Sutter v Reyes
2016 NY Slip Op 32634(U)
December 6, 2016
Supreme Court, Bronx County
Docket Number: 6359/2005
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 3

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MARIA SUTTER,

Index No.:6359/2005

Plaintiff(s),

-against-

DECISION/ORDER
Present:
HON. MITCHELL J. DANZIGER

WINSTON REYES, HIRUNIS VASQUEZ and CITY OF NEW YORK,

Defendant(s).

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THE CITY OF NEW YORK,

Third-Party
Index No.: 42083/2009

Third-Part Plaintiff(s)

-against-

WELSBACH ELECTRICAL CORP.,

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Recitation as Required by CPLR §2219(a): The following papers were read on this Motion for Summary Judgment:	Papers Numbered
Notice of Motion, Affirmation in Support with Exhibits & Memo of Law	1
Affirmation & Affidavits in Opposition with Exhibits by Plaintiff	2
Affirmation in Opposition by Co-defendants Reyes and Vasquez.....	3
Reply Affirmation in Support	4

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Defendant, CITY OF NEW YORK (the "City"), moves for summary judgment dismissing plaintiff's claim and all cross-claims against it pursuant to CPLR §3212, in this personal injury action sounding in negligence.

The record before the court establishes that plaintiff was riding her bicycle east bound on East 233rd Street in the morning of October 31, 2004. Eventually, plaintiff approached the intersection of East 233rd Street and Van Cortlandt Park East in the Bronx. East 233rd Street is a two way street with two lanes of same direction traffic on both sides of the double yellow line. The intersection of East 233rd and Van Cortlandt Park East can be described as a "T" where Van Cortlandt Park East meets

East 233rd Street. Drivers and cyclists traveling east bound on East 233rd can either make a left turn onto Van Cortlandt Park East or continue straight on East 233rd street at the subject intersection. There is no dedicated left turning lane at the intersection of East 233rd Street and Van Cortlandt Park East. There are two hanging traffic lights at the intersection that have green, yellow, and red solid signals, none of which display a left turn arrow. In addition to the two hanging traffic lights, a stand alone traffic light post with five traffic signals is located on the north east corner of the intersection. The three upper traffic signals on the traffic post are green, yellow, and red solid signals. The two lower signals on the post are green and yellow left turn arrows. On October 31, 2004, plaintiff approached the intersection and planned to make the left hand turn from East 233rd Street onto Van Cortlandt Park East. She was traveling in the left hand lane on East bound 233rd Street. Plaintiff noticed a yellow turn arrow on the traffic light post and slowed to a stop. Shortly after plaintiff stopped, she was hit in the rear by a motor vehicle owned by defendant, HIRUNIS VASQUEZ ("Vasquez"), and operated by defendant, WINSTON REYES ("Reyes"). Vasquez was not in the car at the time of the accident. Reyes testified that he did not see the plaintiff in front of him until just before hitting her. However, Reyes testified that he observed that he had a green solid light on the overhanging traffic signal. Based on his observation of the green signal on the hanging light, he proceeded east bound without seeing the plaintiff until it was too late. Plaintiff commenced this suit based on the alleged negligence of Reyes in hitting plaintiff from behind, and on the alleged negligence of the City in designing and maintaining the intersection and traffic signals thereat.

In addition to setting forth the extensive procedural history that has little to do with the instant application, the City asserts that the plaintiff is limited to those theories of negligence set forth in her notice of claim. In so arguing, the City contends that plaintiff's only claim for the negligence against the City is that the, "intersections traffic signals were confusing and the intersection was not equipped with a left turn lane which caused her to wait in the same lane simultaneously used by through traffic" (City's Memorandum of Law at p.2). Thereafter, the City argues that even if the intersection and signals were negligently designed, the City is entitled to qualified immunity for its design decisions regarding the intersection. Nothwithstanding, the City contends that any negligence on its part merely, "furnished the occasion" for the accident, and therefore, that any negligence on the part of the City was not the proximate cause of plaintiff's

injuries. Plaintiff, Reyes and Vasquez oppose the motion.

First, the court notes that the City's interpretation of the plaintiff's claims is correct. In her notice of claim, the plaintiff alleges that her injury was caused, inter alia:

> "by reason of carelessness and negligence of the City and their agents...in their ownership, maintenance, control, inspection, repair, operation, study and/or design of the traffic signals governing the above mentioned intersection, specifically the traffic signal governing the left turn from 233rd Street on Van Cortland Parkway (sic), and the lanes, and lack of a left turning lane, in causing plaintiff to stop at said intersection, and causing Winston Reyes to continue east on 233rd Street due to that traffic signal on the northeast corner of said intersection having confusing and dangerously timed and sequenced signals...."

Therefore, in reviewing the Notice of Claim, the court finds that the theories of negligent at issue in this case against the City consist of the theory that the City was negligence in its ownership, maintenance, control, inspection, repair, operation, study and/or design of the traffic signals at the intersection, as well as in the City's ownership, maintenance, control, inspection, repair, operation, study and/or design of the lanes and lack of a left turning lane in the intersection. It is well settled that theories of liability not asserted in the Notice of Claim are precluded (*Fleming v. City of New York*, 89 A.D. 3d 405 [1st Dep't., 2011]). Therefore, all claims not set forth in the Notice of Claim are dismissed as against the City. Such claims include plaintiff's assertion that the City may have been negligent in permitting this intersection to be included in a publication that assists bike riders in planning safe bike routes and to claims related to allegations of obstructions in the intersection, and failure to warn motorists. However, all claims relating to the alleged defective design of the traffic lights, and the alleged defective design of the traffic lanes of the intersection, including the claim that the City was negligent in failing to conduct traffic studies relating to the same, were properly identified in the notice of claim, and therefore, the City was properly notified same. Indeed, the notice of claim sets forth that the City was negligent in its "study" of the lanes and signals and therefore, that claim may proceed. However, the claim that the City was negligent in failing to include a right shoulder, and adequate warning devices (set forth for the first time in plaintiff's Bill of Particular) exceed the scope of the theories of liability set forth in the notice of claim and therefore, are dismissed.

As for the balance of plaintiff's claim, and for the reasons set forth hereinbelow, the court finds that summary judgment dismissing the same is not warranted.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure of the proponent of a motion for summary judgment to establish a prima facie entitlement to such relief requires the denial of that motion, regardless of the sufficiency of the opposing papers (*Briones v BSC Sec. Corp.*, 224 AD2d 200, 200 [1st Dept 1996]). However, if a movant has met his initial burden on a motion for summary judgment, only then does the burden then shift to the opponent who must produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]).

First, plaintiff raises an issue of fact as to whether the design of the traffic signals and the traffic lanes at the intersection complied with applicable standards and regulations. Consequently, plaintiff also raises an issue of fact as to whether the City is entitled to qualified immunity for its design decisions. When a municipality's design and installation of a roadway and related infrastructure comply with applicable standards and regulations, it is not liable for accidents caused by such roadway or infrastructure (*Gallaway v. Town of N. Collins,* 129 A.D.3d 1669 [4th Dep't., 2015]). A governmental body may be liable for a traffic planning decision only when its study is plainly inadequate or there is a reasonable no basis for its plan (*Affleck v. Buckley*, 96 N.Y.2d 553 [2001]). Here, plaintiff has submitted an affidavit of Nicholas Bellizzi, a professional engineer and accident reconstruction specialist. In his affidavit, Mr. Bellizzi opines that the traffic signals at the

intersection do not meet the standards set forth by the Federal Manual of Uniform Traffic Control Devices (MUTCD) despite the City's expert who opines that the traffic signals do meet the standard set forth by the MUTCD. Therefore, this is an issue of fact that must be resolved by a jury. The Court cannot definitively determine that the City is entitled to immunity. In order to do so, the City must establish the existence, nature and extent of the study which underlay the determination at issue, a matter of which it is likely to have the most knowledge, and prove that the study was adequate and the decision logical (*Santiago v. NYCTA*, 271 A.D.2d 675, 677 [2d Dep't., 2000]). Here, in light of the diverging opinion of plaintiff's expert, the City has failed make such a showing.

Moreover, the City has failed to establish that any negligence on its part was not the proximate cause of the accident. The City argues that any negligence on its part merely "caused the occasion" of the accident. In other words, the City argues that even if it was negligent, the plaintiff would still have been struck from behind by Reyes. In support of that argument, the City cites to *Batista v . City of New York* (101 A.D.3d 773 [2d Dep't., 2012]). However, the court finds that *Batista* is distinguishable from the instant matter. In *Batista*, the negligence asserted against the City was closing a lane which caused one car to stop in order to merge into the right lane. As that car was stopped, it was hit from behind. The *Batista* court found that even if the moving defendants were negligent in closing the lane, the accident still would have occurred. The court did not explain why.

The facts of this matter are divergent. Here, plaintiff alleges that the City was negligent in designing the traffic signals and the lanes of the intersection, including the lack of a left turning lane. Therefore, a jury could find that if the City was negligent in failing to provide a left turning lane, Reyes might never have been behind plaintiff in the first place because he would have been in the non-turning lane. However, it is not the court's function to speculate on the findings of facts on a summary judgment motion. Instead, the key to summary judgement is issue finding and not issue determination (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). Further, a driver's negligence does not automatically exculpate a municipality from liability as a matter of law (*Humphrey v. State*, 60 N.Y. 2d 742 [1983]). The concept of proximate cause, or more appropriately legal cause, has proven to be an elusive one, incapable of being precisely defined to cover all situations (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314 [1980]).

In addition to the analysis above, the record establishes that over time, this particular

intersection has seen a fair share of accidents relating to this particular left turning lane. Without making a determination as to whether the City was negligent in addressing the frequency of accidents, it seems that the City's prima facie case of "non-liability" is muddied by this history. "Indeed, a municipality may be held liable if, after being made aware of a dangerous traffic condition, it does not undertake an adequate study to determine what reasonable measures may be necessary to alleviate the condition. Moreover, after a municipality implements a traffic plan, it is under a continuing duty to review its plan in the light of its actual operation (*Turturro v City of New York*, 127 AD3d 732, 736 [2d Dept 2015], lv to appeal granted, 26 NY3d 908 [2015]). Additionally, the City has a nondelegable duty of maintaining its roads and highways in a reasonably safe condition (Stiuso v City of New York, 87 NY2d 889, 890 [1995]). The fact that the plaintiff and defendant Reyes had both navigated this particular turn in the past, does not relieve the City of its duty to maintain its road, study traffic conditions, and review traffic plans in light of actual operation.

Based on the foregoing, the motion is denied.

This constitutes the decision and order of the Court.

Dated: 12/6/16
Bronx, New York

HON. MITCHELL J. DANZIGER, J.S.C.