

Campbell v County of Suffolk

2007 NY Slip Op 34007(U)

November 30, 2007

Supreme Court, Suffolk County

Docket Number: 0004277/2005

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 8-21-07
ADJ. DATE 10-15-07
Mot. Seq. # 001 - MotD
002 - XMG

-----X		
SUSAN CAMPBELL,	:	CANNON & ACOSTA, LLP
	:	Attorneys for Plaintiff
Plaintiff,	:	1923 New York Avenue
	:	Huntington Station, New York 11746
- against -	:	
	:	
THE COUNTY OF SUFFOLK and PEGGY	:	
COSTELLIC,	:	KRAL, CLERKIN, REDMOND, RYAN,
	:	PERRY & GIRVAN, LLP
Defendants.	:	Attorneys for Defendants/3rd Party Plaintiffs
	:	County of Suffolk & Peggy Costello
-----X	:	496 Smithtown Bypass
THE COUNTY OF SUFFOLK and PEGGY	:	Smithtown, New York 11787
COSTELLIC,	:	
Third-Party Plaintiffs,	:	
	:	
- against -	:	
	:	
CHARLES ARTHUR MERRITT,	:	RUSSO & APOZNANSKI
	:	Attorneys for 3 rd Party Defendant Merritt
	:	875 Merrick Avenue
Third-Party Defendant.	:	Westbury, New York 11590
	:	
-----X	:	

Upon the following papers numbered 1 to 35 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9 ; Notice of Cross Motion and supporting papers 10 - 17 ; Answering Affidavits and supporting papers 18-19; 20-23; 24-25 ; Replying Affidavits and supporting papers 26-27; 28-31; 32-35 ; Other ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (001) by plaintiff, Susan Campbell, pursuant to CPLR 3212 and Insurance Law §5102(d) for summary judgment on the issues of liability and serious injury, is denied on the issue of serious injury, but granted as to liability. Plaintiff is directed to serve a copy of this order with notice of entry within thirty days of the date of this order upon all parties and upon the Calendar Clerk of the Court, who is directed to place this action on the Calendar Control Part Calendar for the next available date; and it is further

ORDERED that this motion (002) by third-party defendant, Charles Arthur Merritt, pursuant to CPLR 3212 for summary judgment on the issue of liability is granted and the third-party complaint by third-party plaintiff County of Suffolk, is hereby dismissed.

This is an action sounding in negligence arising out of an accident which occurred on October 2, 2004, on County Road 51 at or near its intersection with CR 94, Town of Southampton, County of Suffolk, State of New York. Defendant, Peggy Costello was the operator of a bus owned by defendant County of Suffolk when it collided with a car operated by third-party defendant Charles Arthur Merritt. Plaintiff, Susan Campbell, a passenger in the Merritt vehicle, seeks damages for personal injuries allegedly sustained in this accident.

Susan Campbell has claimed in her bill of particulars she sustained a displaced articular fracture of the distal radius and ulnar styloid of the right wrist requiring open reduction; fracture of the right fourth metacarpal; fracture of the right fifth metacarpal; articular fracture of the right thumb at the interphalangeal joint; disc herniation at T12-L1, L1-2, L2-3, L3-4; disc bulge L4-5; right rotator cuff tendinitis; and reflex sympathetic dystrophy of the right upper extremity.

Plaintiff, in motion (001), seeks summary judgment on the issue of liability asserting she bears no liability for the happening of the accident, and further seeks summary judgment on the issue that she sustained serious injury sufficient to meet the threshold pursuant to Insurance Law of the State of New York §5102(d).

In motion (002), third-party defendant, Charles Arthur Merritt, seeks summary judgment on the issue of liability asserting he bears no liability for the happening of the accident in that the bus which struck his vehicle crossed over the roadway and struck his vehicle. He claims he reacted reasonably when faced with this emergency situation created by defendants Peggy Costello and the County of Suffolk.

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 Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [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 [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]).

In support of motion (001), plaintiff has submitted, *inter alia*, copies of the summons and complaint, verified answers of the County of Suffolk and Peggy Costello; a copy of plaintiffs' verified bill of particulars and supplemental bill of particulars; a copy of the MV 104 Police Accident Report; an

unsigned, unsworn copy of an x-ray report from Central Suffolk Hospital; and unsigned, unsworn copies of the deposition transcripts of Peggy Costello and Charles Arthus Merritt.

In support of motion (002), third-party defendant Merritt has submitted, *inter alia*, copies of the summons and complaint, third-party summons and complaint, verified answers of the County of Suffolk, Peggy Costello and third-party defendant Merritt; and unsigned, unsworn copies of the deposition transcripts of Peggy Costello, Charles Arthus Merritt.

Insurance Law §5102(d) provides in pertinent part that “ ‘[s]erious injury’ means a personal injury which results in dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medical determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

The term “significant,” as it appears in the statute, has been defined as “something more than a minor limitation of use,” and the term “substantially all” has been construed to mean “that the person has been curtailed from performing his usual activities to a great extent rather than some slight curtailment (*Licari v Elliot*, 57 NY2d 230, 455 NYS2d 570).

In order to recover under the “permanent loss of use” category, plaintiff must demonstrate a total loss of use of a body organ, member, function or system (*Oberly v Bangs Ambulance Inc.*, 96 NY2d 295, 727 NYS2d 378 [2001]). To prove the extent or degree of physical limitation with respect to the “permanent consequential limitation of use of a body organ or member” or “significant limitation of use of a body function or system” categories, either a specific percentage of the loss of range of motion must be ascribed or there must be a sufficient description of the “qualitative nature” of plaintiff’s limitations, with an objective basis, correlating plaintiff’s limitations to the normal function, purpose and use of the body part (*Toure v Avis Rent A Car Systems, Inc.*, 98 NY2d 345, 746 NYS2d 865 [2000]). A minor, mild or slight limitation of use is considered insignificant within the meaning of the statute (*Licari v Elliott*, 57 NY2d 230, 455 NYS2d 570 [1982]).

It is for the court to determine in the first instance whether a prima facie showing of “serious injury” has been made out (*see, Tipping-Cestari v Kilhenny*, 174 AD2d 663, 571 NYS2d 525 [1991]). It is determined by this court that plaintiff has not made a prima facie showing of serious injury in that plaintiff has not submitted evidence in admissible form in support of this motion. The Central Suffolk Hospital x-ray report by Dr. Parnell and Dr. Gross is unsigned and unsworn. The narrative report of Dr. Jerry Epstein is not sworn. Plaintiff has provided a copy of defendant’s expert report relating to the independent examination by Dr. Noah S. Finkel, M.D. in her reply affirmation, depriving defendants of a right to reply without court permission (*Lazar v Nico Industries, Inc.*, 128 AD2d 408, 512 NYS2d 693 [1987]). In a motion for summary judgment, such failure to submit the affidavits with the moving papers would deem the application insufficient as the affidavits are to be given no consideration by the court entertaining the motion for summary judgment, when received in a reply (*Sherrer v Time Equities, Inc. and Emilia Grocery, Inc. v Time Equities, Inc.*, 218 AD2d 116, 634 NYS2d 680 [1st Dept 1995];

Lumbermens Mutual Casualty Company v Morse Shoe Company, d/b/a Fayva Shoe Store and Another, 218 AD2d 624, 630 NYS2d 1003 [1995]).

Accordingly, that part of motion (001) which seeks summary judgment on the issue that plaintiff sustained a serious injury within the meaning of Insurance Law §5102 is denied as insufficient.

Turning to the issue of liability, plaintiff testified she was a passenger seated in the front passenger seat of the Merritt vehicle. She stated she had looked up from reading a catalogue and saw the bus leave the southbound travel lane, jump the center median, move erratically and bounce in front of them towards them. The collision occurred within five to ten seconds of her seeing the bus for the first time. She thought the vehicle she was in was traveling about thirty to thirty five miles an hour when they first saw the bus, but did not know the speed at the time of impact. She did not see any vehicles directly ahead or immediately to her left at the time of impact. She also testified that at the very last second, the bus turned toward them and was fully on the right northbound lane of County Road 51 facing southbound when it struck them head-on. She stated the bus dragged them backwards until they finally wound up next to the bus facing southbound. She did not know if the SUV she was riding in moved to the left or the right before the accident occurred.

Peggy Costello testified that at the time of the accident she was employed as a bus driver by CBS Bus Lines and was driving a bus owned by the County of Suffolk. The bus involved in the accident, bus 934, was not the regular bus 9910 that was assigned to route 62 which she had been driving for six months. The bus was a spare bus which she had operated maybe five to six times. She did not know the last time she had driven it. She had no training classes to operate either bus, and received no manuals for the buses. The bus involved in the accident had an automatic transmission. She described the regular bus as longer and wider than bus 934.

Peggy Costello described the weather as overcast and dry. She did not remember the time of the accident but stated she was told it was about 1:00 p.m. She had just completed the route from Port Jefferson Plaza that went to Riverhead. She left Riverhead and went to Smithaven Mall and back to Riverhead. She took a ten minute break waiting to go from Riverhead County Center back to the Smithaven Mall. She stated that when her break was over, she was going to the bus stop in front of the Riverhead County Center to begin the trip. She came out of the County Center parking lot onto County Road 51 south of the bus stop. There were four travel lanes on County Road 51, two northbound and two southbound, separated by a grassy median about nine or ten feet wide. She crossed over both southbound lanes of County Road 51 to the intersection where she made a left to go north on County Road 51. She testified she looked both ways before she crossed over County Road 51 and did not see any vehicles coming in either direction. She described the road as flat and level and nothing was obstructing her view. She testified she turned into the right northbound travel lane first just to cut across and stayed in the left northbound lane of County Road 51, traveling north about twenty miles an hour for about three hundred feet. It was her intention to turn around to come back to the bus stop. She slowed the speed of the bus about five miles an hour as she approached the turn. She stated she had traveled about two hundred and fifty to two hundred seventy five feet when she looked into the right side mirror on the bus and saw there was a white box truck "practically on top of the bus" and partially in her lane. She stated the front of the white truck was about three feet from the rear of the bus. It startled her, she said, and to avoid being side swiped, she sped up and cut the wheel hard to the left to go into the cut out but was unable to control the

vehicle. Her foot was heavy on the accelerator to get away from the white truck and she thought her speed could have increased ten miles above what she was traveling, but wasn't sure. She thought she was traveling thirty to forty miles an hour. She said because it wasn't the normal way to make a turn because she was at an accelerated speed and she cut the wheel hard, she wound up making a very wide left into the right lane of the southbound lanes. After making the left in the cut out and making a wide left, she stated she was trying to straighten the bus and get control of the bus but cut across the southbound lanes back over into the northbound lane across the median. At first she traveled in the southbound lane in a diagonal fashion across, and then crossed over the median into the left southbound travel lane going the wrong way. Her speed at the time of impact was about thirty five to forty miles an hour. She did not know if her foot was on the brake or the accelerator at the time of impact. She had traveled about one hundred fifty feet from the point she lost control of the vehicle to the point of impact. The bus moved in an erratic pattern from the median. She was halfway across the median when she saw the SUV involved in the accident in the left hand lane about one hundred and fifty feet away, about ten seconds before the accident occurred. At that time the bus was facing south and traveled about four feet on the northbound left lane until impact with the SUV. She stated her vehicle did not move after coming into contact with the SUV. She testified she did not witness it, but heard the other vehicle turned all the way around from the impact so that it was also facing south in the northbound lane. The right front of her bus and the entire front of the SUV impacted. The vehicles were still touching at the time they came to rest. She stated she was trying to get control of her bus when she saw the SUV, but couldn't do it. She further testified that when she saw the other vehicle for the first time, she thought there might be a collision. She stated she could not hit the brakes because the seat on the bus is an air ride seat which is able to move with traffic. She stated this particular bus did not have any air in the seats, and was bouncing up and down uncontrollably which did not allow her to have proper control or keep her feet on the pedals properly. She testified that she did not check the air ride seat before she left the bus yard. She had previously experienced that the air ride seat did not have air a number of times, and reported it CBS several times on the DOT card that is filled out everyday concerning any defects. No one from DOT or CBS ever responded to this, she stated. She did not sound her horn prior to impact as she stated she did not want to take her hands off the steering wheel as she would have no control of the bus.

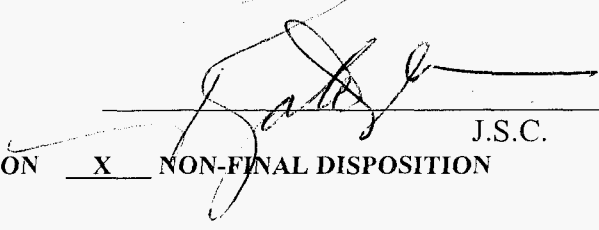
Charles Arthur Merritt testified he was operating a Lexus SUV on County Road 51 across from the courthouse when he was involved in an accident with a bus. He described the roadway as two lanes in each direction going east and west at the point where the accident occurred, but running north and south, with a grass divider in the middle. He was traveling in the right northbound lane. He said the posted speed limit in that area was forty miles an hour, and the weather was ideal, sunny. There were no vehicles traveling in front of him, but he did see vehicles traveling in the southbound direction. Within thirty seconds of the happening of the accident, he was traveling about thirty five miles an hour and was still in the right northbound lane. He first saw the bus about two to three seconds prior to the accident. It was about seventy five feet from him on the left side on the meridian moving perpendicular to the grassy meridian about fifty miles an hour. It was moving up and down. He applied his brakes and was almost still at five to ten miles an hour when the bus exited the meridian traveling southbound in the northbound right hand lane maintaining its speed at about fifty miles an hour. There was a heavy impact between the front of the bus and the front of the SUV. His SUV came to a rest after the impact in the left hand lane facing southbound. He testified there was no time to move his vehicle from the right to the left hand lane to avoid the accident.

Based upon the foregoing, it is determined that both plaintiff Susan Campbell and third-party defendant Charles Arthur Merritt have demonstrated prima facie entitlement to summary judgment on the issue of liability. Here the adduced testimony of Peggy Costello clearly demonstrates that she exited the parking lot by the courthouse, crossed over the southbound lanes of County Road 51 and turned into the northbound travel lane. However, when she noticed a white truck close behind her traveling north partially in the left lane she was traveling in, she began to accelerate and made a hard left hand turn to avoid a potential accident with the truck. She then lost control of the bus, crossed perpendicularly over the center median and traveled approximately four feet in the southbound travel lane in the wrong direction, colliding with the Merritt vehicle in which Susan Campbell was a passenger. Costello further testified that the bus moved in an erratic pattern from the median. She was halfway across the median when she saw the SUV involved in the accident in the left hand lane about one hundred and fifty feet away, about ten seconds before the accident occurred. It is determined that in opposing these motions for summary judgment, the County of Suffolk and Peggy Costello have not raised material factual issues to preclude summary judgment to Susan Campbell or Charles Merritt as to liability. The arguments of the County of Suffolk and Peggy Costello are conclusory and speculative and are unsupported by admissible evidence.

Third-party defendant Merritt argues that he acted reasonably when faced with this emergency. New York has long recognized the "emergency doctrine" which provides that when a person is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration, he or she will not be held liable upon a finding that he or she took reasonable and prudent action in the emergency context. While it is often a jury question whether a person's reaction to an emergency was reasonable, summary resolution is possible when the individual presents sufficient evidence to support the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate issue of fact on the issue (*Ward v Cox*, 2007 NY Slip Op 2026; 2007 NY App Div, Lexis 2883). In the instant matter, no one has come forward with admissible evidence to raise a legitimate issue of fact to dispute the reasonableness of Merritt's actions to avoid the collision. Peggy Costello testified she was traveling perpendicular across the median and then traveled four feet in the northbound travel lane in the southbound direction when the collision occurred. Merritt testified that he was traveling about thirty five miles an hour in the right northbound lane when he first saw the bus about two to three seconds prior to the accident. The bus was about seventy five feet from him on the left side on the meridian moving perpendicular to the grassy meridian. He stated it was traveling about fifty miles an hour, moving up and down. He applied his brakes and was almost still at five to ten miles an hour when the bus exited the meridian and suddenly traveled southbound in the northbound right hand lane. He stated the bus maintained its speed at about fifty miles an hour, then struck his vehicle. Based upon the foregoing, both plaintiff and third-party defendant have demonstrated entitlement to summary judgment on the issue of liability.

Accordingly, summary judgment is granted on the issue of liability to Susan Campbell in motion (001), and to third party defendant Charles Arthus Merritt in motion (002), and the third-party complaint is dismissed accordingly.

Dated: NOV 30 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION