

Hayes v Duffy

2019 NY Slip Op 34337(U)

October 7, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 603327/2019

Judge: John H. Rouse

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INDEX NO. 603327/2019

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 04/25/2019
ADJ. DATE: 08/28/2019
Mot. Seq. 001-MG

MOTION DATE: 06/24/2019
ADJ. DATE: 08/28/2019
Mot. Seq. 002-MG
e-filed full participation

Tara Hayes,

Plaintiff

**COUNTY CLERK
DIRECTIVE**

-against-

with

Amanda L. Duffy, Town Of Brookhaven, Sachem Central School
District,

DECISION & ORDER

Defendants

TO:

LAW OFFICE OF GEORGE T. OSTROWSKI JR.
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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Defendant Sachem Central School District for an Order, pursuant to C.P.L.R. 3211(a)(7)

and §3211(c), granting the defendant Sachem Central School District's motion to dismiss plaintiff's complaint and all cross-claims, and/or for summary judgment, together with such other and further relief as this Court may deem just and proper; (2) e-filed documents 5-59;

(3) Notice of Motion by Defendant Town of Brookhaven for an Order: A. Pursuant to CPLR §3212 (a)(b)(e), granting summary judgment to the Defendant, Town of Brookhaven, on the grounds that there do not exist any material issues of fact sufficient to warrant the denial of summary judgment on behalf of Defendants, and thus, dismissing this action in its entirety with prejudice, together with any and all cross claims asserted; B. Directing Entry of Judgment with prejudice in favor of the Defendant, Town of Brookhaven; and (4) e-filed documents 25-56; it is:

ORDERED that the motion (Seq. #001) by Defendant Sachem Central School District for summary judgment is granted and all claims and cross claims against it are dismissed; and it is further

ORDERED that the motion (Seq. #002) by Defendant Town of Brookhaven for summary judgment is granted and all claims and cross claims against it are dismissed; and it is further

ORDERED that the County Clerk shall amend the caption of this action to reflect that all claims against the Sachem Central School District and Town of Brookhaven have been dismissed and the caption shall be as follows:

Tara Hayes,

Plaintiff

-against-

Amanda L. Duffy,

Defendants

ORDERED that movants are each directed to serve a copy of this decision and order with notice of entry as soon as practicable *See Protocol for Electronic Filing in Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.*
<https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

and it is further

ORDERED that Plaintiff and Defendant Duffy, if they have not done so already, are directed to review the rules of this part found at:
https://www.nycourts.gov/courts/10jd/suffolk/SC_Part_Rules/Rouse.pdf

ENTER JUDGMENT for Defendants Sachem Central School District and Town of Brookhaven

DECISION

On February 19, 2019 Plaintiff commenced this action to recover for injuries she alleges she sustained on December 21, 2016 at about 6:30 a.m. when she was a pedestrian and struck by Defendant Amanda L. Duffy who was driving her car at the intersection of Morris Avenue and Division Street in Holtsville. Plaintiff alleges she was a pedestrian "at the request, direction or instruction of the defendant, Sachem Central School District." *Complaint at par. 5.* Plaintiff further alleges the Defendants were negligent in failing to install any and/or adequate artificial lighting to sufficiently illuminate the intersection; in failing to in failing to keep and/or maintain installed artificial lighting in a proper and/or adequate state of repair and/or condition; in failing to replace light bulbs in a timely fashion; in causing and/or suffering, allowing and permitting a dangerous and hazardous condition to be, remain and exist; in failing to make necessary and proper repairs to the dangerous condition aforementioned; in making improper, unsafe and inadequate repairs to the aforementioned dangerous condition; in failing to properly, adequately and timely inspect the aforementioned area; creating and/or suffering, allowing and permitting a nuisance to be, remain and exist in the aforementioned area; in causing and/or suffering, allowing and permitting a trap to be, remain and exist in the aforementioned area; in failing to give any, and/or any adequate signal, sign, warning or other notice of aforementioned dangerous condition; in failing to rope off or otherwise prevent the use of the aforementioned area; all of which the defendant had or should have had notice and/or knowledge of by reasonable inspection; all of which the defendant had actual written or other notice of, or should have had notice and/or knowledge of by virtue of reasonable inspection; and in addition to and in the alternative to all the aforementioned acts of negligence, the defendant was guilty of negligence under and by virtue of the Doctrine of Res Ipsa Loquitur; in failing to provide crossing guards at the above location during pre and post school hours; in choosing an unsafe or dangerous location for this student's bus stop, particularly considering any limitations or disabilities present prior to the happening of this accident; in making this student traverse a dark and unsafe roadway to arrive at said scheduled location, particularly considering any limitations or disabilities present prior to the happening of this accident; in directing this student to arrive for bus pickup before sunrise, particularly considering any limitations or disabilities present prior to the happening of this accident; in not making arrangements for door-to-door pickup of this student; and in failing to use that degree of care and caution warranted under all of the surrounding circumstances.

Complaint par. 9.

On March 5, 2019 Defendant Town of Brookhaven joined issue and cross claimed against Defendants Amanda Duffy and Sachem Central School District. On March 15, 2019 Defendant made a pre-answer motion pursuant to CPLR §§ 3211. On March 18, 2019 Defendant Duffy joined issue and cross claimed against Defendants Sachem Central School District and the Town of Brookhaven. On June 3, 2019 Defendant Town of Brookhaven moved for summary judgment.

Defendant Sachem Central School District's Motion to Dismiss

Defendant Sachem Central School District moves to dismiss the action against it pursuant to CPLR § 3211(a)(7) for failure to state a cause of action against it, and requests this motion be

converted to a motion for summary judgment pursuant to CPLR § 3211(c) upon the submission in support of its motion of evidentiary materials. Plaintiff and Defendant Town of Brookhaven have not opposed the motion. Defendant Duffy argues that the motion is premature as there has been no discovery.

Defendant School District in support of its motion has made a *prima facie* case that Plaintiff was not under its care or supervision when she was struck by the Defendant Duffy driving her vehicle. In further support of its motion Defendant School District submitted the Individual Educational Plan (IEP) for Plaintiff as made in consultation with Plaintiff's parent. The IEP did not provide for a one-to-one aid and there were no special provisions for the Defendant School District to undertake a special duty of transportation for this student Plaintiff. *See Thompson v. New York*, 78 N.Y.2d 682 (1991) and *Florence v. Goldberg*, 44 N.Y.2d 189 (1978). While it is true there has been no discovery Defendant Duffy has not provided any basis for this court to conclude that discovery might permit it to successfully oppose Defendant's motion. *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620 (2nd Dept. 2008). Accordingly, Defendant Sachem Central School District's motion for summary judgment is granted and all claims and cross claims are dismissed.

Defendant Town of Brookhaven's Motion for Summary Judgment

Defendant Town of Brookhaven moves for summary judgment on all claims and cross claims against it. Plaintiff and Defendant Sachem Central School District do not oppose the motion. Defendant Duffy argues the motion is premature because discovery has not been completed. Defendant Town of Brookhaven has made a *prima facie* case that it did not breach any duty of care to the Plaintiff and therefore is not comparatively at fault in this pedestrian knock down case. *See Thompson v. New York*, 78 N.Y.2d 682 (1991) and *Florence v. Goldberg*, 44 N.Y.2d 189 (1978). The only party to oppose this motion, Defendant Duffy, argues that discovery might produce evidence that would permit her to oppose the motion. Defendant Duffy does not offer an affidavit of any facts to support this contention, and presents only the speculation of counsel that Defendant Duffy might find something. It is correct that there been no discovery, Defendant Duffy has not provided any basis for this court to conclude that discovery might permit her to successfully oppose Defendant's motion. *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620 (2nd Dept. 2008). Accordingly, Defendant Town of Brookhaven's motion for summary judgment is granted and all claims and cross claims are dismissed.

The foregoing shall constitute the decision and order of the court.

Dated: October 7, 2019



JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION