

Rivera v Smith

2019 NY Slip Op 31798(U)

June 18, 2019

Supreme Court, Suffolk County

Docket Number: 38575/12

Judge: Jr., Paul J. Baisley

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Short Form Order

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

PRESENT:

HON. PAUL J. BAISLEY, JR., J.S.C.

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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: 8/23/18
MOTION SEQ. NO.: 007 MG
MOTION DATE: 8/2/18
MOTION SEQ. NO.: 008 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

John DiCioccio, Esq.
Attorneys for Town of Islip
655 Main Street
Islip, New York 11751

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 94 read on this motion (motion sequence no. 007) for summary judgment: Notice of Motion/Order to Show Cause and supporting papers 1 - 19 and Defector Affidavit 20 - 25; Answering Affidavits and supporting papers 26 - 47; Reilly Affirmation in Partial Opposition 48 - 50; Affidavit Replying Affidavits and supporting papers 51 - 58; Other Miranda Sambursky Memorandum in Support 59 - 69; and read on this motion (motion sequence no. 008) to renew and reargue: Notice of Motion/Order to Show Cause and supporting papers 70 - 82; Answering Affidavits and supporting papers 83 - 89; Replying Affidavits and supporting papers 90 - 94; (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. 007) of defendant County of Suffolk for an order pursuant to CPLR R 3212 granting such defendant summary judgment dismissing

plaintiff's complaint and declaring that the County shares no liability relating to plaintiff's alleged injuries, is granted; and it is further

ORDERED that the motion (motion sequence no. 008) of plaintiff for an order pursuant to CPLR 2221 granting plaintiff leave to reargue, and upon reargument, summary judgment to defendant Grace Industries, LLC is granted.

The submissions reflect that on May 11, 2012 the plaintiff Matthew D. Rivera ("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 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 incident.

At the time of the accident, the intersection was undergoing construction which involved rebuilding the overpass bridge over the LIE. The County of Suffolk ("County"), which owned the roadway, had contracted with Grace Industries, LLC ("Grace") to perform the construction and to undertake responsibility for maintenance and protection of traffic at the site. Grace subcontracted with Fence Man, Inc. ("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 the defendants were negligent in failing to provide a proper safety plan, proper traffic control devices, adequate and sufficient signage and adequate sight lines at the construction site. Plaintiff further alleges that defendant Smith was negligent in the operation, management and control of her vehicle. The defendants Fence Man and Grace were granted summary judgment by court order dated May 4, 2018.

The defendant County now moves for summary judgment for an order dismissing the complaint and declaring that the County shares no liability relating to plaintiff's alleged injuries. Plaintiff has served a motion to reargue the court's prior order dated May 4, 2018. The County's motion for summary judgment is supported by, *inter alia*, copies of the pleadings, the deposition of the plaintiff conducted by the County pursuant to General Municipal Law §50-h, the deposition of the plaintiff, the deposition transcript of responding police officer James Conrad, the deposition transcript of defendant Carolyn Smith, the deposition transcript of the County by Kevin Mathers, the deposition transcript of Fence Man by Samantha Kelly, the deposition transcript of Grace by William McDonald, the deposition transcript of defendant Smith, the final design report, Department of Public Works plan, the project manual, contract between County and Grace, daily work reports, engineer's daily project diary, expert affidavit of Scott E. Derector.

In opposition to the motion, and in support of his motion to reargue, plaintiff has

submitted, *inter alia*, aerial photographs and map of the subject location, pleadings, bill of particulars, Town of Islip record plans, the deposition of the plaintiff conducted by the County pursuant to General Municipal Law §50-h, survey, project manual, final design report, engineer's daily project diary, daily work reports, the deposition transcript of defendant Smith, the deposition transcript of responding police officer James Conrad, the deposition transcript of Grace by William McDonald, the deposition transcript of Fence Man by Samantha Kelly, the deposition transcript of the County by Kevin Mathers, affidavit of plaintiff, expert affidavit of Carl M. Berkowitz,

The submissions reflect that the accident occurred on May 11, 2012 at approximately 10:20 p.m. The plaintiff Matthew Rivera was operating a 2006 Harley Davidson motorcycle in a southbound direction on Motor Parkway when he was struck by a Lincoln SUV operated by defendant Smith which had been proceeding northbound on Motor Parkway and was attempting to make a left turn onto the westbound North Service Road. The intersection was controlled by a traffic light which was green for northbound and southbound traffic at the time of the accident. Plaintiff testified that there was nothing obstructing his view of the intersection at the time of the accident. He had driven through this intersection previously and never complained of the traffic conditions or the lighting. The defendant Smith testified that she did not see plaintiff's motorcycle before the collision. The accident occurred while Smith was in the process of making a left hand turn. Both the plaintiff and defendant Smith testified that they were able to see the road, the traffic barrels, the traffic light, and the reconfigured lane alignment and the pavement markers. The responding police officer, James Conrad testified that the area where the accident occurred was well lit. Conrad determined that Smith had failed to yield the right of way to plaintiff, causing the accident.

At the time of the accident, a construction project was being conducted on behalf of the County by Grace and the Fence Man. The work being performed was based upon plans provided by Lockwood, Kessler & Bartlett ("LKB"). Prior to the beginning of construction, the County had a multi-year traffic and project analysis conducted by LKB and subsequently had a plan for maintenance and protection of traffic ("MPT") created by LKB. The County asserts that the decision to conduct the project was the result of a long and thorough legislative process which began in 1988, followed by a three year traffic analysis, and public hearings.

The County contends that the formulated plan was reasonable, adequate, and the result of proper study and deliberation. The County submits that, as such, the County is entitled to qualified immunity and cannot be held liable for plaintiff's accident. The County further contends that the May 4, 2018 court order held, as a matter of law, that "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." The County asserts that this holding is now the "law of the case" and plaintiff is prevented from arguing that the construction was performed negligently.

Plaintiff asserts that the court's prior order overlooked or misapprehended the testimonial, documentary and photographic record. Specifically, plaintiff submits that the plan

for maintenance and protection of traffic implemented by Grace deviated from the plans and specifications and otherwise created improper and insufficient sight lines, inadequate lighting, sight line obstructions and improper lane markings.

Grace has established that the construction work it performed, including its MPT activities, was fully in accord with the plans and specifications of the project engineers. The deposition testimony of William McDonald reflects that the construction was regularly inspected, any issues were immediately corrected, and that there were no problems with lighting, sight lines, lane markings, or traffic signals. Grace's submissions establish 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 as a matter of law. A motion for leave to renew or reargue is addressed to the sound discretion of the Supreme Court (*HSBC Bank USA, N.A. v Halls*, 98 AD3d 718, 950 NYS2d 172[2d Dept 2012]). Plaintiff's submissions fail to establish that the Court overlooked or misapprehended any matters of fact or law in determining the prior motions (CPLR R. 2221(d)).

It is well settled that a municipality owes the traveling public the absolute duty of keeping its highways in a reasonably safe condition (*Friedman v State of New York*, 67 NY2d 271, 493 NE2d 893, 502 NYS2d 669). However, municipalities are "accorded qualified immunity from liability arising out of a highway planning decision which arises out of a concern for unwarranted intrusion into discretionary governmental functions" (*Ames v City of New York*, 177 AD2d 528, 531, 575 NYS2d 917[2d Dept. 1991]). In order to hold a governmental body liable under the doctrine of qualified immunity in the field of traffic design engineering, it must be shown that "its study of a traffic condition is plainly inadequate or there is no reasonable basis for its traffic plan" (*Friedman v State of New York, supra, at 284*). The submissions herein reflect that the County conducted a traffic study over a period of years which included examination of all traffic and accident data and public hearings. The final design report and subsequent project manual and plans were based upon New York State Department of Transportation Standards. The affidavit of Scott E. Derector, P.E. establishes *prima facie* that the traffic plans were reasonable, adequate and in accord with industry custom and standard as well as New York State DOT and Federal Highway Administration Standards.

The Court's decision dated May 4, 2018 held that "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." This holding is now the "law of the case" and plaintiff is estopped from arguing that the construction was performed negligently. "The doctrine of the law of the case seeks to prevent relitigation of issues of law that have already been determined at an earlier stage of the proceeding....[i]t applies to determinations which were necessarily resolved on the merits in the prior order" (*Hampton Val. Farms, Inc. V. Flower & Medalie*, 40 AD3d 699, 701, 835 NYS2d 678 [2d Dept. 2007], citing *Brownrigg v New York City Hous. Auth.*, 29 AD3d 721, 722, 815 NYS2d 681 [2d Dept 2006]).

In light of the foregoing, the defendant County's motion pursuant to CPLR R 3212 granting summary judgment dismissing plaintiff's complaint and declaring that the County

Rivera v Smith, et al.

Index No. 38575/2012

shares no liability relating to plaintiff's alleged injuries, is granted. Plaintiff's motion for leave to reargue, and upon reargument, summary judgment to defendant Grace Industries, LLC is granted.

The foregoing constitutes the order of the Court.

Dated: June 18, 2019

HON. PAUL J. BAISLEY, JR.

J.S.C.