

Freder v Costello Indus., Inc.
2015 NY Slip Op 31616(U)
August 28, 2015
Supreme Court, Putnam County
Docket Number: 1010/12
Judge: Lewis J. Lubell
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SC 10/26/15 @ 9:30 AM

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF PUTNAM

-----X DREW F. FREDER and KAREN J. FREDER,

Plaintiffs,

-against -

COSTELLO INDUSTRIES, INC., OCON INCORPORATED, JOHN J. MURPHY and JEAN B. SIMEUS,

Defendants.

-----X LUBELL, J.

DECISION & ORDER

Index No. 1010/12

Sequence No. 4 & 5 Motion Date 5/18/15

The following papers were considered in connection with Motion Sequence #4 by defendants Ocon Incorporated and John J. Murphy for an Order permitting defendants to amend their answer to include the emergency doctrine and seat belt defense as affirmative defenses or, in the alternative, allowing Ocon to assert the emergency doctrine affirmative defense at trial; and Motion Sequence #5 by plaintiff for an Order pursuant to CPLR 3212, granting plaintiffs summary judgment on the General Municipal Law 205-e claim, and such other relief as the Court deems proper:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBITS A-L	1
NOTICE OF CROSS MOTION/AFFIRMATION/EXHIBITS A-J	2
AFFIRMATION IN PARTIAL OPPOSITION TO CROSS MOTION	3
AFFIRMATION IN OPPOSITION AND IN REPLY/EXHIBIT A	4
AFFIRMATION IN PARTIAL OPPOSITION	5
REPLY AFFIRMATION	6

Plaintiff, Drew F. Freder, brings this personal injury action in connection with a September 10, 2009, 6:30 a.m. motor vehicle accident which took place at mile marker 70.8 on the eastbound lane of I-84. At the time of the incident, plaintiff was an on-duty New York State Trooper responding to a hit-and-run accident with possible injuries.

While traveling to the accident scene in the left lane of the two-lane roadway in excess of the speed limit and with lights on

and perhaps siren blaring, plaintiff swerved and struck the left rear side of defendant Ocon Incorporated's ("Ocon") vehicle which was being driven by defendant John J. Murphy ("Murphy") as Murphy entered plaintiff's lane of travel. Pursuant to Murphy's deposition testimony, just prior to the incident, he had observed co-defendant Jean B. Simeus' vehicle traveling in the right lane "maybe ten car lengths" ahead of him. The next thing he knew, he was caused to make an "evasive move" from the right hand into the left lane to avoid a construction roadway sign situated in the middle of the right lane. After plaintiff's vehicle struck the Ocon vehicle as it entered plaintiff's lane of travel, the Ocon vehicle proceeded to strike the rear of co-defendant's vehicle.

Although Murphy received traffic summonses for unsafe lane change and failure to yield to an emergency vehicle (VTL §§ 1128 and 1144[a]), the traffic offenses were disposed of in local court by pleas to stopping/parking on pavement in violation of VTL §1201(a).¹

The motion by defendants Ocon and Murphy for leave to amend their answer to include the emergency doctrine and seat belt defense as affirmative defenses is granted.

CPLR 3025(b) provides that leave to amend pleadings "shall be freely given upon such terms as may be just." Thus, motions for leave to amend are liberally granted absent prejudice or surprise (see Long Is. Tit. Agency, Inc. v. Frisa, 45 A.D.3d 649, 846 N.Y.S.2d 253). "A court hearing a motion for leave to amend will not examine the merits of the proposed amendment unless the insufficiency or lack of merit is clear and free from doubt ... In cases where the proposed amendment is palpably insufficient as a matter of law or is totally devoid of merit, leave should be denied" (id. at 649, 846 N.Y.S.2d 253 [internal quotation marks and citation omitted]; see Ricca v. Valenti, 24 A.D.3d 647, 648, 807 N.Y.S.2d 123).

Upon application of the standard applicable to motions to amend, the Court finds that the proposed amendments are not plainly lacking in merit and do not unduly prejudice or surprise plaintiff (Vermont Mut. Ins. Co. v Mowery Const., Inc., 96 AD3d 1218, 1219 [3d Dept 2012]) such that the motion should be denied.

[The emergency doctrine] recognizes that when

¹ The Court takes judicial notice that a plea of guilty to VTL §1201(a) in satisfaction of more serious Vehicle and Traffic Law violations is an oft used local court plea negotiation device from which no underlying factual predicate may properly be deduced. The Court has not been provided with any reason to here conclude otherwise.

an actor is faced with a sudden and unexpected circumstance 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 negligent if the actions taken are reasonable and prudent in the emergency context (Amaro v. City of New York, 40 NY2d 30, 36; Rowlands v Parks, 2 NY2d 64, 67; see also, PJI 2:14).

(Rivera v. New York City Tr. Auth., 77 NY2d 322, 327 [1991]).

There are factors present and potentially provable in this case to establish, at trial, that, although the sign was situated in Murphy's path of travel, Murphy was faced with an emergency situation such as may negate any finding of negligence (see Holtermann v. Cochetti, 295 AD2d 680, 681 [3d Dept 2002][although plaintiff's vehicle stopped for several minutes before accident, competent evidence existed to support a finding that darkness, heavy traffic filling defendant's view with a multitude of red taillights and plaintiff's failure to activate his emergency flashers coupled with intervening rise in the highway prevented defendant from seeing stopped vehicle until it presented an emergency situation]; Ferris v. Grogan, 84 AD3d 1571, 1572 [3d Dept 2011][plaintiff's disabled vehicle and subsequent dash into defendant's path of travel presented defendant with an emergency situation], app denied, 17 NY3d 709 [2011]).

The fact that plaintiff was not required by law to wear a seat belt while operating a state trooper vehicle (see VTL §§ 101 and 1229-c[3]), does not preclude a jury from considering same in assessing damages (see Ruiz v. Rochester Tel. Co., 195 AD2d 981, 981 [4th Dept 1993] citing Gardner v. Honda Motor Co., 145 AD2d 41, 47, lv dismissed 74 NY2d 715; Spier v. Barker, 35 NY2d 444, 450).

Finally, the Court denies plaintiff's motion for summary judgment on his General Municipal Law §205-e claim.

A police officer injured in the line of duty seeking to recover under General Municipal Law § 205-e must "identify a statute or ordinance with which the defendant failed to comply," and must "set forth facts from which it may be inferred that the defendant's negligence directly or indirectly caused" his or her injuries (Link v. City of New York, 34 A.D.3d 757, 758, 825 N.Y.S.2d 518; see Giuffrida v. Citibank Corp., 100 N.Y.2d 72,

79, 760 N.Y.S.2d 397, 790 N.E.2d 772). "Proving that the defendant's violation was an 'indirect cause' does not require the same amount of proof as proximate cause in common-law negligence, but requires a practical or reasonable connection between the statutory or regulatory violation and the injury" (Aldrich v. Sampier, 2 A.D.3d 1101, 1103, 769 N.Y.S.2d 338; see Giuffrida v. Citibank Corp., 100 N.Y.2d at 81, 760 N.Y.S.2d 397, 790 N.E.2d 772; Williams v. City of New York, 256 A.D.2d 332, 681 N.Y.S.2d 340).

(Cerati v. Berrios, 61 AD3d 915 [2d Dept 2009]).

Material questions of fact preclude the granting of judgment in favor of plaintiff and against defendants on plaintiff's 205-e cause of action. These include, but are not limited to, whether defendants failed to comply with the requirements of any statute including, as alleged, speeding, driving recklessly or following too closely. There are also questions of fact as to whether defendants were otherwise negligent in the operation of the vehicle, especially upon taking into account the emergency doctrine herein permitted for consideration (see supra).

Based upon the foregoing, it is hereby

ORDERED, that the moving defendants are hereby granted leave to serve an amended answer as herein permitted if served within twenty days of the date of this Decision & Order; and, it is further

ORDERED, that plaintiff's motion for summary judgment on his GML §205-e claim is denied; and it is further

ORDERED, that the parties shall appear for a Status Conference on October 26, 2014 at 9:30 AM.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
August 28, 2015

S/

HON. LEWIS J. LUBELL, J.S.C.

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