

Manjares v County of Suffolk

2012 NY Slip Op 32480(U)

September 25, 2012

Supreme Court, Suffolk County

Docket Number: 45109/2008

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Claudia Manjares,
Plaintiff,

-against-

County of Suffolk, Suffolk County Department
of Public Works Transportation Division, Hector G.
Soto, Nicholas Migliore and Jean Migliore,

Defendants.

Motion Sequence No.: 005; MD
Motion Date: 5/1/12
Submitted: 5/22/12

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Attorneys [See Rider Annexed]

Jean B. Migliore and Nicholas Migliore,
Plaintiffs,

-against-

County of Suffolk, Suffolk County Department
of Public Works Transportation Division and
Hector Soto,

Defendants.

Maricel Donazar,
Plaintiffs,

-against-

Suffolk County, Suffolk County Transit,
Suffolk County Department of Public Works
Transportation Division, Hecktor G. Soto, Jean B.
Migliore and Nicholas P. Migliore,

Defendants.

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Upon the following papers numbered 1 to 35 read upon this motion to amend pleadings and for summary judgment: Notice of Motion and supporting papers, 1 - 25; Answering Affidavits and supporting papers, 26 - 27; 28 - 29; Replying Affidavits and supporting papers, 30 - 35; it is

ORDERED that the branch of the motion by defendants County of Suffolk, Suffolk County Department of Public Works Transportation Division, and Hector Soto for leave to amend their answer is denied without prejudice to renew upon proper papers within 30 days of the date of this order; and it is further

ORDERED that the branch of the motion by defendants County of Suffolk, Suffolk County Department of Public Works Transportation Division, and Hector Soto for summary judgment dismissing the complaint is denied.

This action was commenced by plaintiff Claudia Manjares to recover damages for injuries allegedly sustained in a motor vehicle accident that occurred at the intersection of Higbie Lane and Paumanake Avenue in West Islip, New York on August 5, 2008. Plaintiff allegedly was riding in a bus owned by defendants Suffolk County Department of Public Works Transportation Division and County of Suffolk and operated by defendant Hector Soto when it collided with a vehicle operated by defendant Jean Migliore and owned by defendant Nicholas Migliore. The Migliore vehicle was making a left turn into a shopping center on Higbie Lane when it was struck by the bus. The Court notes that by order of this Court (Tanenbaum, J.) dated May 12, 2009, this action was joined for trial with an action commenced by Jean Migliore and Nicholas Migliore under index number 08-45109, entitled *Jean B. Migliore and Nicholas Migliore v. County of Suffolk, Suffolk County Department of Public Works Transportation Division and Hector G. Soto*.

Defendants Suffolk County Department of Public Works Transportation Division, County of Suffolk and Hector Soto (hereinafter collectively known as the County defendants) now move for leave to amend their answer to assert the emergency doctrine as an affirmative defense. The County defendants also move for summary judgment dismissing the complaint against them on the ground that there are no material issues of law or fact with regard to liability, because co-defendant Migliore was the sole proximate cause of the motor vehicle accident. The County defendants' submissions in support of their motion include copies of the pleadings and transcripts of the parties' deposition testimony.

Defendants Jean Migliore and Nicholas Migliore oppose the branch of the County defendants' motion for summary judgment, arguing that an issue of fact exists as to whether the bus was operated in a reasonably safe and prudent manner. Plaintiff also opposes the County defendants' application for summary judgment, arguing that an issue of fact remains at the issue of liability. Plaintiff does not oppose the branch of the County defendants' motion to amend the pleadings. Maricel Donazar, a plaintiff in a related action assigned index # 09-11275, submits papers opposing the County defendants' motion for summary judgment. However, as Donazar is not a party to this action, her papers were not considered in the determination of this motion. In addition, the

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opposition papers submitted by counsel for the Migliores as plaintiffs in a related action assigned index # 09-02926 were not considered in this determination.

At his examination before trial and 50-h hearing, Soto testified that he was employed by Inter-County Motor Coach as a Suffolk Transit bus driver, and that on the day of the accident he was operating a bus which was traveling northbound on Higbie Lane. He testified that prior to the accident the bus was traveling 25 to 30 miles per hour, and that he observed the Migliore vehicle 20 meters away, traveling in the opposite direction as the bus. He further testified that the Migliore vehicle, without activating the vehicle's turn signal, suddenly made a left turn in front of the bus into a parking lot of a shopping center. He testified that the right side of the bus struck the rear passenger portion of the Migliore vehicle, and that the front portion of the Migliore vehicle had reached the entrance to the parking lot.

At her examination before trial and 50-h hearing, Jean Migliore testified that prior to the accident, she was stopped in the left turn lane of southbound Higbie Lane, waiting to make a left turn into the parking lot of a shopping center. She testified that she observed the bus traveling northbound on Higbie Lane 150 to 200 feet away from the parking lot entrance. She further testified that her left turn signal was activated when she made the left turn, and that 80 percent of her vehicle was already in the parking lot when the bus struck the rear passenger side of her vehicle. She stated that she was driving slowly as there were pedestrians in the parking lot, and that the collision caused her vehicle to spin out into the street.

As to the branch of the County defendants' motion for leave to amend their answer, the papers in support of the motion do not contain a copy of the proposed amended answer and, therefore, the application is insufficient (see *Fernandez v HICO Corp.*, 24 AD3d 110, 804 NYS2d 246 [1st Dept 2005]; *Loehner v Simons*, 224 AD2d 591, 639 NYS2d 700 [2d Dept 1996]; *Branch v Abraham & Strauss Dept. Store*, 220 AD2d 474, 632 NYS2d 168 [2d Dept 1995]). Accordingly, the application by the County defendants for leave to amend their answer is denied without prejudice to renew upon proper papers within 30 days of the date of this order.

With regard to the County defendants' application for summary judgment, Vehicle and Traffic Law §1141 provides that a left turning vehicle must yield the right of way to a vehicle approaching from the opposing direction (see *Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Loch v Garber*, 69 AD3d 814 893 NYS2d 233 [2d Dept 2010]; *Almonte v Tobias*, 36 AD3d 636, 829 NYS2d 153 [2d Dept 2007]; *Gabler v Marly Bldg. Supply Corp.*, 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). However, a driver who has the right of way has a duty to exercise reasonable care to avoid a collision with another vehicle (see *Bonilla v Gutierrez*, 81 AD3d 581, 915 NYS2d 634 [2d Dept 2011]; *Sirot v Troiano*, 66 AD3d 763, 886 NYS2d 504 [2d Dept 2009]; *Cox v Weil*, 66 AD3d 634, 887 NYS2d 170 [2d Dept 2009]). Here, the County defendants failed to make a *prima facie* showing of entitlement to judgment as a matter of law (see *Wilson v Rosedom*, 82 AD3d 70, 919 NYS2d 59 [2d Dept 2011]; *Kuris v Albano*, 38 AD3d 849, 832 NYS2d 674 [2d Dept 2007]; *Calemine v Hobler*, 263 AD2d 495, 693 NYS2d 622 [2d Dept 1999]). Defendant Migliore testified that the bus was 150 feet away when she activated her turn signal and proceeded to make

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a left turn. She also testified that more than 80 percent of her vehicle was in the parking lot when the accident occurred, and it is undisputed that the right front portion of the bus collided with the rear of Migliore's vehicle. Thus, triable questions exist as to whether defendant Soto exercised due care in the operation of the bus and, if not, whether such lack of care was a proximate cause of the accident (see *Tapia v Royal Tours Serv., Inc.*, 67 AD3d 894, 889 NYS2d 225 [2d Dept 2009]; *Gorham v Methun* 57 AD3d 480, 869 NYS2d [2d Dept 2008]). There can be more than one proximate cause of an accident, and the issue of comparative negligence is generally a question for the jury to decide (see *Todd v Godek*, 71 AD3d 872, 895 NYS2d 861 [2d Dept 2010]). As there is conflicting deposition testimony regarding the facts surrounding the accident, the County defendants failed to establish *prima facie* that defendant Migliore's conduct was the sole proximate cause of the accident (see *Borukhow v Cuff*, 48 AD3d 726, 851 NYS2d 374 [2d Dept 2008]; *Gordon v Honig*, 40 AD3d 925, 837 NYS2d 197 [2d Dept 2007]). Accordingly, the branch of the County defendants' motion for summary judgment dismissing the complaint against them must be denied.

Dated: 9/25/2012



HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION

RIDER

Attorney for Plaintiff Claudia Manjares:

Clerk of the Court

The Yankowitz Law Firm, P.C.
175 East Shore Road
Great Neck, NY 11023

Attorney for Plaintiffs,
Jean B. Migliore and Nicholas Migliore:

Vladimir & Associates, P.C.
2137 Deer Park Avenue
Deer Park, NY 11729

Attorney for Plaintiff Maricel Donazar:

Henry Davoli, Jr., PLLC
342 North Long Beach Road
Rockville Centre, NY 11570

Attorney for Defendants County of Suffolk,
Suffolk County Department of Public Works
Transportation Division and Hector G. Soto:

Mulholland, Minion & Roe
374 Hillside Avenue
Williston Park, NY 11596

Attorney for Defendants
Jean B. Migliore and Nicholas P. Migliore:

Russo, Apoznanski & Tambasco
875 Merrick Avenue
Westbury, NY 11590