Santillo v State of New York
2004 NY Slip Op 30406(U)
July 22, 2004
Court of Claims
Docket Number: Claim No. 106133
Judge: Philip J. Patti

ORIGINAL

STATE OF NEW YORK COURT OF CLAIMS

PIERINA SANTILLO and ALBERT SANTILLO,

Claimants,

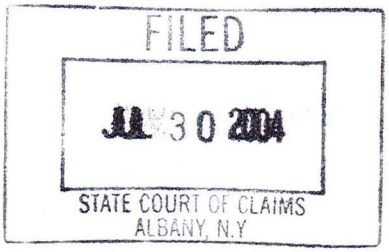
DECISION AND ORDER

-v-

THE STATE OF NEW YORK,

Claim No. 106133
Motion No. M-66809

Defendant.



DOROTHY TRIPPE and ANTHONY TRIPPE,

Claimants,

-v-

THE STATE OF NEW YORK,

Claim No. 106134
Motion No. M-66808

Defendant.

BEFORE: HON. PHILIP J. PATTI
Judge of the Court of Claims

APPEARANCES:

For Claimants:
FARACI & LANGE
BY: ANGELO G. FARACI, ESQ.

For Defendant:
HON. ELIOT SPITZER
Attorney General of the State of New York
BY: THOMAS G. RAMSAY, ESQ.
Assistant Attorney General

Entered In Order Book No. 280
Entered In Claim Book No. KWB
Date 07/30/04

On July 16, 2003, the following papers were read on motions by Defendant[1] for summary judgment dismissing the claims:

Amended Notices of Motion, Affirmations and Exhibits Annexed

Opposing Affirmations and Exhibits Annexed

Defendant's Reply Affirmations and Affidavits

Claimants' Reply Affirmations

Filed Papers: Claims; Answers

Upon the foregoing papers these motions are denied.

This decision addresses two motions, each made in the above-entitled claims by the State of New York, seeking dismissal and/or summary judgment. The relevant facts and issues of law are identical in both motions, and thus this decision and order resolves both. To the extent that Defendant's Motion No. M-66808 separately seeks a default judgment on the counterclaim alleged in the Trippe claim, that issue is addressed distinctly.

Both claims allege culpable conduct by the State of New York relating to a motor vehicle accident on March 17, 2001, involving a 1993 Ford Aerostar van operated by Claimant Dorothy Trippe[2] in which Claimant Pierina Santillo[3] was a passenger. The accident allegedly involved one or two snowplows owned and operated by the New York State Department of Transportation (DOT) on State Route 390 in the Town of Greece.

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1 The Court has *sua sponte* amended the caption to reflect the only properly named defendant.

2 The claim of Anthony Trippe, who was a passenger in the back seat, is derivative in nature.

3 The claim of Albert Santillo, who was a passenger in the back seat, is derivative in nature.

The claims allege that "[a]t the time of the accident, the snowplow that caused the accident was not engaged [engaging][4] in plowing nor was it exhibiting the flashing lights required when engaged in the operation of plowing; the snowplow was raised and not in use, and the vehicle upon which it was mounted entered upon [the][5] Route 390 expressway from a side road" (Trippe claim, ¶10; Santillo claim, ¶9). The allegations of the two claims are substantively identical. The nonderivative causes of action allege (1) negligence and (2) gross negligence and recklessness by the State in the operation of its snowplows.

Cutting directly to the salient point, the major issue before me relates to the question whether under the circumstances the State of New York may be held answerable in damages, as the Defendant contends that it is subject only to the "recklessness" standard articulated in Vehicle and Traffic Law §1103. The State matter-of-factly asserts that it is apparent that the snowplows in question were engaged in maintenance work on the highway at the time of the accident, and as such, it may not be held answerable in simple negligence.

Claimants all demur, and argue that the snowplow driven by the Defendant's now-former employee Jeffrey VanRoo traveled across three lanes of traffic on Route 390 North, struck the Trippe vehicle which was riding in the far left (passing) lane of traffic, causing it to spin out of control into the path of the second snowplow being operated by the Defendant's employee Robert Stork. Claimants contend that the VanRoo snowplow was not engaged in any highway maintenance operation, was not salting or plowing, and that there is evidence to suggest that he was on his way back to the shop to obtain another load of salt. It is further alleged that the plow's rotating flashing

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4 So in the Santillo claim.

5 So in the Trippe claim.

lights were not engaged. Thus, concludes the Claimants, there are clear issues of fact arising from the "irreconcilable versions" of what happened, as described by the four Claimants and three State employees, as well as discrepancies in the testimonies of the three State employees.

The two snowplow drivers (Stork and VanRoo) aver that they had been plowing and salting Route 390 in a southerly direction, that they exited Route 390 at Ridgeway Avenue and that both plows reentered Route 390 in a northbound direction. Defendant's summarization of the deposition testimonies of the drivers reflects slightly different characterizations of the tasks performed upon the northbound reentry of the plows. It is contended that Robert Stork "began plowing and salting the Northbound lanes," while Jeffrey VanRoo "re-entered Route 390 Northbound **to** plow and salt the Northbound lanes" [emphasis supplied] (Defendant's Affirmations, ¶8-A and ¶8-B). The State has not pointed to any testimony from any of its three employees that avers that VanRoo **did** plow or salt after he reentered the northbound lanes prior to the accident.

Therein lies the distinction that Claimants rely upon to bring these claims outside the penumbra of the recklessness standard of Vehicle and Traffic Law §1103, albeit while not conceding that they cannot establish recklessness.

Claimants argue that summary judgment should be denied because there are material issues of fact with regard to VanRoo's actions, which not surprisingly they characterize as reckless, but more to the point, question whether he was engaged in, or was about to become engaged in, maintenance work on the highway at the time of the initial collision with the Trippe vehicle.

The crux of this entire opinion revolves around the decision of the Court of Appeals in Riley v County of Broome (95 NY2d 455), and its progeny. The Court of Appeals affirmed that a snowplow (the offending vehicle in the underlying case of Wilson v State of New York, decided

therewith), was exempt from the rules of the road if it was "actually engaged in work on a highway" (Vehicle and Traffic Law §1103 [b]). In affirming the Fourth Department's decision in Wilson v State of New York, where the plow in question was "... plowing snow on a highway at the time of the accident..."(269 AD2d 854), the Court of Appeals noted that the snowplow was "involved in work on a highway" (95 NY2d 455, 460), "cleaning the road during a snowstorm" (***id*** at 463), and thus it was "actually engaged in work."

So at least in Wilson, ***supra***, the snowplow in question was actually plowing snow. Here at the very least, at the time of the accident there is nothing that establishes that the VanRoo plow was plowing, was salting or was sanding. There are factual disputes as to whether the VanRoo plow had its revolving lights on at the time of the accident, but that has no bearing on whether his actions in just driving on Route 390 North to fill his truck with salt falls within the penumbra of being "actually engaged in work."

In Quackenbush v State of New York (Ct Cl, UID #2000-013-022 [Claim No. 95363 - Motion No. M-61609], Sept. 5, 2000)[6], I reviewed nuances in adjudging whether certain conduct comports to the actual engagement standard. I noted that the addition of the adverb "actually" to modify the verb "engaged" led to the conclusion that the phrase "actually engaged" therefore suggests that the "work" on the highway is "in fact" taking place at the time of the incident and that the vehicle is directly "involved in" the work's performance, and that nothing in the legislative history of Section 1103[b] suggests that the Legislature made any changes to expand the exemption to include travel to and from the work site or other peripheral activity.

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[6] Decisions and selected orders of the Court of Claims are available via the Internet at www.nyscourtofclaims.state.ny.us/decisions.

With that in mind, I agreed with Judge Collins that there was an adequate nexus shown in McDonald v State of New York (176 Misc 2d 130) between that snowplow's U-turn across the median of Interstate 81 and its completion of ongoing snowplowing activity. McDonald's counsel argued that because the snowplow operator was not actually plowing snow at the time, the snowplow operator was not "engaged in work on a highway," as stated in the statute, but after a trial Judge Collins found that that operator made the U-turn while "halfway through completing her plowing 'beat'," and was engaged in the process of snow removal, and hence in work. Since the instant motions precede a trial, and because there are unresolved factual issues, the circumstances here are distinguishable.

I recently revisited the implications of Quackenbush v State of New York (Ct Cl, UID #2000-013-022 [Claim No. 95363 - Motion No. M-61609], Sept. 5, 2000, ***supra***) in McLeod v State of New York (UID #2004-013-009, Claim No. 105861, Motion Nos. M-67036, CM-67072), filed just a few months ago. Quackenbush was a liability decision rendered just a few months prior to the Riley decision at the Court of Appeals, and after a judgment in damages in Claimant's favor, long after the Riley decision, the matter was settled without any appeal having been taken by the Defendant, despite the potential contrariness of Riley. The State, having foregone any appellate review of the Quackenbush analysis, suggests that the parameters of being 'actually engaged' is an evolutionary process.

Accordingly, the Defendant's motions for summary judgment are denied on the basis that material issues of fact exist preventing me from deciding whether VanRoo was actually engaged in work. This is an area of law requiring the trial courts to evaluate these "gray area" scenarios ad hoc and for the appellate courts to harmonize the results. Thus, if VanRoo was only returning to

base to fill his truck with salt, then I am unprepared in these summary judgment motions to determine that, as a matter of law, the State is entitled to benefits of Vehicle and Traffic Law §1103[b]. That of course could change after trial.

It also cannot be determined as a matter of law, based on the disputed questions of material facts, that VanRoo did not engage in reckless conduct. I will need to test the veracity and credibility of those State employees, plow drivers VanRoo and Stork and wingman Gillard, as well the inhabitants of the Trippe vehicle, at a trial before I can make such determination.

Defendant has also sought a default judgment with respect to the counterclaim which it asserted in the answer to the Trippe claim herein and for which no reply was filed or served. The counterclaim seeks equitable share[s] of damages in accordance with CPLR article 14, in the event of a recovery in the Santillo claim. Claimants demur, arguing that the counterclaim sounds like an affirmative defense since it does not constitute a separate cause of action.

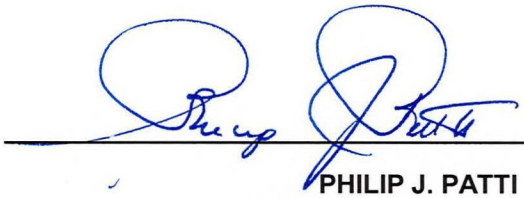
CPLR 1403 permits a cause of action for contribution to be asserted in a counterclaim or by a separate action, with the practice commentaries noting that it is a permissible hypothetical cause of action (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1403 at 550); ***also see*** Bay Ridge Air Rights v State of New York, 44 NY2d 49). The issue is whether there was any negligence in this accident which is attributable to the Trippe Claimants, and if so, the State's preservation of the application of article 14 of the CPLR to those damages. Regardless of whether this is deemed an affirmative defense or preserved as a counterclaim, the Defendant has the burden of proof, with the same elements of proof required at trial.

Nonetheless, this was clearly denominated as a counterclaim, and it could not be unilaterally ignored. But since there will be no prejudice to the Defendant, I deny the Defendant's

motion for a default judgment and the Trippe Claimants may serve and file a reply to the counterclaim within 40 days of service of a file-stamped copy of this order.

Accordingly, the motions are denied in their entirety.

Rochester, New York
July 22, 2004



PHILIP J. PATTI
Judge of the Court of Claims