Femoyer v County of Suffolk
2020 NY Slip Op 35253(U)
March 11, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 618027/2016
Judge: Paul J. Baisley, Jr.
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Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 618027/2016
MOTION DATE: 8/1/19
MOTION SEQ. NO.: 002MG; 003MG; 004MG, CASEDISP; 005XMotD; 006MD

---X
CAMELLA FEMOYER,

Plaintiff,

-against-

COUNTY OF SUFFOLK, ST. JOHN'S UNIVERSITY, CATHERINE GRANDJEAN and BRIGHTVIEW LANDSCAPES, LLC,

Defendants.
---X

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Upon the following papers read on these e-filed motions and cross motion for summary judgment, etc.: Notice of Motions/Order to Show Cause and supporting papers dated Mar. 11, 2019, Mar. 15, 2019, May 2, 2019, and June 17, 2019 ; Notice of Cross-Motion and supporting papers dated May 23, 2019; Answering Affidavits and supporting papers dated July 8, 2019 and July 12, 2019; Replying Affidavits and supporting papers dated July 31, 2019; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

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

ORDERED that the motion by defendant St. John's University (motion sequence no. 002) for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion by defendant Brightview Landscapes, LLC (motion sequence no. 003) for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the motion (incorrectly denominated as a cross motion) by defendant County of Suffolk (motion sequence no. 004) for summary judgment dismissing the complaint and all cross claims against it is granted; and it is further

ORDERED that the cross motion by plaintiff (motion sequence no. 005) for an order pursuant to CPLR 3025 (b) granting leave to amend the bill of particulars and for an order granting summary judgment in her favor on the first and fourth causes of action is decided as follows; and it is further

ORDERED that the motion by plaintiff (motion sequence no. 006) for leave to reargue a prior motion by defendant Catherine Grandjean for summary judgment, which was decided by order dated May 21, 2019, is denied.

This matter arises out of a two-car motor vehicle accident that occurred on November 10, 2015, at the intersection of Montauk Highway and Berard Boulevard, in the Town of Islip, New York. At the time of the accident, plaintiff's vehicle was attempting to make a left-hand turn when it came into contact with a vehicle owned and operated by defendant Catherine Grandjean. Plaintiff alleges that defendants St. John's University (St. John's) and Brightview Landscapes, LLC (Brightview) which, respectively, own and maintain the property on the southwest corner of the subject intersection, were negligent in maintaining trees and shrubs on the property which obstructed the view of oncoming traffic at the intersection. Plaintiff also alleges that defendant County of Suffolk (County) was negligent in creating a dangerous condition on Montauk Highway near the exit of St. John's by the placement of the fence, shrubs, or vegetation. St. John's, the County, and Brightview each assert cross claims for indemnification, contribution, and apportionment.

Plaintiff now seeks leave to amend the bill of particulars to add violation of Islip Town Code §68-404, entitled, "Obstructions to motorist's sight," and §68-406, entitled, "Fences and walls," against St. John's and Brightview. She also seeks summary judgment in her favor on the issue of liability against St. John's and Brightview. In support, plaintiff submits, *inter alia*, a photo and her affidavit.

Generally, leave to amend a pleading "shall be freely given" (CPLR 3025 [b]) unless the proposed amendment is palpably insufficient as a matter of law, devoid of merit, or would prejudice or surprise the opposing party (*see Maldonado v Newport Gardens, Inc.*, 91 AD3d 731, 937 NYS2d 260 [2d Dept 2012]; *Lariviere v New York City Tr. Auth.*, 82 AD3d 1165, 920 NYS2d 231 [2d Dept 2011]; *Gitlin v Chirinkin*, 60 AD3d 901, 875 NYS2d 585 [2d Dept 2009]). "The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or

lack of merit is clear and free from doubt" (*Sample v Levada*, 8 AD3d 465, 467-468, 779 NYS2d 96 [2d Dept 2004]).

Here, the proposed amendment to add violation of Islip Town Code §68-404 cannot be characterized as palpably devoid of merit or insufficient as a matter of law, and there is no evidence St. John's and Brightview are surprised or prejudiced since the amendment does not raise any new factual allegations or theories of liability (*see Hughes v Concourse Residence Corp.*, 62 AD3d 463, 878 NYS2d 333 [1st Dept 2009]). However, St. John's and Brightview would be prejudiced if plaintiff is allowed to add violation of Islip Town Code §68-406 since plaintiff alleges that her vision was obstructed by trees and shrubs, not fences or walls. The Court finds that plaintiff's claim of violation of Islip Town Code §68-406 appears to be plainly without merit at this juncture in the litigation (*see Sihly v New York City Tr. Auth.*, 282 AD2d 337, 723 NYS2d 189 [1st Dept 2001]). Accordingly, the branch of plaintiff's cross motion for leave to amend the bill of particulars is granted to the extent of granting leave to amend the bill of particulars by adding violation of Islip Town Code §68-404 against St. John's and Brightview and is otherwise denied. The branch of plaintiff's cross motion for an order granting summary judgment in her favor on the first and fourth causes of action on the ground that St. John's and Brightview were in violation of Islip Town Code §68-406 is denied because the claim of their violation of that section is not pleaded in the complaint. In any event, even assuming that such claim were properly pleaded in the complaint, plaintiff has failed to submit any evidence demonstrating that the alleged violation of Islip Town Code §68-406 was a proximate cause of the subject accident.

St. John's moves for summary judgment dismissing the complaint and all cross claims against it on the ground that it was not negligent because it had no common-law or statutory duty to prevent vegetation growing on in its property so as to enhance the visibility at the subject intersection. St. John's also alleges that it did not violate Islip Town Code §68-404 and §68-405, entitled, "Sight triangles." In support, St. John's submits, *inter alia*, the pleadings, the parties' deposition testimony, and the affidavit of its expert, Scott Derector, a professional engineer.

In his affidavit, Derector, a New York licensed professional engineer, states that upon the site inspection and review of photographs, he took various measurements and calculated the sight triangle, as required by Islip Town Code §68-405 and opines that the sign, trees, shrubs, and foliage located on the property near the subject intersection did not violate the requirements of the sight triangle on the day of the accident since none of said trees or shrubs were located within the line of the sight triangle.

At her deposition, plaintiff testified that prior to the accident, when she stopped at the stop sign governing the exit of St. John's, her view of Montauk Highway was obstructed by trees and shrubs located on her left side. Then, she inched her vehicle forward approximately 10 feet, until she could see oncoming traffic on Montauk Highway. Plaintiff testified that prior to making a left turn onto Montauk Highway, she was looking to her left and right and had to wait for both lanes of traffic to be clear to proceed into the intersection.

A property owner has no common-law duty to prevent vegetation growing on its property from creating a visual obstruction to users of a public roadway (*see Dutka v Odierno*, 145 AD3d 661, 665, 43 NYS3d 409 [2d Dept 2016]; *Preux v Dennis*, 116 AD3d 942, 983 NYS2d 843 [2d Dept 2014]; *Lubitz v Village of Scarsdale*, 31 AD3d 618, 819 NYS2d 92 [2d Dept 2006]). Nevertheless, where a specific regulatory provision, such as Islip Town Code §68-404, imposes upon property owners a duty to prevent vegetation from visually obstructing the roadway, proof of noncompliance with the regulatory provision may give rise to tort liability for any damages proximately caused thereby (*see Dutka v Odierno*, *supra*; *Lubitz v Village of Scarsdale*, *supra*).

Here, St. John's established a *prima facie* entitlement to judgment as a matter of law by showing that it was not in violation of Islip Town Code §68-404. Its expert opines that the subject trees or shrubs were not located within the line of the sight triangle as required by Islip Town Code §68-405. Moreover, St. John's established that its alleged violation of Islip Town Code §68-404 was not a proximate cause of the subject accident by plaintiff's testimony that prior to the accident, when her view was obstructed by trees and shrubs on her left side, she inched her vehicle forward approximately 10 feet, where she was able to see oncoming traffic on Montauk Highway.

In opposition, plaintiff contends that St. John's was in violation of Islip Town Code §68-404. Plaintiff submits, *inter alia*, her own affidavit stating that on the day of the accident, branches of trees located on the southwest corner of the subject intersection "hung over" the sidewalk adjacent to the road. However, plaintiff has failed to address whether her vision of Montauk Highway was obstructed by the overhanging branches. Moreover, plaintiff did not state whether prior to the accident, her vision was obstructed at the final position of her vehicle after she inched up approximately 10 feet from the stop sign. Plaintiff failed to raise a triable issue of fact as to whether St. John's was in violation of Islip Town Code §68-404 and whether the alleged violation was a proximate cause of the accident. Thus, the motion by St. John's for summary judgment dismissing the complaint and all cross claims against it is granted.

Brightview moves for summary judgment dismissing the complaint and all cross claims against it on the ground that it owes no duty to plaintiff and was not negligent. Brightview argues that although it was responsible for landscape maintenance on the premises, St. John's was generally responsible for maintaining its premises. In support, Brightview submits, *inter alia*, the pleadings, the parties' deposition testimony, and its agreement with St. John's.

At his deposition, Douglas Reedy testified that he is the branch manager for Brightview; and prior to the accident, St. John's entered into a contract with Brightview to perform landscape maintenance operations on the St. John's campus in Oakdale. Reedy testified that said agreement did not require Brightview to trim or prune evergreen trees near the site of the subject intersection. He testified that Brightview did not prune or trim the arborvitae trees located near the site.

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 746 NYS2d 120 [2002];

Bodenmiller v Thermo Tech Combustion, Inc., 80 AD3d 719, 719, 915 NYS2d 312 [2d Dept 2011]; *Schwint v Bank St. Commons, LLC*, 74 AD3d 1312, 904 NYS2d 220 [2d Dept 2010]). Nonetheless, the Court of Appeals has recognized three exceptions to this general rule: (1) Where the contracting party, in failing to exercise reasonable care in the performance of his or her duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely (*see Espinal v Melville Snow Contrs.*, *supra*; *Baker v Buckpitt*, 99 AD3d 1097, 952 NYS2d 666 [3d Dept 2012]). As part of its *prima facie* showing, a contracting defendant is only required to negate the applicability of those Espinal exceptions that were expressly pleaded by the plaintiff or expressly set forth in the plaintiff's bill of particulars (*see Mathey v Metropolitan Transp. Auth.*, 95 AD3d 842, 844, 943 NYS2d 578 [2d Dept 2012]; *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214, 905 NYS2d 226 [2d Dept 2010]).

Here, Brightview has established its *prima facie* entitlement to judgment as a matter of law by demonstrating that it owed no duty of care to plaintiff, who was not a party to the landscape maintenance contract that it had with St. John's. Brightview's limited contractual undertaking was not a comprehensive and exclusive property maintenance obligation which entirely displaced the property owner's duty to maintain the premises safely (*see Linarello v Colin Serv. Sys.*, 31 AD3d 396, 817 NYS2d 660 [2d Dept 2006]; *Katz v Pathmark Stores*, 19 AD3d 371, 796 NYS2d 176 [2d Dept 2005]). Moreover, Brightview's manager testified that Brightview was not obligated to trim or prune any trees near the accident site. Furthermore, inasmuch as plaintiff does not allege the possible applicability of any of the *Espinal* exceptions in the complaint or bill of particulars, Brightview is not required to affirmatively demonstrate that these exceptions did not apply in order to establish its *prima facie* entitlement to judgment as a matter of law (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 26 NYS3d 207 [2d Dept 2016]; *Diaz v Port Auth. of NY & NJ*, 120 AD3d 611, 990 NYS2d 882 [2d Dept 2014]).

In opposition, plaintiff failed to raise a triable issue of fact as to the applicability of one or more of the *Espinal* exceptions. Moreover, plaintiff failed to raise a triable issue of fact as to whether Brightview was in violation of Islip Town Code §68-404, and whether Brightview created a dangerous condition which caused the subject accident. Thus, Brightview's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

The County moves for summary judgment dismissing the complaint against it, *inter alia*, on the ground that it did not owe plaintiff a duty of care because it is not responsible for maintaining the subject sidewalk or landscaping along the sidewalk adjacent to the road. Moreover, the County contends that the proximate cause of the subject accident was plaintiff's failure to yield the right of way to the Grandjean vehicle. In support, the County submits, *inter alia*, the pleadings and the parties' deposition testimony.

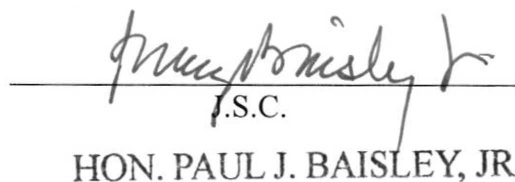
At his deposition, Michael LaGrega testified that he is a highway crew leader employed by the County of Suffolk. He testified that the County is not responsible for maintaining any sidewalks

or landscaping along the sidewalk adjacent to the road. He testified that the Town of Islip would be responsible to maintain the sidewalks in the area of the subject accident.

Here, the County has made a *prima facie* showing of entitlement to judgment as a matter of law by demonstrating that it owed no duty to plaintiff because it is not responsible for maintaining the subject sidewalk or landscaping along the sidewalk. The County further demonstrated that the subject accident was not caused by the alleged obstruction of plaintiff's view of oncoming traffic at the intersection but by her failure to yield the right of way to the Grandjean vehicle. No opposition has been interposed to the County's motion. Accordingly, the County's motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Finally, the motion by plaintiff for leave to reargue a prior motion by defendant Catherine Grandjean for summary judgment, which was granted by order dated May 21, 2019, is denied as her submissions fail to demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in reaching its determination (*see Mooney v Vecchio*, 305 AD2d 415, 758 NYS2d 506 [2d Dept 2003]).

Dated: March 11, 2020



J.S.C.

HON. PAUL J. BAISLEY, JR.