[* 1]

SHORT FORM ORDER

INDEX No. 10-29218

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 11-13-11 (#004, #005, #006)
MOTION DATE 1-31-13 (#007)
MOTION DATE 3-21-13 (#008)
ADJ. DATE 4-18-13
Mot. Seq. # 004 - MD
005 - MD
006 - XMD
007 - MG
008 - XMG

MARILYN McKINNEY, as Executrix of the Estate of PERRY McKINNEY, Plaintiffs, - against - MICHELLE SMITH-FRAWLEY, KEITH FRAWLEY, TOWN OF ISLIP, COUNTY OF SUFFOLK, RAYNOR & D'ANDREA FUNERAL HOME, RAYNOR & D'ANDREA FUNERAL SERVICES, INC., and RAYNOR & D'ANDREA HOLDING COMPANY, LLC, Defendants.	DORNFELD & NASIS, LLP Attorney for Plaintiffs 145 Marcus Boulevard, Suite 4 Hauppauge, New York 11788 PICCIANO & SCAHILL, P.C. Attorney for Defendants Smith Frawley & Frawley 900 Merchants Concourse, Suite 310 Westbury, New York 11590 DENNIS M. COHEN, ESQ., Suffolk Cty Attorney Attorney for Defendant County of Suffolk P.O. Box 6100 Hauppauge, New York 11788 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER, LLP Attorney for Defendants Raynor & D'Andrea 150 East 42nd Street New York, New York 10017

Upon the following papers numbered 1 to 95 read on these motions to preclude, EBT & summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-19; 20-35; 56-69; 70-82 ; Notice of Cross Motion and supporting papers 36-48 ; Answering Affidavits and supporting papers 49-50; 84-85 ; Replying Affidavits and supporting papers 51-52; 53-54; 86-95 ; Other County of Suffolk Memoranda of Law - 83 ; it is,

ORDERED that this motion (seq. #004) by the defendants Michelle Smith-Frawley and Keith Frawley, this motion (seq. #005) by the defendant County of Suffolk, this cross-motion (seq. #006) by the plaintiff Marilyn McKinney, as Executrix of the Estate of Perry McKinney, this motion (seq. #007)

by the defendants Michelle Smith-Frawley and Keith Frawley, and this unopposed cross-motion (seq. #008) by the defendant County of Suffolk hereby are consolidated for the purposes of this determination; and it is further

ORDERED that the motion by the defendants Michelle Smith-Frawley and Keith Frawley for an Order vacating the plaintiff's notices for deposition is denied, as moot; and it is further

ORDERED that the motion by the defendant County of Suffolk for an Order vacating the plaintiff's notices for deposition of the defendants Michelle Smith-Frawley and Keith Frawley is denied, as moot; and it is further

ORDERED that the cross-motion by the plaintiff for an Order compelling the defendants Michelle Smith-Frawley and Keith Frawley to be produced for depositions is denied, as moot; and it is further

ORDERED that the motion by the defendants Michelle Smith-Frawley and Keith Frawley seeking summary judgment dismissing the complaint as against them is granted; and it is further

ORDERED that the unopposed cross-motion by the defendant County of Suffolk seeking summary judgment dismissing the complaint as against it is granted; and it is further

ORDERED that the Court, *sua sponte*, dismisses the complaint as against defendants Town of Islip, Raynor & D'Andrea Funeral Home, Raynor & D'Andrea Funeral Services, Inc., and Raynor & D'Andrea Holding Company, LLC, pursuant to CPLR 3212 (b), for the reasons set forth hereinafter.

The plaintiff Marilyn McKinney, as Executrix of the Estate of Perry McKinney, commenced this action to recover damages for the injuries sustained by the deceased plaintiff Perry McKinney as a result of a motor vehicle accident that occurred at the intersection of Montauk Highway and Washington Avenue in the Town of Islip on September 28, 2009. The accident allegedly occurred when the vehicle operated by the defendant Michelle Smith-Frawley and owned by the defendant Keith Frawley struck the driver's side of the vehicle operated by Perry McKinney when he attempted to make a left turn at the subject intersection. As a result of the collision, the McKinney vehicle was pushed into the fence of the West Sayville Golf Course, causing Perry McKinney to sustain various personal injuries that allegedly led to his subsequent death. Prior to the accident, the Smith-Frawley vehicle was traveling straight on westbound Montauk Highway and the McKinney vehicle, whose direction of travel was controlled by a stop sign, was traveling southbound on Washington Avenue. The plaintiff also instituted causes of action against the defendants Town of Islip and County of Suffolk for negligently controlling, maintaining and supervising the subject intersection and roadway, and against the defendants Raynor & D'Andrea Funeral Home, Inc., s/h/a Raynor & D'Andrea Funeral Home, Inc., d/b/a Raynor & D'Andrea Funeral Home and Raynor & D'Andrea Funeral Holding Company, LLC., operators of a funeral home located on the corner of the subject intersection, for negligently maintaining the landscaping on their premises, which plaintiff alleges obstructs motorists and pedestrians from properly viewing the intersection.

The defendants Michelle Smith-Frawley and Keith Frawley (hereinafter collectively referred to as the "Frawley defendants") now move for summary judgment on the basis that the sole proximate cause of the subject accident was Perry McKinney's violation of Vehicle and Traffic Laws §§ 1141 and 1142 (a). The Frawley defendants also assert that collateral estoppel is applicable, since it has already been determined by an Administrative Judge that Michelle Smith-Frawley was not liable for the subject accident. In support of the motion, the Frawley defendants submit copies of the pleadings, Michelle Smith-Frawley's deposition transcript, photographs of the site of the accident, and a certified copy of the police accident report. The Frawley defendants also submit a copy of the New York State Department of Motor Vehicles Safety Hearing Bureau Finding Sheet regarding the subject accident. The plaintiff opposes the motion on the grounds that she has not been afforded the opportunity to conduct a deposition of Michelle Smith-Frawley, and that there are material triable issues of fact as to how the subject accident occurred. The plaintiff also contends that collateral estoppel is inapplicable to the issue of liability.

A court's task on a motion for summary judgment is issue finding rather than issue determination (*see* ***Sillman v Twentieth Century Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]), and it must view the evidence in the light most favorable to the party opposing the motion (*see* ***Boyce v Vazquez***, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Therefore, in determining a motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]). In the first instance, the moving party bears the burden and must tender evidence sufficient to eliminate all material issues of fact (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see* ***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; ***Vainer v DiSalvo***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; ***Klein v Crespo***, 50 AD3d 745, 855 NYS2d 633 [2d Dept 2008], *lv denied* 12 NY3d 704, 876 NYS2d 705 [2009]; ***Packer v Mirasola***, 256 AD2d 394, 681 NYS2d 559 [1998]). Vehicle and Traffic Law § 1142 (a) states, in pertinent part, that the driver of a motor vehicle approaching a stop sign shall stop and, after having stopped, shall yield the right of way to any vehicle that has entered the intersection or is approaching so closely as to constitute an immediate hazard during the time such driver is moving across or within the intersection (*see also* ***Barbato v Maloney***, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012]; ***Gallagher v McCurty***, 85 AD3d 1109, 925 NYS2d 897 [2d Dept 2011]; ***Thompson v Schmitt***, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]; ***Khan v Nelson***, 68 AD3d 1062, 892 NYS2d 167 [2d Dept 2009]; ***Namisnak v Martin***, 244 AD2d 258, 664 NYS2d 435 [1997]). In addition, Vehicle and Traffic Law § 1141 requires a motorist intending to turn left within an intersection to yield the right of way to any vehicle approaching from the opposition direction, which is within the intersection or so close as to constitute an immediate hazard (*see* ***Kucar v Town of Huntington***, 81 AD3d 784, 917 NYS2d 646 [2d Dept 2011]). A driver who has the right of way is

entitled to anticipate that the other motorists will obey the traffic laws and yield the right of way (*see* ***Cox v Weil***, 66 AD3d 634, 887 NYS2d 170 [2d Dept 2009]; ***Kann v Maggies Paratransit Corp.***, 63 AD2d 792, 882 NYS2d 129 [2d Dept 2008]; ***Parisi v Mitchell***, 280 AD2d 589, 720 NYS2d 806 [2d Dept 2001]). However, a driver who lawfully enters an intersection may still be found liable for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection (*see* ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259 [2d Dept 2009]; ***Exime v Williams***, 45 AD3d 633, 845 NYS2d 450 [2d Dept 2007]; ***Demant v Rochevet***, 43 AD3d 981, 842 NYS2d 74 [2d Dept 2007]; ***Siegel v Sweeney***, 266 AD2d 200, 687 NYS2d 317 [2d Dept 1999]).

Michelle Smith-Frawley testified at an examination before trial that she was traveling 35 to 40 miles per hour, westbound on Montauk Highway, and that Montauk Highway meets with Washington Avenue in a "T-intersection." She testified that there is a stop sign controlling the direction of travel on Washington Avenue, but there is no traffic control device controlling the direction of travel on Montauk Highway. Smith-Frawley testified that she observed the McKinney vehicle seconds before the accident when it was directly in front of her vehicle, and that upon seeing the vehicle she immediately pressed on her brakes and attempted to turn her steering wheel to the left to avoid the collision, but was unable to do so. Smith-Frawley testified that the impact between her vehicle and the McKinney vehicle was heavy, and as a result her vehicle was pushed onto the eastbound shoulder and the McKinney vehicle was pushed into the fence of the West Sayville Golf Course. Smith-Frawley further testified that she was unable to blow her horn because the accident happened so quickly, and that her view of traffic was not obstructed.

Based upon the adduced evidence, the Frawley defendants have established their *prima facie* entitlement to judgment as a matter of law that Perry McKinney's failure to stop at the stop sign and to yield the right of way to the Frawley vehicle as she proceeded into the subject intersection was the sole proximate cause of the subject accident (*see* ***Duran v Simon***, 83 AD3d 654, 919 NYS2d 895 [2d Dept 2011]; ***Czarnecki v Corso***, 81 AD3d 774, 916 NYS2d 828 [2d Dept 2011]; ***McCain v Larosa***, 41 AD3d 792, 838 NYS2d 663 [2d Dept 2007]; ***Gregoris v Miccio***, 39 AD3d 468, 834 NYS2d 253 [2d Dept 2007]; ***Laino v Lucchese***, 35 AD3d 672, 827 NYS2d 249 [2d Dept 2006]). When a driver, approaching an intersection with a stop sign, fails to yield the right of way to another driver who approaches the same intersection from another street without a traffic control device, he or she violates Vehicle and Traffic Law § 1142 and, thus, is guilty of negligence as a matter of law (*see* ***Harris v Laines***, 106 AD3d 873, 964 NYS2d 657 [2d Dept 2013]; ***Gallagher v McCurty***, *supra*; ***Vainer v DiSalvo***, *supra*). Michelle Smith-Frawley, as the driver with the right of way, did not have a duty to watch for and avoid a driver who might fail to stop or to proceed with caution at a stop sign (*see* ***Loch v Garber***, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]; ***Torro v Schiller***, 8 AD3d 364, 777 NYS2d 915 [2d Dept 2004]; ***Klein v Byalik***, 1 AD3d 399, 766 NYS2d 687 [2d Dept 2003]), and she was entitled to anticipate that Perry McKinney would obey the traffic laws that required him to yield the right of way (*see* ***Dominguez v CCM Computers, Inc.***, 74 AD3d 728, 902 NYS2d 163 [2d Dept 2010]; ***Almonte v Tobias***, 36 AD3d 636 [2d Dept 2007]). Furthermore, "[a] driver with the right of way who only has seconds to react to a vehicle which has failed to yield is not comparatively negligent for falling to avoid the collision" (***Vainer v DiSalvo***, *supra* at 1024, *quoting* ***Yelder v Walters***, 64 AD3d 762, 764, 883 NYS2d 290 [2d Dept 2009]; *see* ***DeLuca v Cerda***, 60 AD3d 721, 875 NYS2d 520 [2d Dept 2009]). Thus, the Frawley

defendants have demonstrated that Perry McKinney, by entering the intersection without yielding the right of way, violated Vehicle and Traffic Law § 1142, resulting in the subject accident's occurrence (*see* ***Duran v Simon***, 83 AD3d 654, 919 NYS2d 895 [2d Dept 2011]; ***Rahaman v Abodeledhman***, 64 AD3d 552, 883 NYS2d 259 [2d Dept 2009]; ***Nunez v Cortegiano***, 63 AD3d 704, 880 NYS2d 161 [2d Dept 2009]; ***Seery v Mulholland***, 41 AD3d 829, 839 NYS2d 513 [2d Dept 2007]).

In opposition, the plaintiff has failed to raise a triable issue of fact as to whether Michelle Smith-Frawley was comparatively negligent regarding the happening of the subject accident (*see* ***Jamarillo v Torres***, 60 AD3d 734, 875 NYS2d 197 [2d Dept 2009]; ***Gorelik v Laidlaw Tr., Inc.***, 50 AD3d 739 [2d Dept 2008]; ***Mizrahi v Lam***, 40 AD3d 594, 836 NYS2d 200 [2d Dept 2007]). Perry McKinney, as a driver, was required to see that which, through his proper use of his senses, he should have seen (*see* ***Wilson v Rosedom***, 82 AD3d 970, 919 NYS2d 59 [2d Dept 2011]; ***Gabler v Marly Bldg, Supply Corp.*** 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). The plaintiff's opposition merely raised feigned issues of fact, which are insufficient to defeat a motion for summary judgment (*see* ***Capraro v Staten Is. Univ. Hosp.***, 245 AD2d 256, 664 NYS2d 826 [2d Dept 1997]; *see also* ***Exime v Williams***, 45 AD3d 633, 845 NYS2d 450 [2d Dept 2007]; ***Platt v Wolman***, 29 AD3d 663, 816 NYS2d 121 [2d Dept 2006]). Accordingly, the Frawley defendants' motion for summary judgment dismissing the complaint as against them is granted.

Having granted summary judgment dismissing the complaint as against the Frawley defendants, the motions to vacate the notices of depositions and the cross-motion to compel the appearance of the defendant Michelle Smith-Frawley for a deposition are denied, as moot.

County of Suffolk (hereinafter referred to as the "County") cross-moves for summary judgment on the basis that the plaintiff does not have a cause of action against it, because the plaintiff's claim that the intersection was obstructed is insufficient to establish municipal liability. The County also asserts that the deceased plaintiff was obligated to stop at the stop sign on Washington Avenue and wait until it was clear before he continued into the intersection to execute a left turn, and that his failure to do so was the sole proximate cause of the subject accident. In support of the motion, the County submits copies of the pleadings, the deposition transcript of Michelle Smith-Frawley, a copy of the police accident report, photographs of the accident site, and a copy of the New York State Department of Motor Vehicles Safety Hearing Bureau Finding Sheet regarding the subject accident. The plaintiff has not submitted any evidence in opposition to the County's motion.

"A county is not the insurer of the safety of its roads, and no liability will attach unless the ascribed negligence of the municipality in maintaining its roads in a reasonable condition is a proximate cause of the accident" (***Martinez v County of Suffolk***, 17AD3d 643, 644, 794 NYS2d 98 [2d Dept 2005], *quoting* ***Stanford v State of New York***, 167 AD2d 381, 382, 561 NYS2d 796 [2d Dept 1990], *lv denied* 78 NY2d 856, 574 NYS2d 938 [1991]; *see* ***Carlo v State of New York***, 51 AD3d 618, 855 NYS2d 919 [2d Dept 2008]). Further, without evidence that the failure to provide a traffic control device was the proximate or concurring cause of the accident, municipal liability may not attach (*see* ***Alexander v Eldred***, 63 NY2d 460, 483 NYS2d 168 [1984]; ***Noller v Peralta***, 94 AD3d 830, 941 NYS2d 700 [2d Dept 2012]). Such proximate cause may be found where it is shown that "it was the

very absence of the stop sign or other traffic control device which rendered the driver unaware of the need to stop before proceeding across the intersection" (***Noller v Peralta***, *supra* at 832;).

Under the instant circumstances, the County established its *prima facie* entitlement to judgment as a matter of law by submitting Smith-Frawley's deposition testimony, among other things, in which she testified that there was a stop sign located on Washington Avenue, at its intersection with Montauk Highway, that the view of the roadway was not obstructed, and that she was unaware of any complaints made to either the Town of Islip or the County regarding the subject intersection, or about the shrubbery of the funeral home on the corner of the intersection (*see* ***Milano v George***, 45 AD3d 654, 845 NYS2d 441 [2d Dept 2007]; ***Vega v State of New York***, 37 AD3d 825, 831 NYS2d 246 [2d Dept 2007]; ***Rose v State of New York***, 19 AD3d 680, 800 NYS2d 26 [2d Dept 2005]). Moreover, the record demonstrates that the sole proximate cause of the subject accident was Perry McKinney's failure to stop at the stop sign, which was not obstructed by overgrown shrubbery or plants, and his failure to see that which he should have seen through the proper use of his senses (*see* ***Feeney v Holeman***, 73 AD3d 848, 900 NYS2d 451 [2d Dept 2010], *lv denied* 15 NY3d 711, 912 NYS2d 575 [2010]; ***Sinski v State of New York***, 2 AD3d 517, 767 NYS2d 874 [2d Dept 2003]; ***Mendez v Town of Islip***, 307 AD2d 917, 762 NYS2d 901 [2d Dept 2003], *lv denied* 1 NY3d 504, 775 NYS2d 780 [2003]; ***Perry v Kazolias***, 302 AD2d 575, 756 NYS2d 256 [2d Dept 2003]). Consequently, the County's purported negligence cannot be said to be a proximate cause of the subject accident or the deceased plaintiff's death (*see* ***Green v Mower***, 100 NY2d 529, 761 NYS2d 137 [2003]; *cf.* ***Scott v City of New York***, 16 AD3d 485, 791 NYS2d 184 [2d Dept 2005]). The plaintiff failed to submit evidentiary proof in admissible form in order to raise a triable issue of fact as to the County's alleged negligence for the subject accident's occurrence (*see* ***Sinski v Town of Brookhaven***, 276 AD2d 547, 714 NYS2d 688 [2d Dept 2000]). Accordingly, the County's motion seeking summary judgment dismissing the complaint against it is granted.

As the Court has now determined that the sole proximate cause of the subject accident was Perry McKinney's failure to stop at the stop sign, which was not obstructed by overgrown shrubbery or plants, and his failure to see that which he should have seen through the proper use of his senses, the Court hereby grants summary judgment to the non-moving parties, defendants Town of Islip, Raynor & D'Andrea Funeral Home, Raynor & D'Andrea Funeral Services, Inc., and Raynor & D'Andrea Holding Company, LLC, pursuant to CPLR 3212 (b), and this action is hereby dismissed (*see* CPLR 3212 [b]; ***JMD Holding Corp. v Cong. Fin. Corp.***, 4 NY3d 373, 795 NYS2d 502 [2005]).

The foregoing constitutes the decision and Order of the Court.

Dated: October 10, 2013

Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ FINAL DISPOSITION ____ NON-FINAL DISPOSITION