Banks v City of New York
2009 NY Slip Op 32453(U)
October 20, 2009
Supreme Court, New York County
Docket Number: 100890/05
Judge: Nicholas Figueroa
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[* 1] SCANNED ON 10/26/2009

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. NICHOLAS FIGUEROA, *Justice*   PART 46

BARBARA L. BANKS,

vs

THE CITY OF NEW YORK, THE NYCPD & ANTHONY BRITTON,

INDEX NO. 100890/05
MOTION DATE
MOTION SEQ. NO. 002
MOTION CAL. NO.

The following papers, numbered 1 to ____ were read on this .

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

UPON the foregoing papers, it is ordered that this

See accompanying Decision and Order.

FILED
OCT 23 2009
COUNTY CLERK'S
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: October 20, 2009

J.S.C.

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION ☐

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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BARBARA L. BANKS,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 100890/05

THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, and ANTHONY BRITTON,

Defendants.

---x

FILED
OCT 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Nicholas Figueroa, J.S.C.:

In this personal injury action, the City of New York and its individual co-defendant, a retired police officer, move to set aside a verdict for plaintiff in the sum of $700,000. Defendants ask the court to dismiss the complaint or, alternatively, to direct judgment for them as a matter of law.

This action arises from a collision between plaintiff's vehicle and defendant's marked police van on March 2, 2005. The following account of the accident's circumstances is based upon the trial testimony of plaintiff and defendant police officer.

At the time of the accident, plaintiff was 54 years old and held full-time and part-time positions as a food service supervisor at a medical school and a nursing home. The accident took place at approximately 6:00 a.m. on Manhattan's First Avenue, a three-driving-lane, northbound-only street. Plaintiff was driving to work, northward, when her car was sideswiped by the van, driven by defendant police officer. Moments before the accident, he too had been driving northward, toward a polling place where he had been assigned to monitor activities related to that day's presidential primary. His progress was interrupted, however, when he

observed a truck stopped at an angle ahead, on the nearly empty street, occupying part of the parking lane and jutting out into the contiguous driving lane. It appeared to him that a man standing at the rear of the truck was waving his hands at him.

By the time that defendant police officer had processed what he had seen, and concluded that the man might have been trying to flag him down, he had driven approximately 15 feet ahead of where the truck was stopped. Defendant then proceeded to drive the police van in reverse, or southward, toward the spot where the man had stood. During that maneuver, a part of the van crossed into the second lane, where it made contact with plaintiff's on-coming vehicle. It was not until a little later that defendant police officer became aware that the truck had left.

Although plaintiff made her way that morning to her workplace, chest pain ultimately prompted her to go to a hospital emergency room. Although she continued to report to work for approximately two more weeks, she ceased working completely thereafter. In 2005, she filed a complaint against defendants, seeking damages for physical and psychological trauma caused by the accident, which, when her initial injuries were compounded by a subsequent fall on her knee after it buckled, had left her reliant on a cane for walking and, allegedly, permanently unemployable.

In addition to herself, plaintiff presented the testimony of a psychologist specializing in trauma; an economist; and an orthopedic surgeon who had twice operated on plaintiff's knee. The defendant police officer was defendants' sole witness. The jury returned a verdict for $732,500, including damages for past and future pain and suffering, past and future lost wages, and the future expense of psychological therapy.

The instant motion under CPLR 4404 was filed 57 days after the verdict was rendered, or

some 12 days more than the 45 days allowed by the court. As a threshold matter, plaintiff opposes the motion on the ground of untimeliness. To be sure, there is authority for barring a belated 4404 motion where the movant does not offer an excuse for its failure to meet its deadline (*Casey v Slattery*, 213 AD2d 890 [four-month delay in filing]; *184 West 10th Street Corp. v Marvits*, 18 Misc 3d 46, *aff'd* 59 Ad3d 287 [seven-month delay in filing]). However, in view of the brevity of defendants' default, on the one hand, and the weight of their submissions, on the other, it is concluded that such precedents do not forbid consideration of this motion on its merits.

Defendants challenge the verdict on four grounds.

Defendants first contend that under the Vehicle and Traffic Law they could be held liable for the collision only if defendant police officer were found to have acted in reckless disregard for others' safety, a finding that defendants maintain is not supported by the evidence. In this connection, defendants invoke sections 101 and 114-b of the statute and related case law.

The reckless disregard standard applies to an authorized emergency vehicle (including a police vehicle, under section 101) when engaged in an "emergency operation" as defined by section 114-b (*Saarinen v Kerr*, 84 NY2d 494). Section 114-b defines the phrase "emergency operation" as follows:

> The operation ... of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm or fire, actual or potential release of hazardous materials or other emergency.

According to defendants, including defendant police officer, he was engaged in an "emergency operation" as a matter of law. In other words, defendants argue that the court should not have referred the "emergency operation" question to the jury. Unlike the instant case, however, the precedents cited by defendants in this connection involved situations falling within the specific categories of emergency listed in the statute (*Criscione v City of New York*, 97 NY2d 152 [policeman responding to a "police call, " pursuant to a 911 call to investigate a domestic dispute]; *Gonyea v County of Saratoga*, 23 AD3d 551 [policeman "responding to, or working at a (two-car) accident"]; *Saarinen v Kerr, supra* [policeman "pursuing an actual violator of the law," when chasing van that ran stop sign, red light, and drove into lane for on-coming traffic]; *Stanton v State*, 26 NY2d 494 [policeman "pursuing an actual violator of the law," when chasing speeding car driving against traffic]). By contrast, the present case required a jury's fact-finding to determine whether the circumstances described by defendant police officer constituted an "other emergency" and whether it thus justified a departure from the standard of ordinary care.

Where, as here, a jury verdict is challenged as insufficiently supported by the evidence, "the relevant inquiry is whether 'there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [people] to the conclusion reached by the jury on the basis of the evidence presented at trial'" (*Mirand v City of New York*, 84 NY2d 44, 49, *quoting Cohen v Hallmark Cards*, 45 NY2d 493, 499). In this case, a rational person could have concluded that the police officer's actions immediately prior to the accident departed from the rules of ordinary care and that he had not been confronted with an emergent situation that would have permitted such departure under the statute.

Defendants also contend that plaintiff should have been precluded from offering the

expert testimony of an economist in view of her failure to identify the expert and make his report available to defendants until approximately two weeks before the trial was scheduled to begin (which was when plaintiff retained him). As defendants concede, the statute does not specify a deadline for such disclosure. Nor does the statute contemplate preclusion unless the plaintiff's delay was willful or the defendant is unavoidably prejudiced by it (*see, e.g., Schwartzberg v Kingsbridge Heights Care Center*, 28 AD3d 463; *Bickford v St. Francis Hosp.*, 19 AD3d 344; *McDermott v Alvey, Inc.*, 198 AD2d 95). Although defendants argue that plaintiff's delay in this connection is per se proof of willfulness, the cases do not support such logic (*see, e.g., Ostrow v New London Pharmacy*, 278 AD2d 158; *Gallo v Linkow*, 255 AD2d 113; *McDermott v Alvey, Inc., supra*). Nor can defendants claim to have been surprised by the avenue of testimony in view of plaintiff's bill of particulars, served in 2005, which had identified lost wages as an element of her damages. Moreover, where, as here, a defendant does not move for preclusion until after the jury is selected, it cannot be heard to complain of a resultant prejudice that might have been avoided by an earlier motion for an adjournment (*see Nathel v Nathel*, 55 AD3d 434; *Freeman v Kirkland*, 184 AD2d 331).

Defendants also charge that there was no foundation for the premise that plaintiff was rendered permanently unemployable and therefore no basis from which the economist could opine on damages flowing from such condition. Review of the record confirms, however, that plaintiff's testimony, coupled with her orthopedist's and psychologist's, provided sufficient evidence from which a jury could reasonably find that plaintiff post-accident was no longer psychologically and physically fit to work.

Defendants finally argue that plaintiff should have been precluded from offering the

testimony of the orthopedist concerning plaintiff's future need for a total knee replacement. Defendants point out that plaintiff's first expert exchange, at the end of December 2008, referred only to future surgeries on plaintiff's spine, and also referred to, but failed to attach, the expert's "attached" report. Defendants further point out that plaintiff served them with an amended exchange some 12 days later, disclosing that her expert would testify to future knee surgeries, "including total knee replacement surgeries" and also referring to an "attached," albeit missing, report. Defendants complain that it was not until about a week before the trial began that plaintiff finally supplied them with the expert's report. Defendants charge that plaintiff thus failed to comply with CPLR 3101(d) as well as Section 202.17 of the Uniform Rules for the New York State Trial Courts (the latter requiring disclosure, at least 30 days before trial, of injuries or conditions not known to exist at the time of the original medical reports). It