

Alloncius v Smithtown Fire Dept.

2017 NY Slip Op 31886(U)

September 6, 2017

Supreme Court, Suffolk County

Docket Number: 016870-2013

Judge: John H. Rouse

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INDEX NO. 016870-2013

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 06/21/2017
ADJ. DATE: 08/23/2017
Mot. Seq. # 004-MD

MOTION DATE: 06/22/16
ADJ. DATE: 08/23/2017
Mot. Seq. # 005-MG

DEBRA ALLONCIUS and EDWARD ALLONCIUS,

Plaintiffs

-against-

SMITHTOWN FIRE DEPARTMENT and JONATHAN PAPIA,

Defendants

DECISION & ORDER**TO:**

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Defendants dated May 17, 2017 on the ground that Plaintiff Debra Alloncius has not sustained a serious injury and that Defendants actions did not constitute a reckless disregard, the Affirmation for the Defendants by Gina Hatamik, Esq. affirmed on May 17, 2017 together with Exhibits A-R attached thereto; (2) Affirmation for Plaintiffs in Opposition Defendant's Motion for Summary Judgment by David L. Henerson, Esq. affirmed on July 26, 2017 with Exhibits 1-12 attached thereto (3) Affirmation in Support of Defendants' motion for summary judgment for Plaintiff Edward Alloncius on the Counterclaim supporting dismissal of Debra Alloncius' claim for lack of serious injury; (4) Affirmation in Reply for Defendants by Gina Hatami, Esq. affirmed on August 22, 2017 with Exhibit A attached thereto;

(5) Notice of Motion by Plaintiff, Edward Alloncius, on the Counterclaim, dated May 25, 2017, in which Edward Alloncius contends Defendants were the sole proximate cause for the accident, Affirmation for Plaintiff on the Counterclaim by Shawn P. O'Shaughnessy, Esq. affirmed on May 25, 2017 with Exhibits A-H attached thereto; (6) Affirmation in Opposition for Defendants by Gina Hatami, Esq. affirmed on June 12, 2017 with Exhibits A-O attached thereto; (7) Reply Affirmation for Plaintiff on Counterclaim by Shawn P. O'Shaughnessy, Esq. affirmed on June 16, 2017

ORDERED that the motion (Seq. #004) by Defendants for summary judgment on the ground that Plaintiff Debra Alloncius has not sustained a serious injury and further that Defendants actions did not constitute a reckless disregard is denied as there are questions of fact with respect to whether the Plaintiff suffered a serious injury and whether Defendant Jonathan Pappia was operating the fire truck with lights and siren activated;

ORDERED that the motion (Seq. #005) by Plaintiff Edward Alloncius for summary judgment on the counterclaims is denied in part and granted in part, in that there is a question of fact as to whether Jonathan Pappia was operating the fire truck with both lights and siren; and it is further

ORDERED that, if upon the trial of this action, Plaintiffs prove by a preponderance of the evidence that Jonathan Pappia was *not* operating his vehicle with emergency lights and siren, then the fault for this collision is his alone and liability against the Defendants will have been established; and it is further

ORDERED that upon the trial of this action the first question to be presented to the jury is whether Jonathan Pappia was operating the fire truck with lights and siren activated prior to the collision; and if not, then whether Plaintiff suffered a serious injury; and if so what were her damages for which the Defendants are solely liable.

DECISION

This action was commenced by filing a summons and complaint on June 27, 2017. The action arises out a collision on October 20, 2012 at about 3:00 p.m. Defendants move for summary judgment and allege that Jonathan Pappia was operating a fire truck from the firehouse located on Elm Avenue, the fire truck was located to the rear so Mr. Pappia took Lawrence Avenue southbound and followed it to its junction with Maple Avenue and turned right to go northbound on Maple Avenue. Mr. Pappia testified in his examination before trial that the traffic in the northbound lane was at a standstill because traffic had been stopped at Main Street as a precaution because of a gas leak in the area so he proceeded with lights and siren on in the southbound lane which had no traffic. Edward Alloncius, the Plaintiff's spouse, who had been traveling northbound on Maple Avenue in a Chevy Suburban began to turn left into a driveway at 80 Maple Avenue and collided with a fire truck driven by Defendant Jonathan Pappia. Defendants move for summary judgment on the ground that the Mr. Pappia did not operate the fire truck in a reckless as necessary before the imposition for liability for the operation of an emergency vehicle.

VTL § 1104 Authorized emergency vehicles provides:

(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 emergency vehicle may:

1. Stop, stand or park irrespective of the provisions of this title;
2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as he does not endanger life or property;
4. Disregard regulations governing directions of movement or turning in specified directions.

(c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.

(d) An authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits for the purpose of calibrating such vehicles' speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as an authorized emergency vehicle shall not be prohibited from using any sidewalk, highway, street or roadway during an emergency operation.

(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.

(f) Notwithstanding any other law, rule or regulation to the contrary, an ambulance operated in the course of an emergency shall not be prohibited from using any highway, street or roadway; provided, however, that an authority having jurisdiction over any such highway, street or roadway may specifically prohibit travel thereon by ambulances if such authority shall deem such travel to be extremely hazardous and would endanger patients being transported thereby.

The Court of Appeals has articulated the standard of care in cases of an emergency vehicle responding to an emergency

"[A fireman's conduct in responding to an emergency call] may not form the basis of civil liability to an injured [party] unless the [fireman] acted in reckless disregard for the safety of others. This standard demands more than a showing of a lack of "due care under the circumstances --the showing typically associated with ordinary negligence claims. It requires evidence that the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow"

*Saarinen v. Kerr, 84 N.Y.2d 494 at 501 (1994),
fireman substituted for police officer in quote.*

Defendant's have made a *prima facie* case that Jonathan Pappia was operating the fire truck in response to an emergency and did not operate the vehicle in disregard of known or obvious risk that was so great as to make it highly probable that harm would follow.

However, Plaintiff in opposition contends that her husband Edward turned on his turn signal approximately four seconds prior to turning and had slowed the vehicle to approximately ten miles per hour when they turned and were struck in the driver side of their vehicle and only heard a brief "whoop" of a siren immediately before the collision. Plaintiff also contends that Defendant did not have his emergency lights activated. Plaintiffs have raised a question of fact with respect to whether Defendant was operating with lights and siren, a precondition to being afforded the protections of VTL § 1104. *Kabir v County of Monroe, 16 N.Y.3d 217 (2011); Pollak v Maimonides Med. Ctr., 136 A.D.3d 1008 (2nd Dept. 2016); and Bonafede v Bonito, 145 A.D.3d 842 (2nd Dept. 2016)*. Accordingly, with respect to the operation of the Defendants' fire truck the first threshold question will be whether it was being operated with lights and siren activated.

Defendants have similarly made a *prima facie* case that Plaintiff did not suffer a serious injury as defined by Insurance Law § 5102(d) as a result of the subject accident. See *Toure v Avis Rent*

A Car Sys., 98 NY2d 345, 774 N.E.2d 1197, 746 N.Y.S.2d 865; Gaddy v Eyler, 79 NY2d 955, 956-957, 591 N.E.2d 1176, 582 N.Y.S.2d 990). However, in opposition Plaintiff has raised a question of fact with respect to whether she sustained serious injuries to the cervical and lumbar regions of his spine and to his left shoulder under the permanent consequential limitation of use and significant limitation of use categories of Insurance Law § 5102(d) (see Perl v Meher, 18 NY3d 208, 218-219, 960 N.E.2d 424, 936 N.Y.S.2d 655).

Plaintiff, Edward Alloncius, has moved for summary judgment on the counterclaim, and as provided *supra* the first inquiry that must be resolved is whether Defendant Jonathan Pappia was operating an emergency vehicle with both lights and sirens, if that is the case, then Defendants bear no responsibility for this accident. If, however, Jonathan Pappia was not operating the vehicle with lights and siren, then Plaintiff under the standards of ordinary negligence has made a *prima facie* case that the responsibility for the accident for the Pappia vehicle being driven without both lights and siren is fully responsible for the collision and Edward Alloncius was free from negligence for the collision with the vehicle that struck Plaintiff's car in the side. Defendants have not raised a triable issue of fact, except as to whether Defendant Jonathan Pappia was operating the vehicle with lights and siren.

The foregoing shall constitute the decision and order of the court.

Dated: September 6, 2017



JOHN H. ROUSE, Acting J.S.C.

NON FINAL DISPOSITION