

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ROCKLAND

-----X
PATRICIA GIRARD,

Plaintiff,

-against-

TOWN OF ORANGETOWN, its agents, servants, and/or
employees, ORANGTOWN HIGHWAY DEPARTMENT, its
agents, servants, and/or employees, ORANGETOWN
HIGHWAY SUPERINTENDENT'S OFFICE, its agents, servants,
and/or employees, COUNTY OF ROCKLAND, its agents,
servants, and/or employees, COUNTY OF ROCKLAND
HIGHWAY DEPARTMENT, its agents, servants and/or
employees,

Defendants.

-----X
Sherri L. Eisenpress, A.J.S.C.

SCANNED
DECISION AND ORDER
(Motions # 3 and 4)

Index No.: 033293/2016

The following papers, numbered 1 to 19, were considered in connection with (i) Defendants Town of Orangetown, Orangetown Highway Department and the Orangetown Highway Superintendent's Office's (collectively "Orangetown Defendants") Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in their favor and dismissing the action against them (Motion #3); and (ii) Defendant County of Rockland's (also s/h/a County of Rockland Highway Department's) (hereinafter "County") Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting summary judgment in its favor, and dismissing the Complaint in its entirety (Motion #4):

PAPERS

NUMBERED

Motion #3

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/AFFIDAVIT OF
ANTHONY PALAZOLO/AFFIDAVIT OF JAMES J. DEAN/MEMORANDUM
OF LAW/EXHIBITS "A-H"

1-5

AFFIRMATION IN OPPOSITION/AFFIDAVIT OF NICHOLAS BELLIZZI, P.E./
EXHIBITS "1-19"

6-7

AFFIRMATION IN REPLY/AFFIDAVIT OF JAMES DEAN/AFFIDAVIT OF ANTHONY PALAZOLO/EXHIBITS "A-F"/CORRESPONDENCE DATED 8/18/18 10-11

Motion #4

NOTICE OF MOTION/AFFIDAVIT OF CHARLES VEZZETTI/AFFIRMATION IN SUPPORT/EXHIBITS "A-M"/MEMORANDUM OF LAW 12-15

AFFIRMATION IN OPPOSITION/AFFIDAVIT OF NICHOLAS BELLIZZI, P.E./AFFIDAVIT OF PATRICIA GIRARD/EXHIBITS "1-19" 16-18

AFFIRMATION IN REPLY 19

Upon the foregoing papers, the Court now rules as follows:

Relevant Facts

This action was commenced by Plaintiff with the filing of the Summons and Complaint on August 8, 2016, alleging that she was caused to sustain serious personal injuries on January 5, 2016, when as a pedestrian, she was struck by a vehicle operated by non-party Angelica Gynegrowski, as she made a left hand turn from Holt Drive onto North Middletown Road, in the Town of Orangetown, New York. Plaintiff alleges that Defendants failed to maintain the roadway in a safe condition and failed to implement and/or install further traffic safety devices in the nature of a traffic light at the subject intersection. Issue was joined as to the Orangetown Defendants by service of a Verified Answer on November 14, 2016. On or about January 6, 2017, issue was joined as to Defendant County. Discovery proceeded and Plaintiff filed a Note of Issue on April 25, 2018. The parties were granted an extension of time to serve summary judgment motions to July 6, 2018.

The subject accident occurred at the intersection of North Middletown Road and Holt Drive/Braunsdorf Road, in the Town of Orangetown, New York. North Middletown Road, which is a two-direction road that runs north/south, is maintained by Rockland County and Holt Drive and Bruansdorf Road are maintained by the Town of Orangetown. Holt Drive runs east/west and becomes Braunsdorf Road after crossing to the west side of North Middletown Road. A stop sign controls westbound traffic on Holt Drive just before it meets North

Middletown Road.

At the time of the accident Plaintiff was crossing North Middletown Road within the crosswalk, walking from the Braunsdorf Road side to the Holt Drive side (west side to east side), on the south side of the subject intersection. At Plaintiff's GML Sec. 50-h hearing, and at her deposition, Plaintiff testified that she never saw Ms. Gynegrowski's car before impact. Moreover, Plaintiff testified at her 50-h hearing that there was no car in sight just before she stepped off the curb and onto North Middletown Road. However, in opposition to the County's motion, Plaintiff submits a contradictory affidavit in which she states that the driver of the car which struck her did not see her because she had to avoid very busy traffic on North Middletown Road as she tried to make a left hand turn.

Non-party Angelica Gynegrowski¹ testified that she drove westbound on Holt Drive until she came to a stop sign just prior to the subject intersection. She states that she brought her vehicle to a complete stop at the stop sign. Before proceeding into the intersection, Ms. Gynegrowski testified that she inched forward three or four times until she could see the crosswalk, and that each time she did so, she brought her vehicle to a complete stop before proceeding again. In total, Ms. Gynegrowski testified that she was stopped for one or two minutes before entering into the intersection. She further testified that before entering the intersection, she could see clearly; there were no vehicles approaching from either direction; and nothing was obstructing her view of the intersection. Once she was able to see clearly, Gynegrowski began her left turn. When she was approximately three-quarters of the way through the intersection, she testified that the sun shone in her eyes, temporarily blinding her, and that she then felt her vehicle then strike Plaintiff.

In or about August of 2013, the Town of Orangetown submitted a Federal Transportation Enhancement Program (TEP) grant application for a proposed North Middletown

¹Plaintiff settled with Gynegrowski prior to commencement of the subject action.

Road Project, which would cover 0.75 miles of North Middletown Road, and involves 11 intersections, including the subject intersection at Holt Drive. As set forth in the Affidavit of James Dean, the Superintendent of Highways for the Town of Orangetown, the reason for the grant request was that some of the sidewalks on North Middletown Road were not continuous, some sections needed to be repaired and it was the Town's belief that improving the infrastructure would improve safety for pedestrians. Additionally, there is a high volume of traffic in the area, particularly along the intersection of North Middletown Road and East Central Avenue and at the entrance and exit of Shop Rite.

On January 16, 2014, the TEP application was approved and the Town was informed that it would receive funding in the amount of \$1,899,859. The town would be responsible for covering the remainder of the estimated cost of construction of \$2,520,000. Mr. Dean's affidavit summarizes the chronology of the subject project, including the following: the submission of the Initial Project Proposal (IPP) and Project Management Plan (PMP) in April 2014; the commencement of the bidding process in September 25, 2014; interviews by Town personnel of three potential consultants in November 2014; selection of HVEA as the consultant in December 2014; negotiation of the contract provisions through March 2015; approval of the contract by the Town Board in April 2015; community information meetings in June 2015; consultation on the proposed draft design from June 2015 through September 2015; completion of the initial draft design in November 2015; revisions of the project design from November 2015 through April 2016, and submission to the State for review in May 2016. In June of 2018, the Town was awaiting New York State Department of Transportation ("NYSDOT") determination on the eligibility of traffic signals for federal reimbursement in order to make final edits to the Final Design Report, which will then be submitted to NYSDOT for approval.

With respect to the subject intersection, Plaintiff submits an email dated February 4, 2015, from John Balison to Stephen Munno, in which contract revisions are discussed. It appears that a provision was added to the contract that stated that the Consultant

"will study alternatives that will include (but not be limited to)" adding a signal with a pedestrian phase at Holt Drive. Mr. Dean notes in his Affidavit that after the Consultant was hired and this issue investigated, it became clear that under the Manual on Uniform Traffic Control Devices (MUTCD), published and regulated by the Federal Highway Administration, and the State Supplement, a traffic light at the subject intersection was not warranted and would be inappropriate because in order to justify a traffic light based upon accidents, "five or more reported crashes, of types susceptible to correction by a traffic control signal, [must] have occurred within a 12-month period, each crash involving personal injury or property damage." There is no evidence that this requirement was met. Defendants further point out that at no point in time did the engineer in charge of the project ever recommend that a traffic light be installed at this intersection, and in no design plan was there ever a proposal that a traffic light be installed at the intersection of North Middletown Road and Holt Drive.

The Parties' Contentions

The Orangetown Defendants argue that this action must be dismissed because (i) as a matter of law, they did not breach any duty of care with respect to the safety of the intersection; (ii) they are covered by qualified immunity; (iii) the carelessness of Gynegrowski in driving her car into Plaintiff was the sole proximate or superseding cause of Plaintiff's damages and (iv) public policy argues in favor of the Court granting dismissal. The County moves for similar reasons and argues that summary judgment should be granted because of the absence of proximate cause. More specifically, it points out that Gynegrowski had brought her vehicle to a complete stop, had an unobstructed view of the intersection and looked both ways before entering the intersection, and testified that she was not able to see Plaintiff because she was "blinded" by the sun. Additionally, the County contends that no proximate cause is present because even if a traffic light were installed, both Plaintiff and Gynegrowski would have had the green light during the same "go" interval, such that a traffic light would not have prevented the accident. Lastly, the County argues that the action must be dismissed

because it had no notice that the intersection in question was hazardous to pedestrians and required traffic calming measures beyond the existing stop sign and crosswalk.

In opposition to the summary judgment motions, Plaintiff argues that despite having received authority to proceed with the project, Defendant Orangetown was "lethargic" in its effort to implement the project. She points to a December 2, 2015 email generated from Stephen Munno, which references the fact that Mr. Munno received a letter from Doreen Holsopple, Administrative and Financial Advisor for New York State Department of Transportation, indicating "that the funding for the engineering and right of way incidental phases will be de-obligated and the authorization withdrawn as there has been no activity in the form of a request for reimbursement since the funds were authorized in December 2014." Thus, she argues that there are triable issues of fact as to whether Defendants were negligent in formulating a plan to remedy a dangerous condition but failed to implement it.

Additionally, Plaintiff submits the affidavit of an expert engineer, Nicholas Bellizzi, P.E. It is Mr. Bellizzi's opinion that Orangetown officials had been aware of pedestrian safety issues on North Middletown Road for years. In his affidavit, Mr. Bellizzi notes that the Town conducted a reasonable and adequate study of the North Middletown Road corridor, which included a recommendation and approval for a traffic signal at the subject intersection. It is Mr. Bellizzi's opinion that no improvements were ever made. Furthermore, Mr. Bellizzi opines that "had the improvements been made at the subject intersection as planned for, approved and funded, this collision would not have occurred." Lastly, it is his expert opinion that the Defendants' tardiness and unreasonable delay in implementing the approved and funded intersection safety improvements was a substantial factor in the cause of the subject collision and Plaintiff's resulting injury. Notably absent from the Affidavit is any discussion of Ms. Gynegrowski's testimony that she was caused to strike the plaintiff because of temporary blindness due to sun glare or how a traffic light would have prevented the accident in light of her full stop at the stop sign for more than a minute before proceeding.

Legal Discussion

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003).

However, once such a showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

"It has long been held that a municipality owe[s] to the public the absolute duty of keeping its streets in a reasonably safe condition." Kuhland v. City of New York, 81 A.D.3d 786, 787, 916 N.Y.S.2d 637 (2d Dept. 2011), quoting Friedman v. State of New York, 67 N.Y.2d 271, 283, 502 N.Y.S.2d 669 (1986). "While this duty is nondelegable, it is measured by the courts with consideration given to the proper limits on intrusion into the municipality's planning and decision-making functions." Id. Thus, in the field of traffic design engineering, a municipality is accorded a qualified immunity from liability arising out of a highway planning decision. Turturro v. City of New York, 77 A.D.3d 732, 735, 908 N.Y.S.2d 738 (2d Dept. 2010). "However, a municipality may be held liable if, after being made aware of a dangerous traffic condition, it does not undertake an adequate study to determine what reasonable measures

may be necessary to alleviate the condition, or, having determined what reasonable measures were necessary, it unjustifiably delays in taking them." Id.

In the instant matter, this Court finds that the Orangetown Defendants and the County were not on notice of a dangerous condition at the subject intersection which required additional safety measures other than the stop sign and cross-walk present. While there were numerous accidents at other intersections located on the .75 mile stretch of North Middletown Road which constituted the "North Middletown Road Project", the majority of these accidents happened on a short stretch of roadway between East Central Avenue and East Washington Avenue, which does not include the subject intersection. In fact, only 0.07% of accidents on that stretch of roadway occurred at the intersection of North Middletown Road and Holt Drive/Braunsdorf Road. According to the Affidavit of Sgt. Anthony Palazolo of the Orangetown Police Department, for the period of time from January 1, 2008 through July 2018, there was only one other accident involving a pedestrian at this intersection.² In that accident, a pedestrian was struck crossing North Middletown Road in the cross-walk because, as stated by the driver, "dark and rainy conditions obscured their vision and they did not see the pedestrian."

Additionally, it must be noted that the Town did in fact undertake a study, and as noted in the affidavit of Mr. Dean, at no point in time did the engineer in charge of the project ever recommend that a traffic light be installed at this intersection, and in no design plan was there ever a proposal that a traffic light be installed at the intersection of North Middletown Road and Holt Drive. Upon review, it was determined that under MUTCD, published and the State Supplement, a traffic light at the subject intersection was not warranted and would be inappropriate because in order to justify a traffic light based upon accidents, "five or

²There is a another police report dated June 4, 2010, which references the location of North Middletown Road and Holt Drive, which involves a bicyclist being struck by a vehicle, but review of the report reveals that the accident occurred on North Middletown Road at the exit from the shop Rite parking lot, approximately 60 feet south of the intersection itself.

more reported crashes, of types susceptible to correction by a traffic control signal, [must] have occurred within a 12-month period, each crash involving personal injury or property damage." There was no evidence introduced that these conditions were satisfied.

The affidavit of Mr. Bellizzi does not demonstrate a triable issue of fact with regard to this issue. Mr. Bellizzi, in his analysis, refers to findings with respect to the entire .75 mile stretch of Middletown Road and does not confine his review solely to the subject intersection of North Middletown Road and Holt Drive. Though Mr. Bellizzi states that safety improvements were recommended and approved for the subject intersection which included a traffic signal, the record belies this statement. The email cited by Mr. Bellizzi with respect to the contract states only that Consultant will study alternatives that will include (but not be limited to) adding a signal with a pedestrian phase at Holt Drive, and not that a traffic device was recommended or approved. Indeed, no such traffic light was either recommended or approved. Even assuming, *arguendo*, there was a delay in implementing the plan for a period of one year as Plaintiff contends, Mr. Bellizzi does not opine that a traffic light could have been installed and in place, in accordance with this federally funded project, prior to Plaintiff's accident on January 5, 2016. Thus, in the instant matter, the Defendants were not on notice of a dangerous condition at the subject intersection and are entitled to qualified immunity with respect to their decision to employ the use of a stop sign and cross-walk and not a traffic light.

Even where a municipality is not entitled to immunity, a plaintiff must still demonstrate that the alleged negligent design of the roadway was a proximate cause of the accident. Bowman v. Kennedy, 126 A.D.3d 1203, 1205, 6 N.Y.S.3d 175 (3d Dept. 2015); Duger v. Estate of Carey, 295 A.D.2d 878, 744 N.Y.S.2d 262 (3d Dept. 2002). Stated another way, a municipality may be excused from liability when its conduct in maintaining a road could not be the proximate cause of an accident. Alexander v. Eldred, 63 N.Y.2d 460, 483 N.Y.S.2d 168, 171 (1984).

In the instant matter, Defendants' summary judgment motions must also be

granted on the ground that their actions cannot be said to be a proximate cause of the subject occurrence. At her deposition, Ms. Gynegrowski testified that she brought her vehicle to a complete stop at the stop sign; that she was stopped for one or two minutes before entering into the intersection; that she could see clearly before she began her left hand turn and there were no vehicles approaching from either direction; and that when she was approximately three-quarters of the way through the intersection, she testified that the sun shone in her eyes, temporarily blinding her, and that she then felt her vehicle then strike Plaintiff.

In a case similar to the matter at bar, Morales v. Lia, 238 A.D.2d 786, 656 N.Y.S.2d 458 (3d Dept. 1997), plaintiff contended that despite the fact that the defendant testified to striking plaintiff because she was blinded by the sun, that an array of controls, devices, markings and signs to direct traffic would have made the property safety. The Court held that the driver's actions were the sole proximate cause of the occurrence and noted that plaintiff's expert failed to link the suggested enhancements in a specific manner to the accident site and the circumstances of the case. Id. 787-788. See also Benitez v. Olson, 6 A.D.3d 560, 774 N.Y.S.2d 827 (2d Dept. 2004)(proximate cause of the accident was sun glare and not the allegedly defective four-way flashers on the garbage truck.) Similarly, in the instant matter, Ms. Gynegrowski testified that she struck plaintiff due to "temporary blindness" caused by sun glare. Additionally, Mr. Bellizzi fails to address the issue of Plaintiff's testimony regarding sun glare in his expert affidavit and fails to explain in what manner a traffic light would have prevented this accident, particularly where, as here, Ms. Gynegrowski did not "run" through the stop sign but stopped for one to two minutes. Additionally, Plaintiff's expert does not explain how a traffic light would have stopped this occurrence when both Plaintiff and Gynegrowski would have had the green light during the same "go" interval. For these reasons, Ms. Gynegrowski's actions constitute the sole proximate cause of plaintiff's injuries and no triable issue of fact has been raised.

Accordingly, it is hereby

ORDERED the Notice of Motion filed by the Town of Orangetown, Orangetown Highway Department and Orangetown Highway Superintendent's Office for summary judgment and dismissal of the Complaint and all cross-claims against it (Motion #3) is GRANTED; and it is further

ORDERED that the Notice of Motion filed by County of Rockland and County of Rockland Highway Department for summary judgment and dismissal of the Complaint and any cross-claims (Motion #4) is GRANTED.

The foregoing constitutes the Decision and Order of this Court on Motions #3 and

4.

Dated: New City, New York
October 31, 2018



HON. SHERRI L. EISENPRESS
Acting Justice of the Supreme Court

TO:

All Parties via -NYSCEF-