

Hornbuckle v Hannibal
2019 NY Slip Op 31084(U)
April 23, 2019
Supreme Court, Suffolk County
Docket Number: 11-28279
Judge: Sanford Neil Berland
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ORIGINAL

INDEX No. 11-28279

CAL. No. 17-02058MV

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

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 3-14-18 (006 & 007)

MOTION DATE 3-23-18 (008)

MOTION DATE 5-15-18 (009)

ADJ. DATE 7-10-18

Mot. Seq. # 006 - MD # 008 - MG

007 - MD # 009 - XMD

-----X
SHERI HORNBUCKLE, as Guardian of
ROBERT HORNBUCKLE and SHERI
HORNBUCKLE,

Plaintiffs,

- against -

TYLER E. HANNIBAL, MAUREEN R.
HANNIBAL, TOWN OF SOUTHAMPTON,
COUNTY OF SUFFOLK AND TOWN OF
EAST HAMPTON,

Defendants.
-----X

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Upon the following papers numbered 1 to 147 read on these motions and cross motion for summary judgment : Notice of Motion and supporting papers 1 - 15; 16 - 37; and 38 - 50; Notice of Cross-Motion and supporting papers 51 - 58; Answering Affidavits and supporting papers 59 - 85; 86 - 119; 120 - 134; and 135 - 138; and Replying Affidavits and supporting papers 139 - 147, it is,

ORDERED that all motions (#006, #007 and #008) by defendants and the cross-motion (#009) by plaintiffs are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by defendants Tyler Hannibal and Maureen Hannibal for summary judgment dismissing the complaint and the cross-claims against them is denied; and it is further

ORDERED that the motion by defendant Town of East Hampton for summary judgment dismissing the complaint and the cross-claims against it is denied; and it is further

ORDERED that the motion by defendant County of Suffolk for summary judgment dismissing the complaint and the cross claims against it is granted; and it is further

ORDERED that the cross-motion by plaintiffs for an order granting summary judgment in their favor on the issue of liability against defendants Tyler Hannibal and Maureen Hannibal is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Robert Hornbuckle ("plaintiff") when the bicycle he was riding collided with a vehicle owned by defendant Maureen Hannibal and operated by defendant Tyler Hannibal. The accident allegedly occurred on September 5, 2010, at approximately 4:40 p.m., on Springy Banks Road in the Town of East Hampton, New York. At the time of the accident, plaintiff was riding across Springy Banks Road in the roadway's crosswalk, which was located approximately 100 feet north of Springy Banks Road's intersection with Three Mile Harbor Road. Springy Banks Road, a two-way street with one lane in each direction, runs north and south. Springy Banks Road is owned by the Town of East Hampton ("Town"), and Three Mile Harbor Road is owned by the County of Suffolk ("County"). Sheri Hornbuckle, plaintiff's wife and guardian, in addition to asserting claims for her husband's injuries, also brings a derivative claim for medical expenses and loss of services. In their bill of particulars, plaintiffs allege, *inter alia*, that the Town was negligent in improperly placing the subject crosswalk on Springy Banks Road and in failing to provide adequate warning of the crosswalk.

The Hannibal defendants move for summary judgment dismissing the complaint and the other defendants' cross-claims against them on the grounds that Tyler Hannibal has no responsibility or liability for the accident and that the subject accident was solely the result of Robert Hornbuckle's failure to yield to Hannibal's northbound vehicle. In support, the Hannibal defendants submit, *inter alia*, the pleadings and the transcripts of the parties' deposition testimony. Plaintiffs both oppose the motion and, separately, cross-move for partial summary judgment in their favor and against the Hannibal defendants on the issue of liability.

At his deposition, Tyler Hannibal testified that he had been traveling northbound on Three Mile Harbor Road at 40 miles per hour. He testified when he made a left turn at the intersection with Springy Banks Road, he slowed down to 35 miles per hour. Immediately after he completed his turn onto

Springy Banks Road, he observed plaintiff on the sidewalk, on the right side of the road, “starting out on into the crosswalk.” At the time, his vehicle was one or two vehicle lengths away from plaintiff. He testified that he applied his brakes and turned his wheel to the right. However, his vehicle skidded, and he was not able to avoid colliding with plaintiff. He testified that the passenger side of his vehicle came into contact with plaintiff and that his vehicle then traveled several feet to the right, hit a tree and stopped. Hannibal further testified that at the time of impact, plaintiff was in the crosswalk on his bicycle. Finally, he testified that at the time of the accident, he lived several miles away from the accident area and was familiar with the area.

In general, a motorist is required to keep a reasonably vigilant lookout for bicyclists, to sound the vehicle’s horn when a reasonably prudent person would do so in order to warn a bicyclist of danger and to operate the vehicle with reasonable care to avoid colliding with anyone on the road (*see* Vehicle and Traffic Law § 1146; *Pagels v Mullen*, 167 AD3d 185, 88 NYS3d 727 [4th Dept 2018]; *Chilinski v Maloney*, 158 AD3d 1174, 70 NYS3d 635 [4th Dept 2018]; *Palma v Sherman*, 55 AD3d 891, 891, 867 NYS2d 111 [2d Dept 2008]). A bicyclist is required to use reasonable care for his or her own safety, to keep a reasonably vigilant lookout for vehicles, and to avoid placing himself or herself in a dangerous position (*see Palma v Sherman, supra; Rosenberg v Kotsek*, 41 AD3d 573, 837 NYS2d 343 [2d Dept 2007]). Each is required to obey the statutes governing traffic and is entitled to assume that the other also will do so (*see Palma v Sherman, supra; Rosenberg v Kotsek, supra; Trzepacz v Jara*, 11 AD3d 531, 782 NYS2d 852 [2d Dept 2004]).

Here, the Hannibal defendants have failed to establish, *prima facie*, Tyler Hannibal’s freedom from causative comparative fault and that plaintiff’s alleged failure to yield was the sole proximate cause of the accident. According to his own deposition testimony, Tyler Hannibal was familiar with the area of the accident, slowed down to 35 miles per hour when he made a left turn into Springy Banks Road and immediately after he completing that turn, observed plaintiff on his bicycle “Starting out into” the crosswalk to cross Springy Banks Road. Nevertheless, Hannibal failed to avoid the collision, and his vehicle skidded and stopped after hitting first the bicyclist and then a tree. Thus, the deposition testimony of Tyler Hannibal raises triable issues of fact as to his attentiveness as he drove, whether he used reasonable care to avoid a collision with plaintiff and whether he failed to see that which through proper use of his senses he should have seen (*see Aponte v Vani*, 155 AD3d 929, 64 NYS3d 123 [2d Dept 2017]; *Simmons v Canady*, 95 AD3d 1201, 945 NYS2d 138 [2d Dept 2012]; *Cox v Weil*, 66 AD3d 634, 887 NYS2d 170 [2d Dept 2009]). Accordingly, the Hannibal defendants’s motion for summary judgment is denied. For like reasons - that is, the existence of issues of fact as whether Robert Hornbuckle’s alleged failure to yield the right of way was the accident’s sole proximate cause, or, if not, whether negligence or other culpable conduct on the part of Tyler Hannibal was a proximate cause of the accident - plaintiffs’ cross-motion for partial summary judgment against the Hannibal defendants on the issue of liability is also denied¹.

¹ Although the cross-motion was made more than one hundred twenty days after the note of issue was filed (*see* CPLR 3212[a]), an otherwise untimely cross-motion for summary judgment may be entertained where, as here, it seeks relief against the same parties who made the underlying motion and it raises the same, or “nearly identical,” grounds as the timely underlying motion (*see Wernicki v Knipper*, 119 AD3d 775, 776-77 [2d Dept 2014]).

The Town also moves for summary judgment, dismissing the complaint and all cross claims against it, asserting that it bears no liability for plaintiffs' injuries and losses and that it was Robert Hornbuckle's negligence that was the sole proximate cause of the accident. In support of its motion, the Town submits, *inter alia*, the pleadings, the bill of particulars, the uncertified medical records of Southampton Hospital for Robert Hornbuckle treatment there, the transcripts of the parties' deposition testimony, the affidavit of Carole Brennan, the Clerk of the Town, and the affidavits of two expert witnesses for the Town, Gary Anderson, a professional engineer licensed in New Jersey, and Kevin Wehrle, a traffic accident reconstructionist.

In her affidavit, Brennan states that she is the Town Clerk for the Town of East Hampton. She states that she searched records and found that the Town had received no prior written notice of any dangerous condition of overgrown foliage in the area of the subject accident obscuring the view of the Springy Banks Road crosswalk.

Municipalities have a duty to maintain their roads in a reasonably safe condition for motorists and must guard against contemplated and foreseeable risks (*see Turturro v City of New York*, 28 NY3d 469, 45 NYS3d 874 [2016]; *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]). 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 the study purportedly underlying it is plainly inadequate or there is no reasonable basis for the plan (*see Turturro v City of New York, supra; Friedman v State of New York, supra; Mare v City of New York*, 112 AD3d 793, 794, 977 NYS2d 342 [2d Dept 2013]).

