Rigolini v City of NY
2012 NY Slip Op 32849(U)
November 28, 2012
Sup Ct, New York County
Docket Number: 122049/03
Judge: Barbara Jaffe
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SCANNED ON 12/3/2012

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JAFFE Justice

PART 5

Index Number : 122049/2003
RIGOLINI, JOHN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 008
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1

Answering Affidavits — Exhibits _____ | No(s). 2,3

Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED
NOV 29 2012
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 11/28/12

BJ
BARBARA JAFFE, 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 : PART 5

JOHN RIGOLINI and MAUREEN RIGOLINI,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

Index No. 122049/03

Argued: 5/16/12
Mot. Seq. No.: 007

DECISION AND ORDER

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

TODINO SEWER & WATER SERVICE INC., *et al.*,

Third-Party Defendants.

Index No. 590044/08

FILED
NOV 29 2012
COUNTY CLERK'S OFFICE
NEW YORK

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Second Third-Party Plaintiff,

-against-

NICO ASPHALT, INC., *et al.*,

Second Third-Party Defendants.

Index No. 590224/08

BARBARA JAFFE, JSC:

For plaintiff:
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By notice of motion dated February 21, 2012, plaintiffs move pursuant to CPLR 2221 for

an order: (1) granting leave to reargue defendant City's motion for summary judgment, and (2) upon reargument, denying summary judgment and reinstating plaintiffs' cause of action for a violation of General Municipal Law (GML) § 205-a. Defendant Consolidated Edison Company of New York, Inc. (Con Ed) supports the motion and City opposes it.

I. BACKGROUND

On September 27, 2002, plaintiff John Rigolini, a New York City Fire Department (FDNY) Lieutenant, was allegedly injured when, while responding to a report of a fire and riding in an FDNY fire truck, the truck hit a large mound/hump of asphalt in the roadway at 57th Street between Broadway and Seventh Avenues in Manhattan, causing him injuries. (Affirmation of Barry Salzman, Esq., dated Feb. 21, 2012 [Salzman Aff.], Exh. C).

On or about March 10, 2003, plaintiffs served City with a notice of claim asserting claims against City for common law negligence and GML § 205-a predicated on violations of the New York City Charter §§ 2903(b)(3) and 2904, 34 RCNY § 2-07, and New York Vehicle and Traffic Law (VTL) §§ 1104, 1120, 1124, 1128, and 1130. Their theory of liability was that plaintiff was injured when the fire truck in which he was a front seat passenger "struck a large mound or hump of asphalt located in the middle of the roadway at or near the double yellow line." Plaintiffs further alleged that the accident occurred, in part, due to City's "ownership, operation, management, supervision, control, inspection and use of its apparatus known as Engine Truck 23." (*Id.*, Exh. C).

On or about December 23, 2003, plaintiffs served City with their summons and complaint containing the allegations set forth in their notice of claim, and on or about January

14, 2004, City served its answer. (*Id.*, Exh. D).

These same statutory predicates appear in both the complaint and in plaintiff's first verified bill of particulars, dated April 4, 2006. (*Id.*, Exh. E). They specifically allege in the first bill of particulars, that City was negligent, careless and reckless:

> in the ownership, operation, management, supervision, control and use of its apparatus known as Engine 23; . . . in failing to exercise reasonable care and prudence in its operation of the aforesaid emergency vehicle; in failing to keep its motor vehicle under proper and timely control; in failing to look, in failing to see; in failing to be observant of the surrounding circumstances and more particularly the defective roadway aforementioned, in failing to make prompt, proper and timely use of the braking mechanisms of its motor vehicle; . . . in failing to pay due regard to the existing conditions of the defective roadway at the aforesaid location; in failing to observe the large raised mound/hump of asphalt in the roadway; in acting in reckless disregard for the safety of others more particularly the plaintiff herein; in failing to see that which a reasonable and prudent driver would have seen; in operating its motor vehicle recklessly and without care to its passengers, more particularly the plaintiff herein; in failing to exercise due and required care, caution and forbearance in the operation and control of its vehicle so as to have avoided this accident and the injuries to the plaintiff; in failing to keep and maintain a proper look out upon the roadway, in failing to be and remain reasonably alert....

(*Id.*, Exh. E).

On July 25, 2011, plaintiffs served defendants with a verified second supplemental bill of particulars in which they set forth as additional predicate violations VTL §§ 1180 and 1212 and 34 RCNY § 4-06, and allege that the driver of the fire truck violated those provisions by operating the truck at a unreasonable speed given the conditions that existed at the time of the accident. (*Id.*, Exh. B).

Pursuant to VTL § 1180(a), "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential

hazards then existing." A similar provision is contained in 34 RCNY § 4-06(3), which provides in pertinent part that, "no person shall drive a vehicle on a highway at a speed greater than the lesser of the posted speed limit or the speed that is reasonable and prudent under the conditions then existing, while also taking into account any potential hazards." (*Id.*).

Plaintiffs filed their note of issue three months later.

II. PRIOR DECISION

In its summary judgment motion, City argued, *inter alia*, that plaintiffs' claims under GML § 205-a should be dismissed absent evidence of a violation of any of the predicate statutory provisions upon which they then relied, and because those provisions are inapplicable to the circumstances of the accident. In opposition, plaintiffs advanced additional predicate violations, namely, VTL §§ 1180 and 1212 and 34 RCNY § 4-06. (Salzman Aff., Exh. A).

In reply, City argued that plaintiffs could not raise the additional predicate violations in their opposition to the summary judgment motion without alleging them in their notice of claim or complaint. (Reply Affirmation of Jessica Wisniewski, ACC, dated Sept. 13, 2011). City also argued that there was no evidence that the fire truck was operated at an unsafe speed. (*Id.*).

By decision and order dated January 4, 2012, I granted City's motion for summary judgment and dismissed the complaint as against it. In relevant part, I held that:

> [Although] plaintiffs failure to plead in their notice of claim that Voison was negligent in driving at an unreasonable speed in violation of section 1180 of the VTL and 34 RCNY 4-06 is not fatal (*see eg Zahra v New York City Hous. Auth.*, 39 AD3d 351 [1st Dept 2007] [plaintiff asserting GML 205-a claim not required to plead in notice of claim specific predicate statute violated]; *Reilly v City of New York*, 271 AD2d 425 [2d Dept 2000] [same]), having also failed to so plead in their complaint or to move for leave to amend their complaint, they are now

> barred from raising these violations [as] predicates for their GML 205-a claim (*see eg Balsamo v City of New York*, 287 AD2d 22 [2d Dept 2001] [pleading asserting GML 205-e claim must identify particular statute or ordinance allegedly violated]; *Sclafani v City of New York*, 271 AD2d 430 [2d Dept 2000] [failure to identify in complaint or bill of particulars specific statute with which defendant allegedly failed to comply rendered GML 205-a cause of action legally insufficient]). Plaintiffs have thus failed to establish that any triable issues remain as to their GML § 205-a claim.

III. CONTENTIONS

Plaintiffs argues that I overlooked that the newly pleaded predicate violations, although not pleaded in their notice of claim or complaint, were properly alleged in their second supplemental bill of particulars, and that I erroneously determined that, having failed to plead in their complaint that the driver of the truck was negligent in operating the vehicle at an unreasonable speed in violation of VTL §§1180, 1212 and 34 RCNY § 4-06, and having failed to move for leave to amend their complaint accordingly, they were barred from raising those violations as predicates for their GML § 205-a claim. They maintain that leave of court was not required as the second supplemental bill of particulars merely amplified the pleadings and introduced no new cause of action or theory of liability. (Salzman Aff.).

Alternatively, plaintiffs argue that even if the second supplemental bill of particulars is deemed an amended bill of particulars requiring leave of court, leave to amend would have been granted since the note of issue had not yet been filed and defendants would have suffered no prejudice in permitting the new statutory predicates. And, according to plaintiffs, they may supplement their bill of particulars to allege predicate statutory violations which amplify and elaborate upon facts and theories already contained in the notice of claim and complaint, which

is what they did here. (*Id.*).

Defendants maintain that the second supplemental bill of particulars was actually an amended bill of particulars requiring leave of court because it alleges new causes of action, and that granting leave to amend would result in prejudice because it would have altered the theory of the case. They also argue that the alleged statutory violations in the second supplemental bill of particulars have no merit absent evidence suggesting that the driver operated the truck at an unsafe or unreasonable speed. (Affirmation of Stacey L. Cohen, ACC, dated Apr. 25, 2012).

In reply, plaintiffs deny that they have alleged that the driver was speeding, and assert that the driver was driving at a speed greater than what was reasonable and prudent under the existing circumstances. (Reply Affirmation, dated May 14, 2012).

III. ANALYSIS

A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." (CPLR 2221 [d][2]). Having overlooked the legal effect of plaintiffs' second supplemental bill of particulars, I grant leave to reargue in order to consider it here.

CPLR 3043(b) permits a party to serve a supplemental bill of particulars at least 30 days before trial, without leave of court, provided that no new cause of action is alleged or new injury claimed.

Plaintiffs, in their prior pleadings allege, in detail, that the fire truck was being operated improperly and that the driver failed to exercise reasonable care and prudence in operating it. In

the second supplemental bill of particulars, which they served well before filing the note of issue, plaintiffs amplify the first bill of particulars and prior pleadings by specifically asserting that the driver was operating the fire truck at a speed greater than was reasonable and prudent under the existing conditions. (*See Foley v City of New* York, 43 AD3d 702, 704 [1st Dept 2007]; *Balsamo v City of New York*, 287 AD2d 22, 27 [2d Dept 2001]; *Noetzell v Park Ave. Hall Hous. Dev. Fund Corp.*, 271 AD2d 231, 232 [1st Dept 2000]; *Orros v Yick Ming Yip Realty*, 258 AD2d 387, 388 [1st Dept 1999]).

City cannot credibly argue that it was surprised or prejudiced by the inclusion in the supplemental bill of particulars of statutory violations related to the speed of the subject fire truck given that, in their notice of claim, the plaintiffs allege, *inter alia*, that City was negligent in its operation, control and use of the fire truck. Likewise, in the complaint, it is also alleged that plaintiffs seek recovery pursuant to GML § 205-a relating to, *inter alia*, City's operation of the fire truck.

That speed was not specifically mentioned in the pleadings is not dispositive as speed is a factor often used to determine whether a driver is operating in a safe and reasonable manner under the circumstances. (*See Foley*, 43 AD3d at 704 ["belated identification of several sections of the Administrative Code entails no new factual allegations, raises no new theories of liability, and has caused no prejudice to defendant"]; *Noetzell*, 271 AD2d at 232 [improper to grant summary judgment dismissing complaint where Building Code violation not specified in complaint or bill of particulars raised no new theory or facts and caused no prejudice]).

Moreover, whether the driver of the fire truck was operating it at a speed greater than

what was reasonable and prudent given the existing conditions at the time of the accident presents a factual issue which may not be resolved summarily.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that the plaintiffs' motion for leave to reargue is granted and upon reargument, defendant City of New York's motion for summary judgment is granted except as to plaintiffs' cause of action under General Municipal Law (GML) § 205-a which is hereby reinstated against said defendant to the extent indicated above. The action shall remain on the City Trial waiting list, and the Clerk is directed to enter judgment accordingly.

ENTER:

Barbara Jaffe, JSC

DATED: November 28, 2012
New York, New York

BARBARA JAFFE

FILED

NOV 29 2012

COUNTY CLERK'S OFFICE
NEW YORK