

Rivera v Smith

2018 NY Slip Op 30849(U)

May 4, 2018

Supreme Court, Suffolk County

Docket Number: 38575/12

Judge: Paul J. Baisley, Jr.

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.
-----X
MATTHEW D. RIVERA,

Plaintiff,

-against-

CAROLYN SMITH, COUNTY OF SUFFOLK,
TOWN OF ISLIP, GRACE INDUSTRIES, LLC and
THE FENCE MAN INC.,

Defendants.
-----X

PLAINTIFF'S ATTORNEY:
Siben & Siben, LLP
90 East Main Street
Bay Shore, New York 11706

DEFENDANT'S ATTORNEYS:
Carroll, McNulty & Kull, LLC
Attorneys for The Fence Man, Inc.
570 Lexington Avenue, 8th Floor
New York, New York 10022

INDEX NO.: 38575/12
MOTION DATE: 9/28/17
MOTION SEQ. NO.: 004 MG
MOTION SEQ. NO.: 005 MG

DEFENDANT'S ATTORNEYS (Cont'd):

Edward J. Troy, Esq.
Attorneys for Smith
44 Broadway
Greenlawn, New York 11740

Miranda Sambursky Sloane Sklarin
Verveniotis, LLP
Attorneys for County of Suffolk
240 Mineola Boulevard
Mineola, New York 11501

Michael A. Gajdos, P.C.
Attorney for Town of Islip
110 Lake Avenue South, Suite 46
Nesconset, New York 11767

Andrea G. Sawyer, Esq.
Attorney for Grace Industries, LLC
P.O. Box 9028
3 Huntington Quadrangle, Suite 102S
Melville, New York 11747-9028

Upon the following papers numbered 1 to 88 read on this motion for summary judgment and a cross motion for summary judgment; Notice of Motion/Order to Show Cause and supporting papers 1 - 16; Notice of Cross Motion and supporting papers 17 - 33; Answering Affidavits and supporting papers 34-37, 38-67 and 68-73; Replying Affidavits and supporting papers 74 - 88; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the following motions are consolidated for purposes of this decision and order and, as so consolidated, are determined as set forth hereinafter; and it is further

ORDERED that the motion (motion sequence no. 004) of defendant The Fence Man, Inc. for an order pursuant to CPLR R. 3212 granting such defendant summary judgment dismissing plaintiff's complaint as well as all cross-claims asserted against it is granted; and it is further

ORDERED that the motion (motion sequence no. 005) of defendant Grace Industries, LLC for an order pursuant to CPLR R. 3212 granting such defendant summary judgment dismissing plaintiff's complaint as well as all cross-claims and counterclaims asserted against it is granted.

The submissions reflect the following facts: On May 11, 2012, at approximately 10:20 p.m., Matthew D. Rivera was seriously injured when the motorcycle he was riding was struck by a vehicle owned and operated by defendant Carolyn Smith ("Smith") at the intersection of Motor Parkway (C.R. 67) and the north service road of the Long Island Expressway ("LIE"). The accident occurred when Smith, who was traveling in the left northbound through lane of Motor Parkway, attempted to make a left turn onto the westbound north service road of the LIE and collided with plaintiff's motorcycle, which was traveling in the right southbound through lane of Motor Parkway. The intersection of Motor Parkway and the north service road of the LIE was controlled by a traffic light, which was steady green for both northbound and southbound traffic on Motor Parkway at the time of the accident.

On December 28, 2012, plaintiff commenced this personal injury action against Carolyn Smith, the County of Suffolk, the Town of Islip, Grace Industries, LLC ("Grace") and The Fence Man, Inc. ("Fence Man"). At the time of the accident, the intersection was undergoing construction which involved rebuilding the overpass bridge over the LIE. The County of Suffolk, which owned the subject roadway, had contracted with Grace to perform the construction and to undertake responsibility for maintenance and protection of traffic ("MPT") at the site in accordance with the MPT plan prepared by the engineering firm that designed the construction project. Grace, in turn, subcontracted with Fence Man to clean and prepare the pavement surfaces at the construction site and to install interim and permanent pavement marking stripes and symbols thereon.

Plaintiff alleges that defendant Smith was negligent in the operation, management and control of her vehicle, and that the remaining defendants were negligent in, *inter alia*, failing to provide a proper safety plan, proper traffic control devices, adequate and sufficient signage and adequate sight lines at the construction site.

Defendants Fence Man and Grace now move separately for summary judgment dismissing the complaint and all cross-claims against them. Their motions for summary judgment are supported by, *inter alia*, copies of the pleadings, plaintiff's bill of particulars, the transcripts of the depositions of all parties, including the deposition of plaintiff conducted by the County of Suffolk pursuant to General Municipal Law §50-h, as well as copies of the relevant contracts and numerous photographs and drawings of the subject intersection and the construction site.

In opposition to the motions, plaintiff has submitted the affirmation of his attorney, the affidavit of plaintiff sworn to July 17, 2017, and the sworn report of plaintiff's transportation and traffic engineering expert dated July 28, 2017, together with numerous exhibits, including the detailed project plans for the overpass reconstruction. Defendant County of Suffolk also submitted an affirmation in limited opposition.

The deposition testimony of plaintiff reflects that at the time of the accident, the western half of the newly reconstructed overpass bridge was closed for paving, so southbound traffic on Motor Parkway was being rerouted onto the eastern half of the overpass bridge, where it was separated from the northbound lanes by a double yellow line. A triangular configuration of

approximately 10 to 20 orange traffic barrels on the right side of the southbound Motor Parkway approximately 20 to 25 feet before the intersection guided right-turning vehicles to a temporary turn lane and southbound vehicles to the left toward the intersection and the operational portion of the overpass.

Plaintiff testified that just before he entered the intersection, his view of the northbound lanes was blocked by a vehicle that was about three car lengths in front of him in the left through southbound lane, which he had been following since he turned onto Motor Parkway. He observed that vehicle go onto the overpass but testified that he did not observe any northbound traffic. He testified that the orange construction barrels also blocked his view of northbound traffic, but that once he passed the construction barrels, nothing else obstructed his vision of the intersection. He testified that he did not see Smith's vehicle until just before it struck him.

Smith testified that she had been driving northward on Motor Parkway for several minutes and had driven across the overpass with the intention of turning left onto the north service road of the LIE. She testified that when she approached the intersection the traffic light was green. She testified that before she made the turn she made a stop and then made the turn, but subsequently contradicted her prior testimony and stated that "if the light was green, then I didn't make a stop." She testified that her speed as she entered the intersection was approximately ten miles an hour, and that she was able to see 50 to 100 feet ahead but she never saw plaintiff's motorcycle, or the headlight of his motorcycle, before the accident. Her written statement given to the police officer who investigated the accident reflected that the motorcycle "flew" past her as she was already into the turn and she struck the back half of the motorcycle.

The testimony of Fence Man established that the lane markings required by its subcontract with Grace had been completed, inspected and approved by December 22, 2011, approximately six months before the date of plaintiff's accident. The testimony further reflected that Fence Man had performed no other activities at the site since that date. Moreover, the subcontract between Fence Man and Grace specifically excluded "Maintenance and Protection of Traffic" ("MPT") from the scope of the work to be performed by Fence Man. Grace, in its deposition testimony, confirmed that MPT was the exclusive responsibility of Grace. A party to a contract is not required to undertake obligations that the contract does not require (*Quinones v City of New York*, 105 AD3d 932 [2d Dept 2013]); accordingly, Fence Man owed no duty to plaintiff with regard to the "maintenance and protection of traffic" within the construction area. Moreover, neither the deposition testimony of plaintiff or that of defendant Smith reflected that the accident was caused by any defect in the lane markings. Both testified that they were able to see and follow the lane markings, which included a double yellow lane separating the northbound and southbound lanes on the overpass and a white line separating the through lanes, as well as a hybrid pavement marking for the northbound left through/turning lane. The police accident report (MV-104A) prepared by the Suffolk County police officer who investigated the accident did not identify improper or inadequate lane markings as a contributing factor to the accident. In the absence of evidence that the lane-marking by Fence Man was the cause or a contributing factor to plaintiff's accident, there is no basis for the imposition of liability on Fence Man, even if its performance of the lane-marking subcontract was negligent in some fashion (*Perry v Kazolias*, 302 AD2d 575 [2d

Dept 2003]). Fence Man's submissions thus establish, *prima facie*, its entitlement to summary judgment dismissing plaintiff's claims and any cross-claims.

As to Grace's motion, it is well established that where a contractor complies with the plans and specifications of the architect, engineer or designer, that is *prima facie* evidence that the work was properly constructed and designed (*Sipourene v County of Nassau*, 266 AD2d 450 [2d Dept 1999]; *Cunneen v Hicksville Free Public Library*, 236 AD2d 357 [2d Dept 1997]). Here, Grace's submissions reflect that the construction work it performed, including its MPT activities, was fully in accord with the plans and specifications of the project engineers/designers. The deposition testimony of Grace's witness reflects that the construction was regularly inspected, that any issues or problems were immediately corrected, and that no problems with lighting, sight lines, lane markings, traffic signals, etc. had been identified. The witness for Grace also testified that at the time of the accident there was an existing street light at the northeast corner of the intersection. Moreover, both plaintiff and Smith testified that they observed a light at the Mobil station at the northwest corner of the subject intersection, and neither testified that they were unable to see the roadway or the lane markings or oncoming traffic because of inadequate lighting conditions. Grace's submissions thus establish, *prima facie*, that it was not negligent in the construction of the overpass and intersection and that it did not breach any duty to plaintiff and, accordingly, is entitled to summary judgment dismissing the complaint and any cross-claims.

Plaintiff's submissions in joint opposition to defendants' motions fail to raise a triable question of fact. The affidavit of plaintiff, dated July 17, 2017, states that the intersection was "completely dark" and that "as a direct result of both the traffic pattern and the poor lighting, my site [*sic*] line into the intersection was severely obstructed and compromised." Both plaintiff's deposition testimony and the instant affidavit reflect, however, that plaintiff was able to see the construction zone warning signs, the orange construction barrels, the triangular pattern in which they were deployed, the double yellow line separating northbound from southbound traffic, the vehicle three car lengths in front of his motorcycle as it entered the overpass, and the concrete divider separating the western half of the overpass bridge from the eastern half. There is no evidence that plaintiff had any difficulty following the pathway designated by the orange barrels, and his testimony reflected that he was familiar with the construction area as he regularly traveled the Motor Parkway on a daily basis on his way to and from work.

Moreover, plaintiff's newly proffered claim that the roadway configuration required southbound vehicles to "turn rather sharply right" just at the threshold of the intersection and that the "sharp" curve of the roadway prevented him from seeing plaintiff's left-turning vehicle appears to be tailored to avoid the consequences of plaintiff's earlier deposition testimony that it was the car in front of him and the construction barrels that allegedly prevented him from seeing oncoming traffic (*Fredette v Town of Southampton*, 95 AD3d 940, 943 [2d Dept 2012]). The photographs annexed to plaintiff's affidavit fail to substantiate plaintiff's claim, and indeed reveal that the construction barrels were widely spaced and not a complete blockade to a southbound driver's view of oncoming traffic. Plaintiff's affidavit thus fails to raise a question of fact.

Plaintiff also proffered the report of a transportation and traffic engineering expert which

similarly fails to raise a question of triable fact. The expert's opinion is vague and conclusory and provides no factual support for, *inter alia*, the expert's assertions that the temporary realignment of the southbound Motor Parkway roadway is "completely inconsistent" with the construction plans and specifications, or that defendants failed to properly implement the MPT plan (*Kleinberg v City of New York*, 27 AD3d 317 [1st Dept 2006]). Similarly, the expert's conclusory assertion that lack of intersection lighting, lack of proper warning signs, and lack of proper regulatory signs "created an extremely dangerous intersection for motorists" is unsupported by any facts in the record. None of the testimony or documentary evidence in the record reflects that plaintiff's accident was caused by inadequate lighting or improper or inadequate signage. Both drivers testified that they were able to see the roadway, the pavement markings, the traffic barrels, the traffic light, and the reconfigured lane alignment.

The expert also placed undue reliance on reports of prior accidents at the subject intersection to support his conclusion that a left-turn arrow should have been provided. The record reflects, however, that the conditions of the intersection at the time of plaintiff's accident were not the same as those existing at the time of the prior accidents from 1999 to 2001. The expert also cites numerous safety requirements that were allegedly violated by defendants but fails to identify any particulars as to how those requirements were allegedly violated. Neither plaintiff nor defendant Smith testified to any facts indicating that the construction was performed negligently and that such negligence was causally related to the accident (*id.*).

The expert also relies on the testimony of the police officer who responded to the accident scene to the effect that Ms. Smith may have indicated that she was "confused by the orange cones." That statement is inadmissible hearsay, and in any event is contradicted by Smith's deposition testimony, in which she denies making such a statement to the police officer.

In light of all of the foregoing, defendants' motions for summary judgment are granted and the complaint and all cross-claims are dismissed as against The Fence Man, Inc. and Grace Industries, LLC.

The remaining parties are reminded that a compliance conference is scheduled to be held before the undersigned on May 10, 2018 at 9:30 a.m.

Dated: May 4, 2018

HON. PAUL J. BAISLEY, JR.

J.S.C.