

Lerner v City of New York

2012 NY Slip Op 32378(U)

September 11, 2012

Supreme Court, New York County

Docket Number: 114472/2008

Judge: Geoffrey D. Wright

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: _____
Justice

PART 62

Index Number : 114472/2008
LERNER, NERA
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 002

The following papers, numbered 1 to 3, were read on this motion to/for Summary judgment/dismissal
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2, 3
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance
with the annexed hereto decision

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

SEP 14 2012

NEW YORK
COUNTY CLERKS OFFICE

FILED

SEP 14 2012

NEW YORK
COUNTY CLERKS OFFICE

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GEOFFREY D. WRIGHT
AJSC

Dated: 9/11/12

_____, J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

-----X
NERA LERNER,

Plaintiff,

Index # 114472/2008

-against-

DECISION

THE CITY OF NEW YORK and RONNY X. MUNOZ-
MUNOZ and NECTARIO O. MUNOZ,

Defendants.

Present:

Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the
review of this Motion/Order for summary judgment

FILED

SEP 14 2012

PAPERS

NUMBERED

Notice of Motion and Affidavits Annexed
Order to Show Cause and Affidavits Annexed
Answering Affidavits.....
Replying Affidavits.....
Exhibits.....
Other.....cross-motion.....

NEW YORK COUNTY CLERKS OFFICE

2,3.

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Defendant The City of New York (City) moves, pursuant to CPLR 3212, for dismissal or, alternatively, summary judgment dismissing the complaint and all cross-claims brought against it.

This is a personal injury action. Plaintiff was a pedestrian who, on April 29, 2008, stood near the intersection of East Houston Street and Pitt Street, in downtown New York City, where she suffered serious injuries as a result of a collision between an ambulance owned by City and a vehicle owned and operated by defendants Ronny X. Munoz-Munoz and Nectario O. Munoz (hereinafter the Munoz defendants). Apparently, the ambulance was traveling northbound on Pitt Street, and proceeded through a red light at the intersection with East Houston Street. Upon its collision with the other vehicle, the ambulance approached the median and struck plaintiff.

City moves for dismissal of the complaint and any cross-claims, relying on deposition testimony and a video taken of the incident at bar. City also refers to plaintiff's 50-h hearing, held on August 21, 2008. There, plaintiff testified as to following: plaintiff was standing with

her friend Rene Rodriguez on the median in the middle of East Houston Street, waiting for the traffic light to change colors. She was facing southbound and the traffic light for traffic going eastbound on East Houston Street was green. While she was standing on the sidewalk median, the ambulance struck her and Rodriguez, pushing them onto the pavement. Plaintiff did not see the ambulance until after she was pushed to the ground. Shortly thereafter, paramedics arrived and plaintiff and Rodriguez were taken to the hospital.

City provides the deposition testimony of Robert Martucci, the driver of the ambulance, who is employed by the New York City Fire Department. On the day of the accident, Martucci was assigned to Station 4, which is located on South Street near its intersection with Clinton Street. He was driving the ambulance in the company of a technician, Tameka Harris. Prior to the accident, he received a "high priority" assignment, a child suffering from an asthma attack. Martucci explained that in the event of a high priority call, he had been instructed to activate the ambulance's lights and sirens. Thus, the lights and sirens were allegedly turned on and remained on until the occurrence of the accident. The accident occurred about three to five minutes after Martucci received the high priority call.

Martucci testified that the traffic on that day was light and yielded to the ambulance's lights and sirens. He intended to cross East Houston Street and continue driving northbound on Avenue C. As he approached the intersection, he was driving at approximately ten miles an hour. He stopped the ambulance twice before approaching the median. Shortly before he reached the middle of the intersection, he was struck on the driver's side by a black car traveling eastbound in the left lane on East Houston Street. Martucci stated that he "slammed on the brakes" and turned the ambulance in order to avoid an accident. This resulted in the ambulance driving on to the median and striking plaintiff. Thereafter, firefighters had to extricate Martucci, who was trapped in the ambulance, by removing the door.

City provides deposition testimony from defendant Ronny X. Munoz-Munoz, who stated that he was the driver of the black car. He testified that he was driving eastbound on East Houston Street in the center lane, on his way home. There are three lanes designated for eastbound traffic and three lanes designated for westbound traffic on East Houston Street. The lanes are separated by a median. Munoz-Munoz claims to have first observed the ambulance while he was in the middle of the intersection of Pitt Street and East Houston Street. He observed the lights but did not hear any sirens prior to the collision. His car radio was on when the accident occurred. The ambulance came from his right, and he was unable to see clearly toward his right due to construction on the southwest corner of the intersection.

City obtained a copy of a surveillance video of the intersection of East Houston Street and Pitt Street that shows the accident. A copy was provided to all parties on March 23, 2011. Though it is silent, the video reveals that the ambulance's lights had been activated. The video also reveals that the ambulance had traveled in a slow, cautious manner. The scene when the car struck the ambulance indicates that the car was traveling at a relatively fast speed. The video does show that Martucci did not fully stop the ambulance before or after he entered the

intersection. However, City claims that Martucci was driving the ambulance into the intersection in a slow and deliberate manner. A copy of the video is included with the testimony evidence.

Based on the evidence submitted, City moves for dismissal on the ground that Martucci is not liable under the circumstances. City contends that Martucci, as a City-employed ambulance driver, was involved in a high priority assignment, which subjected him to a special standard of care, pursuant to section 1104 of the Vehicle and Traffic Law (section 1104). Under section 1104, the driver of an authorized emergency vehicle in an emergency operation, can only be liable if the driver acted with reckless disregard for the safety of others at the time of the accident. City argues that, based on the proof provided, there is no indication of Martucci's recklessness at the time of the accident, and no issues of fact as to any possible misconduct. Even if his conduct was less than perfect, City avers that Martucci's driving did not reach the level of recklessness which would result in liability.

Plaintiff opposes the motion, contending that there are issues of fact in this case. She refers to her deposition testimony, in which she testified that she did not observe the ambulance before impact. She did not recall hearing any sirens or seeing lights. Testimony from her friend Rene Rodriguez indicated that he did not hear any sounds from the ambulance or see lights prior to the collision.

Plaintiff argues that there is an issue as to whether City is entitled to rely on the reckless disregard standard of section 1104, or whether the applicable standard should be ordinary negligence, to wit, the failure to exercise reasonable care. If there is a question as to whether the ambulance's siren was not audible when Martucci entered the intersection, then plaintiff claims that the high standard of proof required in section 1104 would not be applicable. Plaintiff also refers to the video, stating that it shows that the ambulance did not come to a stop, as Martucci asserted. Instead of stopping, the ambulance allegedly increased speed. Plaintiff also claims that the video shows that traffic did not yield to the ambulance as it approached the intersection. According to plaintiff, the video contradicts Martucci's deposition testimony and, for this reason, there is an issue as to whether he can rely on the standard of reckless disregard.

The motion is also opposed by the Munoz defendants, who contend that the video is not properly admissible as evidence (plaintiff and City both stipulated to have the video submitted as evidence). Specifically, they state that the video was not authenticated by the testimony of a witness to the recorded events, or by the operator or maintainer of the equipment, declaring that the video accurately represents the subject matter depicted.

In addition, the Munoz defendants argue that there are issues as to Martucci's standard of care, referring to Ronny Munoz-Munoz's deposition testimony, in which he denied hearing sirens prior to the collision, though he saw lights. They claim that whether Martucci can rely on the standard set forth in section 1104 is an issue of fact precluding judgment.

In reply, City argues that judgment should be granted because the issues raised by the opponents of the motion are not substantial. City claims that the ambulance did utilize sirens.

Accordingly, that certain parties assert that they did not hear sirens is not decisive on the issue of whether the sirens were in use, but creates a question of fact as to whether the sirens were in use.

City contends that the video and the depositions both independently establish its entitlement to summary judgment. If this court rules out the video as inadmissible evidence, City asserts that the deposition testimony alone is sufficient to uphold the claim that Martucci was not engaged in reckless conduct at the time of the accident, and is not liable pursuant to section 1104.

“The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law.” *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material question of fact.’” *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224 (1st Dept 2002).

The court shall decide as to the admissibility of the videotape. The Munoz defendants contend that the video is inadmissible in the absence of any proof of authentication which would go to the accuracy and credibility of the video. They refer to a decision, *Read v Ellenville Nat. Bank* (20 AD3d 408 [2d Dept 2005]), in which that court laid out the conditions upon which a videotape may be authenticated before being submitted as evidence in a trial. Essentially, the videotape may be authenticated by the testimony of a witness to the recorded event or of an operator or maintainer of the equipment that the video accurately depicts the subject matter at bar.

Here, City has not provided any proof as to the authenticity of this videotape. No information as to who was responsible for the tape, how or when this tape was obtained, and how accurate this tape is, has been provided. Without a minimal proof of authenticity, the videotape has not been established as admissible evidence for a motion to dismiss or a summary judgment motion. The court shall deny the use of this videotape as prima facie evidence on this motion.

This leaves the deposition testimony as evidence for City’s motion. Here, the primary dispute is whether or not Martucci was driving in emergency mode at the time of the accident, absolving him of liability under the circumstances. Plaintiff and the Munoz defendants argue that the driver did not apply his sirens prior to the collision, or that they did not hear the sirens.

Section 1104 (c) states that “[e]xcept for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic devise or exhaust whistle as may be reasonably necessary.” If Martucci, involved in an emergency situation and not employed by the police department, had appropriately

activated the ambulance's lights and sirens prior to the collision, he would have received broad discretion to disregard a wide range of normal traffic rules, provided he did not act in reckless disregard of the safety of others.

The issue of whether Martucci was operating the ambulance sirens is an issue of fact. The deposition testimony of Martucci, plaintiff and Munoz-Munoz raises a question concerning the application of audible signals. The failure to use such appropriate signal during an emergency operation would consign Martucci to the application of a lower standard of conduct, namely that of ordinary negligence. Summary judgment, in effect, is issue-finding, not issue-determination. *See Brunnetti v Musallam*, 11 AD3d 280, 281 (1st Dept 2004). The court shall deny City's motion at this time due to this disputed issue.

Accordingly, it is

ORDERED that defendant City of New York's motion to dismiss and/or for summary judgment is denied.



GEOFFREY D. WRIGHT

Dated: September 11, 2012

JUDGE GEOFFREY D. WRIGHT
Acting Justice of the Supreme Court

FILED
SEP. 14 2012
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