

Flynn v Grabiec

2016 NY Slip Op 32533(U)

November 1, 2016

Supreme Court, Suffolk County

Docket Number: 11-11619

Judge: Denise F. Molia

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INDEX No. 11-11619
CAL. No. 15-01818MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA
Acting Justice of the Supreme Court

MOTION DATE 2-29-16
ADJ. DATE 3-25-16
Mot. Seq. # 014 - MG

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CAITLIN FLYNN and JENNIFER BEUNTEN,

LAW OFFICES OF JOHN J. GUADAGNO, PC
Attorney for Plaintiffs
136 East Main Street
East Islip, New York 11730

Plaintiffs,

DESENA & SWEENEY LLP
Attorney for Defendant Grabiec
1500 Lakeland Avenue
Bohemia, New York 11716

- against -

CHESNEY AND NICHOLAS, LLP
Attorney for Defendant Town of Islip
485 Underhill Blvd - Suite 308
Syosset, New York 11791

DONNA GRABIEC, TOWN OF ISLIP, and
LONG ISLAND POWER AUTHORITY,

PAGANINI, CIOCI, PINTER,
CUSUMANO & FAROLE
Attorney for Plaintiff Flynn on Counterclaim
3 Huntington Quadrangle, Suite 201-S
Melville, New York 11747

Defendants.

HAMMEL, O'BRIEN, CROUTIER,
DEMPSEY, PENDER & KOEHLER PC
Attorney for Defendant LIPA
6851 Jericho Turnpike, Suite 250
PO Box 1306
Syosset, New York 11791

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Upon the following papers numbered 1 to 29 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-23; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 24-25, 26-27; Replying Affidavits and supporting papers 28-29; Other ; (and after hearing counsel in support and opposed to the motion) it is,

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ORDERED that the motion by defendant Town of Islip for summary judgment dismissing the complaint and all cross claims against it is granted.

This action arises from motor vehicle accident which occurred on February 9, 2010, at approximately 4:00 p.m., which occurred at the intersection of Grant Avenue and Union Boulevard in Islip, New York. Plaintiff Caitlin Flynn was the driver of one of the vehicles, which was owned by her father's company. Plaintiff Jennifer Buenten was a front seat passenger in the Flynn vehicle. Defendant Donna Grabiec was the owner and driver of the second vehicle involved in the accident. It is alleged that the overhanging traffic light was not operational at the time of the motor vehicle accident, and that the Town of Islip ("Town") was negligent in the ownership, operation, control and maintenance of said traffic light, and that said negligence was the proximate cause of the accident.

Defendant Town now moves for summary dismissing the complaint. In support of its motion, it submits, *inter alia*, the pleadings, the verified bill of particulars, the deposition and 50-h examination transcripts of the Caitlin Flynn, Jennifer Bueten, and Donna Grabiec, the deposition transcripts of Peter Kletchka and John Rechinda, a certified police report, a Town Service Notice, a Traffic Signal Service Report, prepared by Hinck Electrical Contractors, Inc., and a Daily Completion Report prepared by the Long Island Power Authority. Plaintiffs and defendant Grabiec have each submitted affirmations in opposition.

At her 50-h hearing plaintiff Flynn testified that on the date of the accident she was driving a 2004 Yukon, plaintiff Buenten was a front seat passenger, and her friend Liz Bay was a back seat passenger. She testified that she was driving home from school, and the drive to her house usually takes about 15 minutes. Ms Flynn testified that traffic was moderate as she traveled on Grant Avenue for three minutes before reaching the intersection with Union Boulevard. She testified that there was a traffic light at this intersection which she first noticed as she was "coming up to it, going through." She testified that she knew the light at the intersection was not red, but could not remember the color, and she did not know that the light was not working. Ms. Flynn further testified that as she approached the light she slowed, looked at the light and did not know what color it was. She testified that she did not stop at the intersection, but looked to her right and her left as she approached the intersection, and did not see anything until about two seconds before the impact occurred, when she hit her brakes. At her deposition, Ms. Flynn testified that the accident occurred at approximately 4:00 p.m. She testified that she had dropped off Liz Bay prior to the accident. The intersection of Union Boulevard and Grant Avenue was only two houses away from her own home. She further testified that she did not remember what color that the light was other than it was not red, and that after the accident she observed that the traffic light was completely out. Ms. Flynn testified that after the accident, one of her neighbors came out side and told her that she had called "all day" about the light, but she could not identify the neighbor and did not know to whom her neighbor complained about the traffic light to, she thought it was the Town, but could not be sure.

