

Borrie v County of Suffolk

2019 NY Slip Op 31163(U)

April 19, 2019

Supreme Court, Suffolk County

Docket Number: 07820/2009

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY**PRESENT:**

WILLIAM B. REBOLINI
Justice

Roderick Borrie, as Executor of the
Estate of Rebecca Borrie,

Plaintiff,

-against-

The County of Suffolk, Town of Brookhaven,
and Hamlet of Setauket,

Defendants.

Motion Sequence No.: 005; MG
Motion Date: 5/14/15
Submitted: 7/15/15

Index No.: 07820/2009Attorney for Plaintiff:

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Clerk of the Court

Upon the following papers numbered 1 to 24 read on this motion for summary judgment: Notice of Motion and supporting papers, 1 - 22; Answering Affidavits and supporting papers, ~~23~~ 24; it is

ORDERED that the motion by defendant Town of Brookhaven ("Town") for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any cross-claims insofar as asserted against it is granted, and the action is severed and shall otherwise continue against the remaining defendants.

Borrie v. County of Suffolk, et al.**Index No.: 7820/2009****Page 2**

This is an action to recover damages for wrongful death and other injuries allegedly sustained by the decedent, Rebecca Borrie, as a result of a motor vehicle accident which occurred on December 3, 2007, at approximately 1:00 p.m., at or near the intersection of Quaker Path and Huyler Court, in the Town of Brookhaven, County of Suffolk. It is alleged that the accident occurred when the vehicle operated by Nancy Rich ("Rich") traveling northbound on Quaker Path swerved into the southbound lane where Peter Golder ("Golder") was operating his vehicle southbound. It is alleged that the Rich vehicle struck the Golder vehicle and then struck the decedent, Rebecca Borrie, a pedestrian on the west side of the roadway.

Defendant Town now moves for summary judgment dismissing the complaint in its entirety and any cross claims. In support of the motion it submits, *inter alia*, its attorney's affirmation, a copy of the pleadings, copies of the General Municipal Law 50(h) and deposition transcripts of Roderick Borrie, of Rich and Golder, and of Susan Mauro as a witness for the Town, a certified copy of the police accident report, photographs, the statement of Dawn Alene, dated June 28, 2012, the affidavits of Joseph G. Pecora, PE, sworn to on April 16, 2015, of Susan Mauro, sworn to on April 14, 2015, of Linda Sullivan, sworn to on April 15, 2015 and of Lynn Weyant, sworn to on April 10, 2015. Plaintiff submitted his attorney's affidavit in partial opposition. No other party submitted opposition to the motion.

Mr. Borrie testified that decedent had walked that particular route dozens of times, heading to the bank to make deposits. He also testified that, although the decedent had complained about the lack of sidewalks in other areas, she had never done so with regard to this portion of Quaker Path.

Rich testified that she was involved in a motor vehicle accident on December 3, 2007 at approximately 1:00 p.m. Prior to the accident, she stopped at a deli in Port Jefferson and purchased a roll and two cups of coffee. She was traveling on Quaker Path, which is one lane in each direction divided by a double yellow line, in a northbound direction. The accident occurred where Quaker Path intersects Huyler Court. She alleged that she was traveling at 25 to 30 miles per hour. She took her eyes off the road because she was reaching down for her coffee, and she never looked at the roadway again before the accident occurred. Her vehicle crossed over the double yellow line into the southbound lane. The passenger/right front and side of her vehicle came into contact with the passenger right side of the vehicle operated by Golder. After the accident she saw a woman, later identified as Rebecca Borrie, lying in the street. She did not see Mrs. Borrie walking along Quaker Path prior to the accident. At the moment of impact she was looking at her coffee and not looking at the road. As a result of the accident, Rich pled guilty and was sentenced to two months in a correctional facility and two months in the DWI facility in Yaphank.

Golder testified that he was involved in a motor vehicle accident on December 3, 2007. Prior to the accident, he made a right turn from Bailey Hollow Road onto Quaker Path. He was heading southbound on Quaker Path, which has two lanes of travel separated by a double yellow line. After turning onto Quaker Path he accelerated to approximately 15 to 20 miles per hour. He observed a pedestrian approximately 200 feet away as he entered Quaker Path walking northbound along his side of the road. When he first saw the Rich vehicle, it was going fast for vehicles traveling on Quaker Path. After he had traveled 50 to 100 feet on Quaker Path, he began to slow down because of the pedestrian and because the oncoming car was veering into his lane. As the vehicle approached him, it veered further into his lane. He put his foot lightly on the brake. Prior to contact, he made

Borrie v. County of Suffolk, et al.

Index No.: 7820/2009

Page 3

a split second decision to avoid a head-on collision and made a hard left to try to get out of the way. The right front of the other vehicle came into contact with right front half of his vehicle. The other vehicle continued after striking his vehicle, and it struck and killed the pedestrian.

A witness statement was submitted from Dawn Alene, who witnessed the accident from the intersection of Quaker Path and Huyler Court. She observed the Golder vehicle turn onto Quaker Path. She also saw the vehicle operated by Rich come fast over the hill. The black car operated by Rich crossed the divider and went into the opposite lane. The Golder vehicle attempted to get out of the way. The Rich vehicle hit the Golder vehicle and then hit the pedestrian. The black car continued and hit a tree. The pedestrian hit the windshield of the Rich vehicle and flew backward, landing on the side of the road.

Section 84.1 A of the Brookhaven Town Code states as follows:

Prior written notice required. No civil action shall be commenced against the Town of Brookhaven or the Superintendent of Highways for damages or injuries to persons or property sustained by reason of the defective, out-of-repair, unsafe, dangerous or obstructed condition of any highway, street, sidewalk...of the Town of Brookhaven, unless, previous to the occurrence resulting in such damages or injuries, written notice of such defective, out-of-repair, unsafe, dangerous or obstructed condition, specifying the particular place and location was actually given to the Town Clerk or Town Superintendent of Highways and there was a failure or neglect within a reasonable time, after the giving of such notice, to repair or remove the defect, danger or obstruction complained of.

“A municipality that has adopted a prior written notice law cannot be held liable for a defect within the scope of the law absent the requisite written notice, unless an exception to the requirement applies” (*Barnes v Incorporated Vil. of Port Jefferson*, 120 AD3d 528, 529, 990 NYS2d 841 [2d Dept 2014]; *Carlucci v Village of Scarsdale*, 104 AD3d 797, 961 NYS2d 318 [2d Dept 2013]; *Wilkie v Town of Huntington*, 29 AD3d 898, 816 NYS2d 148 [2d Dept 2006], citing *Amabile v City of Buffalo*, 93 NY2d 471, 693 NYS2d 77 [1999]; *Lopez v G&J Rudolph*, 20 AD3d 511, 799 NYS2d 254 [2d Dept 2005]). “The only two recognized exceptions to a prior written notice requirement are the municipality’s affirmative creation of a defect or where the defect is created by the municipality’s special use of the property” (*Gonzalez v Town of Hempstead*, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; *Forbes v City of New York*, 85 AD3d 1106, 1107, 926 NYS2d 309 [2d Dept 2011]). “Actual notice of the alleged hazardous condition does not override the statutory requirement of prior written notice of a sidewalk defect” (*Velho v Village of Sleepy Hollow*, 119 AD3d 551, 552, 987 NYS2d 879 [2d Dept 2014]; see also *Gonzalez v Town of Hempstead*, 124 AD3d 719, 2 NYS3d 527 [2d Dept 2015]; *Chirco v City of Long Beach*, 106 AD3d 941, 943, 966 NYS2d 450 [2d Dept 2013]).

The affidavit of an official charged with the responsibility of keeping an indexed record of all notices of defective conditions received by a town is sufficient to establish that no prior written notice was filed (*Velho v Village of Sleepy Hollow*, *supra*; *Petrillo v Town of Hempstead*, 85 AD3d 996, 998, 925 NYS2d 660 [2d Dept 2011]; *Pagano v Town of Smithtown*, 74 AD3d 1304, 904

Borrie v. County of Suffolk, et al.

Index No.: 7820/2009

Page 4

NYS2d 729 [2d Dept 2010]). The testimony and affidavit of Suzanne Mauro, as well as the affidavit of Linda Sullivan establish that there was no prior written notice filed with either the town clerk's office or with the highway department, as required by the Town ordinance.

Plaintiff has alleged that defendant Town was negligent in a number of ways regarding Quaker Path, including: failure to provide a safe means of travel for pedestrians, failure to have sidewalks or to provide shoulders of adequate width, failure to use appropriated funds for construction of safety mechanisms to protect pedestrians, failure to place appropriate signage, failure to redesign the roadway, failure to review the safety of the roadway and failure to provide safer alternatives to pedestrians.

Without question, a municipality owes a nondelegable duty to adequately design, construct and maintain its roadways in a reasonably safe condition (*Friedman v State of New York*, 67 NY2d 271, 283, 502 NYS2d 669 [1986]). A municipality, however, is not an insurer of the safety of its roadways. The design, construction and maintenance of public highways is entrusted to the sound discretion of municipal authorities and so long as a highway may be said to be reasonably safe for people who obey the rules of the road, the duty imposed upon the municipality is satisfied (*see Tomassi v Town of Union*, 46 NY2d 91, 98, 412 NYS2d 842 [1978]). In the area of highway design the Courts must also accord qualified immunity to the State's highway planning decisions (*see Friedman, supra*, at 283–284; *Weiss v Fote*, 7 NY2d 579, 200 NYS2d 409 [1960]). However, 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 (*Bresciani v County of Dutchess*, 62 AD3d 639, 640, 878 NYS2d 410 [2d Dept 2009]). However, as noted, “a [municipality] is not the insurer of the safety of its roads, and ‘no liability will attach unless the ascribed negligence of the [municipality] in maintaining its roads in a reasonable condition is a proximate cause of the accident’ ” (*Martinez v County of Suffolk*, 17 AD3d 643, 644, 794 NYS2d 98 [2d Dept 2005], quoting *Stanford v State of New York*, 167 AD2d 381, 382, 561 NYS2d 796 [2d Dept 1990]; *see also Noller v Peralta*, 94 AD3d 830, 941 NYS2d 700 [2d Dept 2012]).

It is the plaintiff's burden to show that the State was negligent in the first instance, and that the negligence claimed is a proximate cause of a claimant's injuries (*Jordan v State of New York*, 249 AD2d 279, 671 NYS2d 287 [2d Dept 1998]; *Friedman v State of New York, supra*). No evidence of the Town's alleged negligence has been introduced by the plaintiff or any other party hereto. The Town has introduced the affidavit of Lynn Weyant, who was the Town's director of traffic safety at the time the accident occurred. Upon review of Town records, including those for Quaker Path, she found that at no time prior to 2007 had any Town, County, State or Federal funds been designated for construction of sidewalks curbs or any other devices to protect pedestrians in this area. No prior complaints, written or oral, had been submitted to her department requesting sidewalks etc. in this area. She further noted that a review of the records involving the subject roadway and its design and layout indicates that sidewalks, curbs, etc. were not warranted or required by any municipal, state or federal law or by good and accepted engineering principles. Finally, she noted that Town records reveal no evidence of any prior motor vehicle accidents involving pedestrians along Quaker Path, at or near its intersection with Huyler Court. The Town has also submitted the expert affidavit of Joseph G. Pecora, a professional engineer, who is a certified professional traffic operations engineer. After review of the facts in this matter, his findings closely

Borrie v. County of Suffolk, et al.

Index No.: 7820/2009

Page 5

tracked those contained in the Weyant affidavit. He found, among other things, to a reasonable degree of engineering certainty, that the layout design, and construction of the subject roadway was not the cause of the injuries sustained by the decedent, that there is no evidence that the Town failed to routinely review the safety of roadways and pedestrian walkways, and that Quaker Path at the subject location was reasonably designed and constructed in a fashion to provide a safe means of travel for motorists and pedestrians alike. He concluded that the subject accident occurred only due to the failure of the motorists to use reasonable care and obey the laws governing the operation of their vehicles. The plaintiff having failed to produce any evidence that the Town was responsible for any dangerous condition which caused the accident and led to the injuries suffered by the decedent, it is entitled to summary judgment herein (*see Steenbuck v State of New York*, 111 AD3d 819, 975 NYS2d 348 [2d Dept 2013]; *Carlo v State of New York*, 51 AD3d 618, 855 NYS2d 919 [2d Dept 2008]; *Sinski v State of New York*, 2 AD3d 517, 517, 767 NYS2d 874 [2d Dept 2003]).

Accordingly, defendant Town's motion for summary judgment dismissing the complaint and all cross-claims is granted.

Dated: 4/19/2019


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION _____ **X** _____ NON-FINAL DISPOSITION