Chang v City of New York
2014 NY Slip Op 33639(U)
September 5, 2014
Supreme Court, New York County
Docket Number: 103847/09
Judge: Margaret A. Chan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** 52
Justice

Index Number : 103847/2009
CHANG, KEVIN
vs.
ROBERT GOMEZ
SEQUENCE NUMBER : 008
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 6 **, were read on this motion to/for** reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** 1, 2, 3

Answering Affidavits — Exhibits _____ **No(s).** 4, 5

Replying Affidavits _____ **No(s).** 6

Upon the foregoing papers, it is ordered that this motion is

MOTION DETERMINED PURSUANT TO ANNEXED DECISION AND ORDER

FILED
SEP 09 2014
NEW YORK
COUNTY CLERK'S OFFICE

RECEIVED
SEP 09 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____
FOR THE FOLLOWING REASON(S): _____

Dated: 9/5/14

J.S.C.
HON. MARGARET A. CHAN

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PRESENT: Hon. Margaret A. Chan PART 52
Justice

KEVIN CHANG,

Plaintiff,

- v -

THE CITY OF NEW YORK, ROBERT GOMEZ, FUND FOR PARK AVENUE (NEW YORK), INC., AND CITY-SCAPE LANDSCAPING,

Defendants.

INDEX NO. 103847/09

DECISION AND ORDER

Plaintiff brought suit against various defendants including The City of New York (the City) for injuries he sustained from a motor vehicle accident on Park Avenue and East 65th Street in Manhattan occurring in the early morning hours of June 29, 2008. Plaintiff, who was the driver of his Honda Civic, claimed that the City's failure to install a "Stop Here for Red Signal" sign at the accident site was the proximate cause of the accident. In motion sequence #006, the City moves for summary judgment dismissing the complaint against it on three (3) grounds: (1) the City's action or inaction regarding the intersection of the accident site was not the proximate cause of the accident; (2) the City did not have actual or constructive notice of the alleged defective condition; and (3) the City did not have prior written notice of the alleged obstruction caused by the bushes at said interaction. Plaintiff opposed the City's motion. This court's decision and order granted the City's motion for summary judgment. Plaintiff now moves for reargument.

FACTS

The facts, viewed in light most favorable to plaintiff in this reargument motion for summary judgment, are as follows: On a clear night, plaintiff, then a 22-year old college student and a resident of New Jersey, went to a party with Julie Tsang, his girlfriend of about six weeks, at a club in uptown Manhattan. They left the club at about 3:00 or 4:00 a.m. on June 29, 2008 and plaintiff was driving his girlfriend to her home in Chinatown. Plaintiff drove southbound on Park Avenue with the traffic light in favor of the north and southbound traffic. When he approached East 65th Street, he made a left turn intending to go on East 65th Street (*see* Chang Aff, City's Exh 11, p77). Park Avenue has a median or mall with plants and flowers that separates the eight-lane roadway – four lanes northbound and four lanes southbound. In making the turn, plaintiff stopped by the median of Park Avenue between the northbound and southbound traffic facing east toward East 65th Street. The traffic light facing him at the intersection was red, but he was unaware of it. Plaintiff stopped to yield to the northbound traffic. After he stopped, he looked to the northbound lanes for oncoming traffic, but the bushes in the median obstructed his view. He proceeded to turn looking towards his

direction. His car was immediately struck by co-defendant Robert Gomez's pickup truck which was traveling in a northbound lane. Plaintiff lost consciousness and recollection of the accident after the impact. His passenger, Julie Tsang, lost her life.

DISCUSSION

Reargument

Plaintiff claims that in granting the City's motion for summary judgment, this court was "[mistaken in believing] that plaintiff disregarded a steady red light . . . in violation of Vehicle and Traffic Law when the City conceded it its reply that this was not true"; that this "court's misapprehension of the law and facts and its misunderstanding of the law only serves to yet further highlight how confusing and dangerous an intersection this was" and "imputed that faulty knowledge to plaintiff"; and this court erred in not following precedent set forth in *Parada v City of New York*, 205 AD2d 427 (1st Dept 1994), and instead relied on inapt case law (Pltf's Aff, ¶¶ 3-5).

Plaintiff's motion for reargument is granted. Plaintiff correctly argues that the court mistakenly assigned fault to plaintiff for failing to stop for a red light against the East 65th Street traffic. Citing VTL § 120(b), plaintiff argues that he did not disregard the red light because that red light did not govern him since he was making a left turn.

> Where a highway includes two roadways thirty feet or more apart, then every crossing of each roadway of such divided highway by an intersecting highway shall be regarded as a separate intersection. In the event such intersecting highway also includes two roadways thirty feet or more apart, then every crossing of two roadways of such highways shall be regarded as a separate intersection.
>
> (VTL § 120(b)).

The length of the median was not addressed in the prior decision. The gist of plaintiff's argument is that based on VTL § 120(b), the red light facing him did not control him as the median was less than thirty feet, and thus he was not in violation of VTL §§ 1110 and 1111, which require drivers to obey traffic control devices and stop at red lights. Plaintiff points to the City's Reply Brief (Exh F, ¶ 12) in which the City agrees that the red light did not apply to plaintiff as the median was less than thirty feet wide. Accordingly, as the median is less than thirty feet, plaintiff did not violate VTL §§ 1110 and 1111 as the red light did not pertain to him.

