

Costello v Lehmann
2024 NY Slip Op 35600(U)
June 7, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 608994/2019
Judge: C. Stephen Hackeling
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SHORT FORM ORDER

INDEX No. 608994/2019
CAL. No. 202301476OTSUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY**PRESENT:**Hon. C. STEPHEN HACKELING
Justice of the Supreme CourtMOTION DATE 12/24/23 (002)
MOTION DATE 1/3/24 (003)
MOTION DATE 3/13/24 (005)
MOTION DATE 2/7/24 (006)
ADJ. DATE 3/13/24
Mot. Seq. # 002 MD
Mot. Seq. # 003 XMotD
Mot. Seq. # 005 MD
Mot. Seq. # 006 XMD-----X
STEPHEN D. COSTELLO,

Plaintiff,

- against -

MARK LEHMANN, TOWN OF
BROOKHAVEN and BROOKHAVEN
CALABRO AIRPORT,Defendants.
-----XWINKLER KURTZ, LLP
Attorney for Plaintiff
1201 Route 112, Suite 200
Port Jefferson Station, New York 11776TRAUB LIEBERMAN STRAUS &
SHREWSBERRY LLP
Attorney for Defendant Mark Lehmann
Mid-Westchester Executive Park
Seven Skyline Drive
Hawthorne, New York 10532LAW OFFICE OF VINCENT D. MCNAMARA
Attorney for Defendant Town of Brookhaven
1045 Oyster Bay Road, Suite 1
East Norwich, New York 11735

Upon the following papers read on the motions for summary judgment: (1) Notice of Motion and supporting papers by defendant Mark Lehmann, filed November 28, 2023; (2) Notice of Cross Motion and supporting papers by plaintiff, filed December 12, 2023; (3) Answering Affidavits and supporting papers by defendant Mark Lehmann, filed December 26, 2023; (4) Replying Affidavits and supporting papers by plaintiff, filed January 2, 2024; (5) Notice of Motion and supporting papers by plaintiff, filed January 31, 2024; (6) Answering Affidavits and supporting papers by defendant Town of Brookhaven, filed February 2, 2024; (7) Notice of Cross Motion and supporting papers by defendant Town of Brookhaven, filed February 2, 2024; (8) Replying Affidavits and supporting papers by defendant Mark Lehmann, filed February 5, 2024; (9) Answering Affidavits and supporting papers by defendant Mark Lehmann, filed February 5, 2024; (10) Replying Affidavits and supporting papers by plaintiff, filed February 5, 2024; (11) Answering Affidavits and supporting papers by defendant Town of Brookhaven, filed March 4, 2024; and (12) Replying Affidavits and supporting papers by plaintiff, filed March 5, 2024, it is

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ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion by defendant Mark Lehmann for (1) summary judgment dismissing the complaint as asserted against him, (2) summary judgment dismissing the cross claims asserted against him, and (3) summary judgment in his favor on his cross claims against defendant Town of Brookhaven is denied; and it is further

ORDERED that plaintiff's cross motion for (1) summary judgment in his favor on the issue of liability against defendant Mark Lehmann and (2) summary judgment dismissing defendant Mark Lehmann's affirmative defenses alleging comparative fault is granted to the extent of granting plaintiff summary judgment on the issue of liability against defendant Mark Lehmann, and is otherwise denied; and it is further

ORDERED that plaintiff's motion for (1) summary judgment in his favor on the issue of liability against defendant Town of Brookhaven and (2) summary judgment dismissing defendant Town of Brookhaven's affirmative defenses alleging comparative fault is denied; and it is further

ORDERED that the cross motion by defendants Town of Brookhaven and Brookhaven Calabro Airport for summary judgment dismissing the complaint and cross claims against them is denied.

On October 21, 2018, plaintiff, Stephen Costello, was in Suffolk County visiting his girlfriend's family. Costello, who lived in the Washington, D.C., metropolitan area, and his girlfriend were headed to a restaurant in Patchogue. They were traveling there in a vehicle that his girlfriend was driving; Costello was in the front passenger seat. They were the only two occupants of the vehicle. As they were proceeding on Sunrise Highway North Service Road past defendant Brookhaven Calabro Airport (the Airport), the front passenger side window of the vehicle suddenly shattered, and Costello was shot in the face. The bullet came from a shotgun that defendant Mark Lehmann allegedly fired while hunting deer on the Airport property. The Airport, which was apparently owned and operated by defendant Town of Brookhaven (the Town), allowed deer hunters on its property pursuant to a strike hazard permit from the New York State Department of Environmental Conservation. Lehmann, a licensed hunter, had permission from the Town and the Airport to hunt on the Airport's property. The Town alleges that Lehmann fired his shotgun from a location at which hunting was prohibited.

Lehmann was criminally charged in relation to the incident and pleaded guilty to assault in the third degree (Penal Law § 120.00 [3]) under the subsection that makes it illegal when, "[w]ith criminal negligence, [a person] causes physical injury to another person by means of a deadly weapon or dangerous instrument." Costello commenced this action against Lehmann, the Town, and the Airport for negligence. Lehmann cross-claimed against the Town and the Airport for common-law indemnification and contribution. The Town cross-claimed against Lehmann for common-law indemnification and contribution. The Airport never answered the complaint.

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Lehmann now moves for summary judgment dismissing the complaint and cross claims as asserted against him and summary judgment in his favor on his cross claims against the Town. In support of his motion, he submits, among other things, transcripts of the depositions of Costello, himself, and Mark Lyon. Costello opposes the motion and cross-moves for summary judgment in his favor on the issue of liability against Lehmann and the dismissal of Lehmann's affirmative defenses alleging comparative fault. Costello submits, among other things, a certified transcript of Lehmann's plea allocution. Costello separately moves for summary judgment in his favor on the issue of liability against the Town and dismissal of the Town's affirmative defenses alleging comparative fault. In support of his motion, Costello submits, among other things, transcripts of the depositions of himself, Lehmann, and Lyon; and standard operating procedures for hunting at the Airport. The Town and the Airport cross-move for summary judgment dismissing the complaint and cross claims asserted against them, relying on the exhibits submitted in Costello's motion.

On a motion for summary judgment, the movant has the burden to show, through evidence in admissible form (*Bush v St. Clare's Hosp.*, 82 NY2d 738, 602 NYS2d 324 [1993]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]), that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; *Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

The Court will first address Costello's applications. Collateral estoppel prevents a party from relitigating an issue raised in a prior action or proceeding and decided against that party (*e.g. Simmons v Trans Express Inc.*, 37 NY3d 107, 148 NYS3d 178 [2021]). In order to apply, the issue must be identical to that decided in the prior action or proceeding, the issue must have actually been litigated and decided, the estopped party must have had a full and fair opportunity to litigate the issue, and the issue must have been essential to the decision therein (*Conason v Megan Holding, LLC*, 25 NY3d 1, 6 NYS3d 206 [2015], *rearg denied* 25 NY3d 1193, 16 NYS3d 51 [2015]; *Rosa v Triborough Bridge & Tunnel Auth.*, 218 AD3d 810, 194 NYS3d 68 [2d Dept 2023]). The party seeking to utilize collateral estoppel has the burden of showing that it applies (*Gregg v Lan Zhen Chen*, 220 AD3d 697, 197 NYS3d 285 [2d Dept 2023]; *Giamundo v Dunn*, 219 AD3d 878, 195 NYS3d 724 [2d Dept 2023]).

Here, Costello has shown that Lehmann is collaterally estopped from asserting that he was not negligent or that his negligence did not cause Costello's injuries. At his allocution, Lehmann admitted to hunting on the date of the accident at or near the Airport with a shotgun. When asked if he "negligently fire[d] that weapon and it caused harm to another individual," Lehmann replied in the affirmative. Thus, he is collaterally estopped from arguing that he was not negligent or that he did not cause harm to Costello. (*Aya R. v Elbaz*, 212 AD3d 669, 182 NYS3d 181 [2d Dept 2023]; *Uy v Hussein*, 186 AD3d 1566, 131 NYS3d 351 [2d Dept 2020] [involving a defendant who, like Lehmann, pleaded guilty to assault in the third degree under Penal Law § 120.00 (3)]; *Hartman v Milbel Enters., Inc.*, 130 AD3d 978, 15 NYS3d 125 [2d Dept 2015]; *Russo v Dement*, 61 Misc 3d 855, 84 NYS3d 754 [Sup Ct, Suffolk County 2018]). In

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opposition, Lehmann failed to raise a material issue of fact. Contrary to his argument, causation is an explicit element of assault in the third degree (Penal Law § 120.00 [3]). Thus, so much of Costello's motion as seeks summary judgment in his favor on the issue of liability against Lehmann is granted. Costello, however, does not direct any argument toward the branch of his motion that seeks summary judgment dismissing Lehmann's affirmative defenses alleging comparative fault, so the Court is constrained to deny this branch of the motion.

Turning to Costello's separate motion that seeks relief against the Town, he has not shown that he is entitled to summary judgment in his favor on the issue of liability. Costello's sole argument on this issue is that Lehmann was the Town's agent and, therefore, the Town is vicariously liable for his conduct. Although not recognized by any party, it appears that General Obligations Law § 9-103 (1) (b) precludes the Town from liability for Lehmann's conduct (*Bellone v J.R. Shooting Preserve*, 192 AD2d 633, 597 NYS2d 78 [2d Dept 1993]; *see also Sega v State of New York*, 60 NY2d 183, 469 NYS2d 51 [1983], *rearg denied* 61 NY2d 670, 472 NYS2d 1028 [1983]; *Rodriguez v City of New York*, 161 AD3d 682, 77 NYS3d 48 [1st Dept 2018]; *Fredette v Town of Southampton*, 95 AD3d 940, 944 NYS2d 206 [2d Dept 2012], *lv denied* 19 NY3d 811, 951 NYS2d 721 [2012]). Mark Lyon, a Town employee who described the requirements for a hunter to come onto the Airport property and hunt, did not mention that the hunter had to pay any kind of fee, which was uncontradicted by Lehmann. Nor did the Town pay Lehmann to hunt. As Costello does not direct any argument toward the branch of his motion that seeks summary judgment dismissing the Town's affirmative defenses alleging comparative fault, the motion is denied in its entirety.

For the reasons explained above, so much of Lehmann's motion that seeks summary judgment dismissing the complaint against him is denied. For the same reasons, Lehmann has not shown that he is entitled to dismissal of the cross claims against him or that he is entitled to summary judgment in his favor on his cross claims against the Town. Thus, Lehmann's motion is denied in its entirety.

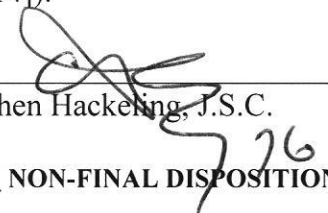
Although the Town and the Airport both seek summary judgment, the Airport has never answered the complaint. Indeed, the Town's answer explicitly states that it is made on behalf of only the Town. The signature block at the end of the answer also states that the Town Attorney's office, which filed the answer, only represents the Town. As the Airport has never answered the complaint, it cannot seek summary judgment, and so much of the cross motion as made by the Airport is denied (*OneWest Bank, FSB v Bernstein*, 196 AD3d 591, 147 NYS3d 442 [2d Dept 2021]; *Cremosa Food Co., LLC v Amella*, 164 AD3d 1300, 81 NYS3d 749 [2d Dept 2018]). In any event, so much of the cross motion as made by the Airport would be denied for the reasons explained below.

So much of the cross motion as made by the Town is untimely (CPLR 3212 [a]; *Podlaski v Long Is. Paneling Ctr. of Centereach, Inc.*, 58 AD3d 825, 873 NYS2d 109 [2d Dept 2009]; *Rivers v City of New York*, 37 AD3d 804, 830 NYS2d 767 [2d Dept 2007]). Nonetheless, the Court may consider an untimely cross motion for summary judgment that is made on nearly identical grounds as a timely motion for summary judgment (*e.g. Sheng Hai Tong v K & K 7619, Inc.*, 144 AD3d 887, 41 NYS3d 266 [2d Dept 2016]), and may search the record and award summary judgment to a nonmovant (CPLR 3212 [b]). Thus, the Court will consider so much of the cross motion for summary judgment as made by the Town.

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The Town's sole argument in support of dismissal of the complaint against it is that Lehmann's acts were the sole proximate cause of Costello's injuries. However, the Town has submitted divergent evidence as to whether it informed Lehmann that hunting was prohibited in the area where he fired the shot. It is also undisputed that there were no markings or signs anywhere on the Airport property indicating where hunting was permissible or prohibited. There may be more than one proximate cause of an accident, and the issue of proximate causation is typically a question for the trier of fact (*Scurry v New York City Hous. Auth.*, 39 NY3d 443, 190 NYS3d 677 [2023]; *Demarest v Village of Greenwich*, 224 AD3d 1196, 206 NYS3d 763 [3d Dept 2024]). Thus, the Court cannot say, as a matter of law, that the Town's acts or omissions were not a proximate cause of Costello's injuries. For the same reasons, so much of the motion as made by the Town seeking dismissal of the cross claims against it is also denied, and the cross motion is denied in its entirety. The Court notes that it cannot grant the Town's motion based on General Obligations Law § 9-103, as the Court cannot grant a motion for summary judgment on a ground not argued by the movant (*Romanelli v Jones*, 179 AD3d 851, 117 NYS3d 90 [2d Dept 2020]; *Grucci v Grucci*, 174 AD3d 790, 102 NYS3d 885 [2d Dept 2019]; *Rosenblatt v St. George Health & Racquetball Assoc., LLC*, 119 AD3d 45, 984 NYS2d 401 [2d Dept 2014]).

Dated: June 7, 2024



Hon. C. Stephen Hackeling, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION