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SHORT FORM ORDER

INDEX No. 09-37104
CAL No. 12-00809MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

***PRESENT:***

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 7-19-12 (#003)
MOTION DATE 7-24-12 (#004)
ADJ. DATE 8-21-12
Mot. Seq. # 003 - MG
# 004 - MD

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SUSAN ARMBRECHT and ROBERT C. ARMBRECHT, JR.,

Plaintiffs,

- against -

TOWN OF BROOKHAVEN, JOSEPH FRAGAPANE, EDNA FRAGAPANE and WILLIAM J. FORE, JR.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant William J. Fore, Jr., dated June 6, 2012, and supporting papers 1 - 17 (including Memorandum of Lawdated ____); (2) Affirmation in Opposition by plaintiff on the counterclaim Robert C. Armbrecht, Jr., dated July 18, 2012, and supporting papers 18 - 19; (3) Affirmation in Opposition by the defendant Town of Brookhaven, dated August 9, 2012, and supporting papers 20 - 21; (4) Reply Affirmation by the defendant William J. Fore, Jr., dated August 8, 2012, and supporting papers 22 - 23;(5) Reply Affirmation by the defendant William J. Fore, Jr., dated August 14, 2012, and supporting papers 24 - 25; (6) Reply Affirmation by the defendant William J. Fore, Jr., dated November 19, 2012, and supporting papers 26 - 27; (7) Notice of Motion/Order to Show Cause by the defendant Town of Brookhaven, dated June 12, 2012, and supporting papers 28 - 48 (including Memorandum of Law dated ____ ; (8) Affirmation in Opposition by the defendant William J. Fore, Jr., dated June 26, 2012 and supporting papers 49 - 50; (9) Affirmation in Opposition by plaintiff on the counterclaim Robert C. Armbrecht, Jr., dated July 18, 2012, and supporting papers 51 - 52; (10) Reply Affirmation by the defendant Town of Brookhaven, dated August 9, 2012, and supporting papers 53 - 54; (11) Reply Affirmation by the defendant Town of Brookhaven, dated August 9, 2012, and supporting papers 54 - 55; (12) Reply Affirmation by the defendant Town of Brookhaven, dated December 3, 2012, and supporting papers 56 - 57; (13) Other ___ (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

***ORDERED*** that the motion (003) by defendant William J. Fore, Jr. and the motion (004) by defendant Town of Brookhaven are consolidated for the purposes of this determination; and it is further

***ORDERED*** that the motion (003) by defendant William J. Fore, Jr. for an order pursuant to CPLR 3212 granting summary judgment in his favor dismissing the complaint and any and all cross claims as against him is granted; and it is further

***ORDERED*** that the motion (004) by defendant Town of Brookhaven for an order pursuant to CPLR 3212 granting summary judgment in its favor dismissing the complaint and any and all cross claims and counterclaims as against it is denied.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Susan Armbrecht, on August 15, 2008 at approximately 5:28 a.m. in a motor vehicle accident that occurred at the intersection of Norwood Avenue and Charm City Drive, Port Jefferson Station, Town of Brookhaven, New York.[1] At the time of the accident, plaintiff Robert C. Armbrecht, Jr. was operating a Chevrolet conversion van in which is wife, plaintiff Susan Armbrecht, was a front seat passenger, his daughter was seated in a captain's seat behind him, and his son, non-party Christopher Armbrecht, was seated in the rear in the third, bench, seat. The Armbrecht vehicle was traveling southbound on Charm City Drive, which was controlled by a stop sign that was allegedly obscured by tree branches and foliage at said intersection. It was dark at the time. The Armbrecht vehicle collided with a vehicle, a Chevrolet Suburban,

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[1]The instant action was joined for trial with the related action, *Christopher Armbrecht v Town of Brookhaven, Joseph Fragapane, Edna Fragapane, Robert Armbrecht and William J. Fore, Jr.*, pending before this Court under Index number 38101-2009 by order of this Court dated July 21, 2010 in this action. A motion for summary judgment by defendants Fragapane in this action was denied as moot by order of this Court dated February 27, 2013 inasmuch as the action had been discontinued as against them pursuant to a Stipulation of Discontinuance dated October 19, 2012. Therefore, plaintiff's second cause of action solely against defendants Fragapane is not addressed herein.

operated by defendant William J. Fore, Jr. (Fore) traveling eastbound on Norwood Avenue, which was not controlled by a stop sign. Defendant Fore testified at his deposition that he was traveling at approximately the speed limit of 30 miles per hour, that his view of the northwest corner of the subject intersection was obstructed by hedges or bushes approximately 15 feet high and a stockade fence, that he did not see the Armbrecht vehicle until it was 10 to 15 feet directly in front of him and that he had no time to react. Plaintiff Robert C. Armbrecht, Jr. testified at his deposition that he was unfamiliar with the road, that he did not see any stop sign before entering the subject intersection, that his son yelled "Dad, stop sign," and that upon entering the intersection he observed the Fore vehicle approaching, approximately 50 feet away. Plaintiff Robert C. Armbrecht, Jr. also testified that he attempted to accelerate by pressing as hard as he could on the gas pedal to avoid the Fore vehicle. The middle of the passenger side of the Armbrecht vehicle was hit head on by the Fore vehicle. Both vehicles came to rest on their driver's sides. Christopher Armbrecht, who was not wearing a seatbelt, was ejected from the van. Defendant Fore stated at his deposition that after the accident, plaintiff Robert C. Armbrecht, Jr. told him that he was sorry and that he did not know that there was a stop sign.

By their complaint, plaintiffs allege a first cause of action against defendant Town for negligence in, among other things, maintaining its roadway and sign in a reasonably safe condition, failing to properly maintain the trees, tree branches, leaves and/or shrubbery surrounding the stop sign, and in allowing the stop sign to become obscured by foliage rendering the stop sign difficult for motorists to observe. In addition, plaintiffs allege that defendant Town created a trap, failed to properly inspect, and that the obstructed condition existed for such a long period of time prior to the subject accident that defendant Town had constructive notice of its existence. Plaintiffs also allege a third cause of action against defendant Fore for negligence in the operation of his vehicle, and a fourth, derivative, cause of action by plaintiff Robert C. Armbrecht, Jr. for loss of services. Defendant Town and defendant Fore assert cross claims in their answers against their co-defendants for indemnification and contribution. Defendant Fore also asserts a counterclaim for contribution against plaintiff Robert C. Armbrecht, Jr. The Court's computerized records indicate that the note of issue in this action was filed on April 25, 2012.

Defendant Fore now seeks summary judgment dismissing the complaint and any and all cross claims as against him on the grounds that he had the right-of-way inasmuch as there was no stop sign or other traffic control device on Norwood Avenue at its intersection with Charm City Drive, that he was entitled to assume that the Armbrecht vehicle would yield, that the accident was caused by the failure of the Armbrecht vehicle, in which plaintiff Susan Armbrecht was a passenger, to stop at the stop sign on Charm City Drive and to yield to the Fore vehicle, and that whether or not said stop sign was obstructed does not affect defendant Fore's freedom from liability. In support of his motion, defendant Fore submits, among other things, the pleadings, plaintiff's bills of particulars, and the deposition transcripts of plaintiffs, Roy Eiron on behalf of defendant Town, Thomas Sternberg on behalf of defendant Town, and defendant Fore.

Plaintiffs Armbrecht, plaintiff on the counterclaim Armbrecht, and defendant Town oppose defendant Fore's motion arguing that the negligence of defendant Fore was a substantial causative or contributing factor of the subject accident inasmuch as defendant Fore entered the intersection at an unsafe and unreasonable rate of speed and failed to keep a reasonably safe lookout and to observe the Armbrecht vehicle already in the intersection in order to avoid the collision. Plaintiffs note that both operators testified that the subject stop sign was completely obstructed.

In reply, defendant Fore provides color photographs of the subject intersection that he identified at his deposition as depicting the hedges and fence that obstructed his view of vehicles entering Norwood Avenue from Charm City Drive. He contends that there is no issue of fact concerning his failure to keep a proper lookout or his rate of speed at impact but that instead plaintiff Robert C. Armbrecht, Jr. is liable pursuant to Vehicle & Traffic Law § 1142 (a) for failure to yield to oncoming vehicles at the intersection, regardless of whether the stop sign was obstructed.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

"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" (***Klein v Crespo***, 50 AD3d 745, 745, 855 NYS2d 633 [2d Dept 2008]). "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" (*id.* at 745-746, 855 NYS2d 633). However, "[t]here can be more than one proximate cause of an accident" (***Cox v Nunez***, 23 AD3d 427, 427, 805 NYS2d 604 [2d Dept 2005]). 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 (*see* ***Exime v Williams***, 45 AD3d 633, 845 NYS2d 450 [2d Dept 2007]).

Here, defendant Fore established his entitlement to judgment as a matter of law by demonstrating, prima facie, that plaintiff Robert C. Armbrecht, Jr. was negligent in failing to yield the right of way (*see* Vehicle and Traffic Law § 1142 [a], 1172; ***Khan v Nelson***, 68 AD3d 1062, 892 NYS2d 167 [2d Dept 2009]; ***Jaramillo v Torres***, 60 AD3d 734, 875 NYS2d 197 [2d Dept 2009]; ***Maliza v Puerto-Rican Transp. Corp.***, 50 AD3d 650, 854 NYS2d 763 [2d Dept 2008]). Whether or not plaintiff Robert C. Armbrecht, Jr. actually stopped at the stop sign before entering the intersection, as he was required to do under Vehicle and Traffic Law § 1172 (a), is not dispositive, as the evidence shows he nevertheless failed to yield to defendant Fore's vehicle, which had the right-of-way (*see* ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259 [2d Dept 2009]; ***Exime v Williams***, 45 AD3d at 633, 845 NYS2d 450). In addition, defendant Fore was required to make a prima facie showing that he was free of comparative fault, and he did so through his own deposition testimony that he was traveling at the posted speed limit at the time of the accident, and that the Armbrecht vehicle was too close to his vehicle to take evasive action immediately before the collision (*see* ***Bonilla v Gutierrez***, 81 AD3d 581, 915 NYS2d 634 [2d Dept 2011]; ***Sirot v Troiano***, 66 AD3d 763, 886 NYS2d 504 [2d Dept 2009]).

In opposition, plaintiffs Armbrecht and defendant Town failed to raise a triable issue of fact as to any alleged comparative negligence of defendant Fore (*see* ***Barbato v Maloney***, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012]; ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259). The speculative assertion that defendant Fore was traveling at an excessive rate of speed and failed to take reasonable evasive action to avoid the accident are unsupported by any competent evidence in the record (*see* ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259; ***Mateiasevici v Daccordo***, 34 AD3d 651, 825 NYS2d 502 [2d Dept 2006]; *see also* ***Rosa v Scheiber***, 89 AD3d 827, 932 NYS2d 349 [2d Dept 2011]; ***Thompson v Schmitt***, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]; ***Nunez v Cortegiano***, 63 AD3d 704, 880 NYS2d 161 [2d Dept 2009]). Notably, defendant Fore was not issued a ticket at the scene of the accident (*see* ***Nunez v Cortegiano***, 63 AD3d 704, 880 NYS2d 161). In any event, a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision (***Yelder v Walters***, 64 AD3d 762, 764, 883 NYS2d 290 [2d Dept 2009]). Under the circumstances of this case, defendant Fore's deposition testimony that he did not look to the left within fifty feet of the intersection is insufficient to raise a triable issue of fact (*see* ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259; ***Mateiasevici v Daccordo***, 34 AD3d 651, 825 NYS2d 502). Therefore, the motion by defendant Fore for summary judgment dismissing the complaint and any and all cross claims as against him is granted.

Defendant Town now requests summary judgment dismissing the complaint and any and all cross claims and counterclaims as against it on the grounds that it did not create nor did it receive prior written notice of the alleged defective condition of the stop sign. In support of its motion, defendant Town submits, among other things, the pleadings, and the affidavits of Suzanne Mauro, who is employed by the Town in the Highway Department as a Principal Clerk, and Linda Sullivan, who is employed by the Town in the Town Clerk's Office as a Senior Clerk Typist, indicating respectively that their search of the Town's records for seven years prior to August 15, 2008 did not reveal any prior written notice or complaint to the Town of an obstructed stop sign at the subject location. Notably, Ms. Mauro avers that defendant Town does own, maintain and exercise jurisdiction over the intersection of Charm City Drive and Norwood Avenue, Port Jefferson Station, New York. Defendant Town also submits the deposition transcripts of John Brett, Jr. on behalf of the Town, defendant Joseph Fragapane and Edna Fragapane.

Plaintiffs Armbrecht, plaintiff on the counterclaim Armbrecht, and defendant Fore oppose the motion of defendant Town contending that the prior written notice laws do not apply under the subject circumstances of a stop sign obscured by tree branches or foliage. Plaintiffs/plaintiff on the counterclaim Armbrecht also contend that the actions of the Town in repairing and/or reinstalling the stop sign several years prior to the subject accident at a time when the subject tree was fully grown constituted an affirmative act of negligence raising an issue of fact as to whether the Town created the alleged defective condition. Plaintiffs' submissions include the deposition transcript of Thomas Sternberg on behalf of the Town who identified a maintenance order filled in by him when he was working at the Town's sign shop on February 19, 2004 indicating that a missing or damaged stop sign was replaced at the subject location on said date.

A municipality has a duty to maintain its roads and highways in a reasonably safe condition, which includes a responsibility to trim the growth of foliage within a roadway's right-of-way to ensure the visibility of stop signs (*see* ***D'Onofrio-Ruden v Town of Hempstead***, 29 AD3d 512, 815 NYS2d 141 [2d Dept 2006]; ***Finn v Town of Southampton***, 289 AD2d 285, 734 NYS2d 215 [2d Dept 2001]). A municipality may be

liable for a dangerous condition of a street or traffic sign if it has actual or constructive notice of the condition (*see* ***DiSanto v Town of Islip***, 212 AD2d 500, 622 NYS2d 313 [2d Dept 1995]).

The deposition testimony of John Brett, Jr. reveals that since 2004 he has been a highway labor crew leader for the Town and that for two years prior he was a road repair worker for the Town, and that at the time of said accident he had been working in District 27, which included the subject area, since March 2008. He informed that a private vendor would form a sidewalk crew that was responsible to "trim high intersections" from spring to autumn and they would be supervised by him or by Bill D'Angelo, a highway general supervisor. According to Mr. Brett, said crew would take a list of locations of the Town's storm sumps or intersections that were overgrown and would cut the grass in those areas. He also explained that if the work order was for tree trimming and involved small trimming that was reachable, his crew would do it, but if it involved trimming 30 feet above ground, a specific tree trimmer would be sent to the location because he had the proper tools. Mr. Brett clarified that tree branch trimming of a Town tree within 15 feet above the ground would be the responsibility of his crew "most of the time" as they would get a work order from the office if someone spotted a problem. He added that if he noticed a problem himself such as a sight obstruction involving tree branches obstructing a stop sign at an intersection, he would just take the trimmers out of his truck and cut it. Mr. Brett testified that generally the tree to be trimmed would have to be inspected to make sure it was not a private tree. He explained that the rule of thumb was that anything within eight feet of the curb was Town property. Mr. Brett read an entry in his log book for July 17, 2008 indicating that the sidewalk crew had been at Norwood Avenue and Charm City Drive, explained that it probably involved grass cutting because they had no other equipment, and stated that the crew had no duty to report an obstructed stop sign if they saw it on that date. He further testified that it was not his duty to regularly inspect the Town's trees that were within the eight-foot perimeter to determine whether they required maintenance and that he did not know of any such procedure of the Town. Nor did he know of any schedule for the regular maintenance of trees within the eight-foot perimeter of the curb line. Mr. Brett did not recollect ever trimming the tree at the corner of Charm Drive and Norwood Avenue where the subject stop sign was located.

Defendant Joseph Fragapane testified at his deposition that his home is located at the subject corner, that it is currently owned by he and his wife Edna Fragapane, that it was built by his parents in 1968, that he has lived continuously in said house since the age of 10, and that he remembers as a child when the Town planted the tree that was next to the subject stop sign. In addition, he testified that the subject stop sign had been at said location since 1968. Mr. Fragapane also testified that he could not recall the last time that the Town had trimmed said tree but that the Town had trimmed and maintained the tree prior to the date of the accident. He was not aware of any other accidents that occurred at said intersection prior to the subject accident.

At her deposition, Edna Fragapane testified that after she heard a loud bang at the time of the accident, she ran outside of the house and saw the two vehicles on their sides. In addition, she testified that she heard banging from the inside of the Suburban vehicle and pulled on its door and its occupant came out saying "Hey, bud, that was a stop sign" to the driver of the custom van who had climbed out of his vehicle and responded "I know. I went right through it." Mrs. Fragapane also testified that she had seen Town employees, which she identified by their vehicles, cutting the branches of the subject tree prior to the date of the accident but could not recall when it was done last prior to the accident.

Here, contrary to the assertions of defendant Town, the prior written notice requirements of Brookhaven Town Code § 84-1 do not apply to the condition of a traffic sign obscured by foliage, as alleged herein (*see* ***DiSanto v Town of Islip***, 212 AD2d 500, 622 NYS2d 313; ***Fitzpatrick v Barone***, 215 AD2d 351, 626 NYS2d 220 [2d Dept 1995]; ***Torres v Galvin***, 189 AD2d 870, 592 NYS2d 788 [2d Dept 1993]). In addition, defendant Town has failed to demonstrate by its submissions that it lacked actual or constructive notice of the subject obscured stop sign (*see* ***Sicignano v Town of Islip***, 41 AD3d 830, 838 NYS2d 655 [2d Dept 2007]). Instead, the evidentiary submissions raise issues of fact, including, how long the subject sign was obscured by foliage, and whether the alleged obstruction or the failure of plaintiff Robert C. Armbrecht, Jr. to look for approaching traffic before entering the subject intersection was a proximate cause of the subject accident (*see* ***Finn v Town of Southampton***, 289 AD2d 285, 734 NYS2d 215). Therefore, the motion by defendant Town for summary judgment dismissing the complaint and any and all cross claims and counterclaims as against it is denied.

Accordingly, the motion by defendant Fore for summary judgment in his favor dismissing the complaint and any and all cross claims as against him is granted, and the motion by defendant Town for summary judgment is denied. The action is severed and continued against defendant Town.

Dated: 4/4/13

Peter H. Mayer

PETER H. MAYER, J.S.C.