Given the fact that a red light does not pertain to left-turning vehicles from an intersection less than thirty feet, there is no reason for a sign commanding left-turning traffic to stop. Further, the installation of traffic signs at intersections on Park Avenue was considered by the Department of Transportation's Borough Engineering Office, which determined not to install a sign at that particular intersection (Exh. G) so to enable left-turning vehicles to complete their turns from medians measuring thirty feet or fewer. As the absence of a "Stop Here on Red" sign was a decision made by an governmental agency charged with making such studies, the doctrine of governmental

immunity applies (*see Affleck v Buckley*, 96 NY2d 553 [2001]; *Weiss v Fote*, 7 NY2d 579, 588; *Jackson v New York City Transit,* 30 AD3d 289 [1st Dept 2006]). In any event, "any public roadway, no matter how careful its design and construction, can be made safer" and a municipality is not an insurer of the safety of its roadways (*Tomassi v Town of Union*, 46 NY2d 91, 97 [1978]). Therefore, plaintiff's argument that the absence of a "Stop Here for Red" sign caused his accident is unavailing when the appropriate governmental agency determined to permit left-turning vehicles to proceed without regard to the traffic light at this particular intersection (*see* VTL § 1143).

As to plaintiff's contention that the court's misapprehension of the law and facts as underscoring the perils of this intersection, it is not the court's intention to accentuate plaintiff's claim. Rather, the undisputed facts, as provided by plaintiff, underscores the driver's recklessness in driving across four lanes of traffic that had the right of way, without being able to see the on-coming traffic. Plaintiff testified that he stopped to yield to the northbound traffic three to five feet before the intersection and inched up three or four feet without stopping and continued to enter the roadway without being able to see Park Avenue north (Exh. B, sub Exh. 10, pp. 103-04). In doing so, plaintiff breached his duty to drive with reasonable care, to see what there is to be seen (PJI 2:77.1).

The court is mindful that the City might be negligent in not trimming the bushes, which obstructed plaintiff's view. Where the evidence regarding defendant's alleged negligence is undisputed, as here, the issue of proximate cause is under the court's purview (*see Dattilo v Best Transp. Inc.*, 79 AD3d 432 [1st Dept 2010]). Thus, even if plaintiff had the right to continue his left turn, plaintiff, as a driver, had a duty to be vigilant and see what there is to see. (Plaintiff's argument that the bushes obstructed his view does not excuse his duty to see what there is to be seen before entering the roadway. His testimony confirms this: " I was on Park Avenue. I stopped to yield to see if there was any oncoming traffic to my right, but there was [sic] bushes in the way. So it obstructed my view. So I continued, so it made me not see any traffic. So I just continued to go" (Exh. B, sub Exh. 10, p. 95, lines 9-13; *see also, id* at p. 51, lines 20-25, p.52, lines 1-3). Plaintiff's decision to go ahead even though his view of the northbound traffic was obstructed by bushes is the proximate cause of the accident (*see Chunhye Kang-Kim v City of New York*, 29 AD3d 57, 62 [1st Dept 2006]).

Plaintiff contends that this court failed to follow *Parada v City of New York*, 205 AD2d 427. In *Parada*, the facts are very similar to the facts in the instant case. The Supreme Court had granted the City defendant's cross motion for summary judgment finding that no issue of fact existed regarding the driver's unobstructed field of vision at the median as she had "'inched up to make sure it was clear'" and therefore, the foliage did not interfere with her view (*id* at 428). The Appellate Division, First Department disagreed finding that a triable issue of fact existed since both the plaintiff and another passenger stated that the foliage obstructed their vision raising an issue as to the City's obligation. The First Department added "[i]nadequate sight distance caused by obstructing trees will result in liability on a governmental authority for negligent roadway maintenance (*id.* at 428-29 *citing McKenna v State of New York*, 91 AD2d 1066 [1983]; *cf Nurek v Town of Vestal*, 115 AD2d 116 [3d Dept 1985]). The First Department also found contradicting testimony that the driver had not inched up, "but had proceeded in a continuous unbroken turn to the point of impact" (*id*). While the *Parada* court made a finding that the City may be negligent because of the overgrowth obstructing a driver's view, it did not make a finding that it was the proximate cause of the accident.

In sum, plaintiff would have this court find that the overgrowth of bushes and the lack of a sign to be the proximate cause of plaintiff's accident. While the City has a duty to keep the roadways in a safe condition (*see Weiss v Fote*, 7 NY2d 579 [1960]), and may be negligent for failing to do so, it may nonetheless escape liability if it is shown that it is not the proximate cause of the accident (*see Tomassi v Town of Union*, 46 NY2d 91 [duty imposed on the City is met where a roadway was reasonably safe for those who obeyed the rules of the road]). The absence of a traffic sign or the overgrowth of the bushes cannot be the proximate cause of a motor vehicle accident when the "physical conditions and the operator's own awareness of them" would cause the same course of action (*Applebee v State,* 308 NY 502 [1955]). Quite simply, plaintiff made the left turn, and continued through the intersection without being able to see whether there was oncoming traffic, with full awareness of the risk. The fact that he proceeded despite his inability to see past the foliage is his folly.

Accordingly, plaintiff's motion for reargument is granted, and upon reargument, the City defendant's motion for summary judgment is granted.

This constitutes the decision and order of the court.

Dated: September 5, 2014

Margaret A. Chan , *J.S.C.*