*SHORT FORM ORDER*

*SUPREME COURT - STATE OF NEW YORK*

*Present:*

*HON. THOMAS P. PHELAN,*

*Justice*

TRIAL/IAS PART 5
NASSAU COUNTY

DARREN LOWRY,

Plaintiff(s),

-against-

COUNTY OF NASSAU, TOWN OF HEMPSTEAD, THE LONG ISLAND RAILROAD, METROPOLITAN TRANSPORTATION AUTHORITY, MERRICK, MATTHEW S. ARNELL and STEPHANIE ARNELL,

Defendant(s).

ORIGINAL RETURN DATE: 12/06/07
SUBMISSION DATE: 03/19/08
INDEX No.: 4633/06

MOTION SEQUENCE #2,3

The following papers read on this motion:

| | |
|---|---|
| Notice of Motion..... | 1 |
| Cross-Motion..... | 2 |
| Answering Papers..... | 3,4 |
| Reply..... | 5 |

This motion by defendant, County of Nassau (the "County"), for an order pursuant to CPLR 3211(a)(7) and 3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it is granted.

This cross-motion by defendant, Town of Hempstead (the "Town"), for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and any and all cross-claims against it is denied.

This is an action to recover damages for personal injuries sustained by the plaintiff in a motor vehicle accident which occurred on April 28, 2005. Plaintiff was traveling on his motorcycle westbound on Sunrise Highway in Merrick, and he collided with the vehicle owned by defendant, Stephanie Arnell, and operated by defendant, Matthew S. Arnell. Defendant, Matthew S. Arnell, had exited the Long Island Railroad parking lot located on the north side of Sunrise Highway, traveled southbound on Lincoln Boulevard, crossed westbound Sunrise Highway and was in between the westbound and eastbound lanes of Sunrise Highway when the collision occurred.

In his complaint, plaintiff alleges negligence on the part of defendant, Matthew S. Arnell. He also alleges that defendants, the County, the Town, Long Island Railroad, Metropolitan Transportation Authority and Merrick, were negligent in that they caused, created, permitted and allowed a dangerous, hazardous, defective, unsafe and unfit condition to exist on the road and /or in the parking lot. More specifically, the plaintiff faults a defective sign, the bottom portion of which was missing, as well as that sign's location. On the top of the sign is an arrow curved to the right; the warning "ONLY" was missing from the bottom portion of the sign. The sign was located approximately 15 feet form the stop sign where the turn would be made.

Defendants, the County and the Town, both seek summary judgment dismissing the complaint and all cross-claims against them.

"On a motion for summary judgment pursuant to CPLR 3212, the proponent 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." Sheppard-Mobley v King, 10 AD3d 70, 74 [2d Dept. 2004], aff'd. as mod., 4 NY3d 627 (2005), citing Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]. "Failure to make such *prima facie* showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." Sheppard-Mobley v King, supra, at p. 74; Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra. Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact. Alvarez v Prospect Hosp., supra, at 324. The evidence presented by the opponents of summary judgment must be accepted as true, and they must be given the benefit of every reasonable inference. See, Demishick v Community Housing Management Corp., 34 AD3d 518 [2d Dept. 2006], citing Secof v Greens Condominium, 158 AD2d 591 [2d Dept. 1990].

"[I]t is well settled that 'liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property. ... Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property,'" Dugue v 1818 Newkirk Management Corp., 301 AD2d 561, 562 [2d Dept. 2003], quoting Aversano v City of New York, 265 AD2d 437, quoting Turrisi v Ponderosa, Inc., 179 AD2d 956, 957 [2d Dept. 1999]. The accident occurred at the intersection of Sunrise Highway and Lincoln Boulevard in Merrick. It is not disputed that the County did not own and had no responsibility for the municipal parking lot or Lincoln Boulevard, as well as the sign involved here. The County has established its entitlement to summary judgment. The complaint and any and all cross-claims against the County of Nassau are dismissed without opposition.

Defendant, the Town, seeks summary judgment based upon a lack of prior written or constructive notice of the defective sign as well as a lack of proximate cause.

An affidavit of John W. Morrison, Assistant Director of the Traffic Control Division of the Department of General Services of the Town of Hempstead, submitted in support of the Town's motion states that the Town did not have written notice of the defective sign and that the Town has not maintained the sign since 1995.

Section 6-1, 6-2 and 6-3 of the Code of the Town of Hempstead requires prior written notice of, *inter alia*, defective highways, parking fields and traffic signs, respectively. Normally, absent an exception for a municipality's affirmative creation of the defect and/or its special use of the property "[a] municipality that has adopted a prior written notice law cannot be held liable for a defect within the meaning of the law absent the requisite written notice . . ." Delgado v County of Suffolk, 40 AD3d 575 [2d Dept. 2007], citing Poirier v City of Schenectady, 85 NY2d 310 ([995]; Akcelik v Town of Islip, 38 AD3d 483 [2d Dept. 2007]; Wilkie v Town of Huntington, 29 AD3d 898 [2d Dept. 2006]; Katsoudas v City of New York, 29 AD3d 740, 741 [2d Dept. 2006].

Nevertheless, prior written notice laws refer to physical defects such as holes and cracks, not to the failure to erect or maintain traffic signs. Alexander v Eldred, 63 NY2d 460 [1984]; Doremus v Incorporated Vil. of Lynbrook, 18 NY2d 362 [1966]; see also, Monteleone v Incorporated Village of Floral Park, 74 NY2d 917 [1989]; see also, Weisman v Town of Brookhaven, 197 AD2d 617 [2d Dept. 1993]; Ramundo v Town of Guilderland, 142 AD2d 50 [3d Dept. 1988]. The Town's allegation that it is entitled to written notice of the defective sign is without merit. General Municipal Law § 50-e(4); see also, Sicigliano v Town of Islip, 41 AD3d 830 [2d Dept. 2007]; citing, Walker v Town of Hempstead, 84 NY2d 360 [1994]; Herrera v Moran, 272 AD2d 374 [2d Dept. 2000], Fitzpatrick v Barone, 215 AD2d 351 [1995]; General Municipal Law §50-e [4].

In any event, the notice requirement does not apply to the Town's placement of the sign, which the plaintiff also alleges was negligent (Hughes v Jahoda, 75 NY2d 881 [1990]) since the Town's creation of the alleged defect obviates the requirement of such notice (Monteleone v Incorporated Village of Floral Park, 74 NY2d 917 [1989]; see also, Kiernan v Thompson, 73 NY2d 840 [1988]); Nevertheless, a municipality is entitled to qualified immunity from liability arising out of a highway planning decision. See, Friedman v State, 67 NY2d 271 [1960]; see also, Affleck v Buckley, 96 NY2d 553 [2001]; McCabe v Town of Brookhaven, 289 AD2d 541 [2d Dept. 2001], lv den. 98 NY2d 613 [2002]. A municipality may be held liable for a traffic planning decision only when its study is "plainly inadequate or there is no reasonable basis for its traffic plan." Friedman v State, supra, at 284. To obtain summary judgment dismissing a claim of negligent traffic planning, a municipality must "demonstrate that its signage plan was neither plainly inadequate nor lacking in a reasonable basis and that it had no notice, either constructive or actual, of any dangerous condition on the particular stretch of roadway which would have given rise to a duty to review either that plan or any other aspect of the design of the roadway in light of actual conditions." Lucchese v Silverman, supra, at 591, citing Friedman v State of New York, supra, at 285-286 [1986]; Weiss v Forte, 7 NY2d 579, 587-588 [1960], rearg den. 8 NY2d 934 [1960]; Buhr v State of New York, 295 AD2d 461 [2d Dept. 2002]. The Town, which has the burden of proof in the first instance, has failed to establish that the right-turn only sign, which the plaintiff alleges was some 15 feet to the right of the stop sign where the turn would be made, was properly placed. Compare, Lucchese v Silverman, supra.

As for proximate cause, in order for a municipality to be held liable for negligently placing or maintaining a sign, a plaintiff must establish that such negligence was the proximate cause of the accident. Applebee v State of New York, 308 NY 502, 506 (1955). "It is well settled that where conflicting evidence is presented that would support various inferences, the issue of proximate

cause is properly a question of fact for the jury to decide." Demshick v Community Housing Management Corp., 34 AD3d 518, 521 [2d Dept. 2006], citing Alexander v Eldred, supra, at 468. In an attempt to establish a lack of proximate cause, the Town relies on the testimony of defendant, Matthew S. Arnell, the operator of the car, who testified at his examination before trial that he had used the subject parking lot exit approximately 10 times in the two to four weeks preceding the accident and that he did not recall ever seeing the right turn only sign. In view of the plaintiff's claim that the sign was improperly placed and that it was not adequately visible, the fact that defendant Arnell never saw the sign despite using that exit numerous times before hardly proves a lack of proximate cause.

Defendant, the Town, has failed to meet its burden of proof, and its motion for summary judgment must be denied.

The Court notes that even if the Town had met its burden and it shifted to the plaintiff to establish the existence of a material issue of fact, that burden would have been met. The plaintiff has submitted the affidavit of Thomas F. Oelerich, a physical engineer, who having reviewed all of the pertinent maps and records, opines that the Town's "improper placement and maintenance of the Right Turn Only sign, as well as its failure to install pavement markings or physical restraints to limit the traffic movements to right turns only, created a confusing, dangerous and unsafe condition for motorists leaving the M7 parking field and those traveling on Sunrise Highway." More specifically, Mr. Oelerich states that "the sign, which was located 15 feet to the right of the stop sign . . . was too far to the right for motorists to see as they were exiting the M7 parking lot." He additionally states that it was in extremely poor condition since the word "ONLY" was missing, thereby rendering its message illegible and its intent incomprehensible. He notes that the sign in question does not comply with the New York State Manual of Traffic Control Devices which requires Right Turn Only signs to be overhead above the traffic lane it is meant to control. He notes that there are no pavement markings or physical constraints limiting exiting vehicles' movement to right turns only. Thus, Mr. Oelerich concludes that the inherently dangerous installation of the sign in November 1995, as well as the Town's failure to rectify the hazard for some ten years through a lack of review, repair and maintenance, was a proximate cause of the plaintiff's accident.

Accordingly, the caption of this action is amended to read as follows:

"DARREN LOWRY,

Plaintiff,

-against-

TOWN OF HEMPSTEAD, THE LONG ISLAND RAILROAD, METROPOLITAN TRANSPORTATION AUTHORITY, MERRICK, MATTHEW S. ARNELL and STEPHANIE ARNELL,

Defendants."

This decision constitutes the order of the court.

Dated: 3-28-08

HON THOMAS P. PHELAN

J.S.C.

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ENTERED

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