

Lucky v Gray

2016 NY Slip Op 32177(U)

October 26, 2016

Supreme Court, Suffolk County

Docket Number: 30417/2013

Judge: Joseph A. Santorelli

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PUBLISH

SHORT FORM ORDER

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CAL No. _____

COPY

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-8-16; 7-14-16;
7-28-16 & 8-3-16

SUBMIT DATE 9-29-16
Mot. Seq. # 02 - MG; case disposed
Mot. Seq. # 03 - MG
Mot. Seq. # 04 - MG
Mot. Seq. # 05 - MD

-----X
MARY SUSAN LUCKY, as Administrator of
the Estate of SHIELA L. ROBINSON,
Deceased,

Plaintiff,

-against-

KENNETH J. GRAY, ET AL.,

Defendants.

-----X

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Upon the following papers numbered 1 to 61 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13 (#02), 14 - 28 (#03), 29 - 35 (#04) & 36 - 45 (#05); ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers; Replying Affidavits and supporting papers 46 - 53 & 54 - 61; Other; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED, that these motions are consolidated for purposes of this determination.

Defendants, Robert Hughes, Keyspan Corporation and Keyspan Gas East Corporation, move for an order pursuant to CPLR 3212 granting summary judgment in their favor and dismissing all claims and cross claims. Defendant, Kenneth J. Gray, moves for an order pursuant to CPLR 3212 granting summary judgment in his favor and dismissing all claims and cross claims. Defendant, Roberto Hernandez, moves for an order pursuant to CPLR 3212 granting summary judgment in his favor and dismissing all claims and cross claims. The plaintiff opposes the motions and cross moves for an order compelling the defendant to produce discovery.

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The plaintiff commenced this action to recover damages for personal injuries allegedly sustained and in the wrongful death of decedent Sheila L. Robinson on January 16, 2013 at approximately 6:12 am when she was struck by three motor vehicles on the westbound Northern State Parkway. The defendants allege that there were adverse weather conditions, including rain, sleet and snow, at the time of the accidents. It is alleged that the first vehicle that struck the decedent was being operated by defendant Kenneth J. Gray. Defendant Gray states that something hit his passenger rearview mirror while he was driving in the right lane of the Northern State Parkway. He alleges that he did not see anything before or after the accident and kept driving to work. Once he arrived at work he heard about a fatal motor vehicle accident and contacted the New York State Troopers to make a statement. The second vehicle that struck the decedent was being operated by defendant Roberto Hernandez. Defendant Hernandez states that he heard “a noise of driving over something” in the road and was told by his passenger that he just hit a body. He pulled his car over and observed the decedent’s body in the middle of the road. The third vehicle that struck the decedent was owned by defendant Keyspan Corporation, and was being operated by defendant Robert Hughes. Defendant Keyspan Gas East Corporation is the employer of defendant Hughes. Defendant Hughes alleges that he saw brake lights on the vehicle in front of his so he applied his brakes. He observed an unmoving object on the roadway directly in front of his vehicle, realized that it was a body and could not stop or maneuver his vehicle away from the decedent’s body in time. Defendant Hughes pulled over and then backed his vehicle up behind the decedent’s body to protect her from being struck by any further vehicles. Defendant Hernandez states that he observed defendant Hughes back up his vehicle, activate its lights and attempt to block the body on the roadway so that no other vehicles could strike it. Defendant Hughes’ vehicle was equipped with a dashboard camera that recorded the incident.

CPLR §3212(b) states that a motion for summary judgment “shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission.” If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts, cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff’d 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v. Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v. Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” (CPLR3212 [b]; *Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v. Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore,

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the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v. Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v. Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v. Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v. Keltie's Bum Steer*, *supra*, citing *Glick & Dolleck v. Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v. Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd.*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

The emergency doctrine holds that a driver faced with a sudden and unexpected circumstance, not of his own making, that leaves him with little or no time for reflection and compels him to make a quick decision without weighing alternative courses of conduct, "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 Authority*, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004], citing *Caristo v Sanzone*, 96 NY2d 172, 750 NE2d 36, 726 NYS2d 334 [2001]; *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 569 NE2d 432, 567 NYS2d 629 [1991]).

In *Bello v Tr. Auth.*, *supra* at 60-61, the Court held that

Although the existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact (see *Morgan v Ski Roundtop*, 290 A.D.2d 618, 736 N.Y.S.2d 135 [2002]), they may in appropriate circumstances be determined as a matter of law (see *Huggins v Figueroa*, 305 A.D.2d 460, 762 N.Y.S.2d 404 [2003]). Here, invoking the emergency doctrine, the Transit Authority established its prima facie entitlement to judgment as a matter of law by demonstrating that an emergency stop was made only after distressed and panicking passengers urgently told the driver that a man had left a bomb on the bus. In opposition, the plaintiff failed to raise a triable issue of fact as to the driver's negligence (see *Huggins v Figueroa*, *supra*). Nevertheless, the plaintiff contends that, having failed to plead the emergency doctrine as an affirmative defense, the defendants are precluded from relying on it. We disagree.

Motion of Defendants Hughes and Keyspan

The Court concludes that defendants Robert Hughes, Keyspan Corporation and Keyspan Gas East Corporation, have made a prima facie showing of their entitlement to judgment as a matter of law in that defendant Hughes' description of events surrounding the accident supports the application of the emergency doctrine (see *Jacobellis v New York State Thruway Auth.*, 51 AD3d 976, 858 NYS2d 786

[2d Dept 2008]). Defendant Hughes was operating the third vehicle that struck the decedent as she lie motionless in his lane of travel. A review of the dashboard camera shows that defendant Hughes was faced with a sudden and unexpected circumstance, not of his own making, that left him with little or no time for reflection and therefore he can not be found negligent in light of the emergent circumstances. In response the plaintiff has failed to raise a triable issue of fact as to these defendants. Therefore, summary judgment is warranted and the complaint is hereby dismissed as to defendants Robert Hughes, Keyspan Corporation and Keyspan Gas East Corporation. (see *Borra v. Walden Books, Inc.*, 298 AD2d 542, 748 NYS2d 670 [2d Dept 2002]).

Motion of Defendant Roberto Hernandez

The Court concludes that defendant Roberto Hernandez has made a prima facie showing of his entitlement to judgment as a matter of law in that defendant Hernandez's description of events surrounding the accident supports the application of the emergency doctrine (see *Jacobellis v New York State Thruway Auth.*, 51 AD3d 976, 858 NYS2d 786 [2d Dept 2008]). Defendant Hernandez was operating the second vehicle that struck the decedent. Defendant Hernandez testified that after the decedent was struck by co-defendant Kenneth J. Gray, his passenger observed the body flying and coming down in front of his vehicle. He also stated that he "heard the noise of going over something" and then stopped his vehicle about one hundred feet after the impact. Defendant Hernandez's testimony establishes that he was faced with a sudden and unexpected circumstance, not of his own making, that left him with little or no time for reflection and therefore he can not be found negligent in light of the emergent circumstances. In response the plaintiff has failed to raise a triable issue of fact as to this defendant. Therefore, summary judgment is warranted and the complaint is hereby dismissed as to defendant Robert Hernandez. (see *Borra v. Walden Books, Inc.*, 298 AD2d 542, 748 NYS2d 670 [2d Dept 2002]).

Motion of Defendant Kenneth J. Gray

Defendant Gray testified that at the time of the incident it was still dark and the weather conditions were a combination of rain, sleet and snow. He further testified that at the location of the incident the Northern State Parkway has no shoulder, a slight incline and curves to the left. He stated that he did not see anyone prior to the accident and heard a loud bang but did not feel any impact. He explained the sound as sounding "like a rock hit my windshield". He looked in his rearview mirror after hearing the sound and testified that "I saw a car behind me and that's about it... I didn't see anything out of the ordinary." He testified that he realized that he might have been involved in the accident when he spoke to his wife later in the day and she told him about an accident with a pedestrian that morning. After learning this information he stated that he contacted the police and gave a statement. On November 7, 2013 a proceeding pursuant to New York State Vehicle and Traffic Law section 510 was convened against defendants Gray, Hernandez and Hughes, and held before Administrative Law Judge Chester J. Weinstein. Judge Weinstein's findings were that

On January 16, 2013, at approximately 6:12 a.m., Respondent Gary was driving a 2004 Volkswagen Suburban... It was dark at this early hour of the morning and the road surfaces were wet and slushy. At this point in time, a pedestrian was apparently

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standing on or about the edge of the westbound right lane of the parkway, and was struck by respondent Gray's vehicle... Each of the respondents appeared and testified at the hearing and confirmed the movement and direction of travel... They each noted that they were traveling at or about the posted speed limit fixed for the Northern State Parkway as they approached Commack Road, all traveling in the right lane. Respondent Gray specifically noted that as he approached the above location he suddenly heard a bump on the passenger side of his vehicle. He further advised that he never saw a pedestrian on the roadway... Trooper Gillespie of the NYS Police appeared and testified at the hearing... his testimony as well as the content of his Police Accident Report... attributed none of the contributory factors to this fatality to any of the named respondents... At the time of these impacts, it was dark and the road surfaces were wet and slushy... Decedent's sudden appearance on the roadway and the manner in which she placed herself in the roadway made these collisions unavoidable for each of the respondents. Under the circumstances, the respondents were neither grossly negligent nor in violation of any of the provisions of the Vehicle and Traffic Law (including failure to exercise due care) which caused or contributed to this unfortunate accident.

Based upon a review of the motion papers the Court concludes that defendant Kenneth J. Gray has made a prima facie showing of his entitlement to judgment as a matter of law. In response the plaintiff has failed to raise a triable issue of fact as to this defendant. Accordingly, summary judgment is warranted and the complaint is hereby dismissed as to defendant Kenneth J. Gray. (see *Borra v. Walden Books, Inc.*, 298 AD2d 542, 748 NYS2d 670 [2d Dept 2002]).

Based upon the foregoing the plaintiff's complaint is dismissed in its entirety.

The plaintiff's motion is denied as moot.

The foregoing constitutes the decision and Order of the Court.

Dated: October 26, 2016



HON. JOSEPH A. SANTORELLI
 J.S.C.

 X FINAL DISPOSITION NON-FINAL DISPOSITION