Glogower-Newman v Roher
2020 NY Slip Op 35086(U)
August 25, 2020
Supreme Court, Westchester County
Docket Number: Index No. 61386/2017
Judge: Terry Jane Ruderman
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To commence the statutory time 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 WESTCHESTER
---x
ELLEN M. GLOGOWER-NEWMAN and
IRVING NEWMAN,

Plaintiffs,

-against-

RICHARD S. ROHER, THE COUNTY OF WESTCHESTER, NEW YORK, THE WESTCHESTER DEPARTMENT OF PUBLIC WORKS, THE WESTCHESTER PUBLIC SAFETY, THE CITY OF WHITE PLAINS DEPARTMENT OF PUBLIC WORKS and THE CITY OF WHITE PLAINS DEPARTMENT OF PUBLIC SAFETY a/k/a THE CITY OF WHITE PLAINS POLICE DEPARTMENT[1],

Defendants.
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DECISION and ORDER
Motion Sequence No. 1
Index No. 61386/2017

RUDERMAN, J.

The following papers were considered in connection with the motion by defendant County of Westchester for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross-claims against it:

Papers	Numbered
Notice of Motion, Affirmation, Exhibits A - L and Memorandum of Law	1
Affirmation in Opposition, Exhibits 1 - 20	2
Reply Affirmation, Exhibit M, and Reply Memorandum of Law	3

[1] A stipulation has been filed discontinuing the action as against the City of While Plains.

This action arises out of a pedestrian knock-down accident that occurred on June 23, 2016 at approximately 9:15 p.m., while plaintiffs Ellen Glogower-Newman and Irving Newman were leaving their nephew's high school graduation at the County Center. When they arrived at approximately 6:30 p.m., plaintiff Ellen Glogower-Newman had dropped off her husband Irving Newman near the ramp at the front of the building, since he was walking with the assistance of a walker due to recent hip surgery; she parked, as directed by uniformed officials, in the parking lot on the other side of the Bronx River Parkway. She then crossed the Parkway with a crowd of event attendees.

At the time plaintiffs left, the ceremony was not yet over; plaintiffs decided to leave early to avoid crowds. Irving Newman decided to accompany his wife back to their car, rather than wait at the bottom of the ramp to be picked up. As they were crossing the Bronx River Parkway in the crosswalk on the north side of the interseciton, on their way to the parking lot, they were struck by a vehicle driven by defendant Richard Roher, who was heading northbound on the Parkway. Roher also testified that when he crossed through the intersection the green light was in his favor, that it changed from green to yellow as he entered the intersection, and that as he looked straight ahead, he did not see the pedestrians in the crosswalk until they walked into the beam of his headlights in the northbound lanes, when he was less than two car lengths from them. It is undisputed that at that time, there were no officials directing pedestrian traffic.

The submitted police report states that "It was determined that the traffic on the Bronx River Parkway had the right of way in that the traffic light was green in both directions at the time." Notwithstanding both plaintiffs' testimony that they entered the crosswalk with the green light in their favor, a recording from a surveillance camera supports the officer's conclusion that the vehicles on the Parkway had the green light in their favor by the time of the accident. While

the traffic light cannot be seen in the surveillance footage, the movement of vehicles in both directions on the Parkway, beginning when plaintiffs were less than halfway across the crosswalk, supports the officer's assessment of the traffic control devices.

The reporting police officer also made the observation that "both street lamps over that portion of the parkway were not illuminated as well as the street lamp above the driveway entrance to the parking lot on the east side of the parkway."

Plaintiffs' contentions with regard to the County's liability are that the County knew or should have known that attendees of the event at the County Center that evening would expect the crossing guards that were present at the beginning of the graduation to be present towards the end of the event; that the subject crosswalk at that intersection was dangerous; and that the failure to provide guards, maintain the streetlights, or do anything else to address the danger, would result in harm.

Defendant County of Westchester now moves for summary judgment dismissing all claims against it, contending that it did not breach any duty owed to plaintiffs, since there was no special duty or relationship between plaintiffs and the County, and it had no duty to offer assistance in crossing the crosswalk at the County Center. Further, the County argues, it has no duty to provide street lamps on its highways, so any failure to maintain street lighting cannot form the basis for liability. The County submits transcripts of the deposition testimony of both plaintiffs, defendant Roher, and portions of the testimony of Kevin Roseman, the County's Traffic Engineer, who described the availability of the pedestrian crossing button at that intersection, and how, if it is used, vehicular traffic in all directions is stopped for the duration of the crossing light. Additionally, the County submits the portion of the deposition of reporting police officer Francis Pagliuca in which he testified that the pedestrian crossing signs were

clearly visible. However, during plaintiffs' testimony, they each stated that they were unaware of a pedestrian traffic control button, and did not look for such a device.

In opposition, plaintiffs submit the report of their retained expert, Kristopher Seluga, P.E., who reviewed the surveillance video of the accident and examined the site, measured the distances between the camera, the crosswalk, and the street and traffic lights, calculated the speed of the Newmans' walk through the crosswalk, and measured the level of illumination in the crosswalk without the inoperative streetlights. Although he concluded that "it is clear from the evidence that Mr. and Mrs. Newman started crossing the road while the traffic signals for north and southbound traffic on the Bronx River Parkway were green," and that "they were unfamiliar with the subject intersection and were under the (incorrect) impression there was a green light indicating it was safe to cross," he also concluded that the other factors contributing to the accident were "Mr. Roher's excessive speed of 48 mph in a 40 mph zone, which reduce[d] the time available to him to perceive and react to the pedestrians in the marked crosswalks," and "[t]he insufficient street lighting near the crosswalk which was caused by the failure of [the] County to maintain the installed overhead lights and which reduced the distance at which approaching drivers such as Mr. Roher, would be able to perceive and react to pedestrians in the marked crosswalk." Seluga included in his report the information that a Westchester County Planning Department Report on the Bronx River Parkway showed that "the accident rate at the subject intersection is more than twice the statewide average for signalized intersections." Seluga offered the opinion that the absence of working streetlights at that location contributed to the accident because proper illumination of the crosswalk would have allowed Roher more time to apply his brakes and avoid hitting plaintiffs.

Plaintiffs also submit a transcript of the deposition of Michael DeFlorio, who was a

Sergeant with Westchester County Public Safety assigned to the County Center on the night of the accident. He stated that he was responsible for coordinating traffic control and crowd control, and supervised the other police officers. DeFlorio explained that for a graduation event he would have officers outside before the event doing traffic control; then the officers would go inside when the event started to do crowd control, and then, as the event was concluding, the officers would go back outside to handle traffic control. He acknowledged that for certain shows at the County Center, for which visitors entered and exited the building throughout the day, they would have traffic control officers outside all day.

Plaintiffs also submit a sworn witness statement by Lawrence Hrazanek,

> "On Thursday June 23, 2016 at around 9:16 p.m., I had left the Civic Center and was walking toward the parking lot. I had just crossed the Bronx River Parkway and was talking with my nephew. I heard a screech of a tire and from the corner of my eye saw that the light for the westbound traffic on North Central Avenue was green. I also saw a vehicle trying to enter the intersection from North Central Avenue onto the Northbound Bronx River Parkway. I saw a vehicle on the northbound Bronx River Parkway stopped in the left lane. I saw a vehicle on the right lane on the Bronx River Parkway pass the vehicle that was stopped in the left lane. I then saw that vehicle go into the left lane and I heard a noise and saw an object fly into the air. The vehicle stopped and that is when I noticed that a woman was on the ground. As I walked toward her I notice[d] a second person on the grounds and a mangle[d] piece of metal. The second person on the ground was next to a traffic control sign that was on the divider at the Bronx River Parkway."

Discussion

"In order to make out a prima facie case of negligence, a plaintiff must first establish the existence of a duty owed" (*Mastro v Mariorino*, 174 AD2d 654, 655 [2d Dept 1991]). "When a negligence claim is asserted against a municipality, the first issue for a court to decide is whether the municipal entity was engaged in a proprietary function or acted in a governmental capacity at the time the claim arose" (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 425 [2013]). "If it is

determined that a municipality was exercising a governmental function, the next inquiry focuses on the extent to which the municipality owed a 'special duty' to the injured party" (*id.* at 426). "The core principle is that to sustain liability against a municipality, the duty breached must be more than that owed the public generally (*id.* , quoting *Valdez v City of New York*, 18 NY3d 69, 75 [2011], quoting *Lauer v City of New York*, 95 NY2d 95, 100 [2000] [internal quotation marks omitted]).

"[A] special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition (*Applewhite*, *supra* at 426, citing *Metz v State of New York*, 20 NY3d 175, 180 [2012]). There is no claim that a statutory duty applies here. Rather, plaintiffs take the position that the County assumed an affirmative duty to act to protect pedestrians such as them, crossing that intersection.

Where a special duty is alleged based on the municipality's voluntary assumption of a duty, "the party asserting the relationship has a heavy burden to prove the following elements: (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking" (*Stanciu v Bilello*, 138 AD3d 824, 825-826 [2d Dept 2016]). Plaintiffs contend that questions of fact are presented on those elements. They cite *Coleson v City of New York* (24 NY3d 476, 483 [2014]) and *Florence v Goldberg* (44 NY2d 189 [1978]), in support of their claim.

However, those cases are not controlling here. In *Florence v Goldberg*, the Court upheld

a jury verdict against New York City, based on its failure to assign a replacement crossing guard when the regularly-assigned crossing guard called in sick. It explained that while the City had no duty to provide crossing guards, having done so, it had assumed a special duty to "children crossing designated intersections while traveling to and from school at scheduled times," on which the children's parents justifiably relied (44 NY2d at 196-197). The same reasoning is not warranted where members of the general population are being assisted by traffic control agents assigned for particular events, rather than crossing guards protecting young schoolchildren on a daily basis, and where the use of such traffic control agents is not uniquely to protect the crossing crowds of pedestrians from vehicles, but to ensure the orderly flow of both pedestrians and vehicular traffic. Moreover, the duty delineated in *Florence v Goldberg* was explicitly limited in times as well as locations; the Court specified not only "designated intersections" but "scheduled times" (*id.*). Even if the reasoning of *Florence v Goldberg* could be applied to adults, plaintiffs forfeited any possible right to claim reasonable reliance on the presence of crossing guards at that intersection by leaving at an unanticipated time when the event was not yet over. Unlike the parents of schoolchildren relying on routinely assigned crossing guards, plaintiffs were not given any reason to rely on the protection of traffic control agents at that location.

In *Coleson v City*, the Court found an issue of fact as to whether the police created a special relationship with the plaintiff through the promises and assurances officers made to her with regard to protecting her and her son from her abusive husband, which " may have lulled her into believing that she could relax her vigilance for a reasonable period of time, certainly more than two days" (24 NY3d at 483). The presence of traffic control agents before the start of the evening's events could not have reasonably lulled plaintiffs into relaxing their normal vigilance when crossing the Parkway.

Nor may the County be held liable based on its failure to maintain the streetlights at that intersection. *Thompson v New York* (78 NY2d 682 [1991]) is controlling on this point. There, the plaintiff had been struck by an automobile while crossing the Grand Concourse in the Bronx; the Court rejected the plaintiff's claim against the City of New York based on the City's failure to maintain the streetlight near the accident site by replacing the burned-out bulb. The Court explained that "[a]lthough authorized to install street lighting by [statute], a municipality generally is required to do so only in certain situations where it is necessary to keep the street safe, i.e., where there is a defect or some unusual condition rendering the street unsafe to the traveling public (*id*. at 684). It elaborated that the language "permitting a dangerous or potentially hazardous condition to exist and cause injury" applied to such conditions as a dangerous roadway shoulder and inadequate support for a cover on a water box (*id*. at 685).

The tautological assertion that the failure of illumination caused a greater degree of darkness cannot alone serve to establish a dangerous condition requiring the municipality to provide additional or functional lighting. As in *Cracas v Zisko* (204 AD2d 382, 383 [2d Dept 1994]), in which the plaintiff was hit by a car as she was crossing a street,

> "plaintiff's allegation at bar that the accident site was dark is insufficient to establish the existence of such a duty [to maintain existing street lights] on the Town. There is no allegation or evidence indicating that there was a defect or hazardous condition in the roadway, and there is no showing in the record that the Town created a dangerous condition at the site of the accident."

The darker condition that necessarily results from failing to replace the bulb of a street light is not, in itself, the requisite dangerous roadway condition that requires illumination. A municipality may not be required to install (or maintain) street lighting simply because the intersection is darker without such lighting. Yet, the only hazard plaintiffs, and their experts, claim is the reduction in the amount of illumination at that location. Plaintiffs presented no

evidence establishing that the Bronx River Parkway at that site contains some *other* "dangerous or potentially hazardous condition" that requires illumination. Even the reference by plaintiff's expert to evidence that accidents occur in larger numbers at that location does not provide proof of some characteristic of the roadway itself that must be illuminated for safety's sake.

The County made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the location of plaintiffs' accident was maintained in a reasonably safe condition, in that it had functioning traffic lights and a crossing signal that could be activated by pedestrians, and that it neither created nor had actual or constructive notice of any actionable dangerous condition at that location (*see Silvestri v Village of Bronxville*, 106 AD3d 901, 902 [2d Dept 2013]), or any duty toward plaintiffs (*see Mastro v Mariorino*, 174 AD2d at 655). Plaintiffs have not submitted evidentiary materials creating questions of fact on those issues.

Accordingly, it is hereby

ORDERED that defendant County's motion for summary judgment pursuant to CPLR 3212 dismissing all claims against it is granted; and it is further

ORDERED that the remaining parties shall appear in the Settlement Conference Part on a date of which they will be notified by that Part.

Dated: White Plains, New York
August 25, 2020

HON. TERRY JANE RUDERMAN, J.S.C.