

Elkin v Deloach

2007 NY Slip Op 30133(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0013151

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 9/20/06
ADJ. DATE 11/8/06
Mot. Seq. # 002 - MG

-----X
MARIA ELKIN and GEORGE ELKIN, :
 :
 Plaintiffs, :
 :
 - against - :
 :
 THOMAS DELOACH and NATIONAL WASTE :
 SERVICE, :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 15; Notice of Cross Motion and supporting papers _____;
Answering Affidavits and supporting papers 16 - 21; Replying Affidavits and supporting papers 22 - 23;
Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by plaintiffs, Maria Elkin and George Elkin, for an order pursuant to CPLR 3212, granting them summary judgment on the issue of liability and against defendants, Thomas De oach and National Waste Service (“National Waste”), and setting this case down for an immediate assessment of damages is granted.

This is an action to recover damages, personally and derivatively, for personal injuries allegedly sustained by the plaintiff, Maria Elkin, as a result of a motor vehicle accident that occurred on March 1, 2004 on Sunrise Highway, at or about its intersection with Route 109, County of Suffolk, New York. Plaintiff’s vehicle, while traveling eastbound on Sunrise Highway, was struck by an L-shaped piece of metal, approximately 5 inches long, that fell from the back of the roll-off truck operated by defendant Thomas Deloach and owned by defendant National Waste Service. Plaintiff was caused to sustain severe injuries. At the time of the accident, defendant Deloach, driving in the center lane, passed the plaintiff with an uncovered roll-off truck, carrying a 30 yard roll-off container containing small metal file cabinets.

Plaintiff now moves for summary judgment on the basis that the sole proximate cause of the accident was defendant Deloach's failure to cover his load in violation of Vehicle and Traffic Law § 380-a. In support, plaintiff submits, the pleadings, copies of the deposition transcripts of plaintiffs, and defendants, photographs of plaintiff's vehicle, and a copy of the police incident report.

Defendants oppose the instant motion on the grounds that there is a material issue of fact as to whether or not the load being transported by defendant Deloach required a covering to prevent any loose debris from escaping. Defendants submit, defendant Deloach's affidavit.

Plaintiff Maria Elkin testified that as she was traveling in the right lane of eastbound Sunrise Highway, the defendants' truck passed her carrying a 30 to 40 yard dumpster. She stated that as the truck was passing her, a piece of steel flew off the truck, striking her vehicle. Mrs. Elkin testified that she braced herself for impact by grabbing hold of the steering wheel while "ducking" under the dashboard and "slamming" on the brakes. Plaintiff testified that she heard a "huge crash against her car" and looked up to see the truck continuing to drive down the road. Plaintiff then testified that once she caught up to the truck, the passenger came out of the truck and informed her that "they saw it fly out and thought it just hit her windshield." Plaintiff further testified that the driver of the truck apologized to her, telling her he was sorry.

Defendant Deloach testified that he operates a roll-off truck for defendant National Waste and transports garbage and demolition. He stated that the roll-off truck is equipped with a hoist that lifts up roll-off containers. Defendant Deloach testified that he received on-the-job training, which included safety training on picking up roll-off containers. He stated he picked up a half-full 30 yard roll-off container in Copiague prior to the accident, which contained small metal file cabinets. He testified that he walked around the truck after the container was lifted onto the truck and did not observe anything "hanging" from the truck. Defendant Deloach testified that he did not cover the container before leaving Copiague with the 50 yard canvas covering that was secured to the truck with rubber bungee cords. He stated the covering is used to cover high loads and the driver is responsible for placing the covering over the load. Defendant Deloach testified that he was not sure if something fell from the truck because he did not see anything fall. Mr. Deloach stated he first became aware of the incident when he saw a guy passing on his left waving at him. Mr. Deloach stated he looked into his side mirror and pulled over to the right shoulder to see why the guy was waving and the plaintiff, Mrs. Elkin, arrived shortly thereafter. He stated the plaintiff informed him that something had hit her car and he observed a large scrape on the fender, a hole and a hole at the top of the windshield. Defendant Deloach further testified that he apologized to her "if something fell off his truck and hit her and to let him call his dispatcher."

Mr. Richard Leone testified on behalf of defendant National Waste. Mr. Leone testified that he and his brother have been the owners of National Waste Services, LLC. since 2001. He stated that Mr. Deloach is an employee of his company and was also employed with the company on the day of the accident. Mr. Leone testified that he became aware of the accident when Mr. Deloach informed him that a piece of metal struck a car and Mr. Deloach thought it came from his load. Mr. Leone testified that the load was supposed to be covered with a tarp and that he got the feeling that Mr. Deloach had been lazy about placing the covering on the load. Mr. Leone further testified that the company holds quarterly safety meetings with its employees, which includes properly "tarping" loads.

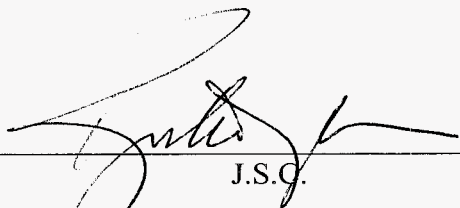
The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see, Alvarez v Prospect Hospital*, 68 NY2d 320 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]).

Vehicle and Traffic Law § 380-a requires the usage of either covers, tarpaulin or other devices approved by the commissioner of transportation on trucks or trailers engaged in the transportation of any loose substances on public highways to prevent the falling of any loose debris from said truck or trailer.

Here, plaintiffs have established their entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital, supra; Winegrad v New York Univ. Med. Center, supra*). Mr. Deloach's deposition testimony reveals that after his initial inspection of the roll-off container while it was on the ground, he did not inspect the container again after it was hoisted onto the roll-off truck in a slanted position. Therefore it cannot be said that Mr. Deloach exercised reasonable care or made an informed decision when he decided not to follow § 380-a of Vehicle and Traffic Law (*Espinal v Sureau*, 262 AD2d 523, 691 NYS2d 335 [1999]; *see also*, Vehicle and Traffic Law § 380-a). Mr. Deloach as an operator of a truck carrying "loose substances" was required to observe the statute and has failed to put forth any evidence that would excuse his duty and constitutes negligence per se (*Arricale v Leo*, 295 AD2d 920, 744 NYS2d 109 [2002]; *Davis v Pizzagalli Constr. Co.*, 186 AD2d 960, 589 NYS2d 960 [1992]; *Petosa v New York*, 52 AD2d 919, 383 NYS2d 397 [1976]). Furthermore, the affidavit submitted by defendant Deloach appears to be an attempt to raise a question of fact in an effort to correct or avoid the consequences of dismissal by raising a feigned issue of fact (*Tejada v Jonas*, 17 AD3d 448, 792 NYS2d 605 [2005]; *Novoni v La Parma Corp.*, 278 AD2d 393; 717 NYS2d 379 [2000]; *Capraro v Staten Island Univ. Hosp.*, 245 AD2d 256, 664 NYS2d 826 [1997]; *Miller v City of New York*, 214 AD2d 657, 625 NYS2d 271 [1995]).

Accordingly, plaintiffs' motion for summary judgment is granted. The plaintiff is directed to serve a copy of this order with notice of its entry upon the Calendar Clerk of this Court. Upon such service, the Calendar Clerk is directed to place this matter on the Calendar Control Part Calendar for the next available date.

Dated: MAR 05 2007



J.S.C.
 FINAL DISPOSITION NON-FINAL DISPOSITION