

Minor v C&J Energy Savers, Inc.

2008 NY Slip Op 30694(U)

February 29, 2008

Supreme Court, Nassau County

Docket Number: 3906-05/

Judge: Stephen A. Bucaria

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CORRECTED SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. STEPHEN A. BUCARIA

Justice

TRIAL/IAS, PART 4
NASSAU COUNTY

INDEX No. 003906/05

MOTION DATE: Jan. 11, 2008
Motion Sequence # 004

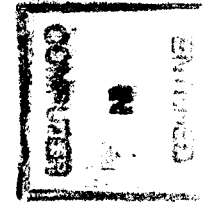
MAURICE MINOR as Administrator for the Estate of SANDY M. MINOR, MAURICE MINOR, Individually, MAURICE MINOR as Parent and Natural Guardian of JAZSMIN MINOR, MAURICE MINOR, JR. and MALACHI MINOR, LUCILLE BOLDEN as Legal Guardian CHIKERA WALDO and SHANIQUA WALDO,

Plaintiffs,

-against-

C&J ENERGY SAVERS, INC. and
CLAYTON W. SPRAGUE,

Defendants.



The following papers read on this motion:

- Notice of Motion..... X
- Affirmation in Opposition..... X
- Reply Affirmation X
- Sur-Reply..... X

This motion, by the attorneys for the defendants, for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all claims against them with prejudice is determined as hereinafter set forth.

The within action arises out of a motor vehicle accident that occurred on October 30, 2004 at approximately 12:00 noon near the intersection of Jerusalem Avenue and First Street, Hempstead, N.Y. Sandy M. Minor (decedent) was killed as the result of a collision with the truck being driven by the defendant Clayton W. Sprague (Sprague). Plaintiffs allege that Sprague's negligent operation of his vehicle was a substantial factor in causing the accident.

In support of the motion, the attorneys for the defendants submitted a copy of the transcript of the examination before trial testimony of Clayton W. Sprague. On October 30, 2004 at approximately 12:00 noon Mr. Sprague, an employee of C & J Energy Savers, was driving a 1987 Ford Diesel tanker westbound on Jerusalem Avenue en route to make a delivery to a customer in Hempstead. There was a light, misty rain on the day of the accident. He had no set time to make the delivery and experienced no problem with his brakes. The tanker could hold a maximum of 2,800 gallons of home heating oil and weighed approximately 33,000 pounds when fully loaded. At the time of the accident, the tanker had 2,740 gallons of number two home heating oil. When Mr. Sprague first entered onto Jerusalem Avenue, there was only one lane of travel in each direction. At Newbridge Road, the roadway expanded to two lanes of travel in each direction. Sprague testified that the highest rate of speed he attained on Jerusalem Avenue was thirty miles per hour and he remained in the right lane of travel the entire time. As he approached a red traffic light near Nostrand Avenue, he slowed down. As the light turned green, he proceeded through the intersection at approximately 30 miles per hour. Near this intersection was the first entrance to the A. Holly Patterson Nursing Home. There was a second entrance about 100 feet further up the roadway. At this point, he observed two cars traveling side by side in the eastbound lanes of Jerusalem Avenue. The decedent's car was in the left lane. He claims not to have observed any headlights or turn signals on either car. The cars were even with each other and then the decedent's car, in the left lane, pulled one car length in front of the other car. At some point, however, the car in the right lane went ahead by two car lengths. The decedent's car continued to proceed in the left eastbound lane towards the tanker, getting as close as ten feet. Suddenly, the decedent's car came into the westbound lane directly in front of the tanker. Mr. Sprague applied his brakes, but could not avoid hitting the decedent's car. The tanker pushed the decedent's car about forty to fifty feet after the impact but did not hit anything else. After exiting the tanker, he observed steam coming out of the decedent's car and ran over to the door on the driver's side about the same time as a man who had come from the fruit stand across the street. The window of the car was open, but they could not open the door. He could smell gasoline leaking from the car. Someone told him to get away from the car because it

was about to catch fire. As soon as he moved away from the car, it burst into flames.

In further support of the motion, the attorneys for the defendants submitted a copy of the unsigned and unsworn transcript of the examination before trial testimony of Detective Gary Ferrucci, a homicide detective with the Nassau County Police Department's Vehicle Homicide Division, in that position since 1990, and a detective for about 22 years. His unit is called to the scene of an accident if there is either a fatality or the potential of a fatality as the result of a motor vehicle accident. Detective Ferrucci, a certified accident investigator, had training for automobile accident reconstruction and investigation. He has investigated between 700 and 1000 accidents. When Detective Ferrucci arrived at the scene at approximately 1:15 PM, the fire had been extinguished and the decedent was in the vehicle. An Officer Fanning was also at the scene, and responsible for memorializing the investigation with respect to measurements and photographs. Detective Ferrucci assisted Officer Fanning with these tasks. According to Detective Ferrucci, the point of impact was between the two entrances to the A. Holly Patterson nursing facility. Based upon the physical evidence at the scene, he did not believe that the decedent was making a left turn at the time of the accident. Detective Ferrucci observed gouge marks on the roadway at the point of impact, which was between the two entrances to the A. Holly Patterson nursing facility. These gouge marks were also depicted in the police photographs. He stated the gouge marks were typical ones that would be found when an accident occurred. He could feel on the roadway when he inspected the gouge marks that they were very fresh and palpable. He did not observe any other noticeable gouge marks anywhere else in the roadway. He also found near the gouge marks part of the headlight from the decedent's car. Mr. Sprague took a portable breath test which indicated that he had not consumed any alcohol prior to the accident; a standard procedure which the Detective administered after every fatal accident. Mr. Sprague never gave any indication that he had consumed alcohol prior to the accident. No violations were issued to Mr. Sprague. Detective Ferrucci learned from the maintenance crew that inspected the tanker after the accident that there was nothing wrong with it. Based upon his investigation of the scene and his conversations with witnesses, Detective Ferrucci concluded that the accident was the result of the decedent losing control of her vehicle and going into the tanker's lane of travel, and that there was nothing that Mr. Sprague could have done to avoid the accident. He also opined that the speed of the decedent's car and the wet road conditions further contributed to the accident.

In opposition to the motion, the plaintiffs' attorney asserts that, since the deposition transcript of non-party witness Detective Ferrucci is unsigned and unsworn,

the deposition transcript is in inadmissible form and cannot be used by this Court in determining the issues before it. The attorneys for the defendants do not explain the reason for submitting the unsigned and unsworn transcript in support of the motion. The defendants failed to show that the unsigned deposition transcript of the non-party witness Detective Ferrucci, submitted in support of their motion, were previously forwarded to Detective Ferrucci for his review pursuant to CPLR 3116(a). Consequently, the transcription deposition of Detective Ferrucci is not admissible. (see, Martinez v 123-16 Liberty Ave. Realty Corp., ___ AD3d ___, 2008 NY Slip Op. 664, 2008 N.Y. AppDiv. Lexis 655, 2nd Dept., January 29, 2008; Pina v Flik International Corp., 25 AD3d 772).

The attorneys for the defendants assert they have cured the defect of the unsigned transcripts by submitting, with the Reply Affirmation, an affidavit sworn to December 21, 2007 by Detective Ferrucci in which he describes in narrative form the results of his investigation of the accident scene, and his conversation with witnesses. In the affidavit, Detective Ferrucci opines that the subject accident was the result of the decedent losing control of her vehicle and going into the truck's lane of travel; and Mr. Sprague could have done nothing to avoid the accident.

The attorneys for plaintiffs argue, in a Sur Reply, that not only do the defendants fail to address the issue of the unsworn and unsigned transcript, but instead improperly put forth evidence for the first time in the Reply Affirmation by annexing the affidavit of Detective Ferrucci sworn to December 21, 2007, five (5) weeks after plaintiff had filed their opposition to the within summary judgment motion.

"A movant is generally precluded from relying on evidence submitted for the first time in its reply papers to sustain its burden on a motion for summary judgment." (Rengifo v City of New York, 7 AD3d 773). However, new matters raised in the reply papers are to be considered when the opposition has had an opportunity to respond in a sur-reply, as herein is the case. (Hayden v County of Nassau, 16 AD3d 415; Ioele v Wal-Mart Stores, Inc., 290 AD2d 614; Teplitskaya v 3096 Owners Corp., 289 AD2d 477).

Finally, plaintiffs allege there are questions of fact that preclude the granting of summary judgment. Plaintiffs' attorney claims that, based on Mr. Sprague's statements, it is "physically impossible" to reach the conclusion that he was driving his vehicle at a safe

speed in a non-negligent manner is not based on any probative admissible evidence. Plaintiffs assert that the deposition testimony of non-party witness Alberta Billings raises issues of fact as to whether the decedent had her turn signal activated and was making a left turn into the parking lot of A. Holly Patterson Nursing Home at the time of the accident. Plaintiffs' argument, that the decedent was turning into the entrance of the nursing home prior to the accident, is directly contradicted by the physical evidence observed by Detective Ferrucci who determined the accident occurred between the two entrances to the nursing home. Further, plaintiffs do not indicate that they have engaged an expert to rebut the testimony of Detective Ferrucci, or need additional time to submit an expert affidavit of evidentiary probative value.


To establish **prima facie** entitlement to judgment as a matter of law, a movant for summary judgment must come forward with evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact. (Zuckerman v City of New York, 49 NY2d 557). The failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers. (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). Herein, the defendants have established their **prima facie** entitlement to summary judgment, and the plaintiffs have not sufficiently come forward with sufficient probative evidence to create an issue of fact.

The motion for summary judgment is **granted**.

This order concludes the within matter assigned to me pursuant to the Uniform Rules for New York State Trial Courts.

So Ordered.

Dated FEB 29 2008


XXX J.S.C.

ENTERED

MAR 04 2008
NAUSSAU COUNTY
COUNTY CLERKS OFFICE