

Belden v County of Wyoming
2015 NY Slip Op 31091(U)
June 26, 2015
Supreme Court, Wyoming County
Docket Number: 34977
Judge: Michael M. Mohun
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At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 26th day of June, 2015.

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

KATHLEEN S. BELDEN a/k/a
KATHLEEN S. PAVONE,

Plaintiff,

v.

DECISION AND ORDER
Index No. 34977

COUNTY OF WYOMING,

Defendants.

The defendant, having moved for an order pursuant to CPLR 3212 directing that judgment be entered herein in its favor dismissing the plaintiff's complaint on the ground that the plaintiff's causes of action are without merit, and said motion having duly come on to be heard.

NOW, on reading the complaint and answer herein, and on reading and filing the notice of motion dated September 30, 2014; the supporting affidavit of the Todd Gadd, Wyoming County Highway Superintendent, sworn to on September 25, 2014, together with the annexed exhibit; the supporting affidavit of James M. Wujcik, Esq., attorney

for the defendant, sworn to on September 30, 2014, together with the annexed exhibits and the accompanying memorandum of law; the responding affidavit of Richard P. Weisbeck, Jr., Esq., attorney for the plaintiff, sworn to on December 18, 2014, together with the annexed exhibits (including "original deposition Exhibit 8"); the responding affidavit of Francis Hattala, plaintiff's step-father, sworn to on October 6, 2014, together with the annexed exhibits; the responding affidavit of Gary Wright, roadway construction expert, sworn to on December 18, 2014, together with the annexed exhibits; the reply affidavit of James Wujcik, Esq., sworn to on February 6, 2015; the reply affidavit of Todd Gadd, sworn to on February 4, 2015; the reply affidavit of James E. Bryden, Professional Engineer, sworn to on February 3, 2015; and after hearing James M. Wujcik, Esq., in support of the motion and Richard P. Weisbeck, Jr., Esq., in opposition thereto, due deliberation having been had, the following decision is rendered.

In the fall of 2002, the plaintiff was a graduate student studying nursing at the State University of New York at Brockport. She would commute to classes from her home at 2065 Saltvale Road, in Warsaw, New York, where she lived with her mother and step father. On the late afternoon of the 28th of October, 2002, she was heading north on Saltvale Road on her way to an evening class, when her car left the road and crashed into a ditch. The complaint seeks damages for the injuries that she suffered,

alleging that negligence on the part of the County was a proximate cause of the accident.

The accident took place within a 4-mile section of Saltvale Road that the County had reconstructed during the summer of 2002. Deteriorated areas had been rebuilt, and a layer of 3½ to 4½ inches of new asphalt was applied to the entire section. The paved width of the road was widened from 20 feet to 28 feet by the addition of 4 feet of pavement to the shoulders on each side of the roadway. Crushed stone was placed along the edges of the pavement. At the time of the accident, no center lines or fog lines had been painted on the new pavement. Also, there were no signs or other markings identifying the driving lanes or warning drivers of any hazards posed by the absence of lines or by the height differential between the paved and unpaved areas of the shoulders. According to the complaint, "by failing to have adequate warning signs and placement of road markings indicating the center line and the shoulder or berm on the side of the road," the defendant created a "dangerous condition" which "resulted in and caused the Plaintiff's vehicle to be drawn into the ditch contiguous to the narrow shoulder of the road."

In seeking summary judgment, the defendant advances two points. Firstly, the defendant contends that the plaintiff's familiarity with Saltvale Road precludes, as a matter of law, a finding that the absence of

road markings caused the accident. In view of the proof that the plaintiff was very well acquainted with the road, the defendant argues, the Court may exclude the defendant's negligence as a cause and conclude that the plaintiff's actions were the sole proximate causes of the accident. In support of this point, the defendant's counsel quotes the following passage from Gilberto v. Town of Plattekill (279 A.D.2d 863, 864 [3rd Dept., 2001], leave to appeal denied by 96 N.Y.2d 710 [2001]):

Fundamentally, the absence of a warning sign or other traffic control device or highway marking may be excluded as a cause of an accident "if the driver's awareness of the physical conditions prescribed the same course of action as the warning sign would have, [or] if the driver, by reason of his recollection of prior trips over the same road, 'actually had the danger in mind' as he approached it on the highway."

Secondly, the defendant argues that the County Highway Department exercised due care in the preparation and the design of the reconstruction of Saltvale Road, and that the placement of lines, signs and other markings on Saltvale Road was a matter of discretion. As defendant's counsel points out, it well settled that municipalities generally enjoy limited immunity from

liability for injuries attributable to discretionary highway planning decisions. Liability attributable to planning decisions can be found only where it is proven "that the plan either was evolved without adequate study or lacked reasonable basis" (Weiss v. Fote, 7 N.Y.2d 579, 589 [1960]). Contending that its submissions conclusively establish that the Highway Department's planning decisions were rational, reasonable and in accordance with applicable standards and guidelines in this instance, the defendant argues that it cannot be found liable for the plaintiff's injuries.

Addressing the defendant's second point first, the Court observes that the complaint does not actually assert, as a basis for liability, that the defendant's plan for Saltvale Road was irrational or unreasonable. Rather, the plaintiff's fundamental claim is that, in elevating the pavement some inches and then allowing motorists to use the road without lines or other markings afterwards, the defendant negligently created a hazardous condition for which it should be held liable. Essentially, the plaintiff contends that the lack of fog lines or lane markers led her to drive her car onto the paved shoulder area, placing her in closer proximity to the hazard of the ditch; then, once her right wheels went off the pavement, the height differential between the paved and the unpaved portion of the shoulder prevented her from being able to return her vehicle to the roadway; thereafter, the steepness of the slope going into the ditch drew her vehicle

entirely off the road; and, finally, the steepness of the slope of the opposite wall of the ditch contributed to the severity of the ensuing crash.

Thus, the plaintiff's theory of liability is not that the defendant adopted a defective plan for Saltvale Road, but that the defendant, in reconstructing the road, negligently created an unsafe condition. While the defendant is correct in stating that a municipality shall be afforded limited immunity for highway planning decisions, this immunity does not relieve the municipality of its duty to maintain its roadways in a reasonably safe condition. Furthermore, it has been held that this duty "extends to conditions adjacent to the highway, and if the State or governmental subdivision undertakes to provide a paved strip or shoulder alongside the roadway, it must maintain that shoulder in a reasonably safe condition for foreseeable uses, including those uses resulting from a driver's negligence or an emergency" (Stiuso v. City of New York, 87 N.Y.2d 889, 891 [1995]; Carrolo v. Town of Colden, 27 A.D.3d 1077, 1078 [4th Dept., 2006]). It is on the defendant's alleged breach of this duty that the plaintiff bases her lawsuit.

Moreover, to the extent that the evidence shows that the defendant actually did develop a plan for the reconstruction of Saltvale Road, that plan did not call for the creation of the elevation differential in the shoulder of the road which the plaintiff claims was a proximate cause of her

accident. On the contrary, the deposition testimony of John Beachel, submitted by the defendant, indicates that the reconstruction plan called for the elimination of such a height difference through the placing and grading of crushed stone along the edge of the pavement. Thus, the creation of the alleged height difference clearly was not "the product of a deliberative decision-making process of the type afforded immunity from judicial interference" (Appelbaum v. County of Sullivan, 222 A.D.2d 987, 989 [3rd Dept., 1995]). Similarly, although defense counsel argues that the defendant had full discretion to make planning decisions with respect to where to place road markings and warning signs, the defendant has offered nothing to establish that the absence of any signs and markings along the side of Saltvale Road on the day of the accident was the result of a planning decision (see, Bailey v Honda Motor Co., 144 A.D.2d 119 [3rd Dept., 1988], leave to appeal denied by 72 N.Y.2d 705 [1989]). Rather, it appears that the plan, to the extent that there was one, recognized the need for the road to be marked, and the record indicates that white lines were ultimately painted on the road showing where the intended driving lanes ended and the new, paved shoulders began. The defendant simply neglected to install any temporary delineators or warning signs to guide motorists using the road during the period between the completion of the paving work and the final striping of the road. The submissions of the defendant do not show that the

installation of such temporary signs or markings was rejected as impossible or cost prohibitive. Therefore, to the extent that the plaintiff claims that the defendant is liable for failing to place warning signs and/or lane delineators along Saltvale in the location where the accident occurred, the defendant once again cannot avoid liability by invoking the doctrine of immunity for municipal highway planning decisions.

Addressing the defendant's first point, clearly the plaintiff was, indeed, well acquainted with Saltvale Road. The defendant's submissions do not establish, however, that her knowledge included knowledge of the newly-created height differential in the shoulder of the road produced by the defendant's re-paving and reconstruction work. Nor has the defendant shown that warning signs and/or shoulder markings would have been superfluous in this case because of the plaintiff's familiarity with the road. As such, the Court finds that the defendant has failed to show either that the plaintiff's negligence was the sole cause of the accident, or that negligence on the part of the defendant may be excluded as a proximate cause.

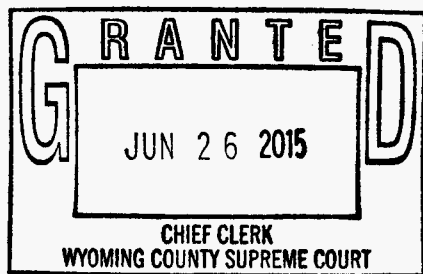
Because the defendant has not made a prima facie showing that it is entitled to judgment as a matter of law, the motion must be denied (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 [1986]; Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 [1985]). As an alternative basis for denying the motion, the Court also finds that the

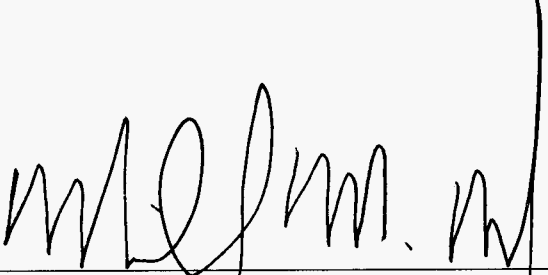
plaintiff's responding submissions are sufficient to establish that material questions of fact remain to be determined with respect to whether the defendant negligently contributed to causing the accident by failing to maintain the road in a reasonably safe condition.

NOW, THEREFORE, it is hereby

ORDERED that the defendant's motion is denied.

DATED: June 26, 2015
Warsaw, New York




HON. MICHAEL M. MOHUN
Acting Justice of the Supreme Court