

<b>Russo v Caporusso Contr. Corp., Inc.</b>
2007 NY Slip Op 31806(U)
June 5, 2007
Supreme Court, New York County
Docket Number: 0111133/2005
Judge: Deborah A. Kaplan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DEBORAH A. KAPLAN  
*Justice*

PART 22

DEBORAH RUSSO

INDEX NO. 111133/05

- v -

MOTION DATE 3-07-07

MOTION SEQ. NO. 001/002

CAPORUSSO CONTRACTING CORP., INC.  
and MARC L. LIBRETTO

MOTION CAL. NO. 107

[and a third-party action]

The following papers, numbered 1 to 7 were read on these motions and cross-motions to strike the note of issue, and compel discovery, preclude discovery and for summary judgment on the issue of liability.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Notice of Cross-Motion/ Order to Show Cause — Affidavits — Exhibits...

2

Notice of Cross-Motion/ Order to Show Cause — Affidavits — Exhibits ...

3

Answering Affidavits — Exhibits (Memo)

4

Replying Affidavits (Reply Memo)

5

Notice of Cross-Motion/ Order to Show Cause — Affidavits — Exhibits ...

6

Answering Affidavits — Exhibits (Memo)

7

**FILED**  
JUN 25 2007

Cross-Motion:  Yes  No

COUNTY CLERK'S OFFICE  
NEW YORK

I. Factual and Procedural Background

On July 11, 2005, plaintiff Deborah Russo exited a 99-cent store in Staten Island and walked to a vehicle operated and owned by third-party defendant Walbert C. Linwood. Linwood had stopped the vehicle in or near a construction site, waiting for the plaintiff to finish her shopping. While she was loading her purchase into the trunk, a backhoe owned by defendant Caporusso Contracting Corp. and operated by defendant Marc S. Libretto struck the vehicle, causing the trunk hood to strike the plaintiff in the head. The wheel of the backhoe then pinned her leg to the ground. She commenced the instant action against Caporusso and Libretto to recover damages for personal injuries she allegedly sustained in the accident. Caporusso and Libretto commenced a third-party action against Linwood.

Several motions are now before the court. (1) Defendants/third-party plaintiffs Caporusso and Libretto move to vacate the note of issue and certificate of readiness and direct plaintiff to appear for an independent neurological examination. (2) Third-party defendant Linwood cross-moves for the same relief as Caporusso and Libretto and to extend the time to file a motion for summary judgment. (3) In a separate cross-motion, Linwood moves for summary judgment on the issue of liability dismissing the complaint as against him. (4) The plaintiff opposes the motions to vacate the note of issue and supports the cross-motion of Linwood for summary judgment on the issue of liability dismissing the complaint as against him, and cross-moves for summary judgment on the issue of liability as against Caporusso and Libretto. She also moves to preclude the evidence of the independent medical examination at trial on the ground that the defendants failed to exchange the examining physician's report.

## II. Motions to Vacate the Note of Issue and Certificate of Readiness

The motion of defendants Caporusso and Libretto and the cross-motion of third-party defendant Linwood for an order vacating plaintiff Russo's note of issue and certificate of readiness and to direct her to appear for an IME are premised upon the movants' allegations that the plaintiff repeatedly failed to appear for a scheduled examination. However, the parties now represent that the IME was completed by Dr. Charles Bagley in December 2006 and there is no other outstanding discovery. Accordingly, the motion and cross-motion to strike the note of issue are denied as moot.

## III. Motions to Preclude Evidence and Extend Time for Summary Judgment Motion

The plaintiff's cross-motion to preclude evidence is granted to the extent that defendants Caporusso and Libretto are precluded from offering Dr. Bagley's testimony at trial unless they provide a copy of his report to the plaintiff within 15 days of entry of this order. The court notes that Caporusso and Libretto represent that they have exchanged the report, which is appended to their opposition papers as Exhibit "D", but the plaintiff claims that the exhibit was not attached to the papers sent to her.

That branch of Linwood's motion which seeks to extend his time for filing a motion for summary judgement is denied. The court notes that the IME report of Dr. Bagley, a board certified neurologist, states that the plaintiff suffered a right hip fracture and a crush injury to the right foot and ankle. See Insurance Law 5102(d).

## IV. Motions for Summary Judgment on the Issue of Liability

To prevail on a motion for summary judgment, the moving party must

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produce evidentiary proof in admissible form sufficient to show the absence of any material issue of fact and the right to judgment as a matter of law. If the moving party makes the requisite showing, the burden then shifts to the opposing party to come forward with proof in admissible form to raise a triable issue of fact requiring a trial. See Kosson v Algaze, 84 NY2d 1019 (1995); Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Winegrad v New York Univ. Med Ctr., 64 NY2d 851 (1985); Zuckerman v City of New York, 49 NY2d 557 (1980).

In deciding a summary judgment motion, the court must bear in mind that issue finding rather than issue determination is the key to summary judgment. See Sillman v Twentieth Century Fox Film Corp., 3 NY2d 395 (1957). Furthermore, since summary judgment is a drastic remedy which deprives a litigant of his or her day in court, the evidence adduced on the motion must be liberally construed in the light most favorable to the opposing party. See Kesselman v Lever House Restaurant, 29 AD3d 302 (1<sup>st</sup> Dept. 2006); Goldman v Metropolitan Life Ins. Co., 13 AD3d 289 (1<sup>st</sup> Dept. 2004).

In support of his motion for summary judgment on the issue of liability, Linwood proffers the pleadings in the third-party action, his own deposition testimony as well as that of the plaintiff and Libretto. In support of her cross-motion for the same relief, the plaintiff proffers the pleadings in the main action and refers to the deposition testimony submitted by Linwood in his motion papers and by Caporusso and Libretto's in their opposition papers.

The plaintiff testified that she was a passenger in Linwood's car and asked him to drop her off in front of the store on St. Paul's Avenue near Van Duzer Street and Victory Boulevard, and wait for her. Linwood parked the car across the street about half a block away. There was construction taking place on that street. According to the plaintiff, before entering the store she saw a backhoe just across the street, on the corner of Van Duzer and Victory Boulevard, and two orange cones in the middle of the intersection. She heard someone at the construction site tell Linwood that he could not park there and had to pull forward. After purchasing a cooler, she walked back out of the store, down the sidewalk about half a block, waited for two cars to pass and then proceeded across the street to where Linwood had parked. Before she crossed, she looked to the left and saw the backhoe once again. Linwood's car was the only vehicle parked on that side of the street. There were other pedestrians in the area. The plaintiff yelled to Linwood to open the trunk, walked to the rear of his car, placed the cooler inside and began rearranging some items in the trunk. She heard a bang and saw the scooper of the backhoe hit the trunk hood which then hit her in the head and caused her to fall. When she stood up, she was knocked to the ground by the backhoe and her leg was pinned under one of its wheels.

Linwood testified that there was construction taking place in a "hole" on the corner of St. Paul and Victory Boulevard and he saw some yellow traffic cones, a

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"working" sign and a barricade in the street, and a tractor or bulldozer digging at the intersection. A construction worker directing traffic told him he could not park in front of the store because he would block traffic. Linwood pulled up about three car lengths ahead of the tractor and over to the left side of the road, a few car lengths behind a pile of mud taken from the hole. The rest of the construction debris was behind his car. While waiting for the plaintiff, he did not look in his rearview mirror to see what was going on behind him. He popped open the trunk release as the plaintiff approached the car. The accident occurred soon thereafter.

At his deposition, Libretto testified that he operated backhoes for three or four years prior to the accident. He worked at the site of the accident for a few weeks, replacing a water main pipe. He testified that there were cones, barrels with reflective lights, orange bicycle fence, caution tape and a "sidewalk closed" sign to mark off the construction site. He was operating the backhoe in the middle of the intersection street and a flagman was directing traffic. Just before the accident, he filled the bucket of the backhoe with sand taken from the hole and was moving forward. He moved about two feet before hearing a noise, and immediately put the backhoe in park and pulled the emergency brake. He got out and saw the front of the backhoe directly behind the rear of Linwood's car and saw the plaintiff under the wheel of the backhoe. He got back into the vehicle, put it in reverse and backed it up a few feet to get it off the plaintiff. Libretto testified that the area where the accident occurred was within the area marked off by cones, barrels, orange fence, caution tape and sidewalk signs, and there were no vehicles or pedestrians moving through it. The bucket was raised about three feet but did not block his view forward but only of things under it, such as Linwood's car.

In opposition to Linwood's motion for summary judgment, defendants Caporusso and Libretto proffer the same deposition testimony as well as the police report of the accident which states that Linwood parked his car "in front of a backhoe at a construction site" and that the backhoe driver could not see Linwood's car because it was too close to the backhoe. The defendants further point out that Linwood testified that he saw no reason to amend the police report. In those papers and in their opposition to the plaintiff's summary judgment motion, Caporusso and Libretto argue that both plaintiff and Linwood contributing to the accident by placing themselves within a clearly marked construction zone.

This deposition testimony and other proof submitted by Linwood and the plaintiff for summary judgment fails to satisfy their burdens on their respective motions because it demonstrates the presence of, rather than the absence of, triable issues of fact on the issue of liability. Since the proof fails to show they are entitled to judgment as a matter of law, the burden did not shift to the opposing parties to raise a triable issue. That is, the proof submitted by the plaintiff and Linwood themselves raises issues of fact as to whether, and to what degree, they contributed to the accident by entering, driving and/or walking in a construction zone.

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"In general, questions of negligence regarding a road accident are best resolved at a jury trial"(Lindgren v NYCHA, 269 AD2d 299, 302 [1st Dept. 2000]) and the issue of comparative negligence and apportionment of liability are almost always matters for the finder of fact. See Andre v Pomeroy, 35 NY2d 361, 366 (1974); Hazel v Nika, — AD3d --- (1<sup>st</sup> Dept. May 22, 2007); Cabrera v Hirth, 8 AD3d 196 (1<sup>st</sup> Dept. 2004); Thoma v Ronai, 189 A.D.2d 635 (1st Dept. 1993), *affd.*, 82 NY2d 736 (1993); Hopkins v Haber, 39 AD3d 471 (2<sup>nd</sup> Dept. 2007). Accordingly, a trial is required on those issues.

For these reasons and upon the foregoing papers, it is

ORDERED that the motion of defendants/third-party plaintiffs Caporusso and Libretto to vacate the note of issue and certificate of readiness of plaintiff Russo and direct her to appear for an independent medical examination is denied in its entirety, and it is further,

ORDERED that the motion of third-party defendant Linwood to vacate the note of issue and certificate of readiness, direct plaintiff to appear for an independent medical examination and extend the time to file a motion for summary judgment is denied in its entirety, and it is further,

ORDERED that the motion of third-party defendant Linwood for summary judgment on the issue of liability is denied, and it is further,


ORDERED that the motion of plaintiff Deborah Russo for summary judgment on the issue of liability is denied, and it is further,

ORDERED that the motion of plaintiff Russo to preclude evidence is granted to the extent that defendants/third-party plaintiffs Caporusso and Libretto are precluded from offering Dr. Bagley's testimony at trial unless they provide a copy of his report to the plaintiff within 15 days of entry of this order, and it is further,

ORDERED that the parties shall appear at Mediation-2 at 80 Centre St., on June 28, 2007, at 9:30 a.m. as previously scheduled.

This constitutes the Decision and Order of the court.

Dated: June 5, 2007

  
Deborah A. Kaplan

DEBORAH A. KAPLAN

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

