

Gunter v Bruno

2008 NY Slip Op 30183(U)

January 7, 2008

Supreme Court, Queens County

Docket Number: 0011434/2006

Judge: David Elliot

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 14
Justice

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| CLYDE GUNTER, | No. 11434/06 |
| Plaintiff, | Motion |
| -against- | Date October 1, 2007 |
| PATRICK BRUNO, BRUNO | Motion |
| CONSTRUCTION, INC. AND | Cal. No. 2 |
| SCHIANO BROS., INC., | Motion |
| Defendants. | Seq. No. 3 |
| ----- | |

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Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained on May 3, 2005 due to a motor vehicle accident on the northbound Van Wyck Expressway, in the County of Queens, City and State of New York.

Plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment in his favor on the issue of liability.

Contentions of the Parties

Plaintiff submits his examination before trial testimony. He testified that he was a passenger in a truck driven by defendant Patrick Bruno (Bruno) who had picked him up to work on a job in Yonkers. Defendant Bruno's truck struck a tractor-trailer (tractor) which was stopped in the right lane. Plaintiff first observed the stopped tractor when the truck was 150-200 feet behind it. The truck was

traveling at about 55-60 miles per hour when it struck the tractor. At that time, the truck brakes were not working properly and had not been in good working order for at least two months prior thereto.

Plaintiff argues that a driver must maintain a safe distance from the car in front of it and use reasonable care to avoid colliding with another vehicle. The failure to do so, in the absence of a non-negligent explanation, constitutes negligence as a matter of law. Brake failure is not a non-negligent explanation as an owner also has an obligation to maintain the brakes in good working order.

In addition, plaintiff submits the deposition testimony of defendant Bruno who testified that he observed the tractor in his lane for 45 seconds to one minute before the accident. Defendant Bruno stated that he was traveling at 30 miles per hour and the tractor was 30-35 feet in front of him. He saw the tractor slow down and then stop. He saw the tractor's brake lights for 5 seconds but he first applied his brakes when he was 15 feet from the rear of the tractor. The truck skidded and struck the rear of the tractor.

In opposition to the motion, defendants Bruno and Bruno Construction, Inc. (Bruno, Inc.) assert that questions of fact exist due to contradictory testimony by plaintiff and defendant Bruno as to the cause of the accident. Defendant Bruno testified that, contrary to plaintiff's testimony, he did not stop, while plaintiff was with him, at an auto supply store to put brake fluid in the truck. Rather, prior to picking plaintiff up, he had the mechanic at defendant Schiano Bros. Inc. (Schiano) check his brakes. Defendant Bruno put brake fluid in the truck prior to leaving the Schiano yard. When defendant Bruno entered the Van Wyck Expressway, plaintiff was sleeping. Plaintiff only woke up when defendant Bruno yelled upon seeing the tractor stopping in front of him and his truck was skidding. Defendant Bruno further testified that the tractor, which had been traveling in the middle lane, passed him and cut in front of him. Defendant Bruno lowered his speed from 30 miles per hour to 25 miles per hour to allow the tractor to fully switch into his lane. For the 4-5 minutes that he was on the expressway, his rate of speed was between 15-30 miles per hour while plaintiff claims that defendant Bruno was traveling at 55-60 miles per hour without ever braking.

Said defendants also assert that defendant Bruno

testified that the tractor had reached an overpass so it slowed down or stopped. Plaintiff testified that the tractor got "hung up on the bridge and then we came...but it was too late. We was in a bind when we first seen it." Someone had gotten out of the truck or was hanging out the window to view the clearance. There were no emergency flashers or any illumination. Defendants argue that this violated VTL § 1163 which requires a disabled or stopped vehicle on a public highway to use flashing signals, if equipped therewith, to warn following vehicles of the hazard.

Defendants also argue that the issue of plaintiff's comparative negligence and assumption of risk preclude summary judgment. Plaintiff testified that he had been working with defendant Bruno for about two months prior to the accident. They would always use the same truck and both were aware of a brake problem with respect to brake fluid. This contradicts defendant Bruno's testimony that there was no brake problem, he serviced the truck every three months, had the mechanic look at it and had put brake fluid in that morning. If plaintiff was awake and believed that defendant Bruno was speeding with bad brakes, he should have protested but failed to do so. Further, although it has not been shown that defective brakes caused the accident, plaintiff's riding with defendant Bruno with knowledge of defective brakes would raise the issue of his assumption of risk. Plaintiff testified that he was not an employee of defendant Bruno but was merely a helper who was paid in cash. Plaintiff was under no obligation to work for defendant Bruno and did not have to ride in his truck. Plaintiff voluntarily worked for him and assented to what he believed the condition of the vehicle to be.

Defendant Schiano opposes the motion based upon the papers submitted by defendants Bruno and Bruno Inc.

In reply, plaintiff argues that the testimony is not contradictory as plaintiff and defendant Bruno both testified that defendant Bruno rear-ended the stopped tractor and that defendant Bruno had observed the stopped tractor prior to the impact. Such testimony creates a prima facie case of liability as to the Bruno defendants. No non-negligent explanation has been shown as defendant Bruno was clearly following too closely, defendant Bruno testified that the tractor driver pressed his brakes thereby illuminating his brake lights and the tractor was only stopped several seconds so that the need for hazard lights

was not yet necessitated. There can be no valid claim of assumption of risk or comparative negligence as defendant Bruno claims that his brakes were working properly and plaintiff, a worker, had no control over how he gets to and from work.

Decision of the Court

The motion by plaintiff for summary judgment solely on the issue of liability as against defendants Patrick Bruno and Bruno Construction, Inc. is granted.

"A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, producing sufficient evidence to demonstrate the absence of any material issue of fact. Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution." Giuffrida v. Citibank, 100 NY2d 72 at 81.

Plaintiff has sustained his initial burden of showing his entitlement to judgment as a matter of law on the issue of the liability.

Although the deposition testimony of defendant Bruno and plaintiff differ on certain points leading up to the collision, it is undisputed that defendant Bruno's truck struck the tractor which was either stopped or slightly rolling forward. Both plaintiff and defendant Bruno agree that the tractor in front of them came to a stop in their lane at the entrance to an overpass. They both speculate that the reason therefore was the tractor driver's uncertainty as to whether a tractor could pass under it.

It is well settled that: "[A] rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the operator of the moving vehicle' (Ayach v. Ghazal, 25 AD3d 742, 743, 808 NYS2d 759; quoting Russ v. Investech Sec., 6 AD3d 602, 775 NYS2d 867) and imposes a duty on that operator to provide a non-negligent explanation for the collision (see Carhuayano v. J&R Hacking, 28 AD3d 413, 813 NYS2d 162; Ayach v. Ghazal, supra; Briceno v. Milbry, 16 AD3d 448, 791 NYS2d 622; Niyazov v. Bradford, 13 AD3d 501, 786 NYS2d 582; Russ v. Investech Sec., supra; Chepel v. Meyers, 306 AD2d 235, 762

NYS2d 95; Leal v. Wolff, 224 AD2d 392, 638 NYS2d 110)."
Campbell v. City of Yonkers, 37 AD3d 750.

In opposition to the motion, defendants Bruno and defendant Schiano have failed to submit sufficient evidence in admissible form which would warrant denial of the motion. No affidavit by defendant is submitted but, rather, said defendants rely upon the deposition testimony of plaintiff and defendant Bruno. However, such testimony does not sustain their burden. Defendant Bruno's testimony clearly sets forth that he was aware of the tractor in front of his truck and that it had stopped or was slowing down. He saw the tractor's brake lights illuminated and, although he stepped on his brakes twice, he could not stop his truck which skidded into the tractor. Plaintiff testified, and there is no contradiction by defendant Bruno, that the accident occurred on the ramp to the Van Wyck Expressway just past a curve in the roadway. Defendant Bruno has offered no non-negligent explanation for his failure to maintain a safe distance between his truck and the tractor considering the curve in the roadway and to stop his vehicle in time to avoid the collision. VTL 1129(a).

Accordingly, the motion by plaintiff for summary judgment solely on the issue of liability as against defendants Patrick Bruno and Bruno Construction, Inc. is granted.

Dated: January 7, 2008

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HON. DAVID ELLIOT