Plaintiff Jennifer Buenten testified that, although she saw the traffic light at the intersection of Union Boulevard and Grant Avenue, she did not know the what color the light was in their direction of travel, and that none of the bulbs were illuminated when she first saw the traffic light. Ms. Buenten further testified that she was "a couple of feet from the traffic light when she first saw it" and did not say

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anything upon noticing the none of the lamps were illuminated. She also testified that the other vehicle, driven by defendant Grabiec was approaching the intersection when she first saw it, and the it was 30 to 40 feet away from the intersection, moving at 35 to 40 miles per hour.

Defendant Donna Grabiec testified that on the day of the accident she was driving her son to Islip High School to play football with his friends. She testified that she was familiar with the intersection of Union Avenue and Grant Avenue, and traveled through the intersection several times a week. She testified that there is a hanging traffic light at the intersection. She further testified that accident occurred at 4:00 p.m., and at the time the roads were clear and dry, and it was still daylight. Ms. Grabiec testified that she traveled on Union for approximately one half mile before the accident occurred and that her highest rate of speed was 30 miles per hour. Ms. Grabiec testified that she was not sure when she first saw the traffic light, but when she did, the light was out completely. She estimated that she was five or six car lengths from the intersection when she first observed the light. She testified that when she saw the traffic light, she slowed considerably. Ms. Grabiec testified that she did not see the Flynn vehicle prior to the impact, and that she looked to her left and her right when she was a few car lengths away from the intersection. She testified that she was about half way or three-quarters of the way through the intersection when the accident occurred. Finally, she testified that she never brought her vehicle to a stop at any time just prior to entering the intersection of Union and Grant.

Peter Kletchka testified as a witness for defendant Town. He testified that, among other duties, he directs the operations of the Division of Traffic Safety and Street Lighting. He testified that, at the time of the accident, the Town's electrical contractor was Hinck Electrical Contractors, Inc. ("Hinck"), and that the contract required Hinck to maintain the functionality of all traffic signals within the Town, from service calls to emergency responses, and anything related to the upkeep and maintenance of the system. Mr. Kletchka testified that the contract required Hinck to respond to any outages and proceed with repairs, and that Hinck was also required to establish a communications center to take calls from either the Suffolk County Police precincts or customers with regard to traffic control problems. He testified that a town inspector does not go out on every call regarding traffic light issues, as this is Hinck's responsibility.

Mr. Kletchka testified that he was the direct supervisor of a former Town employee, Jen Drapal, who has since moved out of state. He testified that Ms. Drapal was an engineering aide, who performed the duties of a traffic inspector, and worked closely with Hinck. He testified that in this case, the Ms. Drapal did respond the scene of this accident, and she called the Suffolk County Police Department at 4:00 pm for a traffic assist. Mr. Kletchka testified as to a Traffic Signal Service Report, provided by Hinck as part of its obligations under the contract. He testified that the report notes that a school crossing guard called in the traffic light outage at 2:25 p.m. The report notes that there was no power to the traffic signal, and that Hinck was on the scene at 3:10 p.m. The report further states that Hinck then called Long Island Power Authority ("LIPA") at 3:15 p.m. Mr. Kletchka testified that without power to the traffic signal, Hinck could not repair the traffic light. He testified that "[t]he Triplex service which is the secondary connection that provides power to the signal had become broken and came into contact with what's called a hot lead to the signal, and that's what created the power failure, so that...the power feed from the LIPA source was broken and created the outage." He testified that, as a result, Hinck could not make any repairs was unable to restore service, for which LIPA has sole responsibility.

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John Rechinda testified as a witness for LIPA. He testified that LIPA provided secondary voltage or a “secondary feed”, which the Town could tap into to provide power for the traffic lights, including the traffic light at the subject intersection. Mr. Rechinda was shown a LIPA Daily Completion Report with regard to the repair of the secondary feed on the day the subject accident occurred. Based on the report, Mr Rechinda testified that the former LIPA employee, Shawn Rooney, was notified of the problem at 4:09 p.m., arrived at the subject intersection prior to 5:41 p.m., and completed the repair of the secondary feed at 5:51 p.m., which restored power to the traffic signal.

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 (*Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). 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]).

Defendant Town has established its prima facie entitlement to summary judgment dismissing the complaint and all cross claims against it by setting forth evidence that it maintained the traffic light at the subject intersection in a reasonably safe condition and that it did not have sufficient time to remedy the alleged malfunction (see *Watt v County of Nassau*, 130 AD3d 613, 13 NYS3d 192 [2d Dept 2015]; *Regan v City of New York*, 127 AD3d 843, 4 NYS3d 889 [2d Dept 2015]; *Salazar v City of New York*, 104 AD3d 931, 962 NYS2d 330 [2d Dept 2013]; *Alvarez v Hee Youn Koo*, 16 AD3d 442, 792 NYS2d 508 [2d Dept 2005]). The Traffic Signal Service Report, provided by Hinck shows that further a school crossing guard called in the outage at 2:25 p.m. The report notes that there was no power to the traffic signal, and that Hinck was on the scene at 3:10 p.m. The report states that Hinck then called LIPA at 3:15 p.m. The testimony of LIPA employee John Rechinda established that a LIPA employee arrived to repair the secondary feed and restore power to the traffic light until approximately one hour after the accident. Therefore, it has been established that the traffic light at the subject intersection was in a reasonably safe condition and, that the loss of power to the light was outside of defendant Town’s control, and could only be remedied by LIPA. The testimony of plaintiff Flynn that an unnamed neighbor told her after the accident that she or she had been calling about the traffic light outage “all day” does not require a different result. While hearsay evidence may be submitted in opposition to a motion for summary judgment, it is insufficient, standing alone, to raise a triable issue of fact as to notice of a dangerous condition (*Wachovsky v City of New York*, 122 AD3d 724, 997 NYS2d 145 [2d Dept 2014]; *Salazar v City of New York*, *supra*)

Moreover, defendant Town has demonstrated, prima facie, that the malfunctioning traffic light was not a proximate cause of the accident (see *Regan v City of New York*, 127 AD3d 843, 4 NYS3d 889

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[2d Dept 2015]; *Ferguson v Sheahan*, 71 AD3d 1207, 896 NYS2d 245 [3d Dept 2010]; *Minemar v Khramova*, 29 AD3d 750, 815 NYS2d 210 [2d Dept 2006]; *Bisceglia v International Bus. Machs.*, 287 AD2d 674, 732 NYS2d 92 [2d Dept 2001]; *Gonzalez v City of Yonkers*, 277 AD2d 421, 716 NYS2d 893 [2d Dept 2000]). Plaintiffs, without citing any legal authority, allege that defendant Town failed to take reasonable steps to secure or barricade the intersection. However, the proper protocol in this situation is set forth in the Vehicle and Traffic Law. More specifically, Vehicle and Traffic Law §1117 states as follows:

Except when directed to proceed by a police officer, every operator of a motor vehicle approaching an intersection governed by a traffic-control signal which is out of service or otherwise malfunctioning shall stop in the manner required for stop signs set forth in section eleven hundred seventy-two of this title, and proceed according to the rules of right of way for vehicles set forth in article twenty-six of this title.

Vehicle and Traffic Law § 1172 states, in relevant part:

(a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, 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 and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

Furthermore, a driver is negligent if he or she fails to see that, which through proper use of the senses, should have been seen (*Heath v Liberato*, 82 AD3d 841, 918 NYS2d 353[2d Dept 2011]). The proximate causes of the accident herein was the failure of the drivers involved to observe that the traffic light was not functioning, their failure to stop before proceeding into the intersection as required by Vehicle and Traffic Law §1117, and their failure to stop where they had a view of approaching traffic prior to proceeding into the intersection as required by Vehicle and Traffic Law §1172 (see *Regan v City of New York*, *supra*; *Minemar v Khramova*, *supra*). Thus, no liability for negligence can be imputed to defendant Town.

Accordingly, the motion by defendant Town of Islip for summary judgment dismissing the complaint and all cross claims is granted.

Dated: 11-1-16

Hon. Dennis R. Nolle

A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION