

DiTuri v County of Rockland
2019 NY Slip Op 34587(U)
May 31, 2019
Supreme Court, Rockland County
Docket Number: Index No. 35883/2014
Judge: Kathie E. Davidson
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To commence the statutory time period for appeals as of right [CPLR 5513(a)], you are advised to serve a copy of this order, with notice of entry upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
DEBRA DiTURI, as Administrator of the
Estate of Lawrence A. DiTuri, deceased, and
DEBRA DiTURI individually,

Plaintiff,

-against-

DECISION & ORDER

Index No. 35883/2014
Motion Seq. No. 1

COUNTY OF ROCKLAND,

Defendant.

-----X
DAVIDSON, J.

The following papers were read on the motion filed by defendant (Motion Seq. 1) for an order granting summary judgment thereby dismissing the complaint pursuant to CPLR 3212.

- Notice of Motion - Attorney Affirmation - Exhibits 1-15 -
- Affidavit of Donald K. Eisentraut - Affidavit of Fred R. Hanscom-
- Affidavit of Andrew Connors - Exhibits 1-2 - Memorandum of Law
- Affirmation in Opposition - Exhibits A-L
- Reply Affirmation - Exhibits 1-3 - Reply Affidavit of Donald K. Eisentraut -
- Reply Affidavit of Fred R. Hanscom-
- Reply Memorandum of Law
- NYSCEF Record¹

Upon the foregoing papers, and all prior papers and proceedings in this action, the motion is determined as follows:

This action arises out of a fatal accident that occurred on November 2, 2013 at approximately 2:05 p.m. on County Route 106 ("Route 106") which crosses through Harriman State Park, a part of the Palisades Interstate Park. According to the pleadings filed on December 31, 2014, it is alleged that Lawrence A. DiTuri was lawfully operating his motorcycle on Route 106 when a vehicle operated by non-party Robert Louis Jacobson pulled over his vehicle into an excavated 'pull-off' alongside the roadway. Jacobson's vehicle proceeded to make a U-Turn crossing over the double yellow lines into the opposite lane of traffic. Jacobson's vehicle was perpendicular to the roadway, obstructing both lanes of traffic, at which time Jacobson's vehicle

¹ Any references herein to "Doc #" are citing to the NYSCEF Record.

was struck by DiTuri's motorcycle, causing DiTuri's death. (Doc. 1). Plaintiff Debra DiTuri, individually and in her capacity as the Administrator of Lawrence A. DiTuri's estate, commenced this action against the County of Rockland ("County") to recover for wrongful death, personal injuries, and property damages resulting from the accident.

It is the plaintiff's contention that the County negligently maintained the roadway by "maintaining, repairing, and/or suffering the roadway to be and remain in a dangerous condition with excavated pull-offs along the road without proper signage" to warn motorists not to park or make U-turns in that vicinity, and not to exceed the speed limit given the limited sight distance around the curved roadway. (Doc. 30). Plaintiff also contends that the County was negligent in failing to provide emergency call boxes along the roadway given the poor cell phone signal in that vicinity. (*Id.*).

Defendant interposed a Verified Answer on April 22, 2015 asserting general denials and affirmative defenses including failure to state a cause of action, expiration of the statute of limitations, lack of written notice of the alleged dangerous condition, and liability is attributable to third parties over whom the defendant does not exercise control (namely, the motorists involved in the collision). (Doc. 7).

A Note of Issue was filed on November 8, 2018. (Doc. 23). The instant motion was timely filed in accordance with the Part Rules of the Hon. Thomas Walsh, II, J.S.C.

County's Motion for Summary Judgment

Defendant filed the instant motion for summary judgment. It is defendant's contention that summary judgment is warranted based upon the fact that (i) the County lacked written notice of any alleged dangerous conditions as required by Rockland County Code §327-1, (ii) the County lacked actual or constructive notice of the alleged conditions; (iii) the County did not negligently create the alleged conditions; and (iv) any alleged acts or omissions by the County are not the proximate cause of the accident, rather the accident was proximately caused by the 'reckless driving' of the motorists involved in the collision. (*See Doc. 50*).

The County's supporting record includes the expert affidavit of Fred R. Hanscom, a registered professional engineer with expertise in highway design engineering and transportation safety research (Doc. 45); the affidavit of Andrew M. Connors, a professional engineer and the Deputy Superintendent of the County of Rockland Department of Highways (Doc. 46); and the affidavit of Donald K. Eisentraut, a licensed professional engineer and accident reconstructionist (Doc. 44).

First, the County argues that it lacks notice of the alleged condition. Counsel states that the County did not receive any written notice of any alleged defect or danger which is a condition precedent to commencing an action against the County pursuant to Rockland County Code §327-1(A). The County also lacked actual or constructive notice of any dangerous

conditions in the roadway. Counsel contends that there is no proof of prior accidents of the same nature at the same location with the same or similar contributing factors to establish constructive notice of such dangerous conditions. (Doc. 46 [Connors Aff.]).

Second, the County argues that it did not negligently create the alleged conditions. Counsel contends that the County did not design or create the roadway, which was designed and constructed before the County exercised control thereof. (Doc. 46 [Connors Aff. ¶6-10]). The County complied with its obligation to maintain the inherited preexisting roadway on a reasonably safe condition in accordance with applicable rules and regulations. Furthermore, there is no legal requirement to provide emergency call boxes or provide adequate cell phone service (Doc. 45 [Hanscom Aff. ¶23-24]), nor was the County on notice of the alleged necessity for such emergency call boxes. (Doc. 46 [Connors Aff. ¶19]).

Third, the County argues that the incident was caused by the reckless driving of the motorists involved in the collision. Counsel argues that documentary evidence demonstrates that Lawrence A. DiTuri's motorcycle was speeding around a curve in the roadways and collided with non-party Robert Louis Jacobson's vehicle as Jacobson was negligently crossing over the double yellow lines to make a U-turn with insufficient visibility to see DiTuri or otherwise confirm the roadway is clear to safely complete the U-turn. (Doc. 44 [Eisentraut Aff.]). The County also submits the Surrogate Court Decree dated October 19, 2015 wherein the decedent's estate entered a judicial settlement of the wrongful death claim as against the other motorist (Robert Louis Jacobson) for \$1,250,000 (Doc. 43).

Plaintiff's Opposition

Plaintiff filed opposition on procedural and substantive grounds. (Doc. 51). Plaintiff's supporting record includes the deposition transcripts of the other motorist Robert Louis Jacobson (Doc. 53), his passenger Carolyn Weiss (Doc. 54), the responding police officer P.O. Andrew Dillinger (Doc. 55), Executive Director of Palisades Interstate Park Commission John Hall (Doc. 57), and certain county employees with highway-related duties (Doc. 58-60). Also submitted is the expert affidavit of accident reconstructionist Gregory L. Witte (Doc. 61), and the expert affidavit of Gordon Meth, a registered engineer whose expertise includes roadway geometry, crash analysis, and roadway and traffic signal design (Doc. 63).

Procedurally, counsel argues that the County proffered unsigned and uncertified deposition transcripts, uncertified police report, and expert affidavits without the attendant curriculum vitae. Counsel concludes that same should be not be afforded any probative value.²

Substantively, plaintiff contends that the County was negligent in the maintenance and

² Of note, the County subsequently resolved any alleged deficiencies by filing signed certified transcripts of Debra DiTuri, motorist Robert L. Jacobson, and his passenger Carolyn B. Weiss (Doc. 66-68 respectively); as well as submitting the curriculum vitae of defense experts/affiants (Docs. 69, 70, 72).

repair of the roadways to contain “excavated pull-offs” along the road “without proper signage warning drivers not to park within or make U-turns from the pull-offs”. (Doc. 51 ¶8, citing Doc. 30 [Plaintiff’s Bill of Particulars]). Counsel refutes the County’s argument of lack of notice, citing Rockland County Code 327-B and *Akley v Clemons*, 237 AD2d 780 [3d Dept. 1998] to support plaintiff’s position that prior written notice was not required where, as here, the claims involve a longstanding defective condition that should have been discovered and remedied (namely, negligent roadway design and lack of proper traffic warning signage).

Counsel also asserts the existence of issues of fact related to (i) whether the County had a duty to evaluate road safety from the time the County exercises ownership and maintenance in 1982; (ii) whether the County had notice of the dangers posed by the roadways deriving from its exclusive maintenance obligations; (iii) whether the County had prior knowledge of the prior accidents at the accident site under similar circumstances, as indicated by the responding Police Officer Higgins; (iv) whether the County was negligent in failing to place stone boulders in the excavated pull-off areas alongside the roadway as the park commissions did on park roadways to prohibit off-road parking or U-turns; (v) whether the County was negligent in failing to place traffic warning signs at the accident site to warn motorists of road and sight distance conditions; and (vi) whether DiTuri was driving within the posted speed limit in light of the conflicting accident reconstructionist opinions proffered by the parties. (Doc. 51 at ¶58).

Plaintiff also proffers conflicting expert affidavit of accident reconstructionist Gregory L. Witte (Doc. 61) to refute the County’s expert claims that DiTuri was recklessly operating his motorcycle at excessive speed. Also proffered is the conflicting expert affidavit of professional engineer Gordon Meth who opined to the lack of appropriate traffic warning signage at the curved roadway which is readily visible upon inspection (Doc. 63).

Decision

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Upon establishing a prima facie entitlement to summary judgment, the burden then shifts to the opposing party to demonstrate by evidentiary facts that genuine issues of fact exist to preclude summary judgment. (*Alvarez v. Prospect Hospital*, 68 NY2d at 324 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see generally Ellis v Eklecco*, 899 NYS2d 59 [2d Dept. 2007]).

As it relates to prior notice, a civil action may be commenced against a municipality absent prior written notice where “the defective, unsafe, dangerous or obstructed condition existed for so long a period that the same should have been discovered and remedied in the exercise of reasonable care and diligence” (Rockland County Code §327-1(B); *see also Highway Law* §139). Prior written notice is not required for a defective condition arising from a failure to

erect adequate road warning signs. (*Id.*; see also *Alexander v Eldred*, 63 NY2d 460 [1984], *Doremus v Incorporated Village of Lynbrook*, 18 NY2d 362 [1966]). Instead, plaintiff is only required to demonstrate constructive notice of the alleged dangerous condition. (*cf. Lugo v County of Essex*, 260 AD2d 711, 713 [3d Dept. 1999]).

Similarly, with respect to the pull-off area alongside the roadway, the prior notice requirement is obviated where the defendant engages in affirmative acts that caused or created the alleged dangerous condition. (*Herzog v Schroeder*, 9 AD3d 669, 671 [3d Dept. 2004]). Here, plaintiff raised issues of fact related to whether the County caused or created a dangerous condition by the existence of a 'pull-off' area alongside the curved roadway thereby obviating the prior written notice requirement. Although the County claims that it 'inherited' the roadway as previously designed, "the County assumed ownership and, as such, may be liable for allowing potentially dangerous or defective conditions to exist" (*Lugo v County of Essex*, 260 AD2d at 712-713).

Here, the record raises issues of fact as to whether the County had constructive notice of and/or created the alleged dangerous road conditions. It is undisputed that the County owned and maintained the roadway since 1982. Plaintiff's opposition cites testimony that the County has routinely inspected and maintained the roadway including the pull-off area (Doc. 58 pg. 29, 31, 32, 33, 93-94 [Connors EBT]), County employees would place a shoulder stone upon the pull-off area alongside the curved roadway upon inspection as deemed necessary (Doc. 59 pg. 46, 48, 49 [Hughes' EBT]), and Jacobson was unaware of a nearby roundabout which would have enabled him to lawfully make a U-turn (Doc. 53 pg. 75-76 [Jacobson EBT]). The record also contains conflicting expert affidavits from professional engineers regarding whether the road conditions conform with applicable roadway and traffic engineering standards. On one hand, plaintiff's expert (Gordon Meth) opined that the County departed from accepted engineering practices by failing to provide adequate traffic signage at the accident site which should have been installed given the curvature of the road, pull-off area alongside the road, and limited sight distance, all of which are ascertainable upon a reasonable inspection of the accident site. (Doc. 63). Conversely, the County's expert engineer Fred R. Hanscom opined that the traffic signage placement conforms with accepted engineering practices (Doc. 45).

As it relates to causation, it is well settled that where, as here, conflicting evidence is presented that would support various inferences, the issue of proximate cause is properly a question of fact for the jury to decide (*Alexander v Eldred*, 63 NY2d 460, 468 [1984]). There are issues of fact as to whether the absence of appropriate traffic signage was a contributing cause to the accident (*Langer v Xenias*, 134 AD3d 906 [2d Dept. 2015]). The record contains conflicting expert opinions from accident reconstructionists who opined to the proximate cause of the collision. The County's expert Donald Eisentraut (Doc. 44) concluded that the proximate cause of the accident was the reckless driving of both motorists, stating that DiTuri was speeding on the curved roadway and Jacobson was making an unsafe U-turn crossing over double-yellow lines. To the contrary, the plaintiff's expert Gregory L. Witte (Doc. 61) challenges the efficacy of the methodologies used by the County's expert to render the opinion that excessive speed was a factor in causing the accident.

All other arguments raised on the motion and evidence submitted by the parties in connection thereto have been considered by this court, notwithstanding the specific absence of reference thereto.

Based on the foregoing, it is hereby

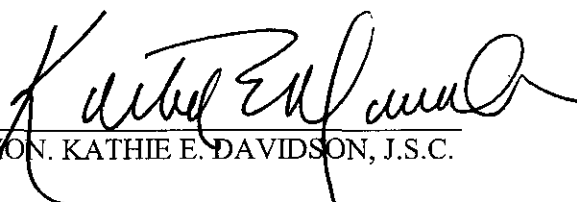
ORDERED that defendant's motion for summary judgment is denied.

Any relief not specifically granted herein is denied and/or rendered moot by the foregoing determination.

The foregoing constitutes the Decision and Order of this court.

Dated: White Plains, New York

5/31, 2019



HON. KATHIE E. DAVIDSON, J.S.C.

TO:

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