McNeill v Town of Islip
2015 NY Slip Op 31264(U)
July 10, 2015
Supreme Court, Suffolk County
Docket Number: 08-34486
Judge: Daniel Martin

[* 1]

SHORT FORM ORDER

INDEX No. 08-34486
CAL No. 14-00217OT

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

PRESENT:

Hon. DANIEL MARTIN

MOTION DATE 04-25-14 (#005)
MOTION DATE 06-29-14 (#006)
MOTION DATE 07-8-14 (#007)
ADJ. DATE 8-19-14
Mot. Seq. #005 - MG
#006 - MD
#007 - XMD

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CAROLYN F. McNEILL, by her parent and natural guardian, CORA McNEILL, and CORA McNEILL, individually,

Plaintiffs,

- against -

TOWN OF ISLIP and COUNTY OF SUFFOLK,

Defendants.

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Upon the following papers numbered 1 to 72 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-13; 14-34; Notice of Cross Motion and supporting papers 35-46; Answering Affidavits and supporting papers 47-48; 49-59; 60-64; 65-68; 69-70; 71-72; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendant County of Suffolk ("County") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims is granted, the action is severed and judgment can be entered dismissing the complaint and all cross claims asserted against it; and it is further

ORDERED that the motion by defendant Town of Islip ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims as asserted against it is granted to the extent that the plaintiffs' second cause of action for loss of services is dismissed, but is otherwise denied; and it is further

ORDERED that the cross motion by plaintiff Carolyn F. McNeill, by her mother and natural guardian, Cora McNeill, and Cora McNeill, individually, for an order allowing plaintiffs leave to amend the notice of claim and the bill of particulars is granted to the extent that the branch of the motion which seeks leave to amend the bill of particulars to replace all instances of the wording "street sign" with "street name sign post" is granted, but is otherwise denied.

This is an action to recover for personal injuries allegedly suffered by plaintiff Carolyn McNeill as result of having been struck in the head by a pole on June 29, 2007, at approximately 6:20 p.m., at or near the intersection of Fifth Avenue and Fairtown Road in the Town of Islip. The complaint alleges a first cause of action for negligence. In the second cause of action, Cora McNeill, Carolyn's mother seeks to recover for loss of services.

Defendant County now moves for summary judgment dismissing the complaint and all cross-claims. In support of the motion it submits, *inter alia*, its attorney's affirmation, the pleadings, the transcripts of the depositions of plaintiffs, Carolyn F. McNeill and Cora McNeill; Alexander Otero, as a non-party witness; Clifford Mitchell, as a witness for the County; and Peter Kletchka, as a witness for the Town. The Town also moves for summary judgment dismissing the complaint and all cross-claims. In support of the motion, it submits, *inter alia*, its attorney's affirmation, the pleadings, and the transcripts of the depositions of plaintiffs; Alexander Otero; Peter Kletchka; Paul Morano; and Clifford Mitchell.

Plaintiffs oppose these motions and cross-move for leave to amend the notice of claim to include a claim for loss of services and for leave to amend the bill of particulars to replace the wording "street sign" with "street name sign post." In support of the motion, plaintiffs submit *inter alia*, their attorney's affirmation, a copy of the proposed amended bill of particulars, a copy of a NYS State Department of Health trauma-prehospital care report, a certified copy of a County Police Department field report date June 29, 2007, a copy of a statement given by Suffolk County Police Officer Alexander Otero with regard to the accident of June 29, 2007, a street sign order dated October 2, 2007, and three photographs.

An examination before trial of plaintiff Carolyn McNeill was attempted, but her physical and mental condition rendered her incapable of testifying. Her mother, plaintiff Cora McNeill testified that Carolyn told her at the hospital that a pole hit her on the head, that her neck hurt and she was dizzy. She did not tell her if there was a stop sign or street sign on the pole. The accident occurred on Fairtown Road in Brentwood. After her operation, Carolyn could no longer speak. Cora further testified that Carolyn was not living with her at the time of the accident. She was on her own. Cora had visited her at her home in Brooklyn one time. When Cora went to the scene of the accident three days after it occurred, she saw a pole lying on the sidewalk. The sign on the pole said Fairtown Road. She did not see a hole in the ground or any dirt on the bottom of the pole. The pole she saw was round.

Suffolk County Police Officer Alexander Otero testified and identified a written statement he made with regard to the accident. On the date of the accident, he received a call to respond to Fifth Avenue and Fairtown Road in Brentwood. When he arrived, he saw plaintiff Carolyn McNeill sitting on the ground. She said that the sign fell and hit her on the head. She was complaining that her head and neck hurt, although he did not see any injury. He saw a street sign which was lying down in a northeast direction across the curb. He thought it was a street sign because it was a circular pole, approximately eight feet in height and made of steel. He only saw the pole. He did not see a street sign attached. He did not recall looking for a hole in the ground for the pole. Shortly after his arrival, an ambulance transported plaintiff to the hospital.

Clifford Mitchell testified as a witness for the County. He has been employed by the Suffolk County Department of Public Works for twenty five and a half years, currently as a highway maintenance supervisor. He is in charge of purchasing sign posts and associated hardware necessary to affix signs to posts. The County purchases the metal (aluminum) and fabricates the signs. He was unaware of any sign inspection procedures that the County might have. County signs are attached with bolts. The County is responsible for installing and maintaining stop signs, but does not install street signs. The County has not used circular sign poles in all of his years as a County employee. Rather, it uses a U channel post.

Paul Morano also testified as a witness for the County. He testified that the County is responsible for the installation and maintenance of stop signs when a Town road intersects a County road. Having been shown the "sign card" for the County stop sign in question, he testified that the County took over control of the stop sign in 1976, after it had been installed by the Town. He was unaware of any inspections of the sign since that time.

Peter Kletchka testified as a witness for the Town. He has been employed by the Town of Islip Department of Public Works for twenty four years, currently as a public works project supervisor. Stop signs, after they are installed by the Town, are not subsequently inspected. The Town currently uses stainless steel U channel posts for the signs. He searched the records regarding the intersection of Fifth and Fairtown Road. He found a record which showed that both signs were missing from that location, dated October 2, 2007, after the plaintiff's accident. He has seen, in the past, the use of round cylinder poles by the Town for street name signs and stop signs, but he thought it was rare. The County maintains stop signs at the intersection of Town and County roads.

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 issues of fact from the case (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must show facts sufficient to require a trial of any issue of fact (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, 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]).

It is axiomatic that before a defendant may be held liable for negligence it must be shown that the defendant owes a duty to the plaintiff (*see* ***Pulka v Edelman***, 40 NY2d 781, 390 NYS2d 393 [1976]; ***Engelhart v County of Orange***, 16 AD3d 369, 790 NYS2d 704 [2d Dept 2005]). As a general rule, liability for a dangerous condition on property must be predicated upon ownership, occupancy, control or special use of the property (*see* ***Dugue v 1818 Newkirk Mgt. Corp.***, 301 AD2d 561, 756 NYS2d 51 [2d Dept 2003]; ***Millman v Citibank, N.A.***, 216 AD2d 278, 627 NYS2d 451 [2d Dept 1995]; *see also* ***Butler v Rafferty***, 100 NY2d 265, 762 NYS2d 567 [2d Dept 2003]). Defendant County has established its prima facie right to summary judgment dismissing the complaint and all cross-claims by showing that the County did not install or maintain street name signs. It further submitted proof that it never used the type of round steel pole which allegedly struck the plaintiff Carolyn McNeill. Plaintiffs and the defendant Town have failed to submit evidence sufficient to raise an issue of fact. Contrary to plaintiffs' claims, the testimony of both Town and County witnesses establishes that the County was only responsible for the installation and maintenance of stop signs at the intersection of Town and County roads. Plaintiffs allege that Carolyn McNeill was injured by a pole bearing a street sign, negating the contention of liability on the part of the County herein. Thus, the County established that it had no involvement or responsibility for the dangerous condition that allegedly injured plaintiff.

In view of the foregoing, the County's motion for summary dismissal of the complaint and all cross claims against it is granted.

The Town's motion for summary judgment dismissing the complaint and all cross-claims is granted only to the extent of dismissing the plaintiffs' second cause of action for loss of services, but is otherwise denied. All of the parties procedural arguments aside, the evidence submitted establishes that the plaintiff Cora McNeill has no cause of action for loss of services. Plaintiff Cora McNeill testified that at the time of the accident Carolyn was not living with her, but was living in Brooklyn, although she could not remember the street. She did remember that she visited Carolyn there one time. She further testified that Carolyn did not work. There was no proof of loss of services, as required to award damages for loss of services, because it is clear that plaintiff Carolyn McNeill provided no services or other support to her mother (*see* ***Turturro v City of New York***, 123 AD3d 732, 5 NYS3d 306 [2d Dept 2015] ***Devito v Opatich***, 215 AD2d 714, 627 NYS2d 441 [2d Dept 1995]) .

