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| Yasso v Town of Brookhaven |
| 2019 NY Slip Op 32698(U) |
| September 5, 2019 |
| Supreme Court, Suffolk County |
| Docket Number: 15-12106 |
| Judge: William G. Ford |
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SHORT FORM ORDER

INDEX No. 15-12106
CAL. No. 18-01420MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 1-3-19 (001)
MOTION DATE 1-10-19 (002)
MOTION DATE 4-8-19 (003)
ADJ. DATE 5-16-19
Mot. Seq. # 001 - MG
 # 002 - MD
 # 003 - MD

-----X
JOSEPH YASSO,

Plaintiff,

- against -

TOWN OF BROOKHAVEN, TERENCE
NORTON, MERCEDES NORTON,
THOMAS KEHLENBECK and BARBARA
KEHLENBECK,

Defendants.
-----X

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Upon the following papers numbered 1 to 69 read on these motions for summary judgment, and for vacatur of the note of issue; Notice of Motion/ Order to Show Cause and supporting papers 1-18; 19-36; 37-51; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 52-63; 64-65; Replying Affidavits and supporting papers 66-67; 68-69; Other ___; (and after hearing counsel in support and opposed to the motion) it is,

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ORDERED that these motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendants Thomas Kehlenbeck and Barbara Kehlenbeck for summary judgment dismissing the complaint and any cross claims against them is granted; and it is further

ORDERED that the motion by defendants Terence Norton and Mercedes Norton for summary judgment dismissing the complaint and any cross claims against them is denied; and it is further

ORDERED that the motion by Thomas Kehlenbeck and Barbara Kehlenbeck for an order striking plaintiff's second supplemental verified bill of particulars, vacating the note of issue, and striking the action from the trial calendar is denied, as moot.

This is an action to recover damages for injuries allegedly sustained by plaintiff as a result of a motor vehicle accident, which occurred on June 27, 2014, at approximately 12:05 p.m., at the intersection of Swezey Street and Chapel Avenue, in the Town of Brookhaven. The accident allegedly occurred when a vehicle owned by defendant Barbara Kehlenbeck and operated by defendant Thomas Kehlenbeck (defendant driver) struck a vehicle operated by plaintiff. It is undisputed that defendant driver had the right of way, and that plaintiff's vehicle was controlled by a stop sign. Plaintiff further alleges that the accident was caused his failure to see a stop sign due to foliage obstruction, which was located on the property of the Norton defendants. Plaintiff alleges that the Norton defendants were negligent in allowing the stop sign and intersection to become obstructed by branches of a tree, and that they assumed a duty to trim the tree. Defendant Town of Brookhaven cross-claims against the Norton defendants and the Kehlenbeck defendants for contribution and indemnification. The Norton defendants cross-claim against the Town of Brookhaven and the Kehlenbeck defendants for contribution and indemnification. The Kehlenbeck defendants cross-claim against the Town of Brookhaven and the Norton defendants for contribution and indemnification.

The Kehlenbeck defendants now move for summary judgment in their favor, arguing that plaintiff's actions were the sole proximate cause of his injuries. The Kehlenbeck defendants submit, *inter alia*, transcripts from the depositions of plaintiff, defendant driver, and non-party witness Peter McNeil. Neither the Norton defendants nor the Town submit opposition to this motion. The Kehlenbeck defendants also move to strike plaintiff's second supplemental verified bill of particulars, to vacate the note of issue, and to strike the matter from the trial calendar.

The Norton defendants also move for summary judgment in their favor, arguing that they were not negligent in permitting foliage from their property to obstruct the view of the stop sign at the corner of their property, as they have no common law or statutory duty to trim foliage on their property to enhance the visibility of a stop sign. The Norton defendants submit, *inter alia*, deposition transcripts of the parties, and copies of e-mail communication between defendant Mercedes Norton and the Town of

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Brookhaven (Town). Neither the Kehlenbeck defendants nor the Town submit opposition to this motion.

Plaintiff opposes the motions¹. As to the Kehlenbeck defendants' motion, plaintiff argues that issues of fact exist as to the happening of the accident, specifically with respect to whether defendant driver exercised due care. As to the Norton defendants' motion, plaintiff argues that the Norton defendants had a duty to trim the foliage on their property pursuant to Brookhaven Town Code, or, in the alternative, that they assumed a duty to trim the foliage on their property that obstructed the stop sign, as they had trimmed the trees during previous years, and that their failure to do so was the proximate cause of plaintiff's injuries. Plaintiff submits, *inter alia*, an affirmation of an accident reconstructionist, Michael J. O'Connor, an affidavit of nonparty witness Phillip Corr, the certified police report, and accident witness statements.

Plaintiff testified at both a General Municipal Law § 50-h hearing and a deposition, and his testimony was essentially the same. Plaintiff testified he was driving south on Chapel Avenue when the accident occurred. He testified he was unfamiliar with the street and had never traveled on it before. He testified he has no recollection of the accident, due to brain injuries he allegedly sustained as a result thereof. He testified he was advised that he ran a stop sign.

At his deposition, defendant driver testified he was traveling eastbound on Swezey Street before the accident occurred. He testified he was driving under the posted speed limit and that the traffic conditions were light. He testified he approached the four-way intersection where Chapel Avenue intersects from north to south across Swezey Street. He testified there were no traffic control devices governing his lane of travel at the intersection where the accident occurred, but that both the northbound and southbound lanes of Chapel Avenue were controlled by stop signs. He testified he observed plaintiff's vehicle seconds before the accident, and that he attempted to brake to avoid the collision.

At her deposition, defendant Mercedes Norton testified she and her husband have owned the subject property, located at 195 Swezey Street, East Patchogue, on the northwest corner of Chapel Avenue and Swezey Street, since 2010. She testified she and her husband maintain the condition of the outside property and described the maintenance that was performed on a weekly basis. She testified that a stop sign exists on the corner of her property, outside of her fence, on the northwest corner of the subject intersection, and that this stop sign controlled the southbound traffic on Chapel Avenue. She testified she had observed branches from a tree, located on the inside of her fence, obscuring the stop sign. She testified that the Town had never cut the branches to clear the view of the stop sign, and that Terence Norton would cut the branches back himself once per year. She added that, at the time of the accident, he had not cut the branches for that year. She testified regarding her interactions with the

¹Although plaintiff submits arguments opposing a motion for summary judgment by the Town of Brookhaven, no such motion has been made in this action.

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Town, detailing complaints that she had made in the past, e.g., litter on the property, speeding drivers on Swezey Road, and neighbors back washing their pools, and about the Town's responses to her complaints. Defendant Terence Norton provided essentially the same testimony, adding that on the date of the accident, the stop sign was obscured by branches.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The Vehicle and Traffic Law establishes standards of care for motorists and an unexcused violation of such standards of care constitutes negligence per se (*see Adobe v Junel*, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; *Marcel v Sanders*, 123 AD3d 1097, 1 NYS3d 230 [2d Dept 2014]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Vehicle and Traffic Law § 1172 (a) provides, in relevant part, that:

every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

Further, Vehicle and Traffic Law § 1142 (a) provides, in relevant part, that:

every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

These statutes, read together, require the driver of a motor vehicle approaching a stop sign to stop and yield the right of way to any vehicle that has entered the intersection or is approaching so closely as to constitute an immediate hazard (*see Zuleta v Quijada*, 94 AD3d 876, 943 NYS2d 111 [2d Dept 2012]; *Mohammad v Ning*, 72 AD3d 913, 899 NYS2d 356 [2d Dept 2010]; *Stanford v Dushey*, 71 AD3d 988,

900 NYS2d 64 [2d Dept 2010]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). The operator of a vehicle with the right of way is entitled to assume that the opposing driver will obey traffic laws requiring him or her to yield (*Kassim v Uddin*, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]; see *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; *Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]).

Here, the Kehlenbeck defendants have met their initial burden of establishing prima facie entitlement to summary judgment. In support of their motion, the Kehlenbeck defendants' submissions demonstrate that plaintiff violated the Vehicle and Traffic Law by failing stop at a stop sign and by failing to yield to the right of way (see Vehicle and Traffic Law §§ 1142 [a], 1172 [a]; *Kraynova v Lowy*, 166 AD3d 600, 87 NYS3d 653 [2d Dept 2018]; *Mastricova v Ruderman*, 164 AD3d 1435, 82 NYSd 546 [2d Dept 2018]; *Adobea v Junel*, *supra*; *Marcel v Sanders*, *supra*; *Vainer v DiSalvo*, *supra*). While plaintiff does not recall the circumstances of the accident, whether he stopped at the stop sign before proceeding into the intersection is not dispositive, as he did not have the right of way to proceed even after stopping (see *Kraynova v Lowy*, *supra*; *Ming-Fai Jon v Wager*, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; *Zuleta v Quijada*, *supra*). Further, as defendant was not faced with a traffic control device governing his travel at the intersection, he had the right of way and was therefore entitled to assume that plaintiff would obey traffic laws requiring him to yield (see *Kassim v Uddin*, *supra*; *Ducie v Ippolito*, *supra*; *Ahern v Lanaia*, *supra*). Nevertheless, as the driver with the right of way, defendant driver had a duty to use reasonable care to avoid a collision (see *Kassim v Uddin*, *supra*; *Galagotis v Armenti*, 133 AD3d 818, 20 NYS3d 556 [2d Dept 2015]). Defendant driver has submitted evidence showing that he had only seconds to react to plaintiff's failure to yield the right of way (see *Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Breen v Seibert*, 123 AD3d 963, 999 NYS2d 176 [2d Dept 2014]; *Bennett v Granata*, 118 AD3d 652, 987 NYS2d 424; *Ducie v Ippolito*, *supra*). Additionally, defendant driver testified he applied his brakes when he observed plaintiff's vehicle in the intersection. Therefore, defendant driver has demonstrated that he attempted evasive maneuvers, but was unable to avoid the collision, showing that he used reasonable care when proceeding into the intersection (see *Galagotis v Armenti*, *supra*; *Kassim v Uddin*, *supra*). Defendant driver has demonstrated, prima facie, that the sole proximate cause of the accident was plaintiff's negligence (see *id.*; *Koepfel-Vulpis v Lucente*, 110 AD3d 851, 972 NYS2d 701 [2d Dept 2013]; *Reyes v Marchese*, 96 AD3d 926, 946 NYS2d 500 [2d Dept 2012]).

The Kehlenbeck defendants having met their initial burden on the motion, the burden now shifts to plaintiff and codefendants to submit evidence, in admissible form, of an issue of fact requiring a trial (*Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*; *Phillip v D&D Carting Co., Inc.*, 136 AD3d 18, 22 NYS3d 75 [2d Dept 2015]; *Goemans v County of Suffolk*, 57 AD3d 478, 868 NYS2d 753 [2d Dept 2008]). Plaintiff attempts to raise an issue of fact as to whether defendant driver exercised reasonable care when traveling with the right of way; however, he submits no evidence to support this contention. Plaintiff does not recall the moments before, or the circumstances of, the subject accident. He submits the affidavit of an accident reconstructionist, Michael O'Connor. O'Connor opines that, based upon his investigation, plaintiff's vehicle was traveling at a minimum speed

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of 27 miles per hour at the time of the collision. O'Connor opines that plaintiff did not stop at the stop sign governing his travel on Chapel Avenue prior to the accident, as he would not have been able to achieve that speed if he had stopped. As such, plaintiff fails to raise any triable issues of fact as to the proximate cause of the accident (*Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). Neither the Town nor the Norton defendants submit opposition to the Kehlenbeck defendants' motion; therefore, they have failed to raise a triable issue of fact on their respective cross claims.

Therefore, the motion by the Kehlenbeck defendants for summary judgment dismissing the complaint and the cross claims against them is granted. In view of this determination, the Kehlenbeck defendants' motion to strike plaintiff's second supplemental verified bill of particulars, to vacate the note of issue, and to strike the matter from the trial calendar is denied, as moot.

With respect to the claims against the Norton defendants, it is well settled that "property owners have no common-law duty to control the vegetation on their property for the benefit of public highway users" (*Szela v Courtier*, 278 AD2d 485, 486, 718 NYS2d 80 [2d Dept 2000], quoting *Cain v Pappalardo*, 225 AD2d 1005, 1006, 639 NYS2d 570 [3d Dept 1996]; see *Preux v Dennis*, 116 AD3d 942, 983 NYS2d 843 [2d Dept 2014]; *Deutch v Davis*, 298 AD2d 487, 750 NYS2d 84 [2d Dept 2002]; *Grant v Schwartz*, 276 AD2d 526, 713 NYS2d 769 [2d Dept 2000]; *Weitz v McMahon*, 252 AD2d 581, 676 NYS2d 212 [2d Dept 1998]). Municipalities have a non-delegable duty to maintain roads and highways in a reasonably safe condition, including clearing the view of stop signs (*Rivera v Town of Wappinger*, 164 AD3d 932, 83 NYS3d 178 [2d Dept 2018]; *Nichols-Sisson v Windstar Airport Serv., Inc.*, 99 AD3d 770, 952 NYS2d 223 [2012]). However, violations of local town or municipal codes that impose affirmative duties to maintain foliage on property may form the predicate for tort liability (see e.g. *Rosado v Bou*, 55 AD3d 710, 713, 966 NYS2d 213 [2d Dept 2008]; *Lubitz v Village of Scarsdale*, *supra*; *McSweeney v Rogan*, 209 AD2d 386, 387, 618 NYS2d 430 [2d Dept 1994]).

Here, it is alleged that the Norton defendants are liable to plaintiff due to their violation of Brookhaven Town Code § 85-882, which provides as follows:

On any corner lot, no wall, fence, barrier, structure, vehicle, pile, mound, hedge, tree, shrub, bush or other growth which may cause danger to traffic by obscuring or obstructing visibility at intersections shall exceed 2 1/2 feet in height, measured from the existing elevation of the center line of any intersecting street, at any point within a radius of 30 feet of the apex of the corner formed by any intersecting streets.

Brookhaven Town Code requires corner property owners to maintain hedges, trees, shrubs, bushes and overgrowth so such foliage does not obstruct the visibility at the intersection. Brookhaven Town Code does not impose a duty on homeowners to trim the foliage of a tree located on their property to enhance the visibility of a stop sign (*Szela v Courtier*, *supra*). However, the provision of the Town Code cited to by plaintiff is applicable, as it applies to foliage that may obstruct the view of the intersection itself

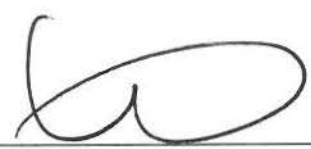
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(*Szela v Courtier, supra; see Lubitz v Village of Scarsdale, supra; Agostino v Masi, supra; see also Cain v Pappalardo, supra*). The Norton defendants have failed to establish prima facie entitlement to summary judgment with respect to whether their maintenance of their property violated this provision of the Town Code with respect to visibility of the intersection, and, if a violation did occur, whether it was a proximate cause of the accident and of plaintiff's injuries (*see Rosado v Bou, supra*).

The Norton defendants having failed to meet their prima facie burden, this Court need not consider the opposition papers (*Winegrad v New York Univ. Med. Ctr., supra*).

Accordingly, the motion by defendants Thomas Kehlenbeck and Barbara Kehlenbeck for summary judgment dismissing the claims and the cross claims against them is granted. The motion by defendants Terence Norton and Mercedes Norton for summary judgment dismissing the claims and the cross claims against them is denied. The motion by Thomas Kehlenbeck and Barbara Kehlenbeck to strike plaintiff's second supplemental verified bill of particulars, to vacate the note of issue, and to strike the matter from the trial calendar is denied.

Dated: September 5, 2019
Riverhead, New York



WILLIAM G. FORD, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION