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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

PRESENT : HON. JEFFREY S. BROWN
JUSTICE

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RICHARD ANTAKI, as Administrator of the Estate of GLORIA ANTAKI, deceased, and RICHARD ANTAKI, Individually,

Plaintiff,

-against-

RAMIRO MATEO, KILKENNY CONSTRUCTION CO., INC., THE COUNTY OF NASSAU and THE NASSAU COUNTY POLICE DEPARTMENT,

Defendants.

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RAMIRO MATEO and KILKENNY CONSTRUCTION CO., INC.,

Third-Party Plaintiffs,

-against-

COMMANDER ELECTRIC, INC., COMMANDER ELECTRIC MAINTENANCE CORP. and JOSEPH PFIESTER a/k/a JOSEPH PFISTERER,

Third-Party Defendants.

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TRIAL/IAS PART 17

INDEX # 11164/09

Motion Seq. 2,3,4,5
Motion Date 8.5.11
Submit Date 11.1.11

The following papers were read on this motion: Papers Numbered

Notice of Motion, Cross Motion, Affidavits (Affirmations), Exhibits Annexed..... 1,2,3,4
Answering Affidavit 5
Reply Affidavit..... 6,7
Memorandum of Law and Reply Memorandum of Law 8,9

Motion by the defendants The County of Nassau and The Nassau County Police Department for an order pursuant to CPLR 3212 granting them summary dismissing the complaint and any and all cross-claims against them is **GRANTED**, without opposition.

The cross-motion by the defendants Ramiro Mateo and Kilkenny Construction Co., Inc. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the complaint and any and all cross-claims against them or, in the alternative, an order pursuant to CPLR 3126 imposing sanctions on the plaintiffs is determined as provided herein.

The motion by the third-party defendants Commander Electric Inc. and Commander Maintenance Corp. for an order pursuant to CPLR 3212 granting them summary judgment dismissing the third-party complaint against them is **GRANTED**.

The motion by the plaintiffs, Richard Antaki, as Administrator of the Estate of Gloria Antaki, deceased, and Richard Antaki, Individually, for an order pursuant to CPLR 3126 imposing sanctions on the defendants Mateo and Kilkenny Construction is determined as provided herein.

This is an action to recover damages for personal injuries and the wrongful death of Gloria Antaki. She was killed in a car accident on June 16, 2008. It is not disputed that at approximately 6:30 AM, while Ms. Antaki was traveling east on 4th Street at the intersection of South Broadway a/k/a Rte. 107, she encountered a malfunctioning traffic light which was steady red for eastbound traffic on 4th Street. As she was crossing South Broadway, a Ford Econoline van owned by Kilkenny Construction and driven by its employee Mateo which was traveling south on South Broadway and had a green light hit the driver's side of Antaki's automobile

causing her death. The defendant Mateo and Kilkenny Construction allege in their third-party complaint that the third-party defendants Commander Electric, Inc., Commander Electric Maintenance Corp. and/or Joseph Pfiester a/k/a Joseph Pfisterer negligently maintained the traffic light and were responsible for the dysfunctional light and concomitantly the resulting accident.

The County, Mateo and Kilkenny Construction all seek dismissal of the complaint. In the alternative, Mateo and Kilkenny seek sanctions based upon the plaintiffs' failure to preserve Ms. Antaki's automobile for their inspection. The third-party defendants Commander Electric, Inc. and Commander Electric Maintenance Corp. seek dismissal of the third-party complaint. Finally, the plaintiffs seek sanctions based upon Mateo and Kilkenney's failure to preserve the van involved in the accident.

The facts pertinent to the determination of these motions are as follows:

At his examination-before-trial, Mateo testified, and it is not disputed, that as he approached the intersection of South Broadway and 4th Street, he had a green light. He testified that traffic was light and there were no vehicles in front of him. He estimated his rate of speed at 35 mph at most, and the posted speed limit was 40 mph. He testified that as he approached the intersection, he had a clear view with nothing obstructing it, he was not eating or drinking anything, nor was he talking to his passengers or using a cell phone, and that the van did not have any brake or steering problems. Mateo testified it was not until after he entered the intersection at 4th Street and South Broadway that he suddenly saw a black vehicle one car length in front of him which was crossing South Broadway from his right to his left. He testified that he did not see this vehicle before encountering it in his lane and that he braked hard and turned his

steering wheel to the right in an attempt to avoid colliding with it. He has attested in support of the defendants' motion that he did not and could not veer to his left because of the median and oncoming northbound traffic. He testified and has attested that while he slowed down, he was unable to avoid the collision, and the front of his van hit the driver's side of the black vehicle. Following the collision, Mateo's vehicle came to rest on the island between the north and southbound traffic. Photographs of the van driven by Mateo reveal minor damage.

Mateo testified that during their investigation, the police informed him that the traffic light had malfunctioned. In fact, it continued to malfunction even 40 minutes after the accident.

Nassau County Police Officer Matthew Schmidt was the first officer to respond to the scene of the accident. At his examination-before-trial, he described the accident scene at the intersection of South Broadway and 4th Street. South Broadway runs north/southbound and is three lanes in both directions; 4th Street runs east/west, is one lane in each direction and ends at Delco Plaza to the east of South Broadway. Officer Schmidt testified that in the year and a half that he patrolled the intersection, he never observed the traffic light malfunction or workers at the site nor was he ever dispatched to the site before. Officer Schmidt testified that the light for westbound 4th Street traffic which was leaving Delco Plaza was working on the day in question and would cause the South Broadway light to turn red but the traffic light that was facing eastbound traffic on 4th Street was not cycling. Therefore, only a vehicle exiting Delco Plaza would have caused the eastbound 4th Street light to cycle. Officer Schmidt further testified that he could not get the light to change for eastbound traffic during the four hours he was at the site. Officer Schmidt testified that eventually an employee of the New York State Department of

Transportation responded to the scene and confirmed that the light was not cycling for drivers on eastbound 4th Street.

Indeed, Joseph Pfisterer of the Department of Transportation who responded to the scene testified at his examination-before-trial that the amplifier was not relaying the presence of eastbound traffic on 4th Street which caused the light to remain red for that traffic and green for north-south traffic on South Broadway unless a vehicle was detected trying to exit Delco Plaza on the east side of South Broadway.

Mateo received a citation for the unlicensed operation of a motor vehicle. Antaki was cited in the police report for disregarding the traffic signal.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." Sheppard-Mobley v King, 10 AD3d 70, 74 (2d Dept 2004), affd as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at p. 324. The evidence presented by the opponents of summary judgment must be accepted as true and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518, 521 (2d Dept 2006), citing Secof v Greens Condominium, 158 AD2d 591 (2d Dept 1990).

Where a party is unable to give testimony concerning the happening that caused his injury, the burden of proof is relaxed. "[I]n a death case a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can [her]self describe the occurrence (citations omitted)." Noseworthy v City of New York, 298 NY 76, 80-81 (1948). Only "slight evidence" is necessary. See, Noseworthy v City of New York, supra, at p. 80-81. The "slight proof" referred to in Noseworthy consists simply of "a showing of facts from which negligence may be inferred." Wank v Ambrosino, 307 NY 321, 323 (1954). This burden of proof applies in wrongful death cases where the decedent's death results from the very conduct that is the subject of the lawsuit. See, Ruiz v Griffin, 71 AD3d 1112, 1115 (2nd Dept 2010).

As for the County and the Police Department, ordinarily, to impose liability on a municipality for negligence in the performance of governmental functions including police and fire protection, there must be a special relationship with the plaintiff which gives rise to a special duty with respect to him or her. Gotlin v City of New York, ___ AD3d ___, 2011 WL 6091527 (2nd Dept 2011) (citations omitted); see also, Balsam v Delma Engineering Corp., 90 NY2d 966 (1997); Dixon v Village of Spring Valley, 50 AD3d 943 (2nd Dept. 2008). Nevertheless, "a municipality has a duty to maintain its streets in a reasonably safe condition." Kohn v City of New York, 69 AD3d 463 (1st Dept 2010). And, a plaintiff may prevail against a municipality if he/she is able to show, inter alia, that it "permitted a dangerous or potentially hazardous condition to exist and cause injury." Kohn v City of New York, supra, at p. 463, citing Thompson v City of New York, 78 NY2d 682 (1991); see also, Urbistondo v City of New York, 89 AD3d 598 (1st Dept 2011), citing Prager v Motor Vehicle Acc. Indemnification Corp., 74 AD2d 844 (2nd Dept 1980). Accordingly, contrary to the County and Police Department's

argument, the lack of a special relationship does not preclude the plaintiff's recovery here. Colon v Manhattan and Bronx Surface Transit Operating Authority, 35 AD3d 515 (2nd Dept 2006); Ayala v Kaestner, 224 AD2d 266 (1st Dept 1996); Brown v City of New York, 154 AD2d 325 (2nd Dept 1989). Indeed, none of the cases relied upon by the County and the Police Department involved malfunctioning traffic devices.

Vehicle and Traffic Law § 1117 provides that:

> "[e]xcept when directed to proceed by a police officer, every operator of a motor vehicle approaching an intersection governed by a traffic control signal which is out of service or otherwise malfunction[ing] shall stop in the manner required for stop signs . . . .

The evidence here clearly establishes, and it is not disputed, that the traffic light Ms. Antaki proceeded through was red. Thus, she was required to act as if she was proceeding at a stop sign. She should have been fully aware of the need to proceed through the intersection with caution. Therefore, the malfunctioning traffic light was not the proximate cause of the accident. The complaint against the County and the Police Department is dismissed, without opposition. Minemar v Khramova, 29 AD3d 750 (2nd Dept 2006); see also, Munoz v The City of New York, 19 Misc 3d 1122(A) (Supreme Court Kings County 2008).

"A driver who fails to yield the right-of-way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law (citations omitted)." Klein v Crespo, 50 AD3d 745 (2nd Dept 2008), lv den., 12 NY3d 704 (2009); see also, Rahaman v Abodeledhman, 64 AD3d 552 (2nd Dept 2009). Vehicle & Traffic Law § 1142(a) states in pertinent part that a vehicle approaching the stop sign "shall yield the right-of-way to any vehicle . . . which is approaching so closely on said highway as to constitute

an immediate hazard during the time when such driver is moving across or within the intersection." "A driver is required to see that which through proper use of his or her senses he or she should have seen, and a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him or her to yield (citations omitted)." Klein v Crespo, supra, at p. 745-746; see also, Rahaman v Abodeledhman, supra.

Nevertheless, "[t]here can be more than one proximate cause of an accident (citations omitted)." Cox v Nunez, 23 AD3d 427, 427 (2nd Dept 2005); see also, Rahaman v Abodeledhman, supra. "Thus, a driver who lawfully enters an intersection may nevertheless be found partially at fault for an accident if that driver fails to use reasonable care to avoid a collision with another vehicle at an intersection." Rahaman v Abodeledhman, supra, at p. 553 citing Exime v Williams, 45 AD3d 633 (2nd Dept 2007). Thus, a driver with the right-of-way has a duty to use reasonable care to avoid a collision and can be held comparatively liable if he fails to do so. Vehicle and Traffic Law § 1111(a)(1); Sirot v Troiano, 66 AD3d 763 (2nd Dept 2009), citing Siegel v Sweeney, 266 AD2d 200 (2nd Dept. 1999). Nevertheless, "a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (citations omitted)." Yelder v Walters, 64 AD3d 762, 764 (2nd Dept 2009).

The defendants have established that Mateo did all he could to avoid the collision with the decedent's automobile: Upon seeing Ms. Antaki's vehicle, he braked and swerved in an attempt to avoid the collision. Accordingly, defendants have established that he was not comparatively negligent. Yelder v Walters, supra, at p. 765; Rahaman v Abodeledhman, supra. Defendant Mateo and Kilkenny Construction have accordingly established their entitlement to

summary judgment dismissing the complaint against them thereby shifting the burden to the plaintiffs to establish the existence of a material issue of fact.

The plaintiffs have in fact done so. More specifically, they have established the existence of an issue of fact concerning Mateo's possible contributory negligence. The plaintiff's expert Steven Schneider's report reveals that after reviewing police documents, photographs and Mr. Mateo's testimony, based on the positions of the vehicles following the accident, the damage sustained by both vehicles, as well as the principles of angular momentum, he concluded within a reasonable degree of engineering certainty that the speed of the Mateo van before the collision was 51 to 57 mph – well in excess of the speed limit – while the speed of the Antaki vehicle was about 5 mph. The plaintiffs maintain that Schneider's personal inspection of Antaki's vehicle itself is not necessary to these conclusions.

Furthermore, statements by witnesses sworn to pursuant to Penal Law § 210.45 (which are admissible at this stage [(see Moore v County of Suffolk, 11 AD3d 591, 592 (2nd Dept 2001); see also Rodriguez v Sixth President, Inc., 4 AD3d 406, 407 (2nd Dept. 2004)]) indicate the following: A green Cadillac transversed South Broadway in front of Antaki's vehicle against a red light. Antaki then pulled forward and stopped inside the crosswalk and waited for what seemed like ten minutes before pulling forward. Another witness swore to having seen Mateo's van traveling "very fast" and hit the Antaki's vehicle with a "punishing impact."

There is a question of fact regarding Mateo's possible contributory negligence via speeding or failing to avoid the collision. See Gardner v Smith, 63 AD3d 783 (2nd Dept 2009), citing Cox v Nunez, supra; Romano v 202 Corp., 305 AD2d 576, 577 (2nd Dept 2005).

The defendant Mateo and Kilkenny Construction's motion for summary judgment

dismissing the complaint is **DENIED**.

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) that the defendant owed him or her a duty of reasonable care, (2) there was a breach of that duty, and (3) a resulting injury was proximately caused by the breach. Boltax v Joy Day Camp, 67 NY2d 617 (1986); see also, Miglino v Bally Total Fitness of Greater New York, Inc., ___ AD2d ___, 2011 WL 6825539 (2nd Dept 2011), citing Pulka v Edelman, 40 NY2d 781 (1976).

Via an affidavit by Administrative Assistant Jamie Booth, the third-party defendants have established that Commander Electric, Inc. is a traffic/electric signal installation company and that Commander Electric Maintenance Corp. is a maintenance company. She attests that the companies' records which are only kept for five years reveal that neither company did any work at the intersection of South Broadway and 4th Street from 2005 (the latest date for which records are maintained by the companies) up until the date of the accident. Robert Foy, a project manager at Commander for the last eight years and a 33 year employee, concurred that Commander maintains records for only five years. When confronted at his examination-before-trial with a "Highway Work Permit" issued to Commander on or about March 1984 for the installation of traffic signals and loop detectors, Mr. Foy testified that Commander did not have such records any longer and that in any event, even if such work had been done, maintenance would not have been performed absent a separate maintenance agreement which did not exist for the subject intersection for any time after November, 2005. In addition, when he reviewed the maintenance card for the intersection, Mr. Foy was unable to identify any of Commander's employees' initials. He was only able to identify Joseph Pfiester's initials, who, he testified, he believed worked for New York State.

Commander did not maintain or service the traffic light system at the intersection for at least 31 months prior to the accident: All the evidence indicates that the New York State Department of Transportation did so. And, the evidence further indicates that Commander was not under any duty to maintain or service the traffic signal system at the intersection. Absent a duty, which is a legal issue for the court (Eisman v State of New York, 70 NY2d 175, 187 [1988]), no claim lies (Pulka v Edelman, supra, at p. 781). Commander has established its entitlement to summary judgment dismissing the third-party complaint against it thereby shifting the burden to the third-party plaintiffs to establish the existence of a material issue of fact.

In an effort to resist dismissal of their third-party complaint, Mateo and Kilkenny Construction rely on a "Single Signal Dispatched Report" which reflects that Commander was called to the scene at 8:43 AM on the date of the accident and more importantly, states "Location HICKSVILLE RD. @ FOURTH STREET DELCO PLAZA Maintained by COMMANDER Municipality Hicksville." The admissibility of this document has not be established.

Assuming, arguendo, that Commander had a duty to maintain the traffic light when called upon to do so, in view of the fact that no work was requested let alone performed for at least some 31 months prior to the accident, liability does not lie. See generally, Orosz v County of Suffolk, 279 AD2d 558 (2nd Dept 2001). Furthermore, assuming, arguendo, that Commander had an independent duty to monitor and maintain the traffic signal, absent an exception as set forth in Espinal v Melville Snow Contractors, Inc., (98 NY2d 136, 139, 141-142 [2002]; see also, Church v Callanan Industries, 99 NY2d 104, 111 [2002]), a duty to the general public does not arise (DiVona v Wahlfeld, 35 AD3d 527 [2nd Dept 2006]). The exceptions set forth in Espinal (supra) are "(1) where the contracting party, in failing to exercise reasonable care in the performance of

[its] duties, 'launche[s] a force or instrument of harm' . . .; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties . . . and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (citations omitted)." Espinal v Melville Snow Contractors, Inc., supra, at p. 140. "The negligent repair of a traffic light may fall within the first exception for launching a force or instrument of harm. Davilmar v City of New York, 7 AD3d 559 (2nd Dept 2004), citing Ruiz v Peralta, 306 AD2d 150 (1st Dept 2003); Ludwig v Welsbach Elec. Corp., 305 AD2d 124 (1st Dept 2003). That is, Commander "can [only] be held liable . . . upon a showing that its 'affirmative act of negligence,' as opposed to 'mere failure to properly maintain' created 'a dangerous condition,' i.e., that its negligent repairs or maintenance of the traffic light had 'advanced to such a point as to have launched a force or instrument of harm.' " Ludwig v Welsbach Elec. Corp., supra, at p. 124-125, quoting Brown v Welsbach Corp., 301 NY202 205 (1950) and Espinal v Melville Snow Contrs., supra, at p. 140. There is no evidence of that here. The Commander defendants' motion is GRANTED, and the third-party complaint against them is dismissed.

Despite numerous demands, the plaintiffs represented as recently as November 4, 2010 that they have not retained an expert. They also represented that Antaki's vehicle could not be inspected because it had been totaled. On June 14, 2011, plaintiffs filed a Note of Issue and Certificate of Readiness. On July 8, 2011, the plaintiffs served their CPLR 3101(d) disclosure identifying Steven Schneider, P.E., as a proposed expert witness. They stated that he was going to testify that Mateo was traveling at an excessive rate of speed and that his opinion "will be based on his inspection of the plaintiff's vehicle." The plaintiffs maintain that the insurance company disposed of the vehicle without consulting with them.

Where, like here, a party arranges for inspection of key evidence but then fails to take steps to preserve it for the other party's review, it is precluded from submitting evidence based upon said inspection. See, Utica Mut. Ins. Co. v Berkoski Oil Co., 58 AD3d 717 (2nd Dept 2009); Webster v Harley-Davidson Motor Co., 58 AD3d 719 (2nd Dept 2009); Dean v Campagna, 44 AD3d 608 (2nd Dept 2007). In this court's view, dismissal of the complaint is not warranted. See, Bjorke v Rubenstein, 38 AD3d 580, 581 (2nd Dept 2007); Marro v St. Vincent's Hosp., 294 AD2d 341, 342 (2nd Dept 2002); see also, Denoyelles v Gallagher, 40 AD3d 1027 (2nd Dept 2008); Gerber v Rosenfeld, 18 AD3d 812 (2nd Dept 2005).

Nevertheless, the plaintiffs or their attorney realized the importance of a physical inspection of Antaki's vehicle and were quick to have one performed. However, they made no efforts to afford the defendants that opportunity. The plaintiffs are sanctioned to the extent that no evidence based upon a physical inspection of Antaki's vehicle will be permitted at trial.

After its insurance company inspected the van and a no-fault claim had been filed, six or eight months after the accident, Patrick Kilkenny of Kilkenny Construction sold the van because the company did not need it any more. Defendants Kilkenny and Mateo are likewise precluded from offering any evidence based upon a physical inspection of the van at trial. See, Bear, Sterns & Co., Inc. v Enviropower, 21 AD3d 855, 856 (1st Dept 2006), app. dism., 6 NY3d 750 (2005).

The foregoing constitutes the decision and order of this Court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 19, 2012

ENTER:

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