

Delgado v City of New York

2008 NY Slip Op 30057(U)

January 9, 2008

Supreme Court, Kings County

Docket Number: 0032425/2002

Judge: Howard Miller

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At an IAS Term, Part 20, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 9th day of January 2008.

P R E S E N T:

HON. ROBERT J. MILLER
Justice.

-----X
WILFRED DELGADO,

Plaintiff,

Index No. 32425/02

-against-

DECISION & ORDER

THE CITY OF NEW YORK,

Defendants.

-----X

The following papers numbered 1 to 3 used on this motion.

	<u>Papers Numbered</u>
Notice of Motion-Order to Show Cause-Affidavit(s) Affirmation(s), Petitioner & Exhibits Annexed	1
Answering Affidavit(s) and Affirmation(s)	2
Reply Affidavits(s) and Affirmation(s)	3
_____ Affidavit(s) and Affirmation(s)	
Other Papers _____	

Plaintiff was represented by Elliot & Ifraimoff & Assoc., P.C., David E. Waterbury, of counsel.

Defendant was represented by Michael A. Cardozo, the Corporation Counsel of The City of New York, Patrick Mantione, of counsel.

In this case, defendant The City of New York (“the City”) moves for summary judgment dismissing plaintiff’s complaint or in the alternative moves for a change of venue from Kings County to New York County.

This action arises out of a traffic accident which occurred on March 19, 2002. During the evening of March 19, 2002, the plaintiff Wilfred Delgado (“Delgado”), an employee of the NYC Department of Sanitation, was driving a sanitation truck from a garage in Manhattan to a site in New Jersey “to dump the truck.”

While taking the Exit 15E ramp off of the New Jersey Turnpike, the complaint at paragraph 10 alleges that “the brakes of said truck failed forcing him to steer the vehicle into a guard rail to bring it to a stop, where it rolled over and caught fire, causing him to sustain catastrophic and permanent personal injuries.”

In its motion for summary judgment, the City relies on the deposition testimony of Joseph M. Weeast, a New Jersey State trooper who conducted a post accident inspection of the damaged sanitation truck. In his March 25, 2002 inspection report, Officer Weeast concluded:

“. . . the brakes on the second and third axles were found to be capable of operating. No mechanical defects were found to have contributed to this collision.”

The City also relies on the deposition transcript of Thomas A. Mugno, a Department

of Sanitation employee, who is a supervisor of mechanics for the Department, his post-accident report and the maintenance records for the truck. The Mugno post-accident report while noting that not all tests could be performed due to damage to the truck concluded that the brake linings and drums were in “good condition,” and that the inspection of the braking systems that were not burned showed no abnormalities.

The City further relies on the maintenance records for the truck for March 2002 which established that the truck was operating without reported problems prior to the March 19th accident (other than a March 15, 2002 repair which was completed).

In addition, the City relies on Delgado’s deposition testimony wherein he testified that he tested the spring brakes prior to leaving the garage on the day of the accident, and that they were in working order.

Finally, the City submitted the affidavit of George Meinschein, a licensed professional mechanical engineer, who concluded (after a review of the maintenance records, the post-inspection reports, the various deposition transcripts, the accident reports as well as a test at the scene of the accident) that:

“ . . .within a reasonable degree of mechanical engineering certainty, that Mr. Delgado had a functioning brake system on the evening of the accident (March 19, 2002) and he had functioning brakes while he was attempting to negotiate Exit ramp 15E of the New Jersey Turnpike.”

The Court concludes that the City has made a prima facie showing of its entitlement to summary judgment as a matter of law by demonstrating that the brakes on the vehicle were operating properly two days before the accident as well as on the day of the accident.

(See, Hoffman v Eastern Long Island Transp. Enterprise, Inc., 266 AD2d 509 [1999], Tufano v Nor-Hgts. Serv. Ctr., Inc., 15 AD3d 470 [2005], Williams v Healy Intl. Corp., 240 AD2d 403 [1997], Breslin v Rji, 259 AD2d 458 [1999]).

In opposition to the motion for summary judgment, plaintiff submits the hearsay affirmation of his attorney. The affirmation contains no exhibits, no citation to any of the movant's exhibits and no reference to or citation to any deposition testimony.


It is axiomatic that an attorney's affirmation is totally insufficient to raise any genuine issues of fact in opposition to a motion for summary judgment. (See, Zuckerman v City of New York, 49 NY2d 557, [1980], Olan v Farrell Lines, 64 NY2d 1092 [1985], Warrington v Ryder Truck Rental, Inc., 35 AD3d 455 [1985], Herbert Stahl, et al., v Stralberg, et al., 287 AD2d 613 [2001], Caramanica v State Farm Fire & Cas. Co., 110 AD2d 869 [1985]).

During oral argument, plaintiff's counsel argued that plaintiff was relying on the deposition transcript of plaintiff Delgado which was annexed to the City's motion papers as the basis of his opposition to the motion.

While plaintiff's counsel failed to cite the portions of the transcript he was relying on, the Court has reviewed the transcript and concluded that it does not raise any genuine issues of fact in opposition to the motion. To the contrary, the plaintiff's deposition transcript at pages 52-55 buttress the City's claim that the brakes were operating properly on the day of the accident.

Accordingly, the defendant City of New York's motion for summary judgment against the plaintiff is granted and the complaint is dismissed with prejudice. The Clerk of the Court is directed to enter judgment dismissing the complaint. The City's motion to change venue is denied as moot.

This constitutes the decision and order of the Court.



HON. ROBERT J. MILLER
J.S.C.