Here, the Town failed to establish its entitlement to judgment as a matter of law. The affidavits of the Town Clerk and the Town's experts have not addressed whether the placement of the crosswalk was the product of an adequate study, a prerequisite to the according of qualified immunity. Although the Town presented evidence that there was no prior written notice of overgrown foliage in the area of the subject accident, it failed to address plaintiffs' allegations of design defects and the failure of the traffic study (*see Busterna v County of Suffolk*, 169 AD3d 636, 91 NYS3d 719 [2d Dept 2019]; *Bresciani v County of Dutchess*, 62 AD3d 639, 878 NYS2d 410 [2d Dept 2009]). The evidence presented by the Town failed to establish that it undertook a study that considered and passed upon the question of risk that is at issue in this case (*see Turturro v City of New York, supra; Bednoski v County of Suffolk*, 145 AD3d 943, 44 NYS3d 485 [2d Dept 2016]; *Moskovitz v City of New York*, 130 AD3d 991, 991-992, 14 NYS3d 425 [2d Dept 2015]). Hence, there are issues of fact as to whether the Town's design of the crosswalk was the product of adequate study and a reasonable planning decision, as well as to whether Robert Hornbuckle's alleged negligence was the sole proximate cause of the accident (*see*

Deleon v New York City Sanitation Dept., 116 AD3d 404, 983 NYS2d 17 [1st Dept 2014]). Thus, the Town's submissions fail to eliminate all triable issues of fact as to whether negligence in the design of the crosswalk was a proximate cause of the accident (*see Poveromo v Town of Cortlandt, supra*). Accordingly, the Town's motion for summary judgment is denied.

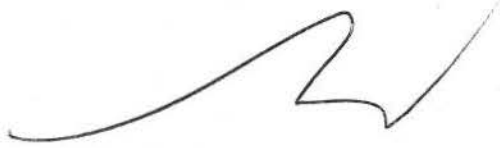
The County moves for summary judgment dismissing the complaint and all cross-claims against it, asserting that it bears no liability for the alleged failure to post warning signs contending that any such alleged failure was not a proximate cause of the subject accident. In support of its contention, the County submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the parties' deposition testimony.

Fundamentally, the absence of a warning sign or other traffic control device or highway marking may be excluded as a cause of an accident if the driver's awareness of the physical conditions prescribed the same course of action that the allegedly required warning sign would have or if the driver, by reason of his recollection from prior trips over the same road, actually had the danger in mind as he approached it on the highway (*see Winters v Town of Germantown*, 20 AD3d 713, 799 NYS2d 307 [3d Dept 2005]; *Gilberto v Town of Plattekill*, 279 AD2d 863, 719 NYS2d 384 [3d Dept 2001]).

Here, the County established its prima facie entitlement to summary judgment by presenting evidence that Tyler Hannibal was familiar with the area of the subject accident and that he lived within several miles from the accident area. Tyler Hannibal knew the speed limits for both Springy Banks Road and Three Mile Harbor Road, as well as the location of the crosswalk where the accident occurred. Thus, the County has demonstrated, prima facie, that the alleged absence of adequate warning signs on Three Mile Harbor Road concerning the crosswalk on Springy Banks Road was not a proximate cause of the accident given Tyler Hannibal's intimate knowledge of the area of the accident (*see Feeney v Holeman*, 73 AD3d 848, 900 NYS2d 451 [2d Dept 2010]; *Gattone v Conlan*, 299 AD2d 394, 749 NYS2d 560 [2d Dept 2002]). Moreover, it is undisputed that Springy Banks Road is not owned by the County.

In opposition, plaintiffs rely on their expert witness, Nicholas Belizzi, a professional engineer licensed in New York, who opines that the County was negligent in failing to reduce the speed limit on Three Mile Harbor Road from 40 to 30 miles per hour within a quarter-mile preceding that road's intersection with Springy Banks Road. However, Belizzi's opinion is conclusory and, thus, is insufficient to raise a triable issue of fact (*see Gattone v Conlan, supra*). The Court has considered plaintiffs' remaining contentions advanced in support of their claims against the County and find them to be without merit. Thus, the County's motion is granted, and plaintiffs' complaint and the cross-claims as asserted against the County are dismissed.

Dated: 4/23/2019



HON. SANFORD NEIL BERLAND, A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION