

**Ortiz v Itzcowitz**

2021 NY Slip Op 33784(U)

March 26, 2021

Supreme Court, Orange County

Docket Number: Index No. EF001884/2020

Judge: Maria S. Vazquez-Doles

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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.

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the 285 Main Street, Goshen, New York 10924 on the 26th day of March, 2021.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ORANGE

EMILIO ORTIZ,

PLAINTIFF,

-AGAINST-

MAYA S. ITZCOWITZ, TOWN OF WOODBURY  
VILLAGE OF WOODBURY, VILLAGE OF  
WOODBURY HIGHWAY DEPARTMENT, TOWN OF  
MONROE, TOWN OF MONROE HIGHWAY  
DEPARTMENT, and VILLAGE OF HARRIMAN,

DEFENDANTS.

VAZQUEZ-DOLES, J.S.C.

To commence the statutory time for appeals of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

**DECISION & ORDER**  
**Index No.: EF001884/2020**  
**Motion Date: 12/29/2020**  
**Motion Seq. #1, 2, & 3**

The following papers numbered 1 to 14 were read on the motions by Defendants, TOWN OF MONROE and TOWN OF MONROE HIGHWAY DEPARTMENT (collectively “Town of Monroe”) (Mot. Seq. #1); Defendants, VILLAGE OF WOODBURY and VILLAGE OF WOODBURY HIGHWAY DEPARTMENT (collectively “Village of Woodbury”) (Mot. Seq. #2); and Defendant, VILLAGE OF HARRIMAN (Mot. Seq. #3) for summary judgment pursuant to CPLR 3212 dismissing the complaint and all cross-claims against each defendant. The motions are consolidated for purposes of this decision:

**Mot. Seq. #1**  
Notice of Motion/Affirmation (Zefi)/ Exhibits A - E. . . . . 1-3  
**Mot. Seq. #2**  
Notice of Motion/Affirmation (Martens)/Supporting Affidavit/Exhibits A-K. . . . . 4-7  
Affirmation in Opposition (Cambareri). . . . . 8  
Reply Affirmation (Martens)/Supplemental Affidavit/Exhibits A-C. . . . . 9-11  
**Mot. Seq. #3**  
Notice of Motion/Affidavit (Cook). . . . . 12  
Affirmation in Opposition (Cambareri). . . . . 13

Reply Affirmation (Cook). . . . . 14

Plaintiff alleges that he was injured as a result of a motor vehicle accident on December 18, 2018 while he was driving on State Highway 17 at or near Exit 131. Specifically, as set forth in the Notice of Claim, Plaintiff alleges that the accident occurred while he was traveling up the exit ramp and another vehicle was traveling down the exit ramp the wrong way due to lack of signage and lighting on the construction area. Plaintiff commenced this action with the filing of a Summons and Complaint on March 6, 2020. Issue was joined by the filing of an Answer on behalf of defendant Village of Harriman on or about June 18, 2020, on behalf of defendants Village of Woodbury on or about June 26, 2020, on behalf of defendant Town of Woodbury on or about June 30, 2020, on behalf of defendant Maya S. Itzkowitz on or about August 11, 2020, and on behalf of defendant Town of Monroe on or about September 1, 2020.

In its motion for summary judgment, the Town of Monroe argues that the location of the alleged accident at State Highway 17 at/near Exit 131 is not located within or maintained by the Town of Monroe. Further, that they had no written notice of any dangerous or defective condition alleged by the plaintiff to have caused the accident and that no exception to the statutory notice requirement applies as the Town of Monroe did not cause or create the condition alleged. In support of their motion, the Town of Monroe submits the affidavit of Mary Ellen Beams, Town Clerk. Ms. Beams avers that she is fully familiar with the Town of Monroe’s jurisdictional boundaries and that the alleged accident location, State Highway 17 at/near Exit 131, is not located within the Town of Monroe. Moreover, the Town of Monroe had no involvement in the "Route 17/Exit 131 Reconstruction Project." As custodian of the Town’s written notice records, she searched the records and confirms that the Town of Monroe did not receive any prior written notice of the alleged dangerous condition.

Plaintiff, in failing to submit any opposition, concedes that the accident site is not located within the Town of Monroe; that the Town of Monroe had no involvement in the construction project; that the Town of Monroe did not create the defect and that there was no prior written notice of the defect. Further, no opposition has been submitted by co-defendants.

Accordingly, the Town of Monroe has established prima facie its entitlement to summary judgment dismissing the complaint and all cross-claims as against them.

The Village of Woodbury moves to dismiss the complaint based on the same argument as the Town of Monroe; the subject accident location is not located within the Village of Woodbury and that the Village of Woodbury does not own, maintain, repair or control the accident location. In support of their motion they submit the Affirmation of Highway Superintendent for the Village, Robert Weyant. Mr. Weyant avers that he is fully familiar with the jurisdictional boundaries of the Village of Woodbury by nature of his position as Superintendent of Highways and that the alleged accident location is not located within the Village of Woodbury and is not owned, maintained, repaired, or controlled by the Village of Woodbury. He further avers that the Village of Woodbury was not involved in any manner with the "Route 17/Exit 131 Reconstruction Project also known as the "Route 17 at Exit 131 Interchange Project."

“ ‘It has long been established that a governmental body, be it the State, a county or a municipality, is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition, and that liability will flow for injuries resulting from a breach of the duty’ ” (*Dutka v. Odierno*, 145 A.D.3d 661, 665 [2d Dept 2016], quoting *Lopes v. Rostad*, 45 N.Y.2d 617, 623 [1978]; see *Stiuso v. City of New York*, 87 N.Y.2d 889, 890 [1995]). However, a governmental body generally “will not be held responsible for the negligent design of a highway it does not own or control” (*Carlo v. Town of E. Fishkill*, 19 A.D.3d 442, 442 [2d Dept 2005];

*see Ernest v. Red Cr. Cent. School Dist.*, 93 N.Y.2d 664, 675 [1999]; *Flynn v. Hanken*, 17 A.D.3d 523, 524 [2d Dept 2005]). Similarly, a governmental body “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 A.D.3d at 442; *see Horn v. Town of Clarkstown*, 46 A.D.3d 621, 622 [2d Dept 2007]).

Here, the Village of Woodbury sustained its initial burden of demonstrating its entitlement to judgment as a matter of law by submitting evidence that the accident occurred on a State highway which it did not own (*see Alcalay v. Town of North Hempstead*, 262 A.D.2d 258 [2d Dept 1999]; *Silver v. Cooper*, 199 A.D.2d 255 [2d Dept 1993]). The evidence submitted in opposition by the plaintiff is insufficient to raise any triable issue of fact. (*see Ernest v. Red Creek Cent. School Dist.*, *supra*; *Kovalsky v. Village of Yaphank*, *supra*)

Plaintiff’s counsel argues that the Village of Woodbury has failed to show *prima facie* entitlement to summary judgment because no map or other evidence regarding the boundaries of the Village was not provided but, in fact, it was. A “Local Road Listing” was included which indicates each road within the jurisdictional boundaries of the Village and New York State Route 17 is not included within the list. Plaintiff’s counsel further argues, without evidentiary support, that because the listing is dated 2020 and not 2018 it is insufficient. In response, the Village submits a supplemental affidavit of Mr. Weyant which includes a “Local Road Listing,” dated 2018, indicating the jurisdictional boundaries of the Village at the time of the accident in 2018. Mr. Weyant avers that the listing was generated by the New York State Department of Transportation at his request and it shows that New York State Route 17 was not included within this list, establishing that the Village did not own, maintain, repair, or control the subject accident location on the date of the accident. Moreover, the plaintiff’s contention that the

Village affirmatively created a dangerous condition was without support in the record, and speculative in any event. (*Gonzalez v Town of Hempstead*, 124 AD3d 719 [2d Dept 2015]) The Village of Woodbury's co-defendants did not submit any opposition.

Making the same arguments as its co-defendants, the Village of Harriman submits the affidavit of Jane Leake, Harriman Village Clerk, in support of their motion. Ms. Leake avers that her office is charged with the responsibility for receiving and maintaining written notices of defects regarding the condition of the roadways and sidewalks in the Village of Harriman. After learning of the subject accident, Ms. Leake searched the Village Clerk's records to ascertain whether any prior written notice had been received of any defective condition at the accident location and found none. Ms. Leake further avers, based upon a review of the records and her experience as Village Clerk, that the Village of Harriman does not own or maintain any portion of State Highway 17 and that same is owned and maintained by the State of New York.

The Village of Harriman established its prima facie entitlement to judgment as a matter of law by submitting, *inter alia*, the affidavit of the Village Clerk, who averred that her search of the Village's records revealed no prior written notice of any dangerous condition at the site where the accident occurred (*see Johnson v. Braun*, 120 A.D.3d 765 [2d Dept 2014]; *Velho v. Village of Sleepy Hollow*, 119 A.D.3d at 552 [2d Dept 2014]; *Spanos v. Town of Clarkstown*, 81 A.D.3d 711, 713 [2d Dept 2001]). Also by submitting evidence that the accident occurred on a State highway which it did not own (*see Alcalay v. Town of North Hempstead*, 262 A.D.2d 258 [2d Dept 1999]; *Silver v. Cooper*, 199 A.D.2d 255 [2d Dept 1993]). The plaintiff submits opposition almost identical to the opposition in the Village of Woodbury's motion and again, plaintiff fails to raise a triable issue of fact. Moreover, the plaintiff's contention that the Village of Harriman affirmatively created a dangerous condition is without support in the record, and

speculative in any event. (*Gonzalez v Town of Hempstead*, 124 AD3d 719 [2d Dept 2015]) Co-defendants submit no opposition.

In light of the above, it is hereby

**ORDERED** that the motion for summary judgment by defendants, TOWN OF MONROE and TOWN OF MONROE HIGHWAY DEPARTMENT, is granted; and it is further

**ORDERED** that the complaint and all cross-claims are dismissed as against defendants, TOWN OF MONROE and TOWN OF MONROE HIGHWAY DEPARTMENT (Mot. Seq. #1); and it is further

**ORDERED** that the motion for summary judgment by defendants, VILLAGE OF WOODBURY and VILLAGE OF WOODBURY HIGHWAY DEPARTMENT, is granted (Mot. Seq. #2); and it is further

**ORDERED** that the complaint and all cross-claims are dismissed as against defendants, VILLAGE OF WOODBURY and VILLAGE OF WOODBURY HIGHWAY DEPARTMENT; and it is further

**ORDERED** that the motion for summary judgment by defendant, VILLAGE OF HARRIMAN, is granted (Mot. Seq. #3); and it is further

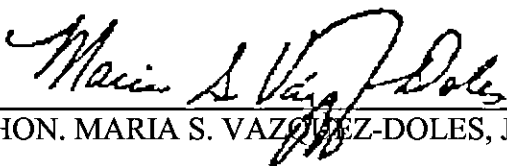
**ORDERED** that the complaint and all cross-claims are dismissed as against defendant, VILLAGE OF HARRIMAN.

The parties shall appear for a preliminary conference on May , 11, 2021 at 10:30 a.m.

The foregoing constitutes the Decision and Order of this Court.

**ENTER**

Dated: March 26th, 2021  
Goshen, New York

  
HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record via NYSCEF