

Machado v Kalb
2012 NY Slip Op 30075(U)
January 4, 2012
Sup Ct, Suffolk County
Docket Number: 03-10428
Judge: Hector D. LaSalle
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY**PRESENT:**Hon. HECTOR D. LaSALLE
Justice of the Supreme CourtMOTION DATE 8-30-11ADJ. DATE 10-18-11Mot. Seq. # 005 MG # 007 - XMD
006 - MD # 008 - MGNICOLE E. MACHADO, ROSELYNDA
LAURICELLA and DAVID MACHADO,

Plaintiffs,

- against -

GELLER, SIEGEL & COONERTY LLP
Attorney for Plaintiffs
419 Park Avenue South
New York, New York 10016ZAKLUKIEWICZ, PUZO & MORRISSEY
Attorney for Defendants Kalb & Thorndike
2701 Sunrise Highway, P.O. Box 389
Islip Terrace, New York 11752GELLER, SIEGEL & COONERTY LLP
Attorney for Defendants Machado
419 Park Avenue South
New York, New York 10016CAROLYN KALB as Administrator of the Estate
of CRAIG THORNDIKE, NICOLE
THORNDIKE, NICOLE MACHADO, DAVID
MACHADO, ANTHONY'S WINDOWS ON
THE LAKE, INC., Individually and d/b/a
WINDOWS ON THE LAKE, TOWN OF
BROOKHAVEN and JOHN T.
MONTECALVO, INC.,

Defendants.LEAHEY & JOHNSON, P.C.
Attorney for Defendant/Third-Party and Second
Third-Party Plaintiff Anthony's Windows
120 Wall Street
New York, New York 10005LAW OFFICES OF CURTIS, VASILE, P.C.
Attorney for Defendant Town of Brookhaven
2174 Hewlett Avenue, P.O. Box 801
Merrick, New York 11566ANTHONY'S WINDOWS ON THE LAKE,
INC.,

Third-Party Plaintiff,

- against -

STEPHEN DAVID FINK, ESQ.
Attorney for Third-Party Defendants Olympic,
Parking Systems Plus, Baron & Spinelle
118-35 Queens Boulevard, Suite 1220
Forest Hills, New York 11375OLYMPIC PARKING SERVICES, LTD.,
PARKING SYSTEMS PLUS, INC., MARK
BARON and RONALD SPINELLE,

Third-Party Defendants.

-----X
 ANTHONY'S WINDOWS ON THE LAKE,
 INC.,

Second Third-Party Plaintiff,

- against -

GUEST PARKING SERVICES, INC.,

Second Third-Party Defendant.
 -----X

MARSHALL, CONWAY, WRIGHT &
 BRADLEY, PC
 Attorney for Second Third-Party Defendant
 Guest Parking
 116 John Street
 New York, New York 10038

Upon the following papers numbered 1 to 90 read on these motions for summary judgment and motion to dismiss; Notice of Motion/ Order to Show Cause and supporting papers 1 - 35, 50 - 64, 88 - 90; Notice of Cross Motion and supporting papers 79 - 81; Answering Affidavits and supporting papers 36 - 42, 43 - 44, 65 - 75, 82 - 87; Replying Affidavits and supporting papers 45 - 47, 48 - 49, 76 - 78; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions are consolidated for the purposes of determination; and it is further,

ORDERED that the renewed motion (# 005) by defendant Town of Brookhaven for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims and counterclaims asserted against it is granted; and it is further,

ORDERED that the renewed motion (# 006) (incorrectly designated as a cross motion) by the second third-party defendant Guest Parking Services, Inc. for summary judgment dismissing the second third-party complaint and all cross claims asserted against it is denied; and it is further,

ORDERED that the renewed cross motion (# 007) by the plaintiffs for an order pursuant to CPLR 3212 granting partial summary judgment in their favor as to the liability of the defendants Carolyn Kalb as Administrator of the Estate of Craig Thorndike and Nicole Thorndike, is denied; and it is further

ORDERED that the unopposed motion (# 008) (incorrectly designated as a cross motion) by the third-party defendants Olympic Parking Services, Ltd., Parking Systems Plus, Inc., Mark Baron and Ronald Spinnelle for an order dismissing the third-party complaint and all cross claims asserted against them pursuant to CPLR 3215 (c) is granted.

By order dated June 22, 2011, this Court, noting that the parties had failed to include copies of all the pleadings in their motions and cross motions, and that many of the parties had moved under the wrong index number, denied the movants' prior requests for summary judgment, without prejudice to renewal upon proper papers, filed in the proper actions, within 30 days of the entry of said order. Now, having submitted copies of all of the pleadings, the parties renew their respective motions.

This action arises from a motor vehicle accident which occurred at approximately 5:30 p.m. on March 16, 2002 on Lake Shore Road in Lake Ronkonkoma, New York. The accident occurred when a vehicle operated by defendant Carolyn Kalb's decedent, Craig Thorndike (Craig), and owned by defendant Nicole Thorndike drifted into the opposite lane of travel and collided with a vehicle operated by plaintiff Nicole Machado and owned by plaintiff David Machado. The plaintiff Roselynda Lauricella was a passenger in the Machado vehicle. In addition to causing Craig's death, the collision caused the death of Crystal Chante Wright (Crystal), a passenger in Craig's vehicle. Immediately prior to the accident, Craig

and Crystal had attended a wedding reception at a facility operated by defendant Anthony's Windows on the Lake, Inc. (Windows). The plaintiffs allege, among other things, that Craig was intoxicated, that Windows served him alcohol after he became visibly intoxicated, and that the Town of Brookhaven failed to properly maintain and repair Lake Shore Road at the site of the accident.

The plaintiffs commenced an action against Carolyn Kalb as the administrator of Craig's estate, Nicole Thorndike, Windows, the Town of Brookhaven (Town) and John T. Montecalvo Inc. (Montecalvo), a road paving company. The plaintiffs allege that the Town and Montecalvo failed to paint traffic control lines on the roadway where the accident occurred.¹ Thereafter, Windows commenced a third-party action against the third-party defendants Olympic Parking Services, Ltd., Parking Systems Plus, Inc., Mark Baron and Ronald Spinelle (Olympic), alleging that they were engaged as parking attendants at Windows, and that they negligently permitted or allowed Craig to get into his car and drive after the wedding reception. It is undisputed that Windows learned that Olympic was not present on the date of the accident, and that Olympic has failed to serve an answer to the third-party complaint. Instead of seeking a default, Windows commenced a second third-party action against the second third-party defendant Guest Parking Services, Inc. (GPS) alleging that it was the entity which negligently permitted or allowed Craig to get into his car and drive after the wedding reception. The administrator of Crystal's estate commenced a separate action against the administrator of Craig's estate, Nicole Thorndike, the Machados and Windows, a second separate action against the Town, and a third separate action against Montecalvo. In an order dated September 30, 2004, these three actions were consolidated under Index No. 12502-03, and the Court directed that the consolidated action was to be tried jointly with the instant action commenced by the Machados and plaintiff Roselynda Lauricella.

The Town moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims and counterclaims asserted against it on the ground that it did not receive written notice of the alleged defect in the roadway at the accident site and that Craig was the sole proximate cause of the subject 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 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 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 [2d Dept 1990]).

A review of the record reveals that, on or about October 12, 2000, the site of this accident on Lake Shore Road had been re-paved by Montecalvo pursuant to a contract with the Town. It is undisputed that the Town's Department of Highways, Division of Traffic and Safety was responsible for the painting of traffic control lines on re-paved highways, including double yellow lines separating lanes of travel. It is also undisputed that lines had not been painted at the site on the date of the subject accident on March 16, 2002.

¹ The action against Montecalvo has been discontinued pursuant to a stipulation of discontinuance filed on December 10, 2008.

The Town contends that it cannot be held liable unless the plaintiff establishes that the Town received prior written notice of the alleged defective condition pursuant to Town Law § 65-a, and Town of Brookhaven Code § 84-1. The latter statute provides that “[n]o civil action shall be commenced against the Town of Brookhaven ... for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous, or obstructed condition of any highway, street, bridge, culvert or crosswalk of the Town of Brookhaven, unless, previous to the occurrence resulting in such damage or injuries, written notice of such defective, out-of-repair, unsafe, dangerous, or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways.”

Where, as here, a municipality has enacted a prior written notice statute pursuant to Town Law, Article 65, it may not be subjected to liability for personal injuries caused by an improperly maintained roadway unless either it has received prior written notice of the defect or an exception to the prior written notice requirement applies (*Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Lopez v G&J Rudolph*, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]; *Gazennmuller v Incorporated Vil. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]). Actual or constructive notice of a defect does not satisfy this requirement (*Wilkie v Town of Huntington*, *supra*).

A party need not show the receipt of written notice by a public corporation where the condition or defect complained of was created by the defendant (*Amabile v City of Buffalo*, *supra*) and is the product of the public corporation’s active negligence, rather than its passive negligence, or nonfeasance (*Monteleone v Incorporated Vil. of Floral Park*, 74 NY2d 917, 550 NYS2d 257 [1989]; *Davidson v Town of Chili*, 35 AD3d 1246, 827 NYS2d 795 [4th Dept 2006]; *Kotler v City of Long Beach*, 44 AD2d 679, 353 NYS2d 800 [2d Dept 1974] *affd* 36 NY2d 774, 368 NYS2d 842 [1975]). It has been held that absent written notice, a Town is not liable for the failure to repaint lines distinguishing travel lanes on a roadway (*Foley v County of Suffolk*, 80 AD3d 658, 915 NYS2d 157 [2d Dept 2011] *see also* *LiFrieri v Town of Smithtown*, 72 AD3d 750, 898 NYS2d 629 [2d Dept 2010]).

In support of its motion, the Town has submitted an affidavit from Suzanne Mauro, who is employed as a principal clerk for the Office of the Department of Highways for the Town of Brookhaven. She swears therein that she is responsible for conducting searches of the records of prior written notice of defects kept and maintained in the department. Ms. Mauro further swears that she conducted a search of the records of the Town Highway Department, and that they do not contain any written notice of any defects at the accident site on Lake Shore Road for the four years prior to March 16, 2002.

In addition, the Town submitted an affidavit from Linda Sullivan, who is employed the clerk typist in the Town Clerk’s Office of the Town of Brookhaven. She swears therein that she conducted a search of the records of the Town Clerk’s Office, and that they do not contain any written notice of any defects at the accident site on Lake Shore Road for the four years prior to March 16, 2002.

The Town has established its prima facie entitlement to summary judgment regarding liability in this action. It is undisputed that the Town has not received prior written notice of the alleged defective condition and there is no evidence that the Town caused or created any alleged defective condition.

In opposition to the motion, the plaintiffs submit the affirmation of their attorney, wherein it is alleged that the Town created the hazardous condition by neglecting to line the road at the accident site and

that the Town had constructive notice of the defect. In addition, said affirmation merely contends that the Town's contention that Craig was the sole proximate cause of the accident ignores the fact that there can be concurrent proximate causes to an accident. 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 [2d Dept 2004]; *Rebecchi v Whitmore*, *supra*). A review of the record reveals that the opposition to the Town's motion fails to raise any issues of fact regarding the creation of a hazardous condition or negligence by the Town relative to the subject accident.²

Accordingly, the Town of Brookhaven's motion for an order granting summary judgment dismissing the complaint and all cross claims and counterclaims asserted against it is granted.

GPS now moves for summary judgment dismissing the second third-party complaint and all cross claims asserted against it on the ground that it did not owe a duty to the plaintiffs. Initially, the Court notes that the motion is untimely. As set forth above, by order dated June 22, 2011, this Court denied GPS's original post note of issue motion for summary judgment with leave to renew within 30 days of the entry of the order. The computerized records maintained by the Court indicates that said order was entered on July 6, 2011. The instant motion was made on August 8, 2011, more than 30 days after entry of the order permitting a renewed motion. Accordingly, the motion is denied. In any event, the Court notes that Windows' opposition to the motion has raised issues of fact requiring a trial of the second third-party action herein.

The plaintiffs move for an order granting partial summary judgment in their favor as to the liability of the defendants Carolyn Kalb as Administrator of the Estate of Craig Thorndike and Nicole Thorndike. Initially, the Court notes that the motion is untimely. As set forth above, by order dated June 22, 2011, this Court denied the plaintiffs' original post note of issue motion for summary judgment with leave to renew within 30 days of the entry of the order. The computerized records maintained by the Court indicates that said order was entered on July 6, 2011. The instant motion was made on August 10, 2011, more than 30 days after entry of the order permitting a renewed motion. In fact, the plaintiffs themselves served a copy of the subject order with notice of entry, emphasizing that the order was entered on July 6, 2011. Accordingly, the motion is denied.

The third-party defendants Olympic Parking Services, Ltd., Parking Systems Plus, Inc., Mark Baron and Ronald Spinelle move for an order pursuant to CPLR 3215 (c) dismissing the third-party complaint and all cross claims asserted against them. The Court notes that this is not a renewed motion, and that the motion is unopposed. It is undisputed that the moving defendants have failed to appear in this action, and that they have not participated in the proceedings herein. However, the third-party plaintiff has failed to discontinue this action against the moving defendants, or to seek a default judgment within one year (CPLR 3215 [c]).

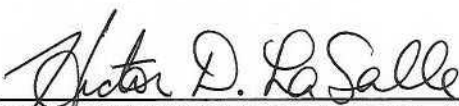
Accordingly, the Court grants judgment dismissing the third-party complaint and all cross-claims against them.

² The Court notes that a reply by the Town indicates Kalb submitted opposition to its motion. However, said opposition is not present, and it is unclear whether Kalb submitted separate papers herein or they relied on the opposition submitted in the related action under Index No. 03-12502. Regardless, in its determination of this motion the Court has considered the opposition submitted in the related action, as the issues and arguments appear identical.

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The claims against the defendant Town of Brookhaven and the defendants Olympic Parking Services, Ltd., Parking Systems Plus, Inc., Mark Baron and Ronald Spinelle dismissed herein are severed, and the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: January 4, 2012
Central Islip, NY


HON. HECTOR D. LASALLE, J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION