORP., and  
JOSEPH PFIESTER a/k/a JOSEPH PFISTERER,

Third-Party Defendants.

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TRIAL TERM PART: 45

INDEX NO.: 11164/09

MOTION DATE: 10-27-10  
SUBMIT DATE: 10-27-10  
SEQ. NUMBER - 001

Third Party Index No.:  
11164/09

The following papers have been read on this motion:

- Notice of Motion, dated 9-23-10.....1
- Affirmation in Opposition, dated 10-20-10.....2
- Memorandum of Law, dated 10-20-10.....3
- Reply Affirmation, dated 10-26-10.....4

The motion by the third-party defendant Joseph Pfiester a/k/a Joseph Pfisterer pursuant to CPLR 3211(a)(2) to dismiss the third-party complaint insofar as it is asserted against him is granted, without prejudice to commencement of a plenary action in the Court of Claims.

This is a motor vehicle fatal accident case.. It is undisputed that plaintiff's decedent Gloria Antaki died as a result of injuries suffered in a collision with a vehicle being driven by defendant/third-party plaintiff Ramiro Mateo, which was owned by defendant/third-party plaintiff Kilkenny Construction Co., Inc. The accident occurred at the intersection of State Route 107 and Fourth Street in Hicksville, New York. Insofar as is relevant to the present application, the third-party plaintiffs seek contribution or indemnification from Pfiester based upon negligent maintenance or repair of intersection traffic signals. They contend that disclosure revealed that Antaki entered the intersection against a red light while driving east on Fourth Street because the light facing her would not change from red to green. According to an eye witness, Antaki waited at the red light for what "seemed to be ten minutes" and then entered the intersection against the red light. A request made under the Freedom of Information Law ultimately revealed Pfiester's alleged role.

Although not specifically alleged in the third-party complaint, it is undisputed that at all relevant times Pfiester was an employee of the New York State Department of Transportation ("DOT"). According to the third-party plaintiffs, he had been personally involved in the maintenance/repair of a traffic control sensor at the intersection only eight days before the accident. This work was allegedly performed in a negligent manner, in that

the sensor was not maintained or repaired properly and thus had caused the light to remain “stuck” on green on Route 107 and red on Fourth Street. As indicated above, third-party plaintiffs allege that it was this condition that had prompted the attempt by Antaki to continue her travel into the intersection, and they contend that it was the cause of the fatal accident.

Given the foregoing factual scenario and the allegations made, the issue before the Court on this motion is whether this action can be maintained against Pfiester in the Supreme Court. Pfiester, represented by the New York State Attorney General’s office, contends that he cannot be sued here because he was acting as an employee of the DOT, and is alleged to be liable for negligence in the performance of his duties. The third-party plaintiffs counter that their action against him is predicated on breach of a duty he owed to the plaintiff Gloria Antaki, and for that reason may be sued in the Supreme Court, notwithstanding the fact that the State, as his employer, may be liable for any judgment resulting against him on the basis of *respondeat superior*. In support of their position, third-party plaintiffs rely on *Morell v Balasubramanian*, 70 NY2d 297 (1987).

In *Morell*, the plaintiff’s decedent was being treated in a State hospital by State-employed physicians during a hip replacement procedure. During the course of the operation she suffered a fatal heart attack. In the subsequent suit brought against the physicians individually in the Supreme Court, the trial court denied the defendants’ motion to dismiss based on the court’s want of subject matter jurisdiction. The Appellate Division reversed and dismissed the complaint, holding that the State was the real party in interest and that the action had to be brought in the Court of Claims.

The Court of Appeals reversed the Appellate Division. It stated that a suit against State employees or agents must be brought in the Court of Claims if it arises from actions or determinations made in his or her official role, and involves rights asserted solely against the State. *See*, Court of Claims Act § 9; NY Const, art VI, § 9. However, if the claim is one in tort and arises from a breach of a duty owed individually by such agent directly to the injured party, the State is not the real party in interest, and the action may be brought in the Supreme Court. *Morell, supra*, at 301. The question thus becomes whether the alleged duty was owed by the individual to the injured party, or solely by the State.

*Morell* suggests that the analysis is heavily fact-specific, and ultimately turns on whether one can find a duty on the part of the individual that is not unique to State employees. In other words, it must be a duty that fairly may be characterized as owed by the individual, without regard to his or her employment and/or status as a State agent. Thus, one may conclude that the physicians in *Morell* owed a professional duty of care directly to their patient, irrespective of their employment by the State. Other examples were cited in the case, such as where individuals making street repairs as State agents were sued in the Supreme Court for damaging the plaintiff's property. Cases following *Morell* are similar in that regard. *See, Mark v Vaseur*, 213 AD2d 927 (3d Dept. 1995) [automobile accident case where Department of Correctional Services employee was a party to the collision, driving State vehicle during course of employment; judgment in Supreme Court affirmed]; *Martin v Baughman*, 205 AD2d 966 (3d Dept. 1994) [State employee leaves DOT truck parked in position that allegedly contributes to accident; order denying dismissal for lack of subject matter jurisdiction in Supreme Court affirmed].

To the contrary, where the duty allegedly breached flows solely from an employee's role as an agent of the State, the State is the real party in interest and the suit must be brought in the Court of Claims. Thus, an action against the chair of the State Board for Professional Conduct for directing that the plaintiff undergo a psychiatric evaluation as part of an ongoing investigation of the plaintiff had to be brought in the Court of Claims. *Monreal v New York State Dept. of Health*, 38 AD3d 1118 (3d Dept. 2007). See also, *Woodward v State of New York*, 23 AD3d 852, 855 (3d Dept. 2005).


In the present case, the alleged negligence of third-party defendant Pfiester involved his servicing of traffic control signals. The State has a nondelegable duty to adequately maintain its roadways in a reasonably safe condition for the traveling public. *Friedman v State*, 67 NY2d 271 (1986); *Tomassi v Town of Union*, 46 NY2d 91 (1978). This includes DOT's duty to maintain traffic controls at the intersections of State highways. Vehicle and Traffic Law § 1681; *Wood v State of New York*, 112 AD2d 612, 614 (3d Dept. 1985). Unlike the duties allegedly breached by the individual defendants in such cases as *Morell, Mark* and *Martin*, the duty here was not one that existed *whether or not* the individual was acting in course of his State employment. Rather, Pfiester's acts or omissions, if negligent, breached a duty that was in reality the State's, through DOT – to properly maintain traffic signals at State highway intersections. Put somewhat differently, maintaining such a safe intersection was not a duty he owed to Gloria Antaki, *except as* a DOT employee. This Court therefore concludes and holds that the real party in interest here is the State of New York, through DOT, and not the individual, Joseph Pfiester.

Accordingly, the third-party complaint is dismissed as to this third-party defendant, without prejudice to a plenary action against him in the Court of Claims. The Court need not and does not address any issue that may arise from the commencement of such an action.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: November 15, 2010

  
HON. DANIEL PALMIERI  
Acting Supreme Court Justice

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**ENTERED**

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**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**