

Nuzzo v Guarini

2012 NY Slip Op 32136(U)

August 8, 2012

Supreme Court, Richmond County

Docket Number: 101810/08

Judge: Thomas P. Aliotta

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X

JOSEPH NUZZO and JANETH NUZZO,

Part C2

Plaintiffs,

Present:

-against-

HON. THOMAS P. ALIOTTA

EZIO GUARINI,

DECISION AND ORDER

Index No. 101810/08

Defendant.

Motion Nos. 360-002
776-003

-----X

EZIO GUARINI,

Third-Party Plaintiff,

Index No. 101810A/08

-against-

ROBERT C. CASTELLI,

Third-Party Defendant.

-----X

EZIO GUARINI,

Second Third-Party Plaintiff, Index No. 101810B/08

-against-

THE CITY OF NEW YORK and NEW YORK CITY
FIRE DEPARTMENT,

Second Third-Party Defendants.

-----X

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The following papers numbered 1 to 5 were marked fully submitted on the 9th day of May, 2012.

Papers
Numbered

Notice of Motion by Second Third-Party Defendant City of New York for Summary Judgment, with Supporting Papers and Exhibits (dated January 30, 2012).....	1
Notice of Cross Motion by Plaintiffs for Summary Judgment, with Supporting Papers and Exhibits (dated March 2, 2012).....	2
Affirmation in Opposition to Motion (dated April 6, 2012).....	3
Reply Affidavit by Plaintiffs (dated April 27, 2012).....	4
Reply Affirmation by City of New York (dated May 1, 2012).....	5

Upon the foregoing papers, the motion (No. 360) for summary judgment and dismissal of the second third-party complaint by second third-party defendants the City of New York and the New York City Fire Department (hereinafter the "City") is granted; plaintiff's cross motion (No. 776) for partial summary judgment on the issue of liability against defendant Ezio Guarini is denied¹.

¹The cross motion (No. 116) by defendant/third-party plaintiff Ezio Guarini for leave to serve an amended third-party complaint alleging a cause of action for recklessness was granted and deemed served by this Court pursuant to a Short Form Order on May 9, 2012.

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This is an action for personal injuries allegedly sustained by plaintiff Joseph Nuzzo, a firefighter (hereinafter "plaintiff"), as the result of an accident on February 9, 2007 between the fire truck in which plaintiff was a passenger and an SUV operated by defendant Ezio Guarini (hereinafter "defendant"). It is undisputed that at the time of the accident, the fire truck was (1) responding to an emergency call; (2) was operating with its lights and sirens on; and (3) was proceeding through a red light. It is also undisputed that the traffic light controlling defendant's direction of travel was green as he entered the intersection of Arden Avenue and Woodrow Street on Staten Island, where the collision occurred. Defendant testified at his deposition that he heard sirens when he was about 25 feet away from the above intersection, but that he did not see the fire truck because his vision was obstructed by a huge tree. He further testified that he first saw the fire truck as it was entering the intersection, at which point he unsuccessfully "attempted to make a left hand turn to avoid the obstruction" in front of him (see City's Exhibit "G", p 23).

In his third-party complaint and amended third-party complaint, defendant alleges, respectively, that the City was both negligent and reckless in the operation and control of the fire

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truck as it entered the intersection, thereby causing the subject accident.

It is axiomatic that Vehicle and Traffic Law § 1104 permits the driver of an "authorized emergency vehicle" (see Vehicle and Traffic Law §§ 101, 114-b) to proceed past a steady red traffic light, exceed the maximum speed limit, and disregard regulations governing, e.g., the direction of traffic, as long as certain safety precautions are observed (Vehicle and Traffic Law § 1104[b], [c]). The privileges afforded by this statute are circumscribed by the provisions of subdivision (e) thereof, which states that "[t]he foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others." Accordingly, notwithstanding the provisions of subdivisions (b) and (c), a violation of § 1104(e) will expose the City and its operator to civil liability for damages resulting from the operation of an emergency vehicle where, e.g. "recklessness" can be proved (see Saarinen v Kerr, 84 NY2d 494). However, as interpreted by the Court of Appeals, "[t]his standard [of liability] demands more than a showing of a lack of due care under the circumstances It requires evidence that the actor has

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intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*id.* at 501 [internal quotation marks omitted]; see Szczerbiak v Pilat, 90 NY2d 553, 557). Hence, "more than a momentary judgment lapse on the part of the defendant" is required (Ayers v O'Brien, 13 NY3d 456, 459 [internal quotation marks omitted]).

Here, when evaluating the character of the alleged misconduct on the part of the operator of the fire truck, third-party defendant Robert Castelli, under Vehicle and Traffic Law § 1104(e), it is evident to this Court, as a matter of law, that the third-party defendant/driver did not overstep the limits of the qualified statutory privilege (see Szczerbiak v Pilat, 90 NY2d at 557). In so concluding, the Court must note that notwithstanding the allegations of recklessness set forth in the amended third-party complaint², defendant/third-party plaintiff has failed to assert any facts in his opposing papers supportive of the inference relied upon to defeat the City's motion, *i.e.*, that the nature of the operator's conduct in responding to this fire emergency was such as to raise a triable issue of fact on the question of "recklessness"

²See footnote 1.

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under the totality of the circumstances presented (see e.g. Szczerbiak v Pilat, 90 NY2d at 557). As a result, the City's motion for summary judgment and dismissal of the second third-party complaint must be granted. Moreover, upon searching the record pursuant to the authority conferred in CPLR 3212(b), it is the opinion of this Court that a like result is required as to the third-party complaint against the individual operator of the emergency vehicle, Robert C. Castelli.

However, plaintiffs' cross motion for summary judgment on the issue of liability against defendant Guarini must be denied.

The "reckless disregard" standard of care set forth in Vehicle and Traffic Law § 1104(e) has been held to apply only when the driver of an authorized emergency vehicle involved in emergency operations engages in the specific conduct exempted from the rules-of-the-road by Vehicle and Traffic Law § 1104(b). Any other injury-causing conduct by such driver is to be governed by the principles of ordinary negligence (see Kabir v County of Monroe, 16 NY3d 217, 220). Thus, the reckless disregard standard of liability does not apply to the operator of the emergency vehicle when he or she is the plaintiff in a personal injury action. "Vehicle and Traffic Law § 1104(e) cannot be used as a sword to ward off a comparative fault defense. It is to be applied only when the

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emergency vehicle operator is sued or countersued" (Ayers v O'Brien, 13 NY3d 456, 459).

Here, despite plaintiff's opposition, there is no distinction of merit between plaintiff-firefighter and his driver to be found in the operative statute. Hence, plaintiff may not rely on this Court's finding that the conduct on the part of the fire truck's operator did not rise to the level of "recklessness" in order to sustain his burden of demonstrating prima facie that the negligence of the defendant-driver (Guarini) was the sole proximate cause of the accident. Such a result could cause significant unfairness to the driver of the non-emergency vehicle and is not warranted in the case at bar.

Accordingly, it is hereby

ORDERED that the second third-party defendants' motion for summary judgment is granted in its entirety; and it is further

ORDERED that the second third-party complaint is severed and dismissed; and it is further

ORDERED that, upon searching the record, the third-party complaint is also severed and dismissed; and it is further

ORDERED that plaintiffs' cross motion for partial summary judgment on the issue of liability is denied; and it is further

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ORDERED that the balance of the action shall continue; and it is further

ORDERED that the Clerk enter judgment accordingly.

E N T E R,

/s/
Hon. Thomas P. Aliotta
J.S.C.

Dated: August 8, 2012