

Andreotti v County of Nassau

2011 NY Slip Op 32203(U)

August 1, 2011

Supreme Court, Nassau County

Docket Number: 18504/09

Judge: Thomas P. Phelan

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

CHRISTINE ANDREOTTI,

Plaintiff,

-against-

TRIAL/IAS PART 2
NASSAU COUNTY

MOTION SEQUENCE ##1, 2, 3, 4
ORIGINAL RETURN DATE: 04/01/11
SUBMISSION DATE: 05/31/11
Index No. 18504/09

THE COUNTY OF NASSAU and ASPLUNDH TREE
EXPERT CO.,

Defendants.

The following papers read on this motion:

Notices of Motion.....	1, 2
Notices of Cross-Motion.....	3, 4
Answering Papers.....	5, 6, 7, 8, 9
Reply.....	10, 11

Defendant's, County of Nassau ("the County"), motion for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any and all cross-claims against it is granted. Defendant's, Asplundh Tree Expert Co. ("Asplundh"), motion for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any and all cross claims against it is also granted.

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is, therefore, entitled to judgment as a matter of law (*Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (*Miller v. Journal-News*, 211 AD2d 626 [2d Dept. 1995]).

This negligence action was brought to recover damages for personal injuries allegedly sustained

by plaintiff as a result of an accident, which occurred on South Oyster Bay Road, at or near its intersection with Ontario Avenue, Plainview, County of Nassau and State of New York, on September 3, 2008. It is alleged that the County, its agents, servants or employees, were negligent, reckless and careless when they permitted a defective, unsafe and dangerous condition to exist and in failing to provide proper signage or sufficient warning to motorists with regard to an approaching lane closure, causing plaintiff to swerve to avoid the closed-off lane and hit a vehicle in on-coming traffic. Plaintiff and the County stipulated to include defendant Asplundh, as Asplundh performs tree maintenance adjacent to highways as well.

In a negligence action where municipal employees or agents were engaged in work on a highway, plaintiff must show that defendant acted with reckless disregard to the safety and welfare of others. New York Vehicle and Traffic Law exempts “persons, teams, motor vehicles, and other equipment while actually engaged in work on a highway,” including “hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway” (Vehicle and Traffic Law §1103) from obeying the traffic laws of the state or municipality.

The law requires these vehicles to practice “due regard for the safety of all persons,” and the exemption will not “protect such persons or teams or such operators of motor vehicles or other equipment from the consequences of their reckless disregard for the safety of others” (Id.). Courts have thus precluded “the imposition of liability for otherwise privileged conduct except where the conduct rises to the level of recklessness” (*Saarinen v. Kerr*, 84 NY2d 494, 497 [1994]; see *McDonald v. State*, 176 Misc.2d 130 [NY Ct. Cl. 1998]).

Work vehicles performing maintenance operations such as mowing are deemed hazard vehicles (*Riley v. County of Broome*, 95 NY2d 455, 463 [2000]; *Farese v. Town of Carmel*, 296 AD2d 436 [2d Dept. 2002]). New York Vehicle and Traffic Law holds that “every vehicle engaged in highway maintenance,” whether owned and operated by a public utility or private, is a hazard vehicle (Vehicle and Traffic Law §117-a; see *Farese v. Town of Carmel*, *supra*). Therefore plaintiff’s assertion that cutting grass on the property off the road is not necessarily a hazardous operation is without merit.

In opposition to this motion, plaintiff argues that the application of a reckless disregard standard must be pleaded as an affirmative defense, as opposed to defendant’s applying the standard in the present motion. The exemption provided to hazard vehicles serves to define the extent of duty owed to claimants, and “the facts that bring the case within the statute are what the claimants themselves allege”—that plaintiff was injured because a County maintenance crew purportedly failed to put out warning signs (*McDonald v. State*, *supra* at 141).

As plaintiff is suing a municipal entity for its highway maintenance operations, there is no surprise in defendant’s request for this higher standard. Further, the Court of Appeals has upheld a trial court’s express ruling that “Vehicle and Traffic Law §1103 need not be pleaded as an affirmative defense” (*Wilson v. State*, 269 AD2d 854, 855 [4th Dept. 2000], *aff’d Riley v. County of Broome*, 95 NY2d 455, 460 [2000]). Where the facts relating to the alleged negligence of

highway maintenance workers are known to the party opposing the motion and would not raise new issues of fact not appearing on the face of the prior pleadings, the party seeking to rely on the reckless disregard standard would not have to raise it as an affirmative defense (*Bello v. Transit Auth. of New York City*, 12 AD3d 58, 61 [2d Dept. 2004]). Defendant's use of a reckless disregard standard is appropriate.

The County claims that even if, arguendo, County employees were present at the location of the accident on the day that it occurred, plaintiff cannot present any facts to show the County acted with reckless disregard. The County refers to the testimony of a Road Department employee, where deponent describes the proper protocol for putting out cones and signs indicating a work area (Def.'s Ex. H, pp. 29, 31, 36) and insists the work crew the morning of the accident "absolutely" put out the appropriate signs and cones in the right lane (Def.'s Ex. H, p. 36).

Additionally, the County submits the testimony of a police officer that responded to the accident. The officer's testimony states that she had observed the road block of cones earlier in the day and "felt it was safe enough distance [from the construction vehicles] in order to get over" and was able to safely maneuver out of the right-hand [blocked] lane (Def.'s Ex. K, p. 52). Plaintiff's testimony also refers to multiple cones (Def.'s Ex. F, pp. 27-29).

Reckless disregard is the "conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm will follow, and one with conscious indifference to the outcome" (*Szerbiak v. Pilat*, 90 NY 553, 557 [1997]). Even supposing the County was negligent in failing to give proper signage ahead of the closed lane, plaintiff failed to raise a triable issue of fact as to whether the County vehicles, equipment and workers operated in reckless disregard of others resulting in a risk so great as to make it highly probable that harm would follow (see *Lobello v. Town of Brookhaven*, 66 AD3d 646, 647 [2d Dept. 2009]; *Farese v. Town of Carmel*, 296 AD2d 436 [2d Dept. 2002]).

Additionally, the County proposes that the complaint should be dismissed because the County was not the proximate cause of plaintiff's injuries. Determining whether an action or inaction is the proximate cause of a plaintiff's injuries is generally for a jury to decide (*Derderian v. Felix Contr. Corp.*, 51 NY2d 308, 314-315 [1980]). However, liability will not be imposed upon a party who "merely furnished the condition or occasion of the event" but was not one of its causes (*Shatz v. Kutshers Country Club*, 247 AD2d 375 [2d Dept. 1998], citing *Sheehan v. City of New York*, 40 NY2d 496, 503 [2d Dept. 1976]; see also *Peralta v. Manzo*, 74 AD3d 1307, 1308 [2d Dept. 2010]).

In assessing proximate cause, "the test to be applied is whether under all the circumstances the chain of events that followed the negligent act or omission was a normal or foreseeable consequence of the situation created by the [defendant's] negligence" (*Mirand v. City of New York*, 84 NY2d 44, 50 [1994]; see, *Dunn v. State of New York*, 29 NY2d 313 [1971]). Plaintiff has not tendered evidence to disprove that the County merely furnished the situation that caused plaintiff to swerve her car into oncoming traffic nor whether the chain of events that followed the

County's alleged inaction was a foreseeable consequence created by the County's negligence. Mere conclusory allegations or speculation is not enough to require a trial of material questions of fact on which plaintiff rests her claim (*Zuckerman v. City of New York*, 59 NY2d 557, 562 [1980]).

Both defendants move for summary judgment dismissing plaintiff's complaint on the grounds that plaintiff's own culpable conduct and negligence was a substantial cause of the events that produced her injuries. The County submits the sworn affidavit of a witness whose car was struck by plaintiff's in the subject accident and the deposition of a police officer who responded to the collision, both of which state that plaintiff was traveling over the speed limit just prior to losing control of her car (Def.'s Ex J; Def.'s Ex. K, p. 37).

The witness testified "[plaintiff] appeared to be going very fast because the way the car was swerving" (Pl.'s Ex. H, p. 41) and "[a]fter she lost control of her vehicle, [plaintiff] continued at an excessive rate of speed" (Def.'s Ex. J). The responding police officer deduced that plaintiff was traveling at an excessive rate of speed because "it was a high impact accident" based on the damage sustained by both vehicles (Def.'s Ex. K, p. 37).

Plaintiff's own testimony affirms that she does not recall what her rate of speed was when she moved into the right-hand lane, but attests that she was going "more than ten miles an hour" (Def.'s Ex. G, p. 84) and quickly accelerated as she entered the right-hand lane (Def.'s Ex. G, pp. 90- 91). Plaintiff attested to accelerating while moving right, despite the fact that she was unable to see further ahead in the direction she was travelling (Def.'s Ex. G, p. 83-84, 90).

Defendant has submitted evidence that plaintiff was driving at a speed excessive for the circumstances before the accident. Plaintiff fails to rebut the evidence that had she been traveling at a speed more appropriate for the traffic conditions, the accident would not have occurred, effectively establishing her negligence as a superseding cause (*see, e.g., Tishler v. Town of Brookhaven*, 205 AD2d 611, 612 [2d Dept. 1994]).

Plaintiff claims that under the "Emergency Doctrine" she is entitled to protection from liability. Under this doctrine, when an actor is faced with a "sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v. New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]).

Use of the "Emergency Doctrine" requires that the situation faced by the person claiming protection of the doctrine was not of that person's own making (*see, e.g., Bello v. Transit Auth. of New York City*, 12 AD3d 58 [2004]; *Smit v. Phillips*, 74 AD3d 782 [2010]). The emergency doctrine does not apply here, as "the party seeking to invoke it created or contributed to the emergency" (*Mead v. Marino*, 205 AD2d 669 [2d Dept. 1994]) (emphasis added). Plaintiff's failure to "anticipate and react to the eventuality that she would be unable to move her vehicle into

the [right] lane as planned preclude[s] application of the emergency doctrine" (*Id.* at 669-670; *see also Sweeney v. McCormick*, 159 AD2d 832, 833 [3d Dept. 1990])). Therefore, plaintiff's negligent driving in the subject circumstances cannot be excused by the alleged emergency circumstance.

The County's motion is granted on the grounds that it was not the proximate cause of plaintiff's injuries, and because plaintiff cannot present evidence that the County acted with reckless disregard. Plaintiff's complaint and any and all cross claims against the County are dismissed.

Defendant Asplundh's cross-motion for summary judgment advocating and reiterating the County's contention that plaintiff's negligence is a superseding cause of the accident is similarly granted. Plaintiff's complaint and any and all cross claims asserted against Asplundh are dismissed.

In light of the foregoing dismissals, defendant Asplundh's motion to strike the Note of Issue and compel depositions and plaintiff's cross-motion for discovery-related relief are denied as academic.

This decision constitutes the order of the court.

Dated: 8-1-11

HON THOMAS P. PHELAN
THOMAS P. PHELAN, J.S.C. XXX

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