Contrary to the position taken by the Town, plaintiffs were not required to prove prior written notice of defect of the alleged condition. It is well established that traffic signs do not fall within the the ambit of prior written notice statutes, including that of the Town (*see* ***Doremus v Incorporated Village of Lynbrook***, 18 NY2d 362, 275 NYS2d 505 [1966]; ***Craig v Town of Richmond***, 122 AD3d 1429, 997 NYS2d 566 [4th Dept 2014]; ***Sicignano v Town of Islip***, 41 AD3d 830, 838 NYS2d 655 [2d Dept 2007]; ***Herrera v Moran***, 272 AD2d 374, 707 NYS2d 217 [2d Dept 2000]). The Town's reliance on the determination by the Appellate Division, Second Department in ***Freeman v County of Nassau,*** 95 AD2d 363, 466 NYS2d 684 [2d Dept 1983] is misplaced. In *Freeman* there was a bent sign stanchion obstructing the sidewalk prior to the plaintiff's accident. Here, the injured plaintiff was struck by a falling pole as she walked along the sidewalk. Defendant Town's argument that the falling pole

became an obstruction when it struck the injured plaintiff is not persuasive. The allegedly defective street sign was not a preexisting part of the sidewalk, as it was in *Freeman*, and, thus, was not an obstruction thereto. The defect, if any, was with regard to the pole, not the sidewalk. Moreover, because the plaintiffs were not required to show prior written notice, they do not have the legal burden to establish that the Town created the defect at issue (*see* ***Smith v City of Mount Vernon***, 101 AD3d 847, 848, 955 NYS2d 635 [2d Dept 2012]).

Defendant Town has failed to meet its initial burden to show lack of constructive notice. A defendant must offer some evidence as to when the area in question was last inspected relative to the time when plaintiff was injured (***Pryzywalny v New York City Transit Authority*** 69 AD3d 598, NYS2d 181 [2d Dept 2010]; ***Baines v G & D Ventures, Inc.***, 64 AD3d 528, 883 NYS2d 256 [2d Dept 2009]; ***Pryzywalny v New York City Transit Authority*** 69 AD3d 598, NYS2d 181 [2d Dept 2010]; ***Strange v Colgate Design Corp.***, 6 AD3d 422, 774 NYS2d 344 [2d Dept 2004]; ***Gordon v American Museum of Natural History***, 67 NY2d 836, 501 NYS2d 646 [1986]). It further failed to submit any evidence that the street sign was in a potentially dangerous condition for an insufficient period of time for its employees to have discovered and remedied the problem (*see* ***Gordon v American Museum of Natural History***, *supra*).

Moreover, as to the first of action, plaintiffs have raised issues of fact as to the issue of the Town's liability for the street name sign post, requiring denial of summary judgment. The law does not require that plaintiffs' proof positively exclude every other possible cause of the accident but defendant's negligence (***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 744, 500 NYS2d 95 [1986]; *see* ***Gayle v City of New York***, 92 NY2d 936, 937, 680 NYS2d 900 [1998]; ***Bardi v City of New York***, 293 AD2d 505, 505–506, 739 NYS2d 747 [2d Dept 2002]). "Rather, [the plaintiff's] proof must render those other causes sufficiently 'remote' or 'technical' to enable the jury to reach its verdict based not upon speculation, but upon the logical inferences to be drawn from the evidence" (***Schneider v Kings Hwy. Hosp. Ctr.***, 67 NY2d 743, 744, 500 NYS2d 95 [1986]; *see* ***Gayle v City of New York***, 92 NY2d 936, 937, 680 NYS2d 900 [1998]; ***Figueroa v City of New York***, 5 AD3d 432, 433, 773 NYS2d 66 [2d Dept 2004]; ***Michel v Gressier***, 298 AD2d 507, 508, 748 NYS2d 512 [2d Dept 2002]; ***Bardi v City of New York***, *supra*). "A plaintiff need only prove that it was more likely or more reasonable that the alleged injury was caused by the defendant's negligence than by some other agency" (***Gayle v City of New York***, 92 NY2d 936, 937, 680 NYS2d 900 [1998]; *see* ***Quiroz v 176 N. Main, LLC***. 125 AD3d 628, 3 NYS3d 103 [2d Dept 2015] ***Uttaro v Staten Is. Univ. Hosp.***, 77 AD3d 916, 917, 910 NYS2d 134 [2d Dept 2010]; ***Nigri v City of New York***, 294 AD2d 477, 478, 742 NYS2d 371[2d Dept 2002]).

In light of the foregoing, the defendant Town's motion for summary judgment dismissing plaintiffs' first cause of action is denied.

That branch of plaintiffs' motion which seeks to amend the notice of claim to include a claim for loss of services is denied as moot, since that cause of action has been dismissed. That branch of plaintiffs' motion which seeks leave to amend their bill of particulars to replace all instances of "street sign" with "street name sign post" is granted. Leave to amend pleadings should be freely given, provided that the proposed amendment does not prejudice or surprise the opposing party and is not palpably insufficient or patently devoid of merit (***Vidal v Claremont 99 Wall, LLC***, 124 AD3d 767, 2 NYS3d 186 [2d Dept 2015]; ***Dimoulas v Roca***, 120 AD3d 1293, 993 NYS2d 56 [2d Dept 2014];

McKinney's CPLR 3025(b)). There has been sufficient discovery on this issue by the parties to avoid any issue of prejudice or surprise.

Dated: JULY 10, 2015

A.J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**