Iacone v Passasini
2011 NY Slip Op 30386(U)
February 4, 2011
Supreme Court, 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 15 NASSAU COUNTY

PRESENT:
Honorable Karen V. Murphy
Justice of the Supreme Court

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NICOLLETTE ANN IACONE, by her co-guardians, NICHOLAS J. IACONE and LORIANN IACONE and NICHOLAS J. IACONE and LORIANN IACONE, Individually,

Plaintiff(s),

-against-

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

Defendant(s).

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Index No. 1993/09

Motion Submitted: 12/23/10
Motion Sequence: 004, 005

The following papers read on this motion:

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

By separate motions, defendants, Anthony Grassi and Geralyn Grassi (collectively referred to herein as "Grassi") [Mot. Seq. 004], and defendants Michael Piccoli and Thomas Piccoli (collectively referred to herein as "Piccoli") [Mot. Seq. 005], move for an Order of this Court, pursuant to CPLR §2221(f), granting them each leave to renew the Decision and Order of this Court dated June 30, 2010. Plaintiff opposes the requested relief.

This is a personal injury action that 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. Among other injuries, plaintiff suffered a traumatic brain injury.

On June 30, 2010, this Court denied the Grassi and Piccoli defendants' respective motions for summary judgment dismissal of the plaintiffs' complaint. This Court determined that, as the plaintiff, Nicollette Ann Iacone, had yet to testify at her sworn examination before trial, the defendants' motion for summary judgment must be denied as premature. This Court also determined that "[b]ecause both moving defendants have failed to demonstrate that the Town of Hempstead Building Zone Ordinances do not apply to them," the motion and cross motion must be denied. Finally, this Court also held that, because "Passasini's operation of his motor vehicle while under the influence of alcohol . . . arguably may be deemed by the trier of fact to be a superseding cause of plaintiff's injuries," the defendants' motions for summary judgment dismissal of plaintiffs' action based in negligence must be denied.

The crux of plaintiff's allegations against the Grassi and Piccoli defendants relates to certain bushes located between the residences, which bushes are alleged to block the view of traffic. Plaintiff alleges that the overgrown nature of the bushes, which plaintiffs claim are in contravention of height requirements provided in local ordinances, contributed in some measure to the occurrence of this serious traffic accident.

In an attempt to reverse this Court's determination, the Grassi defendants and the Piccoli defendants, both separately move for leave to renew this Court's Decision and Order dated June 30, 2010. Both defendants state that their respective motions are made pursuant to CPLR § 2221 (f), which provides for a combined motion for leave to reargue and leave to renew.

CPLR §2221(f) provides in relevant part that,

> A combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made.

In considering such a motion made pursuant to CPLR 2221 (f), a Court must measure each branch of the motion according to the requirements set forth in CPLR §§ 2221 (d) and (e), which govern motions for reargument and renewal, respectively.

In the instant case, the Grassi defendants make it plain in their motion and reply papers that their motion is one for renewal, not reargument. Specifically, in the Grassi reply (paragraph 5) it is stated that, "despite plaintiff's assertion that the defendants' motion is a combined motion to renew and reargue, the defendants Grassis' motion was in fact made as motion to renew (sic)." Yet, the Grassi defendants include in their motion and reply papers various arguments previously submitted to the Court, without identifying which matters of fact or law the Court allegedly overlooked or misapprehended.

The Piccoli defendants intimate that their motion is both a renewal and a reargument motion, although their labeling of their own motion is inconsistent within the affirmation of counsel. Finally, in their reply, the defendants claim that the motion is a combined one for renewal and reargument.

In any event, the Court will consider each such motion separately, as required by statute. Firstly, with respect to the Piccoli defendants' renewal motion, the Court notes that the Piccolis have not presented any new facts for the Court's consideration, nor have they demonstrated that there has been a change in the law that would change the Court's prior determination. Thus, the Piccoli defendants' motion to renew is denied, but the Court will consider their motion as one seeking leave to reargue, which will be addressed below.

The Grassi defendants' renewal motion is likewise denied. Although the Grassi defendants have submitted the plaintiff's deposition testimony, which they did not possess when they filed their original summary judgment motion, the plaintiff's testimony does not change the prior determination of this Court. Plaintiff's testimony consists of a total of six (6) pages wherein plaintiff testified that she remembers nothing about the accident. Plaintiff did not testify about the general appearance of the roadways involved, nor did she offer testimony about the bushes in question. Despite the fact that plaintiff's testimony is wholly and plainly of no moment regarding defendants' liability related to the bushes, defendants submitted such testimony in support of their motion.[1]

Although both defendants' (Grassi and Piccoli) motions are not specifically and properly identified, the Court will afford a broader view of their respective motions and treat those motions as motions for reargument as well.

CPLR § 2221 (d) provides in relevant part:

> A motion for leave to reargue. . . shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

In this case, the Court's prior Order was entered in the Nassau County Clerk's Office on July 20, 2010. The Order and Notice of Entry were served on August 2, 2010. The Grassi defendants did not serve their motion for leave to reargue until October 25, 2010. The Piccoli defendants did not serve their motion for leave to reargue until November 3, 2010. Thus, both defendants' motions are untimely. Specifically with respect to the Grassi

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[1]The Court notes the fact that, despite participating in four non-party witness depositions subsequent to plaintiff's deposition, and despite the fact that at least three of those witnesses characterized the bushes as an obstruction, the Grassi defendants chose not to submit those minutes to the Court.

defendants, the Court notes that plaintiff's deposition was taken on June 15, 2010, and consisted of a mere six (6) pages. This Court issued its Order fifteen (15) days later, without knowledge that plaintiff had already been deposed. The Grassi defendants waited over two and one-half months to file their motion, and the Piccoli defendants waited three months to file their motion. Moreover, there has been no evidence presented that a notice of appeal has been served and filed, which could serve to extend the statutory time frame of CPLR § 2221 (d)(3) (*see* ***Itzkowitz v. King Kullen Grocery Co.***, 22 A.D.3d 636, 804 N.Y.S.2d 350 [2d Dept. 2005]). Thus, the defendants' motions for leave to reargue are denied.

Even if the Court were to grant the defendants' motions for leave to reargue and consider their summary judgment motions on the merits, the Court adheres to its determination that defendants' respective summary judgment motions should be denied.

As detailed by this Court in its June 30, 2010 Decision and Order, the facts are as follows: the underlying accident occurred at a "T-intersection" at Oceanside Road, which runs in an approximate North-South direction, and Erwin Place, which runs approximately East-West. Erwin Place intersected at Oceanside Road at the easterly side of Oceanside Road. At his oral examination before trial, defendant Passasini testified that he had consumed alcohol 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. Passasini 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% per centum or more of alcohol in his blood. His license was subsequently revoked.

Passasini also testified that at the time of the accident, he was operating his motor vehicle heading northbound on Oceanside Road. Plaintiff, Nicollette Ann Iacone was operating her vehicle westbound on Erwin Place and was attempting to make a left hand turn from Erwin Place onto Oceanside Road when the impact occurred. Plaintiff's travel was governed by a stop sign on Erwin Place. The facts established that, at this intersection, Oceanside Road is slightly curved so that a vehicle traveling north on Oceanside Road, such as the defendant Passasini's vehicle, would be driving on a bend as he approached the subject T-intersection. In fact, Passasini testified at his deposition that a person traveling on Oceanside Road did not have clear view of the intersection of Erwin Place as a result of the curvature of the road, the telephone pole, the speed limit sign and also the hedgerow on defendants' properties.

It was also established on the underlying motions that the Grassi defendants are the owners of the premises known as 3036 Erwin Place, which sits on the south-east corner of said T-intersection, and the front of which faces Erwin Place. The Piccoli Defendants are owners as tenants in common of the premises known as 3045 Oceanside Road, which home is adjacent to the Grassis' home, and the front of which faces Oceanside Road. It was

facie entitlement to summary judgment as a matter of law.

Rather, the testimony of the non-party witnesses taken in July 2010 establishes that the bushes in question may have contributed to the occurrence of the accident underlying this action, thus raising triable issues of fact with respect to the liability of both the Grassi and Piccoli defendants. Neither the Grassi defendants, nor the Piccoli defendants submitted the non-party witness deposition testimony to the Court. Plaintiff submitted that deposition testimony in her opposition to the instant motions made by defendants.

Nicholas LaBarbera, plaintiff's former boyfriend, testified that, "there's bushes that are blocking the view" of vehicles located on Erwin Place, thus interfering with a driver's ability to see cars traveling northbound on Oceanside Road.

Joseph Ripepe, a passenger in the car traveling behind plaintiff's, described that same intersection as being obstructed by bushes that were about six feet high.

Steven Kitzen, who was driving the car traveling behind plaintiff's at the time of the accident, testified that the bushes in question block the view of the oncoming traffic on Oceanside Road. Mr. Kitzen saw defendant Passanissi's truck only after it had passed the bushes. According to Mr. Kitzen, the bushes "started relatively close to [the intersection] and ran all the way down so you couldn't really see the street at all."

The Court now turns to the Grassi and Piccoli defendants' claims that the town ordinances do not apply to them, and do not place any duty on them with regard to motorists.

Specifically, the ordinances alleged by the plaintiffs to have been breached by the moving defendants relate to "Fences" and "Fences and Planting screens." Upon their instant motions to renew, the defendants have failed to proffer any new or additional facts surrounding their alleged statutory breaches (***CPLR §2221[e][2], [3]***; ***Shapiro v. State***, 259 A.D.2d 753, 687 N.Y.S.2d 401 [2d Dept., 1999]). Nevertheless, even overlooking this otherwise fatal procedural infirmity, defendants have failed to demonstrate, yet again on this renewed motion, that the ordinances do not apply to them.

As this Court detailed in its prior Decision and Order, 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 (*Bill of Particulars*, ¶4). 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]), defendants have failed to show that the shrubbery at issue does not apply to them. Upon their instant motions, defendants maintain that even if the shrubbery at issue is deemed to be a "planting screen" within the

meaning of the ordinances, "[t]he language of the ordinances to not specifically outline or intimate that the ordinance is in place to protect drivers on a highway" (*Grassis' Motion*, ¶¶11-12; *Piccolis' Motion*, ¶8). Relying principally upon the Second Departments' rulings in ***Weitz v. McMahon***, 252 A.D.2d 581 and ***Ingenito v. Robert M. Rosen, P.C.***, 187 A.D.2d 487 as well as the Court of Appeals' ruling in ***Hayes v. Malkan***, 26 N.Y.2d 295, 258 N.E.2d 695, 310 N.Y.S.2d 281 (1970) defendants argue that in addition to the fact that there is no common law duty owed to the plaintiff by the landowners, the public policy also supports the finding that they as private landowners cannot be held liable to the defendants herein. These arguments are unavailing.

It is true that there is no common law duty imposed upon owners or occupiers of land to control vegetation on their property for the benefit of users of a public highway (***Ingenito v. Robert M. Rosen, P.C., supra***; ***Weitz v. McMahon, supra***; *see also* ***Agostino v. Masi***, 28 A.D.3d 501, 813 N.Y.S.2d 491 (2d Dept., 2006); ***Szela v. Courtier***, 278 A.D.2d 485, 718 N.Y.S.2d 80 (2d Dept., 2000); ***Mountain View Coach Lines v. Storms***, 102 A.D.2d 663, 476 N.Y.S.2d 918 [2d Dept., 1984]).

The absence of a common law duty on the abutting owner, however, does not end the inquiry into the abutting owner's potential liability. There exists an exception to the common law rule when, as in this case, an ordinance or a specific regulatory provision places an affirmative duty on the abutting owner to maintain and keep the area free of obstructions (***Deutcsh v. Davis***, 298 A.D.2d 487, 750 N.Y.S.2d 84 (2d Dept., 2002) *citing* ***McSweeney v. Rogan***, 209 A.D.2d 386, 387, 618 N.Y.S.2d 430 (2d Dept., 1994); ***Perlak v. Sollin***, 291 A.D.2d 540, 541, 737 N.Y.S.2d 660 (2d Dept., 2002); ***Woznick v. Santora***, 184 A.D.2d 692, 693, 585 N.Y.S.2d 97 [2d Dept., 1992]). In this case, it is undisputed that the Town of Hempstead Building Zone Ordinance, Article VII, §74 entitled "Fences" and Article XXXI, §312 entitled "Fences and planting screens" impose upon the property owners a duty to prevent vegetation from visually obstructing the roadway. Thus, in the absence of any demonstration by the defendants that they complied with said ordinances, proof of noncompliance with the regulatory provisions may give rise to tort liability for any damages proximately caused thereby (***Lubitz v. Village of Scarsdale***, 31 A.D.3d 618, 819 N.Y.S.2d 92 [2d Dept., 2006]).

Accordingly, defendants' motions for summary judgment dismissal of the plaintiffs complaint is again denied, even upon renewal/reargument herein. Ultimately, whether the hedgegrow was the proximate cause of the accident, is among the many issues that warrant a trial of this action.

Finally, inasmuch as the defendants do not address the Court's third basis for the denial of their underlying motions, to wit, that "Passasini's operation of his motor vehicle

while under the influence of alcohol . . . may be deemed by the trier of fact to be a superseding cause of plaintiff's injuries," their application herein to reverse this Court's prior determination and order must clearly be denied.

This shall constitute the decision and order of this Court.

The foregoing constitutes the Order of this Court.

Dated: February 4, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.

ENTERED
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NASSAU COUNTY
COUNTY CLERK'S OFFICE