

Lorenzo v Kashimallak
2011 NY Slip Op 30343(U)
January 31, 2011
Sup Ct, Nassau County
Docket Number: 12842/09
Judge: Thomas Feinman
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SHORT FORM ORDER

**SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

Hon. Thomas Feinman
Justice

JAVIER LORENZO, as Administrator of the Estate of
JAVIER LORENZO,

Plaintiff,

- against -

S.D. KASHIMALLAK, ESHAGH KASHIMALLAK,
COUNTY OF NASSAU, TOWN OF NORTH
HEMPSTEAD, VILLAGE OF ROSLYN ESTATES,
and VILLAGE OF FLOWER HILL,

Defendants.

VILLAGE OF ROSLYN ESTATES,

Third-Party Plaintiff,

- against -

WELSBACH ELECTRIC CORP., L.I.,

Third-Party Defendant.

TRIAL/IAS PART 13
NASSAU COUNTY

INDEX NO. 12842/09

MOTION SUBMISSION
DATE: 12/7/10

MOTION SEQUENCE
NOS. 2, 3, 5

The following papers read on this motion:

- Notice of Motions and Affidavits..... X
- Memorandum of Law in Support of Motion..... X
- Affirmations in Opposition..... X
- Reply Affirmations..... X
- Memorandum of Law in Support of Reply..... X

RELIEF REQUESTED

The third-party defendant, Welsbach Electric Corp., L.I., (hereinafter referred to as "Welsbach"), moves for an order pursuant to CPLR §3212 granting summary judgment to Welsbach, severing and dismissing the third-party complaint and each cause of action, and any and all cross-claims, against Welsbach. Welsbach submits a Memorandum of Law in support of the motion. The defendant, Village of Roslyn Estates, (hereinafter referred to as "Roslyn Estates"), moves for an order pursuant to CPLR §3212 granting summary judgment to Roslyn Estates dismissing plaintiff's complaint, and any and all cross-claims as and against Roslyn Estates. The defendant, Village of Flower Hill, (hereinafter referred to as "Flower Hill"), moves for an order pursuant to CPLR §3212 granting summary judgment to Flower Hill dismissing plaintiff's complaint, and any and all cross-claims as and against Flower Hill.

The plaintiff submits opposition and a Memorandum of Law in support of plaintiff's opposition. The defendants, S.D. Kashimallak and Eshagh Kashimallak, (hereinafter referred to as "Kashimallak"), submit opposition adopting plaintiff's arguments. The moving defendants submit reply affirmations, and the moving third-party defendant submits a reply affirmation, and a Memorandum of Law in support of its reply.

DISCUSSION

The plaintiff, decedent, Javier Lorenzo, (hereinafter referred to as "Lorenzo"), initiated this action for personal injuries sustained on May 17, 2008, which led to his ultimate death. The decedent, Lorenzo, on May 17, 2008, at approximately 11:50 p.m., a pedestrian, was struck by a motor vehicle operated by the defendant, Sharona D. Kashimallak, (hereinafter referred to as "Kashimallak"), while crossing the roadway at or near 1044 Northern Boulevard, in Roslyn Heights, Town of Hempstead. Lorenzo was pronounced dead at the scene of the accident on May 18, 2008, at the age of 63 years old.

The plaintiff alleges that the defendants, and third-party defendant, were essentially negligent in failing to properly maintain the street lighting located at the subject roadway, in failing to illuminate the subject roadway in a properly functioning manner so that pedestrians, and motor vehicles, may use the roadway safely.

The moving defendants, and third-party defendant, essentially submit that they do not owe a duty to the plaintiff decedent to provide or maintain street lighting as the mere outage, darkness, or failure to illuminate, at or near the subject roadway, is insufficient to hold the municipal defendants, and the third-party defendant, liable.

It is well established that a municipality's duty to install and maintain street lighting is limited to situations where lighting is required to avoid "dangerous and potentially hazardous conditions". (*Thompson v. City of New York*, 78 NY2d 682). A city's failure to replace a burned out light bulb in a street light near a busy intersection did not create a dangerous condition that permitted the city to be held liable to a pedestrian struck by a motor vehicle while crossing the street. (*Id.*) The mere outage of the street light does not render a street unreasonably safe. In order to prevail, plaintiff must demonstrate that the municipality permitted a dangerous or potentially hazardous condition to exist which caused the injury. (*Id.*) The alleged dangerous condition must be separate and apart from

the allegation of improper lighting. (*Id.*) A plaintiff's allegation that the accident site was dark is insufficient. (*Cracas v. Zisko*, 204 AD2d 382). The mere outage of a street light does not demonstrate that the municipality permitted a dangerous and potentially hazardous condition to exist and cause injury. (*Michetti v. City of New York*, 184 AD2d 263).

Here the defendants have met their burden on this summary judgment motion by demonstrating *prima facie* entitlement to summary judgment. Additionally, the third-party defendant, who entered into a street lighting maintenance agreement with defendant, Roslyn Estates, demonstrated that it complied with its contractual obligations thereto.

The plaintiff, in opposition to the respective summary judgment motions, recognizes that lack of lighting alone is insufficient to hold the defendants liable, and submits that there existed a dangerous condition, separate and apart from the allegation of improper lighting. The plaintiff sets forth that the contour of the subject roadway, a hill, the crest of the hill, in combination with the failure of the street light, constitutes a dangerous condition. The plaintiff submits an affidavit, on behalf of an engineer, who avers that the lack of lighting at the crest of the hill was an actual factor in causing the subject roadway, and had the roadway been level, the mere outage of two streetlights would not, in and of itself, presented a dangerous and hazardous condition that was created by the crest of the hill.

The plaintiff's engineer refers to the testimony of defendant, Kashimallak, operator of the motor vehicle that struck Lorenzo, who testified that she couldn't see the road at the subject location, and the testimony of Ms. Hittner, a non-party, who testified that she needed to use her bright lights to travel on the subject roadway. The plaintiff's engineer also refers to his own observations of the subject roadway.

Here, the plaintiff's engineer's opinion is speculative and conclusory. Plaintiff's expert relies on the testimony of two witnesses who submit it was "dark", and his own observations of the roadway. The plaintiff's expert, an engineer who provides that he has broad expertise in analyzing highway conditions and safety standards, does not provide measurements of the "incline", does not refer to any treatise, industry standard, or defective condition of the roadway.

"Where the moving party has established *prima facie* that it is entitled to summary judgment, the party opposing the motion must demonstrate the existence of a factual issue requiring a trial of the action by admissible evidence, not mere conjuncture, suspicion, or speculation". (*Leggio v. Gearhart*, 294 AD2d 543, 544, 743 NYS2d 135; see *Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595, 404 NE2d 718). Here, the plaintiff's engineer's opinion relies on his own observations of the roadway, the typography of the road, and the fact that the accident happened at the crest of the hill, and that it was "dark". The plaintiff's engineer's opinion is not supported by empirical data or any relevant industry standard, but rather, is speculative and conclusory and therefore, insufficient to raise a triable issue of fact. (*Ghany v. Hossain*, 64 AD3d 517; *Rivas-Chirino v. Wildlife Conservation Socy.*, 64 AD3d 556; *Grover v. Mastic Beach Prop. Owners Assn.*, 57 AD3d 729). Additionally, the plaintiff's expert has not referred to a dangerous condition, separate and apart from the lighting, as plaintiff's expert concludes that the crest of the hill, in combination with the darkness, created a dangerous and hazardous condition.

The plaintiff submits documentation, in support of plaintiff's opposition, approximately fourteen days after the instant motions herein had been fully submitted. Plaintiff provides that the documentation was just provided to plaintiff in a companion action, and is relevant to the motions at bar.

It is well established that evidence submitted for the first time in a reply, or sur-reply, may not be considered as evidence. (*Pampalone v. Giant Building Maintenance, Inc.*, 17 AD3d 556; *Klimis v. Lopez*, 290 AD2d 538; *Voytek Technology, Inc. v. Rapid Access Consulting, Inc.*, 279 AD2d 470). Evidentiary matters raised for the first time in the form of a reply should be disregarded. (*Jackson-Cutler v. Long*, 2 AD3d 590).

In any event, assuming *arguendo*, that this court will accept plaintiff's late documentation to support plaintiff's opposition, the late submission is unavailing. Plaintiff submits that the late submission establishes that the municipal defendants, Roslyn Estates and Flower Hill, were responsible for maintaining the street lighting at the subject roadway. As already established, the defendants are not liable for failure to maintain the street lighting where the defendants have not permitted a dangerous or hazardous condition to exist which caused the injury.

CONCLUSION

In light of the foregoing, the defendants', and the third-party defendant's motions for summary judgment are granted, and therefore, plaintiff's complaint, the third-party complaint, and any and all cross-claims, as and against Welsbach, Roslyn Estates and Flower Hill are hereby dismissed.

Accordingly, the caption in the above referenced matter shall be as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

JAVIER LORENZO, as Administrator of the Estate
of JAVIER LORENZO,

Plaintiff,

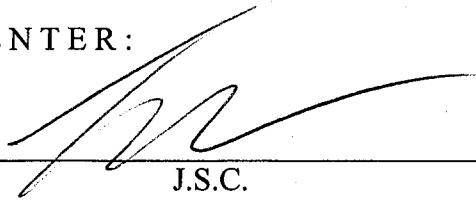
INDEX NO. 12842/09

- against -

S.D. KASHIMALLAK, ESHAGH KASHIMALLAK,
and TOWN OF NORTH HEMPSTEAD,

Defendants.

ENTER:



J.S.C.

Dated: January 31, 2011

ORIGINAL

cc: Miller & Eisenman, LLP
London Fisher LLP
Russo, Apoznanski & Tambasco
Richard S. Finkel, Esq., Town Attorney, Town of North Hempstead
Law Offices of Andrea Sawyers
Morris Duffy Alonso & Faley

ENTERED
FEB 07 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE