

Augustyniak v Schecht

2007 NY Slip Op 32749(U)

August 24, 2007

Supreme Court, Suffolk County

Docket Number: 0015956/2006

Judge: Jeffrey Arlen Spinner

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART XXI - COUNTY OF SUFFOLK**

PRESENT:

HON. JEFFREY ARLEN SPINNER

Justice of the Supreme Court

<p>TERESA AUGUSTYNIAK,</p> <p style="text-align: center;">- against -</p> <p>KATHRYN SCHECHT and AMBOY BUS CO, INC,</p>	<p>Plaintiff,</p> <p>Defendants.</p>
---	--------------------------------------

Action No. 1

INDEX NO.: 2006-15956

MOTION SEQ. NO.: 001 - MG
ORIG. MOTION DATE: 06/19/07

MOTION SEQ. NO.: 002 - MG
ORIG. MOTION DATE: 07/23/07

FINAL SUBMIT DATE: 07/25/07

This Order also concerns the following matter:

<p>JOHN JOSEPH TRIOLO (an infant by his parent and legal guardian TANYA DeSTEFANO) and TANYA DeSTEFANO individually,</p> <p style="text-align: center;">- against -</p> <p>TERESA A AUGUSTYNIAK, ANDREA M AUGUSTYNIAK, KATHRYN SCHECHT, AMBOY BUS CO, INC, and LONGWOOD CENTRAL SCHOOL DISTRICT,</p>	<p>Plaintiffs,</p> <p>Defendants.</p>
--	---------------------------------------

Action No. 2

INDEX NO.: 2007-1710

UPON the following papers numbered 1 to 48 read on these Motions:

- Plaintiff's Motion 001 (Pages 1-11 & Exhibits A-D);
- Defendants' Opposition (Pages 12-29 & Exhibit A);
- Plaintiff's Reply (Pages 30-37);
- Defendants' Motion 002 (Pages 38-48)

it is,

ORDERED, that the application of Plaintiff (001) is hereby granted in the manner set forth herein below; and Defendants' application (002) is hereby granted to the extent set forth herein below.

Plaintiff moves this Court (001) for an Order granting Plaintiff partial Summary Judgment on the issue of liability.

Defendants move this Court for an Order, pursuant to CPLR 602(a), consolidating Action No. 1 with Action No. 2, for the purposes of joint trial and discovery.

This action arises out of a motor vehicle accident which occurred on November 15, 2005, Mount Sinai-Coram Road, at its intersection with Coram-Swezey Town Road, in the Hamlet of Coram, Town of Brookhaven, County of Suffolk, State of New York, wherein the vehicles of Plaintiff and Defendants collided while Defendants' vehicle was making a left turn, allegedly due to the failure of the operator of Defendants' vehicle to obey a stop sign controlling the intersection, and the further failure of same to observe Plaintiff's vehicle coming through the intersection and further allegedly having the right of way, still further allegedly resulting in Plaintiffs in both actions suffering serious personal injuries.

The certified copy of the Suffolk County Police Department Accident Report indicates that Defendant SCHECHT, operator of the Defendant vehicle, a school bus, stated she didn't see Plaintiff, who was operating the approaching vehicle. Plaintiff's Counsel proffers the position that this is an admission of her distraction and inattention, and the sole contributing factor in causing the accident, stating that there is ample authority in the Appellate Division, Second Department, for granting Summary Judgment to Plaintiff on the issue of liability where Defendant failed to obey a stop sign and failed to yield right of way to Plaintiff's vehicle, in violation of Vehicle and Traffic Law (*See: Laino v Lucchese*, 35 AD3d 672 [2 Dept 2006]; *Odumbo v Perera*, 27 AD3d 709 [2 Dept 2006]; *McNamara v Fishkowitz*, 18 AD3d 721 [2 Dept 2005]; *Friedberg v Citiwide Auto Leasing, Inc*, 22 AD3d 522 [2 Dept 2005]; *Ishak v Guzman*, 12 AD3d 409 [2 Dept 2004]; *Willis v Fink*, 7 AD3d 519 [2 Dept 2004]; *Negrete v Hernandez*, 2 AD3d 511 [2 Dept 2003]; *Szczotka v Adler*, 291 AD2d 444 [2 Dept 2002]; *Bolta v Lohan*, 242 AD2d 356 [2 Dept 1997]); and that there is ample authority in the Appellate Division, Second Department, for granting Summary Judgment to Plaintiff on the issue of liability where Defendant's vehicle made a left turn when it was hazardous to do so (*See: Berner v Koegel*, 31 AD3d 591 [2 Dept 2006]; *Bongiovi v Hoffman*, 18 AD3d 686 [2 Dept 2005]; *Feldman v Rich*, 303 AD2d 447 [2 Dept 2003]; *Russo v Schibetti*, 298 AD2d 514 [2 Dept 2002]; *Welch v Norman*, 282 AD2d 448 [2 Dept 2001]; *Agin v Rehfeldt*, 284 AD2d 352 [2 Dept 2001]; *Mattera v Avis Rent A Car Systems, Inc*, 245 AD2d 665 [2 Dept 1997]).

Defendants respond with submitting to this Court an alleged affidavit by Defendant SCHECHT that contains a duplicated signature and a duplicated jurat, not originals, and even if the Court were to consider such inadmissible documents, Plaintiff's Counsel adeptly points out that same attempts to raise a feigned issue to avoid the consequences of Defendant SCHECHT's on-the-scene statement noted in the police report (*See: Abramo v Miral Corp*, 24 AD3d 397 [2 Dept 2005]; *Guevara v Zaharakis*, 303 AD2d 555 [2 Dept 2003]).

Defendant SCHECHT had an unequivocal obligation to obey the Vehicle and Traffic Laws of the State of New York, and Plaintiff, as the driver with the right of way, was entitled to anticipate that Defendant would do so, yielding to her (*See: Bongiovi v Hoffman, Supra*). In order for Defendants to avoid the granting of summary judgment, they must show real and substantial facts sufficient to entitle them to defend the action in question (*See: Strasburger v Rosenheim*, 234 AD 544[1 Dept 1932]).

Furthermore, to grant summary judgment, it must clearly appear that there are no material issues of fact (*See: Sillman v Twentieth Century-Fox Film Corp*, 3 NY2d 395, 144 NE2d 387 [1957]). 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 (*See: Zuckerman v City of New York*, 49 NY2d 557, 404 NE2d 718 [1980]; *Sillman v. Twentieth Century-Fox Film Corp, Supra*).

Once a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to

demonstrate the absence of any material issue of fact is shown, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action (*See: Zuckerman v City of New York, Supra*).

While Plaintiff has addressed entitlement to Summary Judgment as to the issue of liability, Defendants have not been successful in establishing the existence of material issues of fact requiring a trial of the action, and therefore the relief requested by Plaintiff must be granted, the issue of damages to be determined upon a trial of this matter.

As to Defendants' Motion to consolidate (002) the two actions cited above for the purposes of joint trial and discovery, the Court notes that both of these actions arise out of the same motor vehicle accident, and that Plaintiff in the Action No. 2 was a passenger in the vehicle of Defendants in Action No. 1. Since the actions arise from the same incident and involve common questions of fact, consolidation is appropriate to avoid inconsistent verdicts (*See: Orkin v White Plains Hospital, 97 AD2d 399 [2 Dept 1983]*). Moreover, it would be a waste of judicial resources and duplicitous to require two separate trials with the concomitant costs and expenses (*See: Wieder v Skala, 218 AD2d 507[1 Dept 1995]*).

Furthermore, in *Barbalex Associates v Pesaitis*, 113 Misc.2d 436, the Court stated that:

“Consolidation or joinder of trials are procedural devices to promote the economic resolution of similar actions, irrespective of the number of parties involved. (See *Tone and Stifler, Joinder of Parties and Consolidation of Multiparty Actions*, 1967 *Univ. of Illinois Law Forum* 209, 221). A court considering consolidation is required to render a pragmatic judgment as to the feasibility of fusing two or more separately filed complaints and it must weigh this judgment against the possibility of an unwieldy trial. *Id.* at 222.”

All of this reasoning is wholly applicable herein, and this Court is persuaded by these citations of law that the best interests of all parties as well as expense of judicial resources, these matters would be best handled by joinder of their trials.

That being said, the Court reminds all parties of the distinctions set forth in *Mars Associates, Inc v New York City Educational*, 126 AD2d 178[1 Dept 1987], wherein the Court recited the following:

“Although there are similarities between consolidating an action and ordering a joint trial of an action, there are also significant differences. On the one hand, with consolidation there is a total merger of the separate actions into one action. However, with the joinder of trials, each action remains independent of the other. In other words, as we stated in *Pigott v. Field*, 10 AD2d 99, 101, 197 NYS2d 648 (1st Dept. 1960), “consolidation gives rise to a new action displacing the actions affected thereby, whereas a joint trial preserves the integrity of each of the actions ...”. Thus, “[i]n consolidated actions only one judgment is entered, while in joint trials separate verdicts and judgments are entered and each may be appealed from ...” (2 *Weinstein-Korn-Miller, N.Y.Civ.Prac.*, paragraph 602.02, page 6-11).”

For all the reasons stated herein above and in the totality of the papers submitted herein, it is, therefore,

ORDERED, that the application of Plaintiff (001) for an Order granting Plaintiff partial Summary Judgment on the issue of liability, is hereby granted; and it is further

ORDERED, that this application of Defendants (002) for an Order, pursuant to CPLR 602(a), consolidating Action 1 and Action 2 cited herein above, for the purpose of the purposes of joint trial and discovery, is hereby granted to the extent that these matters are hereby joined for all purposes; and it is further

ORDERED, that Counsel for all parties are directed to appear in Room 203A of the Courthouse located at 235 Griffing Avenue, Riverhead, New York, for a Preliminary Conference on October 10, 2007, at 9:30 AM of that day, and it is further

ORDERED, that Counsel for Plaintiff AUGUSTYNIAK is hereby directed to serve a copy of this order, with Notice of Entry, upon Counsel for all parties in these joined actions, or their Counsel, and upon the Calendar Clerk of this Court and the Suffolk County Clerk, within twenty (20) days of the date this order is entered by the Suffolk County Clerk.

Dated: Riverhead, New York
August 24, 2007



HON. JEFFREY ARLEN SPINNER, JSC

FINAL DISPOSITION	✓ NON-FINAL DISPOSITION
✓ SCAN	DO NOT SCAN

TO:

Rosenberg & Gluck, LLP
Attorneys for AUGUSTYNIAK
1176 Portion Road
Holtsville, New York 11742

Silverman Sclar Shin & Byrne, PLLC
Attorneys for SCHECHT, AMBOY & LONGWOOD
381 Park Avenue South, Suite 1601
New York, New York 10016

Steven D Dollinger & Associates
Attorneys for TRIOLO
5 Threepence Drive
Melville, New York 11747