

Sandoval v County of Suffolk
2014 NY Slip Op 33276(U)
December 12, 2014
Supreme Court, Suffolk County
Docket Number: 10-944
Judge: Daniel Martin
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INDEX No. 10-944
CAL No. 13-02065MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 9 - SUFFOLK COUNTY

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 3-27-14 (004 & 005)
MOTION DATE 3-25-14 (006)
MOTION DATE 4-18-14 (007)
ADJ. DATE 7-1-14
Mot. Seq. # 004 - MG # 006 - MD
005 - MG # 007 - MD

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- against -

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THE COUNTY OF SUFFOLK, TOWN OF
BROOKHAVEN, ANTONIO LEOPOLDINO
BROTHERS CONCRETE INC., ABOVE ALL
STORE FRONTS, INC. and 474 PORTION
ROAD CORP.,

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Defendants.

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Upon the following papers numbered 1 to 88 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; 14 - 40; 41 - 66; 67 - 76; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 77 - 78; 79 - 80; Replying Affidavits and supporting papers 81 - 82; 83 - 84; 85 - 86; 87 - 88; Other letter dated September 17, 2014; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that for the purpose of this determination these motions for summary judgment (# 004) by defendant Town of Brookhaven, (# 005) by defendant 474 Portion Road Corp., (# 006) by defendants Antonio Leopoldino and Brothers Concrete Inc., and (# 007) by defendant County of Suffolk are consolidated and decided together; and it is further

ORDERED that the motion (# 004) by defendant Town of Brookhaven for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims asserted against it is granted; and it is further

ORDERED that the motion (# 005) by defendant 474 Portion Road Corp. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims asserted against it is granted; and it is further

ORDERED that the motion (# 006) by defendants Antonio Leopoldino and Brothers Concrete Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims asserted against it is denied as moot. By letter dated September 17, 2014, the attorney for said defendants has advised the Court that the action as asserted against them has been settled; and it is further

ORDERED that the motion (# 007) by defendant County of Suffolk for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and cross claims asserted against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff when her vehicle collided with the vehicle owned by defendant Brothers Concrete Inc. and operated by defendant Antonio Leopoldino. The accident occurred as the plaintiff was waiting in the right hand turn lane in the parking lot of a shopping center owned by 474 Portion Road Corp. ("474 Portion") to turn onto the westbound lane of Horseblock Road in the Town of Brookhaven ("Town"), New York, on March 3, 2009 at approximately 7:00 p.m. It is undisputed that there is a triangular shaped island in the area of the accident, which separates the entrance from and the exit onto Horseblock Road, and that the accident site is 1/8 of a mile east of its intersection with Old Medford Avenue. In her complaint, the plaintiff alleges that the defendants negligently designed, constructed, maintained and controlled the exit of the parking area onto the roadway. By the bill of particulars, she also alleges that the defendants were negligent in placing a stop sign and a stop line in the area of the accident, obstructing her view of oncoming traffic.

The Town now moves (# 004) for summary judgment dismissing the complaint and cross claims asserted against it on the ground that it did not own, operate, maintain, manage or control the subject roadway or shopping center. The Town alleges that it never received prior written notice of the alleged defective road as required by Town Law § 65-a, and that the County of Suffolk ("County") was responsible for the subject road at the time of the accident. In support, the Town submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by the plaintiff, Paul Morano, the County's representative, Suzanne Mauro and Craig Tillinghast, the Town's representatives, and Steven Smith, a representative of 474 Portion.

At her May 15, 2012 deposition, the plaintiff testified to the effect that on the day of the accident, she was exiting the parking lot of the subject shopping center. There was a stop sign at the exit, and she came to a complete stop. She advanced to a solid white line to see any oncoming traffic on Horseblock Road. When she advanced a little more, she observed that "there was nothing coming" towards her. Suddenly, when she saw "the headlights right on top of" her, her vehicle was hit by the Leopoldino vehicle which was traveling in the westbound lane, and she lost consciousness. At the time of the accident, her vehicle was stopped, almost entirely within the parking lot. The plaintiff testified that initially when she stopped to view traffic, trees blocked her view. However, the last time she stopped before the accident, she looked to her left, and nothing blocked her view of the oncoming cars.

At his deposition, Paul Morano testified to the effect that he is employed as an assistant civil engineer for the County of Suffolk Public Works Department. He testified that Horseblock Road is owned by the County, and that the County would have made a final inspection and approval of the construction of the entrance and exit of the subject parking lot onto Horseblock Road. He testified that there are trees located at the east side of the entrance and exit, and that he has no independent knowledge as to who owns the property where the trees are located.

At her deposition, Suzanne Mauro testified to the effect that she is employed as a civil service principal clerk for the Town of Brookhaven. She testified that Horseblock Road is owned by the County, and that the Town does not maintain or have jurisdiction of Horseblock Road. She searched records for a complaint regarding a problem with the stop sign or overgrown trees for Horseblock Road, and the records indicate that there was no problem with the trees or the stop sign for three years prior to the subject accident.

At his deposition, Craig Tillinghast testified to the effect that he is employed as a map drafter III of the planning division for the Town. His duties include reviewing commercial site plans which were submitted to the department. Several years before the accident, when the property owner of the subject shopping center applied to the Town for site plan review, the Town notified other involved agencies including the County and requested their comments. He testified that the County has the final jurisdiction on any access and improvements on its roadways, and that the County recommended right-in/right-out access onto Horseblock Road based on the volume of traffic on the road. He testified that he had no knowledge of any studies with regard to Horseblock Road's volume of traffic before the subject site plan was approved. Several years later, the site plan was fully approved.

At his deposition, Steven Smith testified to the effect that he is a shareholder and the president of 474 Portion which owns the subject shopping center. When 474 Portion hired an architect to plan and design the shopping center, the plans called for the entrance and exit to the shopping center to be in the front of the building. However, upon the request of the County or the Town, the entrance and exit was moved east to the current location. He testified that the short grass located adjacent to the east of the entrance into the shopping center off of Horseblock Road is owned by 474 Portion Road, and that he did not know who owns the eastern shoulder of the roadway beyond the property of 474 Portion Road. He testified that he has not received any complaints regarding accidents in the vicinity of the entrance and exit to Horseblock Road.

A municipality will not be held responsible for the negligent design of property it does not own or control (see *Ernest v Red Cr. Cent. School Dist.*, 93 NY2d 664, 695 NYS2d 531 [1999]; *Mudgett v Long Is. Rail Rd.*, 81 AD3d 612, 917 NYS2d 220 [2d Dept 2011]; *Horn v Town of Clarkstown*, 46 AD3d 621, 848 NYS2d 260 [2d Dept 2007]). Moreover, a municipality cannot be held liable for the failure to maintain in a reasonably safe condition property it does not own or control unless it affirmatively undertakes such a duty (see *Ernest v Red Cr. Cent. School Dist.*, *supra*; *Mudgett v Long Is. Rail Rd.*, *supra*; *Carlo v Town of E. Fishkill*, 19 AD3d 442, 798 NYS2d 64 [2d Dept 2005]).

Pursuant to Town Law § 65-a and Town of Brookhaven Code § 84-1, as a precondition to commencing a civil action against the Town to recover damages for personal injuries sustained as a result of a defect on Town property, the Town must be given prior written notice of the defect and must fail to repair it within a reasonable time thereafter (see *Nixdorf v East Islip School Dist.*, 276 AD2d 759, 715 NYS2d 432 [2d Dept 2000]). There are only two exceptions to the prior written notice rule, namely, where the locality created the defect or hazard through an affirmative act of negligence and where a special use confers a special benefit upon the locality (see *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Ganzenmuller v Incorporated Vill. of Port Jefferson*, 18 AD3d 703, 795 NYS2d 744 [2d Dept 2005]).

Here, the Town established its prima facie entitlement to summary judgment by presenting evidence that it did not own, design, maintain or control the subject road or shopping center where the subject accident occurred. The Town also demonstrated that it did not receive the requisite prior written notice of the allegedly defective condition on the exit of the parking area onto the roadway (see *Betzold v Town of Babylon*, 18 AD3d 787, 796 NYS2d 680 [2d Dept 2005]; *Khaghan v Rye Town Park Commn.*, 8 AD3d 447, 778 NYS2d 313 [2d Dept 2004]). Thus, the burden shifted to the plaintiff to submit “competent evidence” to establish that the Town owned or controlled the subject road or shopping center at the time of the accident or that it affirmatively created the defect (see *Betzold v Town of Babylon*, *supra*; *Hinkley v Village of Ballston Spa*, 306 AD2d 612, 759 NYS2d 612 [3d Dept 2003]).

In opposition, the plaintiff contends that the Town was negligent in its placement of the location of the exit and the trees and its failure to trim the trees, both of which contributed to the subject accident. However, the plaintiff failed to submit evidence raising a triable issue of fact as to whether the Town owned or controlled the subject road or shopping center. Moreover, the plaintiff failed to raise an issue of fact as to whether the Town received prior written notice of the dangerous condition which allegedly caused the accident (see *Odell v Town of Riverhead*, 305 AD2d 477, 758 NYS2d 829 [2d Dept 2003]), or as to whether one of the two exceptions to the prior written notice rule applied (see *Gilmore v Village of Hempstead*, 47 AD3d 676, 850 NYS2d 168 [2d Dept 2008]; *Healy v Village of Patchogue*, 28 AD3d 519, 813 NYS2d 499 [2d Dept 2006]).

Accordingly, the Town’s motion is granted, and the plaintiff’s complaint and all cross claims asserted against it are severed as well as dismissed.

474 Portion moves (# 005) for summary judgment dismissing the complaint and all cross claims against it on the ground that the condition of the subject parking lot was not the proximate cause of the plaintiff’s injury. 474 Portion also argues that upon the request of the County or the Town, the entrance and exit were moved to the current location. In support, 474 Portion submits, *inter alia*, the pleadings, the bill

of particulars, the transcripts of the parties' deposition testimony, and photographs of the area where the subject accident occurred.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden shifts to the opposing party to demonstrate that there are material issues of fact, 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]). The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Here, 474 Portion has established prima facie that there was no negligence on its part as the condition and design of the shopping center was not the proximate cause of the plaintiff's injuries. Rather, either the negligence of the plaintiff or defendant Leopoldino in failing to maintain a proper lookout or the negligence of the County in moving the entrance and exit of the parking lot to the current location was the sole proximate cause of the accident. "Evidence of negligence is not enough by itself to establish liability. It must be proved that the negligence was the cause of the event which produced the harm" (*Sheehan v City of New York*, 40 NY2d 496, 501, 387 NYS2d 92 [1976]). Moreover, there will ordinarily be no duty imposed on a defendant to prevent a third-party from causing harm to another unless the intervening act which caused the plaintiff's injuries was a normal or foreseeable consequence of the situation created by the defendant's negligence (*see Comolli v 81 & 13 Cortland Assocs. L.P.*, 285 AD2d 863, 727 NYS2d 795 [3d Dept 2001]; *Rivera v Goldstein*, 152 AD2d 556, 557, 543 NYS2d 159 [2d Dept 1989]). Under the circumstances, the shopping center area "merely furnished the condition or occasion for the occurrence of the event rather than one of its causes" (*Margolin v Friedman*, 43 NY2d 982, 983, 404 NYS2d 553 [1978]; *see Castillo v Amjack Leasing Corp.*, 84 AD3d 1298, 924 NYS2d 156 [2d Dept 2011]; *Vayser v Waldbaum, Inc.*, 225 AD2d 761, 640 NYS2d 177 [2d Dept 1996]), and any alleged negligence in the shopping center's design or management did not proximately cause the accident (*see Castillo v Amjack Leasing Corp.*, *supra*).

In opposition, the plaintiff contends that there are factual issues of fact as to whether the architectural plans drawn up by 474 Portion were defective, and whether the location of the subject exit contributed to the accident. However, the plaintiff failed to submit evidence raising a triable issue of fact as to whether a defect in the shopping center exit caused the accident.

Accordingly, 474 Portion's motion is granted, and the plaintiff's complaint and all cross claims asserted against it are severed as well as dismissed.

The County moves (# 007) for summary judgment dismissing the complaint and cross claims asserted against it on the ground that it had no notice that the area of the accident was unsafe, and that the cause of the accident was the plaintiff's failure to yield to traffic on Horseblock Road. The County contends that even if it were found to be negligent, the negligence was not a proximate cause of the

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accident. In support, the County submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony given by Paul Morano.

Here, the County failed to establish its entitlement to judgment as a matter of law. The County's representative testified that the County would have made a final inspection and approval of the construction of the entrance and exit of the subject parking lot. The evidence demonstrated that upon the request of the County, the entrance and exit was moved to the current location, and that the County owns Horseblock Road. There is an issue of fact concerning the County's liability for negligent design of the roadway. Accordingly, the County's motion for summary judgment dismissing the complaint and all cross claims asserted against it is denied.

Dated: December 12, 2014


A.J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION