

Check v Town of Islip
2011 NY Slip Op 31441(U)
May 12, 2011
Sup Ct, Suffolk County
Docket Number: 06-25826
Judge: Ralph T. Gazzillo
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Justice of the Supreme Court

MOTION DATE 1-3-11
ADJ. DATE 3-3-11
Mot. Seq. # 005 - MG ✓
006 - MG ✓

-----X
STEVEN CHECK, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 TOWN OF ISLIP, TOWN OF ISLIP PUBLIC :
 WORKS and TOWN OF ISLIP-TRAFFIC AND :
 SAFETY DEPARTMENT, :
 :
 Defendants. :

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-----X
TOWN OF ISLIP, TOWN OF ISLIP PUBLIC :
 WORKS and TOWN OF ISLIP-TRAFFIC AND :
 SAFETY DEPARTMENT, :
 :
 Third-Party Plaintiffs, :
 - against - :
 :
 COUNTY OF SUFFOLK, DANIEL LEWIS and :
 LONG ISLAND FIXED GROUP LLC, :
 :
 Third-Party Defendant. :
-----X

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Upon the following papers numbered 1 to 47 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14, 15 - 29; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 30 - 35, 36 - 42; Replying Affidavits and supporting papers 43 - 44, 45 - 47; Other ____; (and after hearing counsel in support and opposed to the motion) it is,

Jan

ORDERED that these motions are hereby consolidated for purposes of this determination, and it is further

ORDERED that this motion by the third-party defendant Long Island Fixed Group LLC for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross claims against it, is granted, and it is further

ORDERED that this motion (incorrectly designated as a cross motion) by the third-party defendants County of Suffolk and Daniel Lewis for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross claims against them, is granted.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at approximately 11:00 a.m. on September 24, 2005 at the intersection of Comac Street and 13th Avenue in the Town of Islip, County of Suffolk, New York. The accident allegedly happened because the stop sign controlling traffic in the direction in which the plaintiff was traveling was obscured by foliage located on the property owned by third-party defendant Long Island Fixed Group LLC (LIFG), and the stop sign itself was faded. The plaintiff, traveling westbound on Comac Street, failed to stop at the intersection and struck a bus operated by third-party defendant Daniel Lewis (Lewis), and owned by the third-party defendant County of Suffolk (County). The plaintiff commenced this action against the defendants third-party plaintiffs Town of Islip, Town of Islip Public Works and Town of Islip Traffic and Safety Department (Town) alleging that the Town permitted the subject stop sign to be obstructed by foliage, and that it failed to properly maintain and position the stop sign. The Town's third-party complaint alleges that LIFG failed to trim its foliage in violation of section 68-405 of the Town of Islip Code (Code), which forbids sight obstructions at intersections, and that Lewis and the County were negligent in failing to avoid the accident.

LIFG moves for summary judgment on the grounds that there is no common law duty of a landowner to control vegetation on its property for the benefit of users of a public highway, and that it has established as a matter of law that it is not in violation of Code section 68-405. The relevant code section provides that intersecting streets shall have a sight triangle at every corner, and that "Each such triangle shall be bounded by the pavement edges and a diagonal line joining points on the pavement edges which are located 30 feet from the point of the actual or projected intersection of the pavement edges ..." The Town has not plead a violation of Code section 68-404, or indicated such in its bill of particulars. However, it is clear to the Court, and LIFG implicitly acknowledges in its submission, that the latter section is the controlling provision in this matter, and that the former section is merely definitional. Code section 68-404 provides that "Visual obstructions to a motorist's view at the intersection of streets or driveways are not permitted at any time within any sight triangle, as specified herein ... which is higher than three feet or lower than eight feet above the adjacent edge of pavement."

In support of its motion, LIFG submits the affidavit of James Mugford, the property manager for the premises owned by LIFG at 101 to 125 Comac Street, Ronkonkoma, New York. In his affidavit, Mr. Mugford swears that the premises are located on the northeast corner of Comac Street and 13th Avenue, that he is responsible for inspecting the premises and arranging for their maintenance, upkeep and repair, and that he visits the premises at least twice a week as part of his duties. He states that the driveway into

LIFG's premises is located 266 feet from the stop sign for westbound traffic on Comac Street, and that there are no trees, shrubbery or foliage now located within the "sight triangle" on the northeast corner of the subject intersection, nor where there any at any time on or prior to the date of the plaintiff's accident.

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 eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore, supra*).

LIFG has established its prima facie entitlement to summary judgment herein. A landowner is not under a common law duty to control vegetation on its property for the benefit of users of a public highway (*Clementoni v Consolidated Rail Corp.*, 8 NY3d 963, 836 NYS2d 507 [2007]; *Meloe v Gardner*, 40 AD3d 1055, 840 NYS2d 72 [2007]; *Kolkmeier v Westhampton Taxi & Limo Serv.*, 261 AD2d 587, 690 NYS2d 675 [1999]; *Ingenito v Robert M. Rosen, P.C.*, 187 AD2d 487, 589 NYS2d 574 [1992]). "Nevertheless, where a specific regulatory provision ... imposes upon property owners a duty to prevent vegetation from visually obstructing the roadway, proof of noncompliance with the regulatory provision may give rise to tort liability for any damages proximately caused thereby" (*Lubitz v Village of Scarsdale*, 31 AD3d 618, 819 NYS2d 92 [2006]; *see also Deutch v Davis*, 298 AD2d 487, 750 NYS2d 84 [2002]; *Perlak v Sollin*, 291 AD2d 540, 737 NYS2d 660 [2002]). Here, LIFG established that there was no obstruction within the sight triangle at the subject intersection.

In opposition to LIFG's motion, the Town submits various photographs, allegedly taken on the date of the plaintiff's accident, which purport to show that foliage on LIFG's premises obstructed the subject stop sign. However, it is clear that the submitted photographs were taken in excess of 266 feet from the intersection, and that there is no evidence that there were any trees, shrubbery or foliage within the sight triangle imposed by Code sections 68-404 and 68-405. The Town has failed to raise a material issue of fact requiring a trial of this matter.

Accordingly, LIFG's motion for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross claims against it is granted.

Lewis and the County move for summary judgment on the grounds that Lewis was not negligent, and that he did not contribute to, nor was he the proximate cause of, the plaintiff's accident. The plaintiff was deposed on March 10, 2008 and November 21, 2008. His testimony was essentially the same at both proceedings, and can be summarized as follows: On the day of his accident, he was driving

westbound on Comac Street, which he described as a two-way road with one lane of travel in each direction. He had never driven on Comac Street before his accident, but he had driven on 13th Avenue two or three times previously, and he was aware that there was no traffic control device for traffic on 13th Avenue. He was traveling at 30 miles per hour on Comac Street as he approached the intersection with 13th Avenue and, because he did not see a stop sign at the corner, he proceeded directly into the intersection. He stated that he first saw the other vehicle a “[s]plit second before the impact,” and a “few feet away.” He did not know the speed of the bus, and he was unsure if his vehicle or the bus were in the intersection at impact. He indicated that the front of his vehicle impacted the passenger side of the bus, but he did not know if he struck the front, middle or rear of the bus.

Lewis was deposed on July 18, 2008 and July 9, 2010. His testimony was essentially the same at both proceedings, and can be summarized as follows: On the day of the accident he was operating the bus along his normal route, which included bus stops along 13th Avenue. He described 13th Avenue as running north and south, with either four lanes or three lanes of travel. He was driving at 25 to 27 miles per hour as he approached the subject intersection, intending to pass through the intersection and past the next bus stop because there were no riders awaiting pick up. Lewis indicated that there was no traffic control devices at the intersection for vehicles traveling on 13th Avenue. He described the intersection as being bigger than the size of his bus, which is approximately 48 feet long. About one second before the impact, he saw the plaintiff’s vehicle traveling “above the speed limit,” he took his foot off of the gas pedal, but he was unable to do anything else to avoid the accident. He stated that the plaintiff’s vehicle struck his bus in the “middle to end” of the bus, and that, at impact, the front of his bus was five to eight feet past the northerly edge of the intersection.

Lewis and the County submit the affidavit of a nonparty witness, Theresa Masi, a passenger on the bus at the time of the accident. Ms. Masi swears that she was seated behind the driver of the bus, facing the passenger side of the bus. She states that she observed a dark colored vehicle traveling at a “fast speed” strike “the right rear side” of the bus with a heavy impact.

The movants have established their entitlement to summary judgment herein. The adduced evidence, viewed in a light most favorable to the plaintiff, establishes that the bus, having entered the intersection first, had the right of way. It is clear that the obligation of a driver to stop at a stop sign, imposed by VTL 1142 (a) and 1172 (a), does not apply if the “sign is not in proper position and sufficiently legible to be seen by an ordinarily observant person” (VTL § 1110 [b]). In that case, the driver’s obligation to stop depends on whether the driver is aware that the intersecting highway is a through highway. If the plaintiff was aware that 13th Avenue was a through highway, the fact that the stop sign was missing or obscured is irrelevant and he would be held negligent (*Mays v Weiman*, 73 AD2d 639, 422 NYS2d 751 [1979]; *Villa v Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 [1975]; *Del Villano v Lasky*, 8 AD2d 924, 187 NYS2d 205 [1959]). If the plaintiff was not aware that 13th Avenue was a through highway, the matter is governed by VTL 1140 concerning uncontrolled intersections. VTL 1140 (a) provides that “The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.” The prima facie proof demonstrates that Lewis was not negligent, had proceeded a majority of the way through the intersection, did not exceed the speed limit, and was not the proximate or comparable cause of the impact, and has

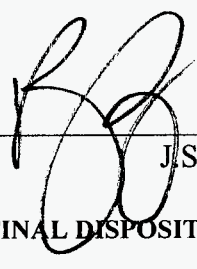
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demonstrated entitlement to judgment since no question of fact is raised (CPLR 3212[b]; VTL §§1140, 1141, 1142; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Zuckerman v City of New York*, *supra*).

Accordingly, the motion by Lewis and the County for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and all cross claims against them is granted.

The claims against the third-party defendants dismissed herein are severed and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: 5/12/11



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION