

Waldenmayer v Shechter

2008 NY Slip Op 33758(U)

January 25, 2008

Supreme Court, Queens County

Docket Number: 28941/06

Judge: Orin R. Kitzes

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Short Form Order

NEW YORK SUPREME COURT -QUEENS COUNTY

PRESENT: ORIN R. KITZES

PART 17

Justice

-----X
**GEORGE WALDENMAYER and EILEEN
WALDENMAYER,**

Plaintiff,

**Index No.: 28941/06
Motion Date: 1/23/08
Calendar Number: 59**

-against-

**YONA SHECHTER,
Defendants.**

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The following papers numbered 1 to 12 read on this motion by plaintiffs for an order pursuant to CPLR 3212 granting plaintiffs summary judgment in their favor on the issue of liability, and cross-motion by defendant for an order pursuant to CPLR 3025 (b) amending the defendant's Answer to include an affirmative defense of the emergency doctrine.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Exhibits.....	1-4
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Affirmation in Opposition-Exhibits.....	8-9
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Upon the foregoing papers it is ordered that the motion by plaintiffs for an order pursuant to CPLR 3212 granting plaintiffs summary judgment in their favor on the issue of liability, and cross-motion by defendant for an order pursuant to CPLR 3025 (b) amending the defendant's Answer to include an affirmative defense of the emergency doctrine are decided as follows:

According to the complaint, the action arises out of a two vehicle accident which occurred on December 31, 2005, on the Northern State Parkway, Nassau County, New York. Plaintiff George Waldenmayer was driving his vehicle when defendant's vehicle came into contact with plaintiffs' vehicle. Thereafter, plaintiffs commenced the instant action to recover for personal injuries; plaintiff Eileen Waldenmayer claims she has been denied the services of her husband as a result of injuries he received in the accident.

Plaintiffs now move for summary judgment, based upon defendant's vehicle crossing over lanes of traffic and hitting plaintiff's car on the passenger side. Plaintiff has submitted the deposition testimony that indicates plaintiff was within the eastbound right lane of Parkway when defendant was in the middle lane of traffic, attempting to enter the right lane, and hit plaintiffs'

vehicle. Plaintiff's claim this establishes a prima facie case for judgment as a matter of law. Defendant opposes this motion by claiming she was confronted by an emergency consisting of a third vehicle cutting off the defendant's vehicle and in response, defendant crossed traffic lanes and hit plaintiff's vehicle. Since defendant did not plead this affirmative defense in her Answer, she has made the cross-motion to amend her defense to add this defense. The Court shall first address defendant's cross-motion, which is opposed by plaintiff.

"While leave to amend a pleading shall be freely granted (*see*, CPLR 3025[b]), a motion to amend is committed to the broad discretion of the trial court. Edenwald Contr. Co. v City of New York, 60 NY2d 957 (1983); Ingrami v. Rovner, 2007 NY Slip Op 9362 (2d Dept 2007.) and the exercise of that discretion will not be "lightly disturbed". *Id.* In exercising its discretion, the Court must consider whether there has been a gross delay in asserting the amendment and, where the action has long been certified ready for trial, to rule with caution and circumspection. Furthermore, "the court will also note how long the amending party was aware of the facts upon which the motion was predicated, and whether it offers a reasonable excuse for its lengthy delay" F.G.L. Knitting Mills, Inc. v. 1087 Flushing Property, Inc., 191 A.D.2d 533 (2d Dept 1993.) (Citations omitted.) In this case, the defendant has moved to amend her answer so to assert an affirmative defense after the Note of Issue has been filed and only after plaintiff has filed a summary judgment motion. Furthermore, the affirmative defense of emergency has been known to the defendant since the very inception of this action. Significantly, the defendant has failed to proffer an acceptable excuse for this delay. Moreover, since the plaintiffs have prepared their respective cases in response to the original Answer, they would suffer prejudice by the late addition of this defense theory. *Id. See, McGowan v. RPC Realty Corp.*, 2007 NY Slip Op 10116 (2d Dept 2007.) The Court notes that defendant's original Answer contained ten affirmative defenses. Accordingly, the cross-motion by defendant is denied.

However, although defendant cannot amend her Answer to add the emergency doctrine as an affirmative defense, she is not precluded from asserting this defense in opposition to the plaintiffs' motion and raising it at trial. CPLR § 3018, states that, "a party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading. . . ." In Bello v. Transit Auth., 12 A.D.3d 58 (2d Dept 2004) the Court analyzed the question whether the emergency doctrine must be pleaded as an affirmative defense, and determined that the answer depends upon the circumstances of each case. "Where the facts relating to the existence of an emergency are presumptively known only to the party seeking to invoke the doctrine, it must be pleaded as an affirmative defense lest the adverse party be taken by surprise." *Id.* However, "where the facts relating to the existence of the emergency are known to the adverse party and would not raise new issues of fact not appearing on

the face of the prior pleadings, the party seeking to rely on the emergency doctrine would not have to raise it as an affirmative defense”. *Id.*

Here, on the day of the accident, plaintiff was made aware that defendant claimed to have been cut off by another vehicle and this caused her to hit plaintiff’s vehicle. This is demonstrated by a document signed by defendant on December 31, 2005 and submitted by plaintiffs’ as Exhibit 5 in their summary judgment motion. To the extent that there were some details unknown to plaintiffs, defendant’s deposition provided a full description of her emergency. See, Edwards v. New York City Tr. Auth., 37 A.D.3d 157 (1st Dept 2007.) Thus, there was no unfair surprise arising from the defendant’s failure to plead the emergency doctrine and its supporting facts in her Answer as an affirmative defense. Furthermore, plaintiffs were able to question defendant regarding all of the facts supporting her claim of an emergency at defendant’s deposition, which took place prior to the filing of the summary judgment motion. Finally, plaintiffs have opposed defendant’s motion to amend her Answer both procedurally and on the merits. Bello v. Transit Auth. supra. Accordingly, this Court finds that defendant did not have to plead the affirmative defense of the emergency doctrine and, as such, it is appropriate to consider her claims regarding the applicability of the doctrine. *Id.*

Regarding plaintiffs’ motion for summary judgment, the court finds that they have made a prima facie showing of their entitlement to summary judgment on the issue of liability. See, Coss v Sunnysdale Farms, 268 AD2d 499 (2d Dept 2000.) Plaintiffs have established entitlement to judgment as a matter of law by submitting evidence showing that defendant violated Vehicle and Traffic Law § 1128(a) by failing to stay within her lane and moving from such lane when it was not safe. The burden then shifted to defendant to demonstrate by admissible proof the existence of a triable issue of fact. Alvarez v Prospect Hosp, 68 NY2d 320 (1986.)

The defendant claim’s that her deposition testimony establishes she was confronted with an emergency and in response to that situation, she hit plaintiffs’ vehicle. The emergency doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance not of his or her own making, which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be held negligent if the actions taken are reasonable and prudent in the emergency context, even if it later appears that the actor made a wrong decision, provided the actor has not created the emergency (*see*, Caristo v. Sanzone, 96 N.Y.2d 172 (2001); Pawlukiewicz v. Boisson, 275 A.D.2d 446 (2d Dept. 2000.)) The essence of the emergency doctrine is that, where a sudden and unexpected circumstance leaves a person without time to contemplate or weigh alternative courses of action, that person cannot reasonably be held to the standard of care required of one who has had a full opportunity to reflect, and

therefore should not be found negligent unless the course chosen was unreasonable or imprudent in light of the emergent circumstances. *See, Bello v. Transit Auth., supra.* "This is not to say that an emergency automatically absolves one from liability for his conduct. The standard then still remains that of a reasonable man under the given circumstances, except that the circumstances have changed" (*Ferrer v. Harris*, 55 N.Y.2d 285 (1982).)

In the instant case, the defendant testified at her deposition that a vehicle sped up and cut off her vehicle immediately prior to the subject accident. In response to this situation, she applied pressure to her brakes and her car started "swirling" and she lost control of the vehicle. She was unable to gain control of the vehicle and it collided with plaintiffs' vehicle. The Court finds that this testimony is sufficient to rebut plaintiffs' showing of negligence and raise triable issues of fact as to whether the defendant was confronted with an emergency when it was cut off by a third vehicle. *See, Reid v Courtesy Bus Co.* 234 AD2d 531 (2d Dept 1996.) Accordingly, the plaintiff's motion is denied.

DATED: January 25, 2008

ORIN R. KITZES, J.S.C.