

<b>McLoughlin v Mackey</b>
2017 NY Slip Op 31672(U)
July 27, 2017
Supreme Court, Suffolk County
Docket Number: 16158/2011
Judge: W. Gerard Asher
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**PUBLISH**

At a term of the Supreme Court of  
The State of New York, County of  
Suffolk at the Courthouse located at  
1 Court Street,  
Riverhead, New York 11901  
On the 27<sup>th</sup> day of July, 2017

PRESENT: HON. W. GERARD ASHER, J.S.C.

-----X  
Lorraine McLoughlin,  
Plaintiff,

-against-

Public Administrator for John R. Mackey  
and Eladio Bonilla-Ramos,  
Defendants,

-----X  
Lorraine McLoughlin,  
Plaintiff

-against-

Capital Warehouse Corp., Home Depot, Inc. and  
Home Depot, U.S.A., and Niatco Trucking  
& Delivery Corp.,  
Defendants.

-----X  
Capital Warehouse Corp., and Niatco  
Trucking & Delivery Corp.,  
Third-Party Plaintiffs,

-against-

Public Administrator for John R. Mackey,  
Eladio Bonilla-Ramos and Bonilla-Ramos  
Delivery,  
Third-Party Defendants,

-----X  
Lorraine McLoughlin,  
Plaintiff,

-against-

Bonilla-Ramos Delivery, General Electric  
Company and GE Consumer and  
Industrial,  
Defendants,

-----X

Action 1:  
16158/2011

**AMENDED ORDER**  
Seq. No.: 002 Mot. D; 004 Mot. D  
005 Mot. D; 006 Mot. D

Action 2:  
Index No.: 09317/2012

Third-Party Index No.:  
320214/2012

Action 3:  
Index No.: 4417/2014

It is hereby

**ORDERED**, that the undersigned rescinds its previous order dated April 21, 2017 and determines motion sequence numbers 002, 004, 005 and 006 as follows:

The defendants, ELADIO BONILLA-RAMOS and BONILLA-RAMOS DELIVERY, having moved this Court (Motion Sequence 004) for an Order seeking summary judgment on the issue of liability and for an Order dismissing the Complaint of the plaintiff and any and all cross-claims pursuant to CPLR 3212, and upon the Affirmation of David T. Fowler, Esq. dated June 3, 2016 in support thereof, the Affirmation in Partial Support of Shawn P. O'Shaughnessey, counsel for CAPITAL WAREHOUSE CORP., NIATCO TRUCKING & DELIVERY CORP. and GENERAL ELECTRIC COMPANY i/s/h/a GENERAL ELECTRIC COMPANY and GE CONSUMER AND INDUSTRIAL dated June 16, 2016, plaintiff, LORRAINE McLOUGHLIN's Affidavit in Opposition sworn to the 20<sup>th</sup> day of July, 2016 and the Reply Affirmation of David T. Fowler, Esq. dated September 19, 2016; and defendant CAPITAL WAREHOUSE CORP., NIATCO TRUCK & DELIVERY CORP. and GENERAL ELECTRIC COMPANY having moved this Court (Motion Sequence #005) for an Order seeking summary judgment on the issue of liability and for an Order dismissing the Complaint of the plaintiff and any and all cross-claims pursuant to CPLR 3212, and upon the Affirmation of Shawn P. O'Shaughnessey, Esq. dated June 17, 2016, plaintiff, LORRAINE McLOUGHLIN's Affidavit in Opposition sworn to the 20<sup>th</sup> day of July, 2016; and defendant HOME DEPOT having moved this Court (Motion Sequence 006) for an Order seeking summary judgment on the issue of liability and for an Order dismissing the Complaint of the plaintiff and any and all cross-claims pursuant to CPLR 3212, and upon the Affirmation of Stephen G. Traflet, Esq. dated July 8, 2016, plaintiff,

LORRAINE McLOUGHLIN's Affidavit in Opposition sworn to the 20<sup>th</sup> day of July, 2016 and the Reply Affirmation of Stephen G. Traflet, Esq. dated August 10, 2016; the motions having come on before this Court on September 20, 2016, and upon the due deliberation having been had thereon, it is now,

**ORDERED** that motion sequences (004), (005) and (006) are granted in their entirety and plaintiff's complaint is dismissed against them. Accordingly, any and all cross-claims against the defendant's are also dismissed.

This is an action, for personal injuries sustained by plaintiff LORRAINE McLOUGHLIN in a motor vehicle accident that occurred on April 2, 2011 at approximately 7:14a.m. at or near the premises known as 669 Flanders Road (State Road 24) nearest its intersection with Glider Avenue, Town of Southampton, County of Suffolk, State of New York, when co-defendant JOHN R. MACKEY'S vehicle in which the plaintiff was a passenger, struck defendant's ELADIO BONILLA-RAMOS i/s/h/a BONILLA-RAMOS DELIVERY's parked truck in the rear. The BONILLA-RAMOS truck was parked with flashers on, completely within the shoulder lane and did not impede the flow of traffic on the subject roadway. It has been learned through discovery that co-defendant JOHN MACKEY drove his vehicle into the parked truck due to sun glare. The Court notes that co-defendant JOHN MACKEY is now deceased and has been substituted by the Suffolk County Public Administrator.

Defendant BONILLA-RAMOS was an independent contractor for CAPITAL WAREHOUSE CORP., NIATCO TRUCKING & DELIVERY CORP. On the day of the accident, BONILLA-RAMOS was delivering appliances for NIATCO, BONILLA-RAMOS picked up the appliances from CAPITAL WAREHOUSE which is affiliated with NIATCO. All appliances scheduled for delivery on that day had been purchased at HOME DEPOT. Although

not alleged by plaintiff it would appear some of the appliances within the truck were manufactured by GENERAL ELECTRIC COMPANY i/s/h/a GENERAL ELECTRIC COMPANY & GE CONSUMER and INDUSTRIAL which is why they are named as defendants.

Plaintiff LORRAINE McLOUGHLIN initiated an action against Defendant JOHN R. MACKEY and ELADIO BONILLA-RAMOS via Summons and Verified Complaint on May 19, 2011.

Issue was joined by Defendant ELADIO BONILLA-RAMOS via Verified Answer dated July 8, 2011.

Issue was joined by Defendant JOHN MACKEY via Verified Answer dated June 28, 2011.

Plaintiff LORRAINE McLOUGHLIN initiated a second action against Defendants CAPITAL WAREHOUSE CORP. ("CAPITAL"), NIATCO TRUCKING & DELIVERY CORP. ("NIATCO"), and HOME DEPOT via a Supplemental Summons and Amended Verified Complaint on April 5, 2015.

Issue was joined by CAPITAL and NIATCO via Verified Answer dated May 15, 2012.

Issue was joined by HOME DEPOT via Verified Answer dated July 18, 2012.

A third-party action was initiated by CAPITAL and NIATCO against JOHN MACKEY and ELADIO BONILLA-RAMOS and BONILLA-RAMOS Delivery on August 16, 2012.

Issue was joined in the third-party action by ELADIO BONILLA-RAMOS via Verified Third-Party Answer with Cross claim and Counterclaim dated January 16, 2013.

Issue was joined in the third-party action by JOHN MACKEY via Verified Third-Party Answer with Cross claim and Counterclaim dated March 6, 2013.

Plaintiff LORRAINE McLOUGHLIN initiated a third action against BONILLA-RAMOS DELIVERY, GENERAL ELECTRIC COMPANY (“GE”), and GE Consumer & Industrial via a Summons and Verified Complaint on February 28, 2014.

Issue was joined by BONILLA-RAMOS DELIVERY via Verified Answer dated July 1, 2014.

Issue was joined by GE via Verified Answer dated December 18, 2014.

Pursuant to an Order dated March 11, 2016, Action No. 3 was consolidated with Actions No. 1 and 2. Pursuant to the same Order, the Suffolk County Administrator was substituted for the now-deceased JOHN R. MACKEY.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgement as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]); *Winegrad v. New York Univ. Med. Ctr.*, 64 NYS2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v. Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v. Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties’ compelling interest must be viewed “in a light most favorable to the party opposing the motion” (*Marine Midland Bank, N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, 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]; *Rebecchi v. Whitmore, supra*).

It is well settled that summary judgment should be granted without hesitation where there is no merit to a cause of action. *Blake v. Gardino*, 35 A.D.2d 1022, 315 N.Y.S. 2d 973, aff'd. 20 N.Y.2d 876, 328 N.Y.S. 2d 442, 278 N.E.2d 649 (1972). Such relief is proper to eliminate unnecessary expense to named litigants where no issue of a material fact is presented to justify a trial against them. *Donado v. Crouse-Irving Memorial Hospital*, 756 A.D.2d 715, 427 N.Y.S. 2d 118 (4<sup>th</sup> Dept., 1980); *Axelrod v. Armistead*, 36 A.D.2d 593, 318 N.Y.S. 2d 407 (1<sup>st</sup> Dept. 1971). Indeed, the Courts have stated that it is the unquestionable duty of special term and appellate judges to utilize the remedy of Summary Judgement in tort cases where there is clearly no liability, rather than to strain to find issues, however nebulous, which may preserve an unfounded claim for litigation or negotiation. *Donlon v. Pugliese*, 27 A.D.2d 786, 277 N.Y.S. 2d 334 (3d Dept. 1967).

In support of his motion for summary judgement, co-defendant RAMOS submitted the deposition transcripts of LORRAINE McLOUGHLIN, JOHN MACKKEY and ELADIO BONILLA-RAMOS. In sum and substance, McLoughlin testified she saw the parked truck on the side of the roadway but shortly after seeing it she passed out and has no memory of the subject accident. Co-Defendant Mackey testified he was driving southbound on Route 24 at approximately three minutes prior to the accident sun got into his eyes and blinded him; he then raised his left hand to shield the sun from his eyes, lost control of the vehicle which veered to the left and when he swerved back to the right, his car slammed into the box truck. Defendant Bonilla-Ramos testified he was not in the truck at the time of the accident but inside a deli when he heard the impact of the accident. Bonilla was issued a summons for parking in a non-parking zone to which he plead guilty and was issued a \$75.00 fine.

Although BONILLA was issued a summons for illegal parking, in order for a violation of a statute, rule, regulation or ordinance to be evidence of proof of negligence, the resulting injury

must have been that which the regulation intended to protect against. (see *Chester Litho, Inc. v. Palisades Interstate Park Commission*, 33 AD2d 202, 305 N.Y.S. 2d 682 aff'd 27 N.Y.S. 2d 323, 317 N.Y.S. 2d 761 [1971]). In the matter at hand, the BONILLA vehicle was parked with flashers on adjacent to the curb on the shoulder of the roadway separated from traffic by a solid white line. In order to raise a triable issue of fact, the plaintiff must show that BONILLA's alleged negligence was a substantial cause of the events that produced the injury. Courts have held that location of a vehicle on a shoulder of a road furnishes the condition or occasion for an accident but not the proximate cause. see, *Williams v. Envelop Tr. Corp.*, 186 AD2d 797 (2d Dept. 1972); *Dunlop v. City of New York*, 186 A.D. 2d 782 (2d Dept. 1992); and *Rogers v. Huggins* 106 AD2d 621 (2d Dept. 1984). Here, had co-defendant MACKEY's vehicle not swerved, leaving the lane of traffic on Route 24, BONILLA-RAMOS' parked truck would not have been struck. Liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes. *Ely v. Pierce*, 302 A.D.2d, 755 N.Y.S. 2d 250 (2d Dept. 2008). Accordingly, the defendant ELADIO BONILLA-RAMOS has established his entitlement to summary judgement dismissing the plaintiff's complaint and third party complaint as well as any cross claims. Co-defendant's CAPITAL WAREHOUSE CORP., NIATCO TRUCKING & DELIVERY CORP., GENERAL ELECTRIC CORP., GE CONSUMER AND INDUSTRIAL (mot. seq. 005) and HOME DEPOT, INC. (mot. seq. 006) join in support with defendant BONILLA-RAMOS' application.

These co-defendant's attempt to reiterate the arguments of defendant BONILLA-RAMOS that defendant MACKEY's admitted negligence was the sole proximate cause of the accident.

Furthermore, as BONILLA-RAMOS was an independent contractor the only connection that CAPITAL WAREHOUSE CORP., NIATCO TRUCKING & DELIVERY CORP., GENERAL ELECTRIC CORP. and GE CONSUMER AND INDUSTRIAL had with



BONILLA-RAMOS was that they supplied appliances to be delivered as well as a list of customers who were to receive the deliveries. As BONILLA-RAMOS never had any kind of contractual relationship with HOME DEPOT and any claim of vicarious liability as to HOME DEPOT is eliminated.

Wherefore as it is the determination that defendant BONILLA-RAMOS, is void of any negligence, it is determined that co-defendants CAPITAL WAREHOUSE CORP., NIATCO TRUCKING & DELIVERY CORP., GENERAL ELECTRIC CORP., GE CONSUMER AND INDUSTRIAL and HOME DEPOT, INC., are not vicariously liable for the accident in which the plaintiff was injured. It is further


**ORDERED** that summary judgement is granted to the defendants ELADIO BONILLA-RAMOS, BONILLA-RAMOS DELIVERY, GENERAL ELECTRIC COMPANY i/s/h/a GENERAL ELECTRIC COMPANY, GE CONSUMER AND INDUSTRIAL HOME DEPOT, INC. and HOME DEPOT USA; and it is further

**ORDERED** that the Complaint of the plaintiff, LORRAINE McLOUGHLIN, and all cross-claims are dismissed in their entirety as against the defendants and third-party defendant noted above; and it is further

**ORDERED**, that the motion to Compel (Motion Sequence 002) by GENERAL ELECTRIC COMPANY is denied as moot in view of the decision on summary judgement herein; and it is further

**ORDERED**, that a copy of this Order with Notice of Entry be served upon all parties in the action within thirty (30) days of entry.

ENTER



Hon. W. Gerard Asher, J.S.C.