Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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MAUREEN COLLETTI, MARCO COLLETTI, and DONNA LEE BOLLETTIERI,

Plaintiffs,

Index No.: 11037/05
Motion Date: 12/5/07
Motion Cal. No.: 12
Motion Seq. No.: 2

-against-

EILEEN PERIERA, FRANK SCAVO AND WILLIAM A. BUTLER, JR.,

Defendants.

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The following papers numbered 1 to 9 read on this motion by defendant Butler for an order, pursuant 2221, granting the defendant leave to renew and reargue the prior order by this court dated April 16, 2007, and for a further order pursuant to CPLR 3212, dismissing plaintiff's complaint against defendant William A. Butler, Jr.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition -Exhibits.....	5 - 7
Reply.....	8 - 9

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action to recover damages for injuries allegedly sustained by plaintiffs Maureen Colletti, Marco Colletti, and Donna Lee Bollettieri ("plaintiffs"), passengers in a vehicle owned by defendant Frank Scavo ("Scavo"), and operated by defendant Eileen Pereira ("Pereira"), as a result of a motor vehicle accident that occurred on July 25, 2002, on State Road 82 north of Alley Road, in LaGrange, New York, between their vehicle and the vehicle operated by defendant William Butler ("Butler"). By order of this Court dated April 16, 2007, this Court (Satterfield, J.) denied, without prejudice to renew upon completion of discovery, defendant's motion for summary judgment and dismissal of the complaint on the ground that there were no triable issues of fact as the rear-end collision occurred while he was operating his vehicle while he was in the official discharge of his duties as a volunteer fireman, pursuant to General Municipal Law § 205-b. Defendant now moves,

inter alia, for leave to reargue the prior summary judgment motion.[1] The motion, insofar as it seeks reargument, is granted.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

As a general proposition, a rear-end collision establishes a prima facie case of negligence on the part of the operator of the rearmost vehicle and imposes a duty of explanation to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause. See, Milskiy v Solanky, 8 A.D.3d 353 (2nd Dept.2004); Barile v. Lazzarini, 222 A.D.2d 635 (2nd Dept. 1995); see also McGregor v Manzo, 295 A.D.2d 487 (2nd Dept. 2002); Gambino v City of New York, 205 A.D.2d 583 (2nd Dept.1994); Power v. Hupart, 260 A.D.2d 458 (2nd Dept. 1999); see, also, Caputo v. Schaumeyer, 252 A.D.2d 512 (2nd Dept. 1998); Danza v. Longieliere, 256 A.D.2d 434 (2nd Dept. 1998). In short, the driver of the offending vehicle is required to rebut the inference of negligence, and if he or she cannot do so, the driver of the lead vehicle may properly be awarded judgment as a matter of law. See, McGregor v Manzo, supra; see also Leal v Wolff, 224 A.D.2d 392 (2nd Dept. 1996); Barile v Lazzarini, 222 A.D.2d 635 (2nd 1995). This is because he or she is in the best position to explain whether the collision was due to a reasonable, non-negligent cause. Carter v. Castle Elec. Contr. Co., 26 A.D.2d 83, 85 (2nd Dept. 1966). If the operator cannot come forward with any evidence to rebut the inference of negligence, the moving party may properly be awarded judgment as a matter of law on the issue of liability. Lopez v. Minot, 258 A.D.2d 564 (2nd Dept. 1999).

Here, defendant asserts section 205-b of the General Municipal Law as a total defense, contending that pursuant to General Municipal Law § 205-b, he is insulated from liability arising from the rear-end collision that occurred while he was operating his vehicle during the official

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[1] Defendant, who is also named as a defendant in a companion action pending under Index Number 16150/05, entitled *Eileen Scavo Pereira, Donna, Aspenleiter and James Aspenleiter v. William A. Butler, Jr.*, also moves for dismissal of that action on the same ground. By order of this Court dated January 29, 2008, the motion for reargument and for summary judgment was granted without opposition and the matter was dismissed as to him.

discharge of his duties as a volunteer fireman. The relevant statute states, in pertinent part, the following:

> Members of duly organized volunteer fire companies in this state shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for wilful negligence or malfeasance.

"Section 205-b provides for an immunity for volunteer firefighters for simple negligence, allowing liability only for "wilful negligence or malfeasance." Tobacco v. North Babylon Volunteer Fire Dept, 182 Misc.2d 480 (Supreme Court, Suffolk Co., 1999), appeal dismissed, 276 A.D.2d 551 (2nd Dept. 2000); see, Tikhonova v. Ford Motor Co., 4 N.Y.3d 621 (2005)[discussing Sikora v. Keillor, 13 N.Y.2d 610 (1963), in which the Court of Appeals affirmed, "without opinion, the Appellate Division's determination that no liability attaches to a vehicle owner where the negligent driver (a volunteer firefighter) was immune from suit under General Municipal Law § 205-b ."].

Under the aforementioned section, although defendant cannot be held liable for ordinary negligence, if there is prima facie evidence of wilful negligence or malfeasance, then defendant Butler would not be entitled to the protection of the statutory provision. Defendant Butler submits his deposition testimony, the affidavits of officials of the LaGrange Fire Department attesting to his employment as a volunteer firefighter, the Emergency Vehicle Accident/Loss Investigation Report that was prepared by defendant Butler, and the Police Accident Report. The Emergency Vehicle Accident/Loss Investigation Report set forth: "Approximately 100 feet North of Alley Road, on curve, a vehicle was observed facing east in outbound lane of Route 82. Upon realizing this vehicle was facing east, I applied by brakes. The other vehicle began moving east towards Northbound lane direction on Rte 82. The brakes on my vehicle remained on with my vehicle striking the other vehicle in right rear." The accident report set forth: "veh 1nbound on SR82. Oper states she slowed for an animal in the road. Veh 2 also n-bound sees veh 1 slowed, but cannot stop in time striking the rear of veh 1 with veh 2." Defendant Butler testified at his deposition that the highest rate of speed that he achieved in his Chevy Lumina "would have been definitely not higher than 55 because that's the speed limit up until you get to the 45 mile an hour. . ." He initially testified that he did not see the other vehicle "until the time of the accident . . . in the southbound lane;" subsequently he testified that immediately before the accident, he saw the other vehicle "come into the northbound lane." He also testified that he was operating his vehicle with his "blue light." He draws the legal conclusion that "no acts of willful negligence or malfeasance can be attributed to" him.

In opposition to the motion, plaintiffs submitted the deposition testimony of plaintiff Maureen Colletti, plaintiff Bollettieri and plaintiff Marco Colletti, all of whom were passengers in defendant Pereira's vehicle that was heading northbound on State Road 82 when it was struck in the rear by defendant Butler's vehicle. The testimony of plaintiffs, while raising issues of facts with respect to ordinary negligence, clearly do not raise an issue of fact with respect to the "wilful negligence or malfeasance" statutory standard. On that issue, the ruling of the Appellate Division, Second Department, in Tobacco v. North Babylon Fire Dept., 251 A.D.2d 398 (2nd Dept. 1998), a

strikingly similar case, is dispositive. There the Court stated:

> Furthermore, the Supreme Court did not err in dismissing, inter alia, all cross claims asserted against Doyle. As a member of a volunteer fire company, Doyle may not be held liable for an act done in the performance of his duties "except for wilful negligence or malfeasance" (General Municipal Law § 205-b). The record reveals that upon observing Superty's vehicle stopped about 200 feet in front of him, Doyle repeatedly applied the fire engine's brakes, and had slowed down to a speed of five to seven miles per hour when he skidded into the Superty vehicle. Under these circumstances, there is no evidence to support a finding that Doyle's failure to avoid the accident constituted wilful negligence or malfeasance. Moreover, contrary to Superty's contention, Doyle is also entitled to a privilege pursuant to Vehicle and Traffic Law § 1104 because there is no evidence that he acted with "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104[e]; see, Szczerbiak v. Pilat, 90 N.Y.2d 553, 664 N.Y.S.2d 252, 686 N.E.2d 1346; Saarinen v. Kerr, 84 N.Y.2d 494, 501, 620 N.Y.S.2d 297, 644 N.E.2d 988; Notorangelo v. State of New York, 240 A.D.2d 716, 659 N.Y.S.2d 312).

Accordingly, defendant Butler's motion to dismiss the complaint must be granted, and the complaint hereby is dismissed as to that defendant.

Dated: January 31, 2008

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J.S.C.