Miller v County of Suffolk
2015 NY Slip Op 31428(U)
July 24, 2015
Supreme Court, Suffolk County
Docket Number: 07-32516
Judge: Ralph T. Gazzillo
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[* 1]

SHORT FORM ORDER

INDEX No. 07-32516
CAL No. 13-01215MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. RALPH T. GAZZILLO
Acting Justice of the Supreme Court

MOTION DATE 8-28-14 (#001)
MOTION DATE 8-22-14 (#002)
MOTION DATE 8-14-14 (#003)
MOTION DATE 10-27-14 (#004)
ADJ. DATE 5-5-15
Mot. Seq. # 001 - MG # 003 - MD
002 - MD # 004 - MotD

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ANTHONY MILLER, an infant by his guardian ad litem, KENNETH M. SEIDELL; KENDALL GAMBLE, an infant by his guardian ad litem, ANDREA COWELL TAYLOR; COREY MIMS an infant by his mother and natural guardian, LINDA PICKNEY; LINDA PICKNEY, individually and MAURICE RICHARDSON,

Plaintiffs,

- against -

COUNTY OF SUFFOLK, TOWN OF SOUTHAMPTON, MTA-LONG ISLAND RAILROAD, HAMPTON OUTDOOR, INC. DANIEL A. GIL, MARY PICKNEY and KIESHA MILLER,

Defendants.

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Upon the following papers numbered 1 to 102 read on these motions for summary judgment and for discovery sanctions : Notice of Motion/ Order to Show Cause and supporting papers 1-16; 17-33; 34- 46; 47 - 53 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 54 - 74; 75 - 81; 82 - 86; 87 - 92 ; Replying Affidavits and supporting papers 93-96; 97-98; 99-100; 101-102 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that the motion (# 001) by defendant Town of Southampton for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (# 002) by defendants Hampton Outdoor Inc. and Daniel Gil for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint of plaintiffs Anthony Miller, Kendal Gamble, Corey Mims, and Maurice Richardson against them is denied; and it is further

ORDERED that the motion (# 003) 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; and it is further

ORDERED that the motion (# 004) by defendant Town of Southampton for an order striking this action from the trial calendar, or, in the alternative, compelling plaintiff Cory Mims to respond to outstanding demands for disclosure is decided as follows.

ORDERED that the note of issue shall be filed in this action within sixty (60) days of the date of entry of this order by the Clerk of the County of Suffolk.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiffs when their vehicle collided with the vehicle owned by defendant Hampton Outdoor Inc. ("Hampton Outdoor") and operated by defendant Daniel Gil. The accident occurred at the intersection of Holzman Lane and Newtown Road in the Town of Southampton, New York, on October 3, 2006. Holzman Lane, a two-way street with one lane in each direction, runs east and west, and Newtown Road, a two-way street with one lane in each direction, runs north and south. There is a train trestle located above Newtown Road near the intersection, owned by defendant MTA Long Island Railroad, and a stop sign on Holzman Lane controls westbound traffic entering the intersection with Newton Road. At the time of the accident, Anthony Miller, Kendal Gamble, Corey Mims, and Maurice Richardson were passengers in a vehicle owned by defendant Mary Pickney and operated by defendant Kiesha Miller.

By order dated June 26, 2014, the court in a related action (Index No. 07-14828) denied the prior applications of defendants County of Suffolk, Town of Southampton, Hampton Outdoor and Daniel Gil for summary judgment without prejudice to filing new motions under the proper caption and index number, finding that this action and the related action (Index No. 07-14828) had been improperly consolidated by prior order dated December 2, 2008 (Weber, AJSC).

Defendant Town of Southampton moves for summary judgment dismissing the complaint and all cross claims against it on the ground that it owed no duty to maintain the intersection where the subject accident happened. The Town alleges that the County of Suffolk was responsible for the intersection at the time of the accident. In support of its motion, the Town submits, *inter alia*, the pleadings; the bill of particulars; the affidavit of William FitzPatrick, the Town's expert; the affidavit of Alex Gregor, the Town's representative; the testimony given by defendant Kiesha Miller at the General Municipal Law § 50-h hearing; the transcripts of the deposition testimony given by Paul Morano, the County's representative, and Alex Gregor; and an excerpt of the deposition testimony given by William Masterson, Jr., the Town's representative.

In his affidavit, the Town's expert, William FitzPatrick, a New York licensed professional engineer, stated that he was able to make certain findings based upon a field inspection of the subject roadways on December 12, 2011. He opined that the view to the south from the stop sign located on Holzman Lane from westbound traffic, which is approximately 15 feet from the intersection of Newtown Road, provides "a restricted view of oncoming traffic" due to the location of the Long Island Railroad train trestle. He

further opined that the view to the south from a stopped westbound vehicle closer to or at the point where Holzman Lane meets Newtown Road is "completely unobstructed and unaffected" by the trestle.

In his affidavit, Alex Gregor stated that he is the Highway Superintendent of the Town of Southampton. He stated that the subject intersection is within the jurisdiction of the County, and that the signage at the intersection was provided the County. He further stated that the Town's records revealed that the Town never assumed responsibility for maintenance or repair of the intersection, and that the Town never assumed control over the subject intersection.

At the General Municipal Law § 50-h hearing, defendant Kiesha Miller testified to the effect that on the day of the accident, she had been traveling westbound on Holzman Lane, and made a complete stop at a stop sign at the intersection with Newtown Road. She testified that she looked both ways and observed no oncoming traffic. Ms. Miller further testified that when she looked to the left, she saw a train trestle underneath which Newtown Road runs, but that she "could not see the road or if there was any traffic coming." She testified she was "creeping" in her vehicle closer to the intersection to see any oncoming traffic on Newtown Road. When she noticed that she "was already in the road," she "just slammed on the brakes" and "grabbed the wheel." Then, she got hit by defendant Gil's vehicle, which she saw right before it hit her.

At his deposition, Paul Morano testified that he is employed as an assistant civil engineer for the County of Suffolk Public Works Department. He testified that Newtown Road is owned by the County, and that the stop sign and stop line on Holzman Lane are owned and maintained by the County.

At his deposition, Alex Gregor, the County's representative, testified that Newtown Road is owned by the County and Holzman Lane is owned by the Town. Before he became the superintendent, Holzman Lane was changed from a two-direction roadway to a one-way road. He testified that there was a stop sign controlling Holzman Lane at the intersection of Newtown Road, and that "the stop sign would be the County's."

At his deposition, William Masterson, Jr., the Town's representative, testified that there was a stop sign controlling westbound traffic on Holzman Lane, and that the County, not the Town, was responsible for placing that stop sign.

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 (*see* ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; ***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]). 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]).

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]).

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 intersection where the subject accident occurred (*see* ***Horn v Town of Clarkstown***, *supra*; ***Carlo v Town of E. Fishkill***, *supra*). Thus, the burden shifted to the plaintiffs to submit evidence to establish that the Town owned or controlled the subject intersection at the time of the accident or that it affirmatively created the defect (*see* ***Horn v Town of Clarkstown***, *supra*; ***Carlo v Town of E. Fishkill***, *supra*).

In opposition, the County contends that the Town was responsible for maintenance of the roadways at the time of the accident. In support of its opposition, the County submits, *inter alia*, the transcripts of the deposition testimony given by Lance Aldrich and Thomas Neely, the Town's representatives.

At his deposition, Lance Aldrich testified that he is the Highway General Supervisor of the Town. He testified that Holzman Lane is a Town road and is maintained by the Town, and that Newtown Road is owned by the County. At his deposition, Thomas Neely testified that he is the Director of Transportation and Traffic Safety for the Town of Southampton. He testified that Newtown Road is owned by the County and maintained by the Town, and that Holzman Lane is owned and maintained by the Town. He testified that he does not know who installed the stop sign located on Holzman Lane at the intersection of Newtown Road.

In their opposition, the plaintiffs contend that Town of Southampton Code § 312-9 provides that stop signs shall be installed both northbound and southbound on Newtown Road at the subject intersection.

Here, the records established that Newtown Road is owned by the County, and the Town did not erect the stop sign controlling westbound traffic on Holzman Lane at the subject intersection. In its reply, the Town concedes that Town Code § 312-9 does not permit the Town to erect a stop sign on a County road. The plaintiffs and other defendants failed to submit evidence raising a triable issue of fact as to whether the Town owned or controlled the subject intersection at the time of the accident. Thus, the Town of Southampton's motion is granted, and the plaintiffs' complaint and all cross claims as asserted against the Town are severed as well as dismissed.

Defendants Hampton Outdoor and Gil move for summary judgment dismissing the complaint of plaintiffs Anthony Miller, Kendal Gamble, Corey Mims, and Maurice Richardson and cross claims asserted against them on the ground that defendant Kiesha Miller failed to yield the right-of-way upon entering an intersection in violation of Vehicle and Traffic Law § 1142, and, thus, was negligent as a matter of law. In support, defendants Hampton Outdoor and Gil submit, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of defendants Kiesha Miller and Gil.

A driver who has the right of way is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield (*see* ***Jenkins v Alexander***, 9 AD3d 286, 780 NYS2d 133 [1st Dept 2004]; ***Namisnak v Martin***, 244 AD2d 258, 664 NYS2d 435 [1st Dept 1997]). However, even a driver who has the right-of-way has a duty to use reasonable care to avoid a collision, including keeping a proper lookout and to see what can be seen through the proper use of his or her senses (*see* ***Canales v Arichabala***, 123

AD3d 869, 1 NYS3d 140 [2d Dept 2014]; ***Bennett v Granata***, 118 AD3d at 653, 987 NYS2d 424 [2d Dept 2014]; ***Regans v Baratta***, 106 AD3d 893, 965 NYS2d 171 [2d Dept 2013]). The issue of comparative negligence is generally a question for the jury to decide (*see* ***Blok v Mammadov***, 126 AD3d 836, 5 NYS3d 505 [2d Dept 2015]; ***Gause v Martinez***, 91 AD3d 595, 936 NYS2d 272 [2d Dept 2012]).

Here, the deposition testimony of defendants Kiesha Miller and Gil conflict as to the happening of the accident (*see* ***Pyke v Bachan***, 123 AD3d 994, 999 NYS2d 508 [2d Dept 2014]; ***Viggiano v Camara***, 250 AD2d 836, 673 NYS2d 714 [2d Dept 1998]). At her deposition, Kiesha Miller testified that she stopped at the stop sign on Holzman Lane at the intersection for about five seconds. At his deposition, Gil testified that while he was driving at about 25 miles per hour, the plaintiffs' vehicle was traveling at about 12 miles per hour. He also testified that although he immediately applied his brakes, he was unable to avoid hitting the plaintiffs' vehicle. Under this circumstances, there are questions of fact as to the speed of defendant Gil's vehicle and his attentiveness as he drove (*see* ***Gonzalez v County of Suffolk***, *supra*), and as to whether comparative negligence on defendant Gil's part contributed to the subject accident (*see* ***Ruthinoski v Brinkman***, 63 AD3d 900, 882 NYS2d 165 [2d Dept 2009]). Thus, defendants Hampton Outdoor and Daniel Gil have failed to sustain the initial burden of establishing prima facie entitlement to judgment as a matter of law. Accordingly, their motion is denied.

Defendant County of Suffolk moves for summary judgment dismissing the complaint and all cross claims against it, asserting that it bears no liability for the plaintiffs' injuries and that Kiesha Miller's negligence was the sole proximate cause of the subject accident. In support, the County submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the deposition testimony of defendant Kiesha Miller and defendant Daniel Gil.

At her deposition, defendant Kiesha Miller testified to the effect that prior to the collision she traveled westbound on Holzman Lane and, upon arriving at the intersection with Newtown Road, stopped at the stop sign for about five seconds, intending to make a left turn onto Newtown Road. Kiesha Miller testified that when she looked to the left, she saw a train trestle, but could not see any distance down Newtown Road. She testified that she was "creeping forward" for five seconds by easing her foot off the brake to see any oncoming traffic on Newtown Road, and that, before the nose of her vehicle entered the intersecting roadway, she was not able to see the roadway beneath the train trestle. According to Kiesha Miller, at the time when she first saw the other vehicle, the driver's side door of her vehicle was beyond the stop line and she slammed the brake, but was hit by the oncoming vehicle. Kiesha Miller testified that she remained looking left from the time that she first began to move from the stop sign until the moment of impact.

At his deposition, defendant Gil testified to the effect that he is the owner of Hampton Outdoor, a landscaping company. He testified that on the day of the accident, he had been traveling northbound on Newtown Road, and saw the plaintiffs' vehicle for the first time 15 or 20 feet away from him, as he was driving under the trestle at about 25 per hour. According to defendant Gil, the plaintiffs' vehicle was heading westbound on Holzman Lane at about 12 miles per hour, and the "midway of the vehicle" was crossing the stop line when he first saw it. Although he immediately applied his brakes and turned his vehicle to the left, defendant Gil was unable to avoid hitting the plaintiffs' vehicle. Defendant Gil testified the front of his vehicle came into contact with the driver's side of the plaintiffs' vehicle. Prior to the accident, he observed that the driver of the plaintiffs' vehicle was driving "straight ahead ... as if she was driving down a road." He testified that while he was able to see the stop line on Holzman Lane from his

position beneath the trestle, he had no recollection as to whether he was able to see the stop sign from the same position.

"[E]very driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway" (Vehicle and Traffic Law § 1142 [a]). "Every driver of a vehicle approaching a stop sign shall stop ... at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection" (Vehicle and Traffic Law § 1172 [a]).

Municipalities have a duty to maintain their roads in a reasonably safe condition for motorists and must guard against contemplated and foreseeable risks (*see* ***Wittorf v City of New York***, 23 NY3d 473, 991 NYS2d 578 [2014]; ***Friedman v State of New York***, 67 NY2d 271, 502 NYS2d 669 [1986]; ***Nichols-Sisson v Windstar Airport Serv., Inc.***, 99 AD3d 770, 772, 952 NYS2d 223 [2d Dept 2012]). Nevertheless, the duty is measured by the courts with consideration given to the proper limits on intrusion into the municipality's planning and decision-making functions (*see* ***Friedman v State of New York***, *supra*; ***Poveromo v Town of Cortlandt***, 127 AD3d 835, 6 NYS3d 617 [2d Dept 2015]; ***Kuhland v City of New York***, 81 AD3d 786, 787, 916 NYS2d 637 [2d Dept 2011]). Thus, in the field of traffic design engineering, the municipality is accorded a qualified immunity from liability arising out of a highway planning decision (*see* ***Poveromo v Town of Cortlandt***, *supra*; ***Kuhland v City of New York***, *supra*; ***Drake v County of Herkimer***, 15 AD3d 834, 788 NYS2d 770 [4th Dept 2005]). A municipality may be liable for a traffic planning decision only when its study is plainly inadequate or there is no reasonable basis for its plan (*see* ***Affleck v Buckley***, 96 NY2d 553, 732 NYS2d 625 [2001]; ***Friedman v State of New York***, *supra*; ***Bowman v Kennedy***, 126 AD3d 1203, 6 NYS3d 175 [3d Dept 2015]; ***Mare v City of New York***, 112 AD3d 793, 794, 977 NYS2d 342 [2d Dept 2013]).

Here, the County failed to establish its entitlement to judgment as a matter of law. At her deposition, Kiesha Miller testified that when she stopped at the subject stop sign on Holzman Lane, she could not see oncoming traffic on Newtown Road due to the train trestle, and that she had to creep into the intersection to see oncoming traffic. The evidence demonstrated that the County owns Newtown Road. The evidence presented by the County failed to establish that it undertook a study which entertained and passed on the question of risk that is at issue in this case (*see* ***Poveromo v Town of Cortlandt***, *supra*; ***Mare v City of New York***, *supra*; ***Kuhland v City of New York***, *supra*), or that the design of the intersection was reasonably safe (*see* ***Mare v City of New York***, *supra*; ***Scott v City of New York***, 16 AD3d 485, 791 NYS2d 184 [2d Dept 2005]). There are several issues of fact as to whether the County's design of the intersection was the product of adequate study and a reasonable planning decision (*see* ***Drake v County of Herkimer***, *supra*) and as to whether Kiesha Miller's negligence was the sole proximate cause of the subject accident (*see* ***Deleon v New York City Sanitation Dept.***, 116 AD3d 404, 983 NYS2d 17 [1st Dept 2014]). There can be more than one proximate cause of an accident (*see* ***Rodriguez v Klein***, 116 AD3d 939, 983 NYS2d 851 [2d Dept 2014]; ***Cox v Nunez***, 23 AD3d 427, 805 NYS2d 604 [2d Dept 2014]), and where varying inferences as to causation are possible, resolution of the issue of proximate cause is a question for the jury (*see* ***Ernest v Red Cr. Cent. School Dist.***, 93 NY2d 664, 695 NYS2d 531 [1999]). The County's submissions failed to eliminate all triable issues of fact as to whether negligence in the design of the intersection was a proximate cause of the accident (*see* ***Poveromo v Town of Cortlandt***, *supra*). Accordingly, the County's motion for summary judgment dismissing the complaint and all cross claims asserted against it is denied.

The Town also moves for an order striking this action from the trial calendar, claiming that although multiple attempts were made to schedule a physical examination of plaintiff Cory Mims, he failed to appear for the physical examination. In the alternative, the Town seeks an order compelling plaintiff Cory Mims to respond to outstanding demands for disclosure.

In opposition, the plaintiffs' counsel concedes that plaintiff Cory Mims failed to appear for the physical examination, and has consented to an order compelling him to appear for a physical examination.

Under the circumstances, the Town's motion is granted to the extent that plaintiff Mims is directed to comply with all of the outstanding discovery demands within forty five (45) days of the date of entry of this order.

Dated: 2/24/15

A.J.S.C.

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

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