

Curry v County of Suffolk
2020 NY Slip Op 35166(U)
November 30, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 609596/2018
Judge: Joseph A. Santorelli
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

ORIGINAL

INDEX No. 609596/2018

CAL. No. 202000284MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7/8/20 (003)

MOTION DATE 7/30/20 (004)

MOTION DATE 8/27/20 (005)

ADJ. DATE 8/27/20

Mot. Seq. # 003 MG

004 MD

005 MD

-----X
MICHELLE CURRY,

Plaintiff,

- against -

COUNTY OF SUFFOLK, TOWN OF
BABYLON, GMOS LIMITED PARTNERSHIP,
WINTERS BROS. WASTE SYSTEMS OF
LONG ISLAND, LLC., and WINTERS BROS.
RECYCLING CORP.,

Defendants.
-----X

CELLINO & BARNES, P.C.
Attorney for Plaintiff
532 Broad Hollow Road, Suite 107
Melville, New York 11747

DENNIS M. COHEN, ESQ.
Suffolk County Attorney
100 Veterans Memorial Highway
P.O. Box 6100
Hauppauge, New York 11788

MARTYN MARTYN SMITH & MURRAY
Attorney for Defendant GMOS Limited
Partnership
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

GORDON & REES, LLP
Attorney for Defendant Winters
18 Columbia Turnpike, Suite 200
Florham Park, New Jersey 07931

LEWIS JOHS AVALLONE & AVILES
Attorney for Defendant Town of Babylon
One CA Plaza, Suite 225
Islandia, New York 11749

Curry v County of Suffolk
Index No. 609596/2018
Page 2

Upon the following papers read on these e-filed motions for summary judgment: Notice of Motions/Order to Show Cause and supporting papers by plaintiff, dated June 10, 2020, by Town, dated July 6, 2020, and by Winter Bros., dated July 22, 2020; Notice of Cross-Motion and supporting papers by County, dated July 23, 2020, by Town, dated August 20, 2020, by Town, dated August 20, 2020, and by plaintiff, dated August 21, 2020; Replying Affidavits and supporting papers by plaintiff, dated August 21, 2020, by Winter Bros., dated August 21, 2020, and by Town, dated August 26, 2020; Other by plaintiff, dated August 21, 2020, by Winter Bros., dated August 21, 2020, and by Town, dated August 26, 2020; Other by plaintiff, dated August 21, 2020, by Winter Bros., dated August 21, 2020, and by Town, dated August 26, 2020; (and after hearing counsel in support and opposed to the motion) it is,

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

ORDERED that the motion by plaintiff for an order granting summary judgment in her favor on the ground that she did sustain a “serious injury” as defined in Insurance Law § 5102 (d) and striking defendants’ affirmative defense that she did not sustain a “serious injury” is granted; and it is further

ORDERED that the motion by defendant Town of Babylon for summary judgment dismissing the complaint and the cross claims against it is denied; and it is further

ORDERED that the motion by defendants Winters Bros. Waste Systems of Long Island, LLC and Winters Bros. Recycling Corp. for summary judgment on their cross claims for contractual indemnification against the Town is denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff arising out of a single-vehicle accident which occurred on July 11, 2017, at approximately 9:15 p.m., in front of a building located at 513 Acorn Street in defendant Town of Babylon. Acorn Street is a two-way street with one lane in each direction, running east and west. Plaintiff alleges in her complaint that her vehicle collided with a dumpster on the side of the road. The dumpster allegedly was owned by the Town of Babylon and was placed at the location by defendants Winters Bros. Waste Systems of Long Island, LLC and Winters Bros. Recycling Corp. (Winters Bros. defendants). By her bill of particulars, plaintiff alleges that, as a result of the subject accident, she sustained serious injuries and conditions, including fractures in the left wrist and right hip and sprain and strain in the cervical region.

Plaintiff moves for an order granting summary judgment in her favor on the ground that she did sustain a “serious injury” as defined in Insurance Law § 5102 (d).

As the proponent of a motion for summary judgment, the plaintiff has the burden of making a prima facie showing that she suffered a serious injury pursuant to Insurance Law § 5102 (d) and that the injury was causally related to the accident (*see Dembowski v Morris*, 184 AD3d 741, 124 NYS3d 245 [2d Dept 2020]; *Kapeleris v Riordan*, 89 AD3d 903, 933 NYS2d 92 [2d Dept 2011]; *Elshaarawy v U-Haul Co. of Miss.*, 72 AD3d 878, 881, 900 NYS2d 321 [2d Dept 2010]). The plaintiff may satisfy this burden by submitting his own deposition testimony and the affirmed medical report of his treating physician (*see Kapeleris v Riordan, supra; Elshaarawy v U-Haul Co. of Miss., supra*).

Here, plaintiff has made a prima facie showing that she sustained a “serious injury” as defined in Insurance Law § 5102 (d) through the affirmed report of Dr. A. Robert Tantleff, a radiologist. In his affirmed report, Dr. Tantleff stated that he reviewed the x-ray films of plaintiff’s right hip and left wrist,

Curry v County of Suffolk
Index No. 609596/2018
Page 3

conducted on July 11, 2017. Dr. Tantleff opined that as a result of the subject accident, plaintiff sustained a fracture of the acetabulum in the right hip and a fracture of the distal radius in the left wrist. He opined that plaintiff's fracture injuries are post traumatic fractures consistent with the subject accident. Thus, plaintiff has met her initial burden with respect to the fracture category by submitting Dr. Tantleff's report (*see Crutchfield v Jones*, 132 AD3d 1311, 17 NYS3d 525 [4th Dept 2015]; *Madafferi v Herring*, 104 AD3d 1293, 962 NYS2d 558 [4th Dept 2013]). The burden, therefore, shifted to defendant to raise a triable issue of fact (*see Callaghan v Point at Saranac Lake, Inc.*, 83 AD3d 1177, 1180, 921 NYS2d 356 [3d Dept 2011]).

In opposition, the Town has conceded that plaintiff sustained a fracture and has not provided any medical evidence concerning plaintiff's condition contemporaneous to the accident (*see Perl v Meher, supra; Camilo v Villa Livery Corp.*, 118 AD3d 586, 987 NYS2 164 [1st Dept 2014]). None of the defendants have opposed the plaintiff's motion for summary judgment on the issue of serious injury. The court has considered the remaining claims of defendants and found them to be without merit. Accordingly, the motion by plaintiff for granting summary judgment in her favor on the issue of serious injury and striking defendants' affirmative defense is granted.

The Town moves for summary judgment dismissing the complaint and cross claims against it on the ground that it is entitled to the protection of the governmental function immunity defense, because the subject dumpster was placed for an eviction procedure. The Town alleges that Town ordinance § 133-35 prohibiting placement of dumpsters on streets or roads does not apply to the municipality. In support, the Town submits, *inter alia*, the pleadings, the bill of particulars, and the transcripts of the parties' testimony.

At the General Municipal Law § 50-h hearing conducted by the Town, plaintiff testified that she had been traveling westbound on Acorn Street at approximately 30 miles per hour. She testified that the area of Acorn Street was very dark and unlit. Plaintiff testified that when an unidentified vehicle which was traveling eastbound in the opposite lane veered into her lane to go around another vehicle in front of it, she swerved her vehicle to the right to avoid impact and collided with a dumpster placed on the shoulder of the roadway. She testified she did not see the dumpster prior to the collision.

At his deposition, Raoul Castaneda testified that he is the solid waste administrator of the Town of Babylon. He testified that the Town entered into a waste collection service agreement with Winters Bros., which was effective at the time of the subject accident. According to the agreement, the Town has Winters Bros. place dumpsters at commercial eviction sites. The dumpsters are owned by the Town. He testified that the sheriff in charge of the eviction determines how many dumpsters are needed, when they are needed, where they are placed, and whether any cones, barricades, or signs are needed in or around them. The sheriff also determines when the dumpsters are removed from the site. Castaneda testified that if a dumpster is to be left overnight, the Town does not place cones, barricades, or signs. He testified that Winters Bros. has no responsibility for placing cones, barrels or signs other than what the Town directs it to do. He testified that on the day of the accident, an eviction took place on 513 Acorn Street, and when he arrived, he observed two dumpsters on the side of the road. He testified that the sheriff decided that the dumpsters would be kept overnight. He testified that the Town would notify the Sheriff's Office if the dumpsters on the road impeded traffic or it is not safe to leave them on the road.

Curry v County of Suffolk
Index No. 609596/2018
Page 4

At his deposition, John Vodola testified that he is a driver employed by Winters Bros. He testified that under the contract with the Town of Babylon, Winters Bros. delivers roll-off containers for eviction. Those containers are owned by the Town. On every eviction, the sheriff in charge of the eviction would direct him “exactly where to put” the dumpster. On the day of the accident, he dropped two roll-off containers on Acorn Street for an eviction and placed them at the direction of the sheriff.

At his deposition, Ronald Saager testified that he is a deputy sheriff in the Suffolk County Sheriff’s office. On the day before the subject accident, he called the Town of Babylon to order a container to be placed on the site of the eviction on the following day. Although he had no recollection as to whether he instructed Winters Bros. where to leave the containers, he testified he would have instructed that the containers be left alongside the roadway because that was the only place the containers could have been placed. He testified that the container could not have left in the parking lot of the building where the eviction was executed, because the eviction court ordered to remove the tenant’s property to the nearest public roadway. Saager testified that two containers were delivered on the day of the eviction, and that it is not his job to place any warning signs, such as cones, around containers on the road. He testified that the eviction at 513 Acorn Street was completed at around 2:30 p.m. Saager explained that when an eviction is completed he typically brings a copy of the warrant of eviction to the Town. He testified that he does not know when the containers are picked up by Winter Bros.

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 (*see Turturro v City of New York*, 28 NY3d 469, 477, 45 NYS3d 874 [2016]; *Marks-Barcia v Village of Sleepy Hollow Ambulance Corps*, 183 AD3d 883, 125 NYS3d 116 [2d Dept 2020]; *Halberstam v Port Auth. of N.Y. & N.J.*, 175 AD3d 1264, 109 NYS3d 111 [2d Dept 2019]). “A government entity performs a purely proprietary role when its activities essentially substitute for or supplement traditionally private enterprises” (*Applewhite v Accuhealth, Inc.*, 21 NY3d 420, 972 NYS2d 169 [2013]; *see Watts v City of New York*, 2020 NY Slip Op 05084, 2020 NY App. Div. Lexis 5187 [2d Dept 2020]; *Granata v City of White Plains*, 120 AD3d 1187, 1188, 993 NYS2d 47 [2d Dept 2014]). In that instance, the government entity is subject to suit under the ordinary rules of negligence (*see Tara N.P. v Western Suffolk Bd. of Coop. Educ. Servs.*, 28 NY3d 709, 713, 49 NYS3d 362 [2017]). In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers (*see Applewhite v Accuhealth, Inc., supra*).

It is well settled that a municipality must maintain the shoulder of a highway in a reasonably safe condition for foreseeable uses, including those resulting from a driver’s negligence or an emergency (*see Carollo v Town of Colden*, 27 AD3d 1077, 1078-79, 811 NYS2d 543 [4th Dept 2006]; *see generally Stiuso v City of New York*, 87 NY2d 889, 639 NYS2d 1009 [1995]).

First, given the allegations of negligence contained in the complaint, the Court concludes that the Town was acting in its proprietary capacity when it arranged for the subject dumpster to be placed at the site of the accident. The Town’s assistance to the landlord in evicting a tenant is not within the governmental function for the protection and safety of the public pursuant to the general police powers

Curry v County of Suffolk
Index No. 609596/2018
Page 5

(cf. *Applewhite v Accuhealth, Inc., supra*). Given that the Town was acting in its proprietary capacity at the time of the accident, the next question focuses on whether the Town was negligent in placing the dumpster on the side of the roadway. Here, the Town has failed to establish its entitlement to judgment as a matter of law. There are several issues of fact as to whether the Town determined the subject dumpster would be left on the road over night after an eviction, whether the Town created an allegedly dangerous condition by placing the dumpster on the side of the road, whether the Town was negligent in not placing any warning signs near the dumpster, whether the Town breached its duty to adequately illuminate the area where the accident occurred, and whether the accident was caused solely by the negligence of plaintiff in failing to operate her vehicle in a safe and lawful manner. Thus, the Town’s motion for summary judgment is denied.

The Winters Bros. defendants move for summary judgment on their cross claims for contractual indemnification against the Town. Article 5 (b) of the waste collection service agreement between the Town and Winters Bros. Recycling Corp. contains a broad indemnity clause, providing in relevant part that “[t]he Town agrees that it shall protect, indemnify and hold harmless the Contractor, its affiliates ... (the “ Contractor Indemnified Party”) from and against all liabilities ... and shall defend the Contractor Indemnified Party in any suit, including appeals for personal injury ... arising out of the performance (or non-performance) of the Town’s obligations under this Agreement.” A party’s right to contractual indemnification depends upon the specific language of the relevant contract (see *Castillo v Port Auth. of N.Y. & N.J.*, 159 AD3d 792, 72 NYS3d 582 [2d Dept 2018]; *Morris v Home Depot USA, supra*). Here, the indemnification clause, by its terms, limits indemnification only to claims arising out of the performance or non-performance of the Town’s obligations. There are several issues of fact as to how the accident happened and whether the accident was caused by the performance or non-performance of the Town’s obligations. The Winters Bros. defendants failed to establish their entitlement to summary judgment for contractual indemnification against the Town since a question of fact exists with respect to whether the subject accident arose out of the performance or non-performance of the Town’s obligations under the agreement (see *Peycke v Newport Media Acquisition II*, 17 AD3d 338, 793 NYS2d 92 [2d Dept 2005]; *Baratta v Home Depot USA*, 303 AD2d 434, 756 NYS2d 605 [2d Dept 2003]; cf. *Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014]). Accordingly, the Winters Bros. defendants’ motion for summary judgment on their cross claims for contractual indemnification against the Town is denied.

Dated: Nov. 30, 2020



HON. JOSEPH A. SANTORELLI
J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION