Montes De Oca v Genovesi
2020 NY Slip Op 35357(U)
November 18, 2020
Supreme Court, Westchester County
Docket Number: Index No. 56736/2020
Judge: Charles D. Wood
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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 WESTCHESTER
---x
JORGE MONTES DE OCA,

Plaintiff,

DECISION & ORDER
Index No.56736/2020
Seq No. 1

-against-

MICHAEL G. GENOVESI, SEBASTIAN S. DINIS, ISABEL M. DINIS, COUNTY OF WESTCHESTER, TOWN OF OSSINING and VILLAGE OF OSSINING,

Defendants.
---x
WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 29-46, were read in connection with the Town of Ossining's ("the Town") motion for summary judgment, on the grounds that the Town: does not own or maintain the accident location, and, as such, the Town has no duty with regards to the location at issue; and did not receive prior written notice of the alleged defective condition and did not affirmatively create same. Plaintiff opposes the motion. Plaintiff accuses the Town in permitting and allowing shrubs and other greenery to grow to a height and width that obstructed the vision of those traveling at the subject accident site. The County takes no position as to the Town's motion other than to request if the court is inclined to dismiss the complaint as against the Town, that it do so without prejudice, so that in the event that discovery yields evidence indicating that the Town

may have owed a duty or control or responsibility over any of the alleged contributing factors to the accident, that it could be brought back into the action.[1]

Plaintiff claims that he sustained personal injuries on July 30, 2019, at approximately 2:15 p.m., at the intersection of Ryder Road and Sunset Drive, in Ossining, when the vehicles driven by plaintiff and defendant Michael G. Genovesi, collided at said intersection.

NOW, upon the foregoing papers, the motions are decided as follows:

It is well settled that a 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 issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any

[1]Relevant information about the intersection is either within the County's possession, or is readily available to the County, and therefore the court is unswayed by this request.

doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Susanne Donnelly is the Town Clerk for the Town of Ossining. She reviewed the Notice of Claim and Summons and Complaint, which set forth certain events that allegedly occurred on July 30, 2019, at the accident intersection. She also reviewed the Town's zoning map depicting the Town's jurisdiction and roadways within the Town. Donnelly asserts that the Town does not own, maintain, operate, manage, repair, or control the alleged site of the subject intersection. Additionally, the Town does not undertake any daily maintenance or management services for the accident location, or employ any staff who provide those services, and did not undertake any safety efforts at the accident location in July of 2019 (NYSCWEF#32)

Peter Connolly, the Superintendent for the Town's Department of Highways for 16 months, monitors all Department of Highway's construction/paving operations, maintenance of roadways, and seasonal activities. He reviewed the Notice of Claim, the complaint, and the Town's Zoning map depicting the Town's jurisdiction and roadways within the Town, and arrives at the same conclusion that the Town does not own, maintain, operate, manage, repair, or control the alleged site of the incident, located at the subject intersection (NYSCEF#33).

The Second Department recognized that as a general rule, "a municipality will not be held responsible for the negligent design of a highway it does not own or control. Moreover, a municipality cannot be held liable for the failure to maintain in a reasonably safe condition a road it does not own or control unless it affirmatively undertakes such a duty" (Carlo v. Town of E. Fishkill, 19 AD3d 442, 443 [2d Dept 2005]).[internal citations omitted]).

Here, the Town sustained its initial burden of demonstrating its entitlement to judgment as a matter of law, by submitting evidence that the accident occurred at an intersection it did

not own, including the Town's Zoning Map, that was referred to in both affidavits, which depicts all roadways within the Town jurisdiction, and that the subject intersection was not within the Town's borders.

In opposition, plaintiffs failed to submit evidence to raise a triable issue of fact as to whether the Town assumed control of the intersection, or affirmatively undertook a duty to maintain it.

Furthermore, plaintiffs' mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process did not provide a basis for denial of the motion (Carlo v. Town of E. Fishkill, 19 AD3d at 443.

In light of the foregoing, the remaining contentions of the Town have not been addressed by the court, and are academic. All matters not herein decided are denied. This constitutes the Decision and Order of the court.

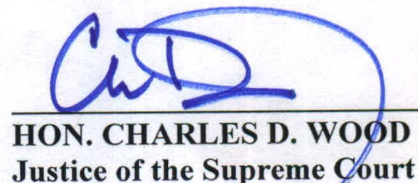
NOW, therefore, it is hereby

ORDERED, that the Town's motion for summary judgment dismissing the complaint and all cross claims asserted against it is **Granted**; and it is further

ORDERED, that the remaining parties shall appear in the Preliminary Conference Part, at a date, time, and place as designated by that Part.

The Clerk shall mark his records accordingly.

Dated: November 18, 2020
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF