

Fawcett v Suffolk Transp. Serv. Inc.

2008 NY Slip Op 30685(U)

February 26, 2008

Supreme Court, Suffolk County

Docket Number: 0012410/2006

Judge: Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 012410/2006

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

COPY

PRESENT:**Hon. Paul J. Baisley, Jr.** _____

LIAM FAWCETT, infant by his Mother and Natural
Guardian, PATRICIA HARREN, and PATRICIA
HARREN, individually.

Plaintiff(s),

-against-

SUFFOLK TRANSPORTATION SERVICE INC.,
SUFFOLK TRANSPORTATION SYSTEMS INC.
SUFFOLK TRANSPORTATION CORP.,
LONG ISLAND POWER AUTHORITY,
KEVIN G. DONNELLY and OBDULI GONZALEZ.

Defendant(s).

ORIG. RETURN DATE: August 21, 2007
FINAL RETURN DATE: October 23, 2007
MTN. SEQ. #:003-MD; #004-MD and
#005-MG

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DEFT'S ATTORNEY for
Suffolk Transportation Service, Inc.,
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Suffolk Transportation Corp., and
Obdulia Gonzalez:

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DEFT'S ATTORNEY for

Kevin G. Donnelly and
Long Island Power Authority:
GEORGE ARGIRIOU, ESQ.
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Upon the following papers numbered 1 to 69 on this motion and these two cross motions: Notice of Motion and supporting papers 1 - 15; Affirmation in Response and supporting papers 16 - 17; Affirmation in Reply and in Opposition and supporting papers 18 - 33; First Notice of Cross Motion and supporting papers 34 - 44; Reply Affirmation and supporting papers 45 - 51; Second Notice of Cross Motion and supporting papers 52 - 61; Reply Affirmation 62 - 69; it is,

ORDERED that the motion (003) for reargument by the defendants Long Island Power Authority and Kevin G. Donnelly is denied; and it is further

ORDERED that the first cross motion (004) by the defendants Suffolk Transportation Service, Inc., Suffolk Transportation Systems, Inc., Suffolk Transportation Corp. and Obdulia Gonzalez for summary judgment granting their cross claim for property damage as against the defendants Long Island Power Authority and Kevin G. Donnelly is denied; and it is further

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ORDERED that the second cross motion (004) by the defendants Long Island Power Authority and Kevin G. Donnelly for dismissal of said cross claim for property damage asserted against them by the defendants Suffolk Transportation Service, Inc., Suffolk Transportation Systems, Inc., Suffolk Transportation Corp. and Obdulia Gonzalez is granted not on the merits but for failure to provide a notice of claim as required by law; and it is further

ORDERED that counsel for the defendants Suffolk Transportation Service, Inc., Suffolk Transportation Systems, Inc., Suffolk Transportation Corp. and Obdulia Gonzalez shall serve a copy of this decision and order upon respective counsel for all parties pursuant to CPLR 2103(b)(1), (2) or (3) within 30 days of the date hereof and thereafter file the proofs of service with the Clerk of the Court

The underlying action arises out of a motor vehicle accident in which the infant plaintiff was injured while he was a passenger in a school bus due to a collision with a prone utility pole being trailered by a Long Island Power Authority (hereinafter LIPA) vehicle. More specifically, while the LIPA vehicle was making a left turn, the utility pole which was on a trailer and extended well beyond the end of the trailer went into the side of a small school bus traveling straight ahead in an adjacent lane, thereby causing property damage to the bus and physical injuries to the infant plaintiff.

The LIPA defendants (LIPA and the driver of its vehicle, Kevin G. Donnelly) have moved (003) for reargument of only that part of a decision and order signed by this court on June 21, 2007, which granted summary judgment to the defendants Suffolk Transportation Service, Inc., Suffolk Transportation Systems, Inc., Suffolk Transportation Corp. and Obdulia Gonzalez (hereinafter the Suffolk Transportation defendants) on the issue of liability, that is; the Suffolk Transportation defendants were found to have no liability for the accident (*see Fawcett v Suffolk Trans. Service, Inc.*, Sup Ct, Suffolk County, June 21, 2007, Baisley, J., index No. 12410/06).

By way of cross motions, the Suffolk Transportation defendants are seeking summary judgment (004) as against the LIPA defendants on their cross claim for property damage in a specified amount; and the LIPA defendants are seeking dismissal (005) of the Suffolk Transportation cross claim for a failure to serve a notice of claim pursuant to Public Authorities Law §1020-y and General Municipal Law §50-e.

Motion for Reargument (003):

The LIPA defendants claim that the court overlooked or misapprehended certain key facts in granting summary judgment on the issue of liability to the Suffolk Transportation defendants (*see* CPLR 2221[d][2]). The key facts alleged to have been overlooked or misapprehended were 1) the court's reliance on photographs submitted on the original motion (001) and cross motion (002); 2) the court's finding that there were only two lanes of traffic on the side of the road in question; and, 3) that the court failed to take into consideration the contradictory nature of the eye witness statements.

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The photographs submitted on that motion and cross motion and considered by the court clearly supported the facts found by the court and, moreover, were properly considered by the court on the cross motion (*see Maderias v National Bank of North America*, 17 Misc 3d 1131[A] [SupCt, Richmond County 2007]; *Banks v State of New York*, 15 Misc 3d 1144[A], 841 NYS2d 818[Table] [Ct Cl 2007]; *Olsovi v Shore Hill Housing Co., Inc.*, 15 Misc 3d 1126[A], 841 NYS2d 220[Table] [Sup Ct, Kings County 2007]; *Stone v City of New York*, 13 Misc 3d 1134[A], 847 NYS2d 905[Table] [Sup Ct, Kings County 2007]). In addition, the court notes that the LIPA defendants raised no objections to the photos in their responsive papers on that motion (001) and cross motion (002). Furthermore, it is interesting to note that with regard to the number of lanes in the road, the LIPA defendants now ask to court to refer to a photograph in the same manner as the cross movants did in the original cross motion.

As to the number of lanes, the court did not err in the number of lanes. Indeed, the court agrees with the LIPA defendants that there were three lanes comprised of a left-turn lane and two through lanes and was of that mind in the original decision and order.

Lastly, as to the alleged contradictory witness statements, the court was aware of the contradictions but found them not to be sufficient in nature to prevent the basic finding that the LIPA vehicle was at fault in making its turn in a manner resulting in the end of the pole invading the space of the adjacent lane in which the bus was traveling.

In short, the LIPA defendants have failed to show on this motion (003) that the court overlooked or misapprehended any facts in rendering its decision on the original cross motion (002). Accordingly, this motion to reargue is denied (*see CPLR 2221[d][2]*; *Wechsler v First Unum Life Ins., Co.*, 295 AD2d 340, 742 NYS2d 668 [2d Dept 2002]).

Cross Motion for summary judgment on the Suffolk Transportation cross claim for property damage (004):

Although the Suffolk Transportation defendants make persuasive arguments for the granting of summary judgment on their cross claim for property damages, this application must be denied in view of the granting herein of the LIPA defendants' cross motion (005) to dismiss this cross claim for failure to comply with the notice of claim requirements in GML §50-e (as made applicable to LIPA by PAL §1020-y; *see Benzinger v Town of Brookhaven*, 288 AD2d 412, 735 NYS2d 394 [2d Dept 2001]).

Cross Motion to dismiss the cross claim for property damage (005):

In support of this cross motion, the LIPA defendants refer to the notice of claim requirements of GML §50-e which are specifically applicable to public authorities such as LIPA in accordance with PAL §1020-y[3] (*see Benzinger v Town of Brookhaven*, 288 AD2d 412, 735 NYS2d 394 [2d Dept 2001]).

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In opposition, the Suffolk Transportation defendants argue that LIPA obviously had timely notice and the full opportunity to investigate this incident not only based upon the notice of claim filed by the plaintiffs but also based upon a phone call within 90 days of the incident by a Suffolk Transportation employee to the claims representative of LIPA specifically with regard to the property damage and, furthermore, that call was acknowledged in writing by the LIPA claims representative who also wrote that the matter was investigated and the claim was denied on the basis of it concluding that LIPA was without fault.

Based upon the facts of this case, however, this was not sufficient to satisfy the notice of claim filing requirements of GML §50-e. Even though the actual claim was investigated, the claimant (Suffolk Transportation) so utterly failed to follow the statutory requirements here that it is not possible to hold that a proper notice of claim was served (*see Ayotte v Bd. Of Educ. of Plattsburgh City School Dist.*, 12 AD2d 562, 206 NYS2d 702 [3d Dept 1960]). Indeed, no notice of claim, let alone an improper one, was served at all on behalf of the Suffolk Transportation defendants; and, no application was made for leave to file a late notice of claim.

On this basis, the cross claim for property damage by the Suffolk Transportation defendants against the LIPA defendants must be dismissed. The court notes, however, that this dismissal is without prejudice to Suffolk Transportation bringing a petition for permission to file a late notice of claim with LIPA. While the court makes no prejudgment with regard to such a petition, the court notes that such an application may be supported by the facts of this case (*see* GML §50-e[5]) and that while such an application must be brought within the time to commence an action for such a claim, there is support for the proposition that the commencement of an action stops the running of the one year-ninety day statute of limitations (*see* GML §50-i) which would otherwise prohibit the court from considering such an application for an extension of time to serve a notice of claim (*see Casazza v City of New York*, 8 Misc 3d 1015[A], 801 NYS2d 777 [Table][Civ Ct, Richmond County, 2005]).

This decision constitutes the order of the court.

Dated: 2/26/08

HON. PAUL J. BAISLEY, JR.

HON. PAUL J. BAISLEY, JR., J.S.C.