Delrosario v City of New York
2017 NY Slip Op 32408(U)
November 9, 2017
Supreme Court, New York County
Docket Number: 157411/14
Judge: Alexander M. Tisch

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 52

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DAISY DELROSARIO,

Plaintiff,

-against-

THE CITY OF NEW YORK and CARLOS DURAN,

Defendants.

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DECISION & ORDER

Index No. 157411/14

Motion Seq. No. 001

ALEXANDER M. TISCH, J.

Defendant City of New York moves pursuant to CPLR 3212 for an order granting summary judgment in its favor and dismissing plaintiff Daisy Delarosario's complaint. Plaintiff seeks damages for injuries arising from a motor vehicle accident on February 3, 2014 while she was a passenger in co-defendant Carlos Duran's motor vehicle. Plaintiff contends that a motor vehicle owned by co-defendant City of New York was double parked, which allegedly contributed to the occurrence of the accident. For the reasons stated herein, City's motion is denied.

The City contends that the driver of its vehicle, John Hernandez, an inspector with the City's Department of Environmental Conservation, was pursuing a violator of the law, in response to a noise complaint. As such, Hernandez was engaged in an emergency operation pursuant to New York Vehicle and Traffic Law ("VTL") § 114-b when he parked his vehicle behind a dumpster.[1] Section 114-b defines an "emergency operation" as "[t]he operation, or parking of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or

[1] VTL § 101 sets forth that an authorized emergency vehicle includes an "environmental response vehicle."

responding to, or working or assisting at the scene of an accident, disaster, police call, alarm or fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service." Moreover, VTL § 1104 states in pertinent part that:

> (a) The driver of an authorized emergency vehicle, when involved In an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
>
> (b) The driver of an authorized vehicle may:
> 1. Stop, stand or park irrespective of the provisions of this title;...
>
> (e) The 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.

The City asserts that the subject vehicle was permitted to "stop, stand or park irrespective of this provisions of the Vehicle and Traffic Law that would normally prohibit double parking. Plaintiff contends in opposition that the City vehicle was not responding to an emergency, and that Hernandez' actions were investigatory. As such, the City vehicle was not entitled to double park pursuant to Section 1104.

Hernandez testified in his EBT that he double parked "because his agency received a complaint for loud noise from construction work." See NYSCEF Doc. No. 25, Tr. 12:17-21. The complaint came in "early in the morning" "anywhere from 8:30 to 9:00, 9:30." *See* Id. at 12:17-21. He went to the construction site "midday." *See* Id. at 15:12-18. When Hernandez got to the site he spoke to the foreman, the sum and the substance of the conversation was that "he didn't have a noise mitigation plan." *See* Id. at 22:16-22. He spoke to the foreman for "about a good fifteen minutes." *See* Id. at 22:23-25. Hernandez said he issued a summons to the foreman but informed him that "we don't hand or serve. We just inform them they're in

violation, and then we get the address, and when we write up the report, the violation gets mailed to the corporation or the company that's doing the job." He answered "no" when asked if her prepares the summons on site. *See* Id. at 23:7-20. He did prepare a "CC" report in his motor vehicle immediately afterwards, which took about "15-20 minutes." *See* Id. at 24:11-15.

The City primarily relies on *Joseph H. Gonyea v. County of Saratoga*, 23 A.D.3d 790 [3rd Dep't 2005], which held that a vehicle was engaged in an "emergency operation" when an emergency vehicle protruded on to the road while double parked on the shoulder of a road causing another vehicle to maneuver around resulting in an accident with the plaintiff while the operator issued a ticket to a motorist. Plaintiff primarily relies on *Quintero v. City of New York*, 113 A.D.3d 414 [1st Dep't 2014], where the recklessness standard was not granted when a police officer double-parked his car for 15-20 minutes to observe two suspects in a stolen car, which was held to be investigatory in nature. Neither case directly fits the facts of the instant matter.

The proponent of a motion for summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. *Alvarez v. Prospect Park Hospital*, 68 N.Y.2d 320, 324 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]; *see also Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 852 [1985]. Once the showing is satisfied, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. *See Alvarez v. Prospect Park Hospital*, *supra* at 324.

The Court finds that the City has failed to sustain its burden because questions of fact remain about the circumstances surrounding Hernandez's issuance of the violation. It is unclear

from Hernandez' EBT testimony what the official procedure is for issuing a violation, particularly whether a summons can be orally issued at the site as occurred here initially. It is apparent that a major component of Hernandez' visit to the site was investigatory in nature because he discussed the noise complaint with the foreman. There are simply not enough facts presented to determine whether a summons was issued when Hernandez visited the site without the Court knowing the official policy of the Department on issuing summonses. Without that context the Court can't determine whether Hernandez' visit to the site rises to the level of an "emergency operation" as set forth in Sections 114-b and 1104 and that the recklessness standard applies.

Accordingly, it is ordered that the defendant City of New York's summary judgment motion is denied.

This constitutes the decision and order of this Court.

Dated: November 9, 2017
New York, New York

Alexander M. Tisch, J.S.C.

HON. ALEXANDER M. TISCH