

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

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ALEX M.J. WONG and
CHRISTINA C. TING WONG, individually

Plaintiffs,

-against-

Michele M. Woodard, J.S.C.
IAS Part 24
Index No. 07298/2003
Motion Seq. Nos: 02, 03, 04 & 05
DECISION & ORDER

DOINA LOVRICH, MICHAEL A. LOVRICH,
KENNETH GAMS, LAURIE GAMS,
COUNTY OF NASSAU and TOWN OF NORTH HEMPSTEAD,

Defendants.

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Papers Read on this Motion:

Defendants Gams' Notice of Motion for Summary Judgment	02
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The motion by defendants, Kenneth Gams and Laurie Gams ("Gams defendants"), and the cross motion by defendants, Doina Lovrich and Michael A. Lovrich ("Lovrich defendants"), defendant the County of Nassau ("County") and defendant the Town of North Hempstead ("Town"), all seeking summary judgment pursuant to CPLR§ 3212, are decided as hereinafter indicated.

Plaintiffs commenced this action for personal injuries sustained in an automobile collision that occurred on February 11, 2002 at approximately 8:30 a.m. at or near the intersection of Schoolhouse Lane and I.U. Willets Road, North Hempstead, Nassau County, New York. Plaintiff Alex Wong (the "plaintiff") was traveling northbound on Schoolhouse Lane and attempted to make a left hand turn onto I.U. Willets Road. Plaintiff had a stop sign at Schoolhouse Lane. Plaintiff alleges he initially stopped at the stop sign and gradually inched out into the intersection. The Plaintiff contends that his view onto I.U. Willets Road was obstructed by bushes on the Gams' property located in the southwest area of the intersection. When plaintiff finally pulled out, his vehicle collided with the Lovrich vehicle being operated by Doina Lovrich. Ms. Lovrich was heading eastbound on I.U. Willets Road.

As to the Gams defendants' motion, they contend plaintiff regularly used the intersection (making the left from Schoolhouse Lane onto I.U. Willets) since January 1, 2002 (see Exhibit D, pgs. 58-60 annexed to the Gams defendants' motion) with no complaints from anyone as to the bushes on their property (see Exhibit F, pgs. 19, 20 annexed to the Gams defendants' motion). They contend plaintiff's view was not obstructed due to the bushes on their property.

As to the County's cross motion for summary judgment, the plaintiffs contend the County failed to supervise and maintain the shrubs on the Gams defendants' property and the County failed to provide adequate speed devices. The County contends, citing the deposition of the Gams defendants, that a driver at the intersection could see to the left 1/8 mile down I.U. Willets Road (see Exhibit F, pgs. 16, 17 annexed to County's cross motion). The County also indicated it did an adequate study of the intersection and the surrounding area and the intersection, as it was at the time of the collision and it was fine (see Exhibit G, pgs. 13, 16, and 28 and Exhibit H, the

traffic study, both annexed to County's cross motion).

As to the Lovrich defendants' cross motion, they contend that the plaintiff Alex M. J. Wong, the driver of one of the vehicles involved in an accident on February 11, 2002, caused the collision when he failed to yield the right of way at the intersection to Ms. Lovrich since he had the stop sign. The Lovrich defendants contend that the plaintiffs' vehicle was jutting out onto I.U. Willets Road when the Lovrich vehicle was close (see Exhibit D, pg. 21 annexed to the Lovrich defendants' cross motion). The Lovrich defendants have the depositions of a non-party witness, one Orlando Rincon, wherein Mr. Rincon, heading westbound on I.U. Willets Road at the time of the collision, stated that the plaintiff's vehicle was jutting out onto I.U. Willets Road when the Lovrich vehicle was close and approaching plaintiff's vehicle (see Exhibit G, pgs. 14, 15 annexed to the Lovrich defendants' motion).

As to the Town's motion for summary judgment, the plaintiffs contend that the Town was responsible for the condition of the road, i.e., the alleged lack of visibility at the intersection. The Town states that the intersection is the responsibility of the County, citing the deposition of Ray Ribeiro, assistant director of traffic engineering for the County (see Exhibit H, pgs. 14-16 annexed to the Town's cross motion). Also, the Town states that it never received written notice of the alleged defect, i.e., the vegetation, pursuant to § 26-1 of the Town Code.

First, the Court will consider the Gams defendants' motion. There is no common law duty of a landowner to control the vegetation on his or her property for the benefit of the users of a public highway (*Kolkmeier v Westhampton Taxi and Limo Service*, 261 AD2d 587 (2d Dept 1999); *Barnes v Stone-Quinn*, 195 AD2d 12 (4d Dept 1993)).

To maintain a negligence action, a plaintiff must establish *prima facie* that the alleged

negligence of the defendant was the substantial cause of events which produced the plaintiff's injuries (*Derdiarian v Felix Contracting Corp.*, 51 NY2d 308 (1980); *Sorrentino v Wild*, 224 AD2d 607 (2d Dept 1996).

Here, as noted, plaintiff driver, Mr. Wong, testified that the hedges obscured his view of I.U. Willets Road. As he inched closer, plaintiff stated his view of I.U. Willets Road increased, and the collision occurred after plaintiff passed the point where the hedges would have obscured his view.

In an action arising from an automobile collision at an intersection where the visibility was allegedly obscured by a hedge, there are issues of fact precluding summary judgment for property owners in view of the undisputed fact that the hedge abutting the intersection was in excess of the height specified by ordinance (*Woznick v Santora*, 184 AD2d 692 (2d Dept 1992)).

It is established law that the violation of an ordinance is evidence of negligence which a jury could take into consideration with all other evidence on the subject (*Barnes v Stone-Quinn, supra*). The Plaintiffs have established, and the language of the ordinance clearly sets forth, that the Town of North Hempstead Code § 70-203(B), was intended to protect those persons traveling a highway from the risk of injury that may reasonably be anticipated from reduced visibility at intersections caused by overgrown vegetation. Thus, it is a question of fact for a jury to determine whether the Gams' defendants violated the ordinance and whether the alleged violation of the ordinance proximately caused the accident (*Barnes v Stone-Quinn, supra*).

A town ordinance prohibiting hedges over a certain size that obstructed the view of the intersection imposed a duty on the landowner that could give rise to tort liability for damages proximately caused by its violation, *Deutchsh v Davis*, 298 AD2d 487 (2d Dept 2002). Thus,

from the record, triable issues of fact exist as to whether the Gams violated the ordinance at issue, Town Ordinance § 70-203(B) and if so, whether such violation was a proximate cause of the accident. *Perlak v Sollin*, 291 AD2d 540 (2d Dept 2002).

Did plaintiff Mr. Wong, have an ample area in which to proceed with caution and observe oncoming traffic without obstruction from the bushes and hedges remains a question of fact.

Therefore, the Gams defendants are not entitled to summary relief.

Next, the Court will consider the cross motion of the County.

A governmental body may be liable for a traffic planning decision only when its study is plainly inadequate, or there is no reasonable basis for its plan (*Affleck v Buckley*, 96 NY2d 553 (2001)). Here, the County examined the need for a traffic control device and did not overlook the issue of the left hand turn from Schoolhouse Road onto I.U. Willets Road. Plaintiffs must show that the plan adopted herein lacked a reasonable basis. *Buhr v State*, 295 AD2d 462 (2d Dept 2002), and here, plaintiffs failed to meet this burden.

A municipality could not be held liable to an injured motorist, even if it was negligent in deciding to place a stop sign instead of a traffic light at an intersection in question, absent a showing that a planning decision was made without adequate study (*Buhr v State, supra*). Here, the plaintiffs offer no valid expert affidavits that the traffic study done herein was inadequate or lacked a reasonable basis.

Where both drivers involved in a car collision were familiar with the location and character of the intersection of roads where the collision occurred, the plaintiff driver could not sustain an action against a municipality for alleged negligent failure to add lights and signs (stop ahead, etc.) at the intersection as the municipality's failure to erect additional lights and signs

could not be deemed the proximate cause of plaintiff's injuries *Atkinson v County of Oneida*, 59 NY2d 840 (1983). Here, both drivers were well acquainted with the intersection and its right of way and all possible obstructions. Under the facts herein, the County's failure to erect the additional lights, signs, etc., cannot be deemed the proximate cause of plaintiff's injuries. However, a municipality is under a nondelegable duty to maintain its roads and highways in a reasonably safe condition; such duty encompasses an obligation by the municipality as to the roads it owns or controls, to trim growth within the highway's right of way to assure visibility of stop signs and other traffic. *Nurek v Town of Vestal*, 115 AD2d 116 (3d Dept 1985). From the traffic study (see Exhibit H annexed to County's cross motion), the County had concerns of overgrowth of vegetation as to obscuring the stop sign on the north side of I.U. Willets Road at or near the intersection where the collision occurred (on the south side of I.U. Willets Road). Did the County or should the County have trimmed back the hedges on the south side, i.e., at the intersection of I.U. Willets Road and Schoolhouse Road?

This issue of fact precludes summary relief for the County.

The Lovrich defendants' cross motion is the next one the Court will consider.

A party established his or her *prima facie* entitlement to summary judgment on the issue of liability by presenting undisputed proof that the other vehicle proceeded into an intersection which was controlled by a stop sign and the other vehicle failed to yield the right of way to the party's approaching vehicle in violation of VTL § 1142(a). *Yusupov v Lugo*, 305 AD2d 496 (2d Dept 2003).

In a traffic collision case, recent Appellate Division cases hold that one party's speculation that another person in a vehicle must have been speeding because the party did not

see the other person's vehicle when that party looked in the other person's vehicle's direction is insufficient to raise a triable issue of fact (*Szczotka v Adler*, 291 AD2d 444 (2d Dept 2002); *Perez v Brux Cab Corp.*, 251 AD2d 157 (1st Dept 1998)).

The record established that plaintiff violated VTL § 1142(a) by proceeding into the intersection without yielding the right of way to the Lovrich vehicle; such a violation constituted negligence as a matter of law notwithstanding his testimony that the Lovrich defendants' vehicle was speeding prior to the collision (*Botero v Erraez*, 289 AD2d 274 (2d Dept 2001)).

There still remains a question of comparative negligence. The Lovrich defendants are not entitled to summary relief.

As to the Town's cross motion for summary judgment, a village or town is not generally responsible for state or county roads (*see Horvath v Rose*, 261 AD2d 438 (2d Dept 1999)). Here, the Town contends I.U. Willets Road is a County Road and County is responsible for the intersection (see the County's traffic study of the intersection, Exhibit H annexed to County's cross motion). This contention is not refuted by the record.

A plaintiff must establish a nexus between a municipality and the allegedly defective conditions in connection with an automobile collision at an intersection such as whether the municipality maintained or controlled the traffic intersection or that the trees, plants, shrubs, etc., that allegedly obstructed drivers' views of each other were within the municipality's geographical boundaries (*May v Town of Islip*, 207 AD2d 872 (2d Dept 1994)). Plaintiff has failed to meet the above burden as to the Town.

Assuming, *arguendo*, Town is responsible for the intersection, an automobile collision cause of action based on the Town's failure to maintain a trim roadside vegetation was subject to

the Town Law's prior notice requirement and **will be dismissed** in view of the undisputed absence of prior written notice as well as the plaintiff's failure to produce evidence that the written notice requirement was excused on the grounds that the Town had knowledge of the defect either through inspecting or performing work at the site (*Field v Stubelek*, 238 AD2d 467 (2d Dept 1997), *lv. to appl. den.* 90 NY2d 806; *see Forsythe-Kane v Town of Yorktown*, 249 AD2d 505 (2d Dept 1998). Plaintiffs have offered no evidence that the Town had knowledge of the defect or had performed work at the site.

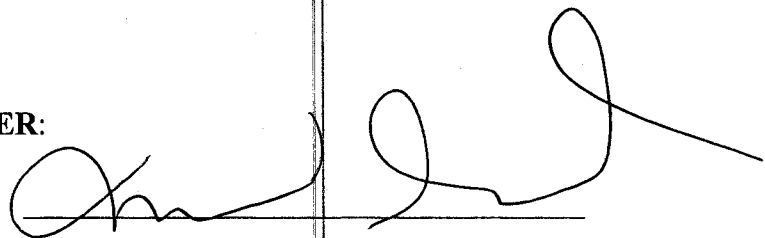
A personal injury claim against a town's failure to mow or cut back roadside vegetation was subject to the Town's prior notice law which required written notice as a prerequisite to liability arising out of the defective, unsafe or obstructed condition of any town road (*Boucher v Town of Condor*, 234 AD2d 669 (3d Dept 1996). **In view of the undisputed absence of prior written notice to the Town, that part of a the plaintiff's action as to the Town must be dismissed.**

Accordingly, the motion of the Gams defendants and the cross motion of the County for summary dismissals (**Mot. Seq. Nos. 02, 05**) are **denied**. The cross motion for summary dismissal of the Lovrich defendants (**Mot. Seq. No. 04**) is **denied**. The Town's motion for summary judgment dismissing the complaint against (**Mot. Seq. No. 3**) it is **granted**.

DATED: August 3, 2005

Mineola, NY

ENTER:



HON. MICHELE M. WOODARD

J.S.C.

ENTERED

AUG 08 2005

NEW YORK COUNTY
COUNTY CLERK'S OFFICE