

Ramirez v BHL Transp., Inc.

2008 NY Slip Op 30794(U)

March 12, 2008

Supreme Court, Suffolk County

Docket Number: 0011484/2003

Judge: Thomas F. Whelan

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.



SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 10-26-07
ADJ. DATE 2-1-08
Mot. Seq. # 005 - MG
Mot. Seq. # 006 - XWDN

-----X
EDUARDO RAMIREZ, as Administrator of the :
Estates of Cecilia Ramirez and Fiorella Ramirez, :
RENEE MARGOT VILLAVICENCIO and :
LILIANA ARELLANO, as Co-Administrators of :
the Estate of Ernesto Villavicencio and LUIS :
RAMIREZ, :

Plaintiffs, :

- against - :

BHL TRANSPORT, INC., HOLGER PEREZ, :
JOSHUA VON BLUME, JANET BLUM, :
COUNTY OF SUFFOLK and SUFFOLK :
COUNTY POLICE DEPARTMENT, :

Defendants. :

-----X

DANKNER & MILSTEIN, P.C.
Attorneys for Plaintiffs
41 East 57th Street
New York, New York 10022

LAWRENCE, WORDEN, RAINIS & BARD, P.C.
Attorneys for Defendants BHL & Peres
425 Broad Hollow Road, Suite 120
Melville, New York 11747

ROBERT P. TUSA, ESQ.
Attorneys for Defendants Von Blume & Blum
898 Veterans Memorial Highway, Suite 320
Hauppauge, New York 11788

CHRISTINE MALAFI, ESQ, Suffolk Cty Atty
By: Christopher A. Jeffreys, Esq.
Attorneys for Defendants County of Suffolk &
Suffolk County Police Department
H. Lee Dennison Building
100 Veterans Memorial Highway, P.O. Box 6100
Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 18 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 4; Notice of Cross Motion and supporting papers 5 - 8; Answering Affidavits and supporting papers 9 - 11; 12 - 14; 15 - 16; Replying Affidavits and supporting papers 17 - 18; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (005) by defendants, County of Suffolk and the Suffolk County Police Department, for summary judgment pursuant to CPLR 3212 is granted; and it is further

Ramirez v BHL Transport
Index No. 03-11484
Page No. 2

ORDERED that the cross motion (006) by defendants, BHL Transport, Inc. and Holger Perez, for summary judgment pursuant to CPLR 3212 has been withdrawn pursuant to a letter from counsel dated January 30, 2008; and it is further

ORDERED that plaintiffs' action as against defendants, County of Suffolk and Suffolk County Police Department, is severed and shall continue against the remaining defendants (*see Holt v Holt*, 262 AD2d 530, 692 NYS2d 451 [2d Dept 1999]); and it is further

ORDERED that counsel for the County defendants shall serve a copy of this Order with Notice of Entry upon counsel for all parties pursuant to CPLR 2103(b)(2) or (3) within forty (40) days of the date hereof and thereafter file the affidavit of service with the Clerk of the Court.

In this negligence action, plaintiffs seek to recover damages for allegedly sustaining serious injuries and wrongful death in a second accident which occurred on September 29, 2002. Plaintiffs allege that defendants, County of Suffolk and the Suffolk County Police Department (hereinafter "the County") negligently failed to close the west bound lanes of the eastbound Long Island Expressway (hereinafter "LIE") after an accident, negligently caused by a tractor trailer traveling in the eastbound lanes which collided with the center median (the first accident). The first accident caused debris to fall into the westbound lanes of traffic where the plaintiffs were traveling in the second accident. The tractor trailer in the first accident was owned by defendant BHL Transport, Inc. and operated by defendant Holder Perez in the course of his employment (hereinafter "BHL").

Plaintiffs allege that as a result of the debris caused by the first accident, their vehicle sustained a flat tire and was struck in the rear in the second accident by a vehicle owned by defendant, Janet Blum and operated by defendant Joshua Von Blume near westbound Exits 52 and 51 of the LIE. As a result of the second accident, plaintiffs allege that Cecilia Ramirez, Fiorella Ramirez and Ernesto Villavicencio wrongfully died of their injuries and that Luis Ramirez and his front seat passenger, Laurie Luna, sustained serious injuries.

The record and sworn testimony reveal that, as a result of the accidents, traffic on the LIE was closed in the westbound lanes from Exits 56 to 51 and in the eastbound lanes from Exits 55 to 56 some time between 11:48 p.m. and 12:11 a.m. The record is devoid as to the exact moment either accident occurred. The County now moves for summary judgment dismissing the action as against it.

Initially, the court notes that the BHL defendants have withdrawn their cross motion for summary judgment pursuant to CPLR 3212, according to correspondence dated January 30, 2008.

In support of its motion, the County submits copies of the pleadings, bill of particulars, examination before trial transcripts of defendant Perez, non-party Thomas Southard, non-party James Ermentraut, non-party John Cammarata, plaintiff Luis Ramirez, defendant Joshua Von Blume, P.O. Jennifer Price, Lt. Steven Hernandez, P.O. Jesus Faya, non-party Richard Knowlden, and eye witness statements. The County contends that there is no liability to the plaintiffs inasmuch as their injuries were caused from the impact by Von Blume's vehicle. In addition, the discretionary activities undertaken by the police officers were not subject to liability and the police were not negligent.

With regard to the first accident, defendant, Holger Perez testified to the effect that he lost control of the tractor trailer he was operating on the date of the accident; that he was trying to avoid a black pickup truck which was approaching from his left; that in doing so, he clipped a red vehicle in the far right lane and then tried to compensate by swerving to the left but struck the center divider; that he was unaware that debris from the concrete divider had landed in the west bound lanes; and that he was trapped in the cab of the truck and was provided with assistance to exit the vehicle in a short time by police and rescue operations.

Non-parties Thomas Southard and James Ermentraut both testified that they were the occupants of the red vehicle which was struck by the tractor trailer traveling eastbound; that their vehicle was pushed to the right shoulder of the expressway after impact and they sustained no personal injuries; that police and fire personnel were at the scene within five minutes and all eastbound traffic was stopped shortly thereafter; and that they were initially unaware of the traffic situation in the westbound lanes.

Non-party John Cammarata testified to the effect that he operated the black pickup truck; that he was trying to avoid the tractor trailer as it appeared to be weaving between the lanes as it entered the expressway, that he observed the tractor trailer hit the center divider; that the police responded within three to five minutes; and that he did not recall when the traffic was closed in the westbound lanes.

Testimony concerning the second accident reveals that plaintiff Luis Ramirez was driving in the middle westbound lane of the LIE near Exit 56 and that traffic in the westbound lanes was light. Mr. Ramirez states that he felt the vehicle run over something bumpy, which caused a flat tire shortly thereafter; that he slowed the vehicle to 25 mph and turned on the blinker and emergency flashers; that he began to pull over to the right shoulder; that he checked the rear view mirror several times and saw no vehicles behind him; that in the next moment, he found himself lying in the highway; and that he learned the vehicle had been struck in the rear. Testimony by non-party Philip McHugh, who came upon the accident a few minutes later, reveals that the Ramirez vehicle's emergency flashing lights were on.

Defendant Joshua Von Blume testified to the effect that he was operating a ford pickup truck in the middle westbound lanes of the LIE on the evening of the accident; that after he observed the broken divider from the first accident and debris in the westbound lanes, he moved into to the right lane and reduced his speed to avoid the debris; that after he passed through the debris, he moved back into the middle lane and resumed his speed of 55 miles per hour; that he did not see the Ramirez vehicle before impact; and that he did not recall if he lost consciousness prior to the accident.

Police Officer Jennifer Price testified to the effect that she was notified by Suffolk County Police dispatcher at 11:45 p.m. of an accident in the eastbound lanes of the LIE on September 29, 2002; that she verified a dispatch tape wherein someone made reference to debris in the westbound lanes at 11:47 p.m.; that Sgt. Hernandez, the supervisor of the police officers, made an announcement to clear the air waves at 11:48.

Lt. Hernandez testified to the effect that on the date of the accident, he was employed by the Suffolk County Police Department as a Sargent in the Highway Patrol; that he was in charge of Officers Price and Faya at the first accident scene; that he was notified by police radio of the accident; that from

Ramirez v BHL Transport

Index No. 03-11484

Page No. 4

his location. he reached the first accident by stopping his police cruiser in the westbound lanes opposite the site of the tractor trailer near Exit 56; that when he stopped, his vehicle had a flat tire; that he noticed concrete in the roadway; that he recalls his first transmission on arrival was to clear the air so he could have full use of the police radio; that he started calling out orders to the dispatcher and responding units, for all highway units to respond to the scene and that he needed to shut down the area in the eastbound and westbound directions; that he also ordered the dispatcher to call for the Third and Fourth Precincts to assist in closing the road and to direct traffic; that he did not recall at what time the order was given and an excerpt of the 911 tapes did not specify the time; and that he then drove to the second accident scene in Officer Faya's cruiser.

Police Officer Jesus Faya testified to the effect that he was involved in the investigation of both accidents; that he received the call regarding the first accident at 11:45 p.m.; that when he arrived, two units were already there, that of Officer Price and Officer Richard Raynock; that he parked his vehicle approximately 150 feet behind the tractor trailer with turret lights on to protect the scene; that he then placed traffic cones diagonally across the roadway and completely closed the eastbound lanes from Exits 55 to 56; that he did not hear of any reports regarding debris in the westbound lanes; that he recalls driving to the westbound lanes opposite the tractor trailer to meet Sgt. Hernandez shortly thereafter and at that time, he observed the debris all over the road; that Sgt. Hernandez ordered Faya to change the flat tire of his vehicle; that when the dispatch call was received regarding the second accident, Sgt. Hernandez drove in Faya's vehicle to the scene near Exits 52 and 51; that when he arrived at the second accident, he inspected the Ramirez vehicle and noted a flat in the right front tire; and that he also noticed five or six police vehicles and seven or eight fire vehicles already at the scene.

Richard Knowlden testified to the effect that he was employed as a project manager by Parsons Brinckerhoff, Inc. under contract with the New York State Department of Transportation (hereinafter "DOT") to operate the INFORM System, which monitors the condition of the expressway by closed circuit televisions, police scanners, radios and telephones; that the Incident Summary Report which he prepared revealed INFORM was notified by a Suffolk County Police Officer, badge 453, at 12:05 a.m. of the accident and that traffic was closed eastbound from Exits 55 to 56; and that he verified an entry which stated six minutes later, at 12:11 a.m., traffic was closed in all directions, meaning the eastbound and westbound lanes were closed.

In opposition, plaintiffs submit the above examination before trial transcripts and claim that the County is liable for misfeasance as opposed to nonfeasance. The misfeasance arises from the alleged negligence of the police officers when they undertook to control the traffic and did nothing to reduce the risk of harm, which was created by the debris covering the westbound lanes from the first accident. In essence, plaintiffs claim that the police should have allocated their limited resources in a different manner.

There is municipal immunity from suit when the conduct complained of involves the exercise of professional judgment even if the judgment was poor in retrospect (*see Kenavan v City of New York*, 70 NY2d 558, 523 NYS2d 60 [1987]). An exception to this rule is when plaintiffs establish a special relationship with the municipality (*see Pelaez v Seide*, 2 NY3d 186, 778 NYS2d 211 [2004]).

Ramirez v BHL Transport
Index No. 03-11484
Page No. 5

The four elements that are required to establish a special duty are (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of a party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) the party's justifiable reliance on the municipality's affirmative undertaking (*see Kovit v Estate of Hallums*, 4 NY3d 499, 797 NYS2d 20 [2005], *rearg denied* 5 NY3d 783, 801 NYS 2d 803 [2005]). Absent such a showing, "the proper allocation of public resources and available police services is a matter for the executive and legislative branches to decide." (*De Long v County of Erie*, 60 NY2d 296, 469 NYS2d 611 [1983]). The special duty rule is limited to cases involving nonfeasance, where the municipality is alleged to have failed to take any action in breach of some general duty imposed by law or voluntarily assumed for the benefit of the public as a whole (*see Rodriguez v New York*, 189 AD2d 166, 595 NYS2d 421 [1993]).

Here, the actions by the police constitute a government function. Since there was a limited number of personnel immediately available, they attended to the victims of the first accident and closed off traffic leading to the first accident in the eastbound lanes. The police had no knowledge of the debris in the westbound lanes at the time the plaintiff drove over it. It was not until Sgt. Hernandez arrived on the scene in the westbound lanes, opposite the first accident and after experiencing a flat tire on his vehicle, that he noticed debris in the westbound lanes. He immediately gave the order to close all lanes of traffic (*see Napolitano v County of Suffolk*, 61 NY2d 863, 474 NYS2d 461 [1984]). It was after that point in time that the police were notified of the second accident involving the plaintiffs.

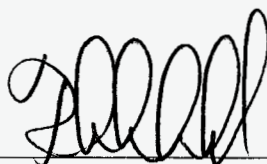
Plaintiffs have failed to establish the elements of a special duty (*see Gonzalez v County of Suffolk*, 228 AD2d 411, 643 NYS2d 651 [1996]). *Cuffy v New York*, 69 NY2d 255, 513 NYS2d 372 [1987], *motion amend dismiss* 70 NY2d 667, 518 NYS 2D 960 [1987]). In any event, the police were not directly responsible for the plaintiffs' injuries inasmuch as the second accident was proximately caused by Von Blume and the police had no notice of the debris until after plaintiffs had already driven through the area.

The Court finds that the County met its prima facie burden of establishing that there was no negligence on the part of the police officers (*see Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Accordingly, the motion for summary judgment dismissing the action as against the County is granted as herein indicated. This constitutes the Order and decision of the Court.

DATED: _____

3/12/08



THOMAS F. WHELAN, J.S.C.