

Farrago v County of Suffolk

2015 NY Slip Op 30762(U)

May 7, 2015

Supreme Court, Suffolk County

Docket Number: 08-37094

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-19-14
ADJ. DATE: 1-22-15
Mot. Seq. # 008 - MG

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Plaintiff,	
	DENNIS M. BROWN, ESQ. County Attorney
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	SC Highway Patrol Motorcycle Division
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- against -	
	RUSSO APOZNANSKI & TAMBASCO
	Attorney for Defendant Gillman
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	Westbury, New York 11590
COUNTY OF SUFFOLK, SUFFOLK COUNTY POLICE DEPARTMENT, SUFFOLK COUNTY HIGHWAY PATROL MOTORCYCLE DIVISION, and ROBERT GILLMAN,	
Defendants.	
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Upon the following papers numbered 1 to 22 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-17; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 19-20, 21-22; Replying Affidavits and supporting papers ; Other memorandum of law 18; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants County of Suffolk, Suffolk County Police Department, and Suffolk County Highway Patrol Motorcycle Division pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against them is granted.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at approximately 1:20 p.m. on July 15, 2007 at the intersection of Pinelawn Road and Old East Neck Road in the Town of Huntington. The plaintiff was riding his motorcycle in a charity event called the WBAB Sticky Fingers Run (Run), involving a procession of approximately 1,000 motorcycles. The accident allegedly happened when the vehicle driven by the defendant Robert Gillman (Gillman) proceeded across the lane of travel occupied by the plaintiff's motorcycle. The plaintiff alleges, *inter alia*, that the defendants County of Suffolk, Suffolk County Police Department, and Suffolk County Highway Patrol Motorcycle Division (the County) were negligent in allowing the plaintiff and Gillman to proceed through the subject intersection without police supervision.

It is undisputed that the Suffolk County Police Department's Highway Patrol Motorcycle Division and its Second Precinct provided an escort for the motorcycles participating in this procession from its starting point until the group reached the Long Island Expressway. The County now moves for summary judgment dismissing the complaint and all cross claims against it on the grounds that it owed no duty to the plaintiff to shut down intersections along the route of the motorcycle procession. In support of the motion, the County submits, *inter alia*, the pleadings, the depositions of the parties, and an unauthenticated copy of the relevant police accident report, Form MV-104A. The police accident report record relied on by the County is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378 [1984]; *Cheul Soo Kang v Violante*, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]).

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]).

At his deposition, the plaintiff testified that he had participated in similar events such as this one, that the police usually keep ahead of the procession to close off intersections as it proceeds, and that there were 700 to 1,000 motorcycles in this procession. This event was scheduled to start at the Dave and Buster's restaurant in Farmingdale, New York and to end at the Great South Bay. When the Run started, the procession made a right turn out of the restaurant parking lot, and then intended to make a left turn at the intersection with Pinelawn Road, where the police had the intersection blocked to allow the procession to pass. Before he could reach Pinelawn Road, one of the motorcycles in front of him had a small mishap that delayed those behind it. His was the first motorcycle to get around the resulting stoppage of traffic. When he made the left turn onto Pinelawn Road, he could not see the rear end of the procession, but he proceeded at a slow rate of speed while waiting for a friend to catch up to him. Once the friend was behind him, he increased his speed hoping to catch up to the procession. He first saw the traffic light at the intersection of Pinelawn Road and Old East Neck Road when he was 200 feet from the intersection, but he did not know the color of the light, neither did he feel the need to continue to observe the light as he was participating in a procession. He stated that he did not see any police at the intersection, that no one ever told him that he could proceed through a red light, and that he did not remember if the intersection immediately prior to the subject intersection had been closed off by the police. The plaintiff indicated that he first saw the Gillman vehicle five to ten seconds before the impact, and that the left rear of his motorcycle came into contact with the driver's side rear quarter panel of the other vehicle.

At his deposition, Gillman testified that he was traveling west on Old East Neck Road approaching the intersection with Pinelawn Road prior to this accident. He observed that the traffic light was red, and he stopped for the light. Being the first in line, he intended to make a left turn and to head south on Pinelawn Road, once the traffic light turned to green. He waited, while the traffic light went through a number of red/green cycles,

for a “caravan” of motorcycles to pass through the intersection. After waiting for about 15 minutes, the caravan passed, but the traffic light was still red. He waited another one to two minutes for the traffic light to turn to green. Gillman indicated that no stragglers passed the subject intersection during those one to two minutes. After the traffic light turned to green, he looked left and then right, he observed that traffic had stopped in both the north and south lanes of travel, and he proceeded into the intersection. He had crossed one and one-half lanes of the northbound lanes of Pinelawn Road when he felt an impact to his vehicle. Gillman further testified that the vehicles stopped in the northbound lanes of Pinelawn Road just before he proceeded into the intersection were not motorcycles.

Jason Steinberg, the director of marketing and promotion for Cox Radio, Inc.,¹ the owner and operator of radio station WBAB, which sponsored the charity event, was deposed on March 17, 2010. He testified that, prior to the Run, he wrote to Sergeant Dini of the Suffolk County Highway Patrol advising him of the details of the planned event. He was present at the start of the Run on July 15, 2007, and he recalled being told that the route had been changed for safety reasons, as well as the convenience of the public. Mr. Steinberg further testified that the police department did not give out any instructions regarding traffic lights, but that participants were told not to “break” the line of the procession. He indicated that it was his understanding that there was a break in the procession because of an earlier situation that occurred before the plaintiff’s accident.

Sergeant Michael Trentini, of the Suffolk County Highway Patrol, was deposed on March 17, 2010. He testified that he was in charge of police efforts to provide services to the Run, that he spoke with the sponsors of the Run in preparation for its start, and that he suggested a change in route to Pinelawn Road, which was accepted by the sponsors. He stated that normal procedure is for police officers to close off intersections to allow processions such as these to travel as a group, and that the officers “leap frog” to the next intersection as the procession passes a given intersection. That is, they leave an intersection that has been passed by the procession and race ahead of the procession to close off a more distant intersection. Sergeant Trentini further testified that police officers do not instruct participants to ignore traffic signals, that no police officer gave Run participants any instructions as to how to proceed if there was a break in the procession, and that, if there is a break in a procession, participants should obey all traffic lights.

Police Officer James Messina, of the Second Precinct, was deposed on June 11, 2010. He testified that, on the day of the Run, he was advised by his supervisor, Sergeant DeSantis, that the procession was coming through the precinct, and that he “should take” the intersection of Pinelawn Road and Half Hollow Road, approximately one-half mile or less north of the intersection at Old East Neck Road. He stated that he understood his instructions to include “closing down” his intersection, “if necessary.” He indicated that, at some point, someone indicated that he should respond to the subject accident, that on his way south to the accident, he saw less than 50 motorcycles heading north, and that while at the accident scene he saw Police Officer Boyle. Officer Messina further testified that he was not aware of any police department instructions to participants in the Run to disregard traffic lights.

Police Officer John Boyle, of the Highway Patrol, was deposed on August 30, 2010. He testified that, on the day of the Run, he was advised by his supervisor that he was part of the team whose job was to leap frog

¹ Cox Radio, Inc. was granted summary judgment by the undersigned on August 15, 2011.

and get the procession up to the Long Island Expressway. He stated that while he was at a “major intersection” he noticed an “extensive break” in the procession, and that he and two other officers there discussed whether it was a gap or the end of the Run. Officer Boyle further testified that he decided to leave the two other officers at the major intersection and head to the next intersection approximately one-quarter mile or more north, and that the subject accident had already occurred at said intersection when he arrived. He stated that he did not know if any police officers were at the intersection where the accident occurred, or had been assigned there, before he arrived.

Sergeant Steven DeSantis, of the Second Precinct, was deposed on September 28, 2010. He testified that he was the supervisor of patrol officers on the day of the Run, that he was in charge of assigning officers from the Second Precinct to specific intersections, and that he did not recall where any police officers were stationed that day. He stated that his assignment was to monitor traffic at larger intersections, and that he did not remember which intersections he worked or whether any police officer was placed at the intersection of Pinelawn Road and Old East Neck Road.

The County contends that it cannot be found liable herein because the plaintiff has failed to plead or prove that he had a “special relationship” to the County, that it is entitled to governmental immunity as the police officers actions were discretionary, and that the operators of the two vehicles involved were the sole proximate cause of this accident. The County is not entitled to summary judgment based on its first and third contention as there are issues of fact which would preclude the granting of the motion. However, the County has established its prima facie entitlement to summary judgment regarding the applicability of governmental immunity herein.

In negligence actions involving a governmental function, the Court of Appeals has made clear that there are two separate but well established grounds for a municipality to secure dismissal of a tort claim brought against it by a private citizen injured by a third-party (*see Valdez v City of New York*, 18 NY3d 69, 936 NYS2d 587 [2011]). The first ground is the lack of a special duty owed to the injured party, beyond that owed to the public at large (*see Valdez v City of New York*, 18 NY3d at 75, 936 NYS2d at 592). The second ground is the defense of governmental function immunity, which “shields public entities from liability for discretionary actions taken during the performance of governmental functions,” even if the plaintiff is otherwise able to establish all the elements of a tort claim, including the existence of a duty owed to the injured party (*see Valdez v City of New York*, 18 NY3d at 76, 936 NYS2d 593). The enforcement of traffic regulations has been held to be a function which is “uniquely” governmental (*Shuttlesworth v Birmingham*, 394 U.S. 147, 152, 89 S.Ct. 935, 22 L.Ed.2d 162 [1969]). In addition, the “regulation of the use of streets for parades and processions is a traditional exercise of control by local government” (*Cox v State of New Hampshire*, 312 U.S. 569, 574, 61 S.Ct. 762, 85 L.Ed. 1049 [1941]). Thus, the rule that emerges is that “[g]overnment action, if discretionary, may not be a basis for liability, while ministerial actions may be, but only if they violate a special duty owed to the plaintiff, apart from any duty to the public in general” (*Valdez v City of New York*, 18 NY3d at 76-77, 936 NYS2d at 593, quoting *McLean v City of New York*, 12 NY3d 194, 203, 878 NYS2d 238 [2009]; *see Bawa v City of New York*, 94 AD3d 926, 942 NYS2d 191 [2d Dept 2012]).

Discretionary acts involve the exercise of reasoned judgment which would typically produce different acceptable results, while ministerial acts envision direct adherence to a governing rule or standard with a compulsory result (*Lauer v City of New York*, 95 NY2d 95, 100; 711 NYS2d 112 [2000]; *see also Tango v*

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Tulevech, 61 NY2d 34, 471 NYS2d 73 [1983]). Here, the adduced evidence reveals that the County was involved in the discretionary acts of controlling traffic along the route of the Run.

Having established its entitlement to summary judgment dismissing the complaint and all cross claims against it, it is incumbent upon the nonmoving parties to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto, supra; Rebecchi v Whitmore, supra; O'Neill v Fishkill, supra*). In opposition to the County's motion, the plaintiff submits the affirmation of his attorney, who contends that the County owed the plaintiff a special duty under the circumstances, and that the "failure to provide an officer at the subject location was the cause of the subject accident ..." The plaintiff has failed to produce any evidence that the actions of the County on the day of his accident were ministerial in nature, or were governed by a rule, standard or plan that was compulsory in nature. In opposition to the motion, Gillman submits the affirmation of his attorney, who contends that there exist questions of fact whether the County owed the plaintiff a special duty. Similarly, Gillman has failed to produce any evidence that the actions of the County on the day of his accident were ministerial in nature, or were governed by a rule, standard or plan that was compulsory in nature. The opposition has failed to raise an issue of fact regarding the discretionary nature of the County's actions. Accordingly, the County's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

The Court directs that the causes of action as to which summary judgment was granted are hereby severed and that the remaining causes of action shall continue (*see* CPLR 3212 [e] [1]).

Dated: May 7, 2015


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION