

Nachshen v McGlore

2007 NY Slip Op 31487(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0001868/2005

Judge: Robert W. Doyle

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 2-23-07
ADJ. DATE 4-20-07
Mot. Seq. # 003 - MG
004 -XMG

-----X		
SCOTT NACHSHEN,	:	HARNICK & HARNICK
	:	Attorneys for Plaintiff Scott Nachshen
Plaintiff,	:	305 Broadway, Suite 602
	:	New York, New York 10007
- against -	:	
	:	CARMAN, CALLAHAN & INGHAM
PATRICK McGLORE and McGLORE	:	Attys for Defts/3rd Party Pltfs McGlore
TRUCKING, INC.,	:	266 Main Street
Defendants.	:	Farmingdale, New York 11735
-----X		
PATRICK McGLORE and McGLORE	:	RUSSO & APOZNANSKI
TRUCKING	:	Attys for 3 rd Party Deft Michelle Nachshen
	:	875 Merrick Avenue
Third-Party Plaintiff,	:	Westbury, New York 11590
	:	
- against -	:	
	:	
MICHELLE NACHSHEN,	:	
	:	
Third-Party Defendant.	:	
-----X		

Upon the following papers numbered 1 to 14 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-8; Notice of Cross Motion and supporting papers 9-14; Answering Affidavits and supporting papers ; Replying Affidavits and supporting papers ; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (003) by third party defendant Michelle B. Nachshen pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability and dismissing the third party complaint and all cross claims, ~~o~~pposed by defendant/third party plaintiff, is granted.

ORDERED that this motion (004) by plaintiff Scott Nachshen pursuant to CPLR 3212 for an order granting summary judgment on the issue of liability, opposed by defendants, is granted; and it is

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further

ORDERED that plaintiff is directed to serve a copy of this order with notice of 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 on the issue of damages.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Scott Nachshen in a two vehicle motor vehicle accident which occurred in the vicinity of Elwood Road at or near its intersection with Pulaski Road, Town of Huntington, County of Suffolk, State of New York, when defendant was making a left hand turn. Scott Nachshen was a passenger in the vehicle operated by Michelle Nachshen. A third party action which seeks indemnification against Michelle Nachshen was commenced by defendant/third party plaintiff Patrick McGlore and McGlore Trucking, Inc. The complaint and testimony by the parties set forth the date of the accident as October 13, 2004, however, the third party complaint sets forth the date of the accident as October 14, 2004.

In motion (003), third party defendant Michelle Nachshen seeks an order granting summary judgment dismissing the complaint and cross claims arguing she bears no liability for the happening of the accident. In motion (004), plaintiff seeks an order granting summary judgment on the issue of liability. Defendants Patrick McGlore and McGlore Trucking, Inc. oppose the motion.

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. 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]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). 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" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeraxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2nd Dept 1979]) and 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 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

Vehicle and Traffic Law §1141(a) provides, "[T]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard."

With regard to the motion for summary judgment on the issue of liability for the subject accident, the plaintiff and third party defendant rely primarily upon the deposition testimony given by each of them and defendant. While the copies of the deposition transcripts of plaintiff and third party defendants submitted to the Court are unsigned and unsworn and therefore not in admissible form, defendants have not objected to their use on the instant motions. The Court will therefore consider them.

Patrick McGlore testified at his examination before trial (third party defendant's exhibit B) that he was operating a 61 foot long Mack tractor-trailer transporting a forklift, heading west on Elwood Road, making a left hand turn onto Pulaski Road, when the accident occurred. There was a traffic light at the intersection of Elwood and Pulaski Road which was green. He signaled to make a left hand turn, was traveling about 2 to 3 miles an hour, stopped and put the truck into first gear. In the opposite direction there was a car and a bus in the turn lane waiting to make a left turn. He started to make the turn, did not see a car coming down the travel lane, but felt and heard a thump. He slammed on the brakes. He stated his cab was struck about halfway across the bumper on the driver's side, and the other vehicle was struck on the left door and back quarter panel on the left side of the vehicle.

Michelle Nachsen testified at her examination before trial (third party defendant's exhibit D) that she was traveling about 20 to 30 miles per hour when she first saw the front of the tractor trailer approaching in the opposite direction just before the intersection, just as she was about to enter the intersection. Had the accident not occurred she would have continued straight on Elwood. The truck started to turn in her direction at least a car length from her. She moved her car to the right to avoid the truck coming into her. She was almost midway through the intersection when the truck started to make its turn and collided with her vehicle. She stated the impact to her car was to the driver's side door, the door behind the driver's door, and the rear of the car by the wheel. The impact to the trailer was to the driver's side front fender.

Plaintiff testified at his examination before trial (third party defendant's exhibit C) that he was a passenger in the vehicle operated by his sister, Michelle Nachshen. She was traveling on Elwood Road. The closest vehicle ahead of her was about 15, 20 or thirty feet from their vehicle. He never saw the tractor trailer before the accident, only after. He felt a heavy impact and heard a crunch on the driver's side. The car spun around towards his right. He testified it felt like three times. The car came to rest in the middle of the intersection.

The evidence submitted clearly demonstrates defendant McGlore testified he started to make the left turn, did not see a car coming, but felt and heard a thump. It was then he realized something hit his truck. Since McGlore testified that he saw no vehicle approach, he has invoked the common-law rule that a motorist must see what there is to see (*see, Weigand v United Traction Col*, 221 NY 39; 1PJI 2:77) and unless its appearance in this case was truly talismanic, what there was to see was the Nachshen car (*Kiernan v Edwards*, 97 AD2d 750, 468 NYS2d 381 [2d Dept 1983]).

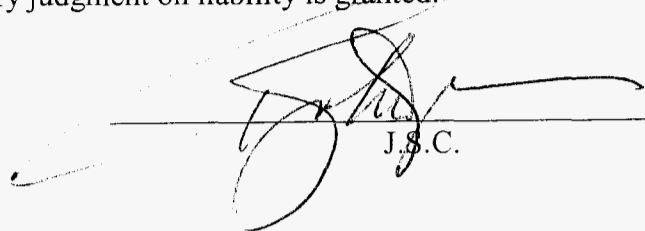
It is undisputed that defendant McGlore was making a left turn across Elwood Avenue, and did not see plaintiff's car heading in the opposite direction before he started executing his left hand turn. Therefore, as a matter of law, as required by Vehicle and Traffic Law §1141(a), McGlore did not yield the right of way to the Nachshen vehicle which was approaching the intersection from the opposite

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direction. The Nachshen vehicle was so close to the intersection as to constitute an immediate hazard. Therefore, both plaintiff and third party defendant have demonstrated prima facie entitlement to an order granting summary judgment. Defendant McGlore has not come forward with admissible evidence to raise a triable issue of fact to preclude summary judgment.

Accordingly, motions (002) and (003) by third party defendant Michelle Nachschen and plaintiff Scott Nachshen for an order granting summary judgment on liability is granted.

Dated: MAY 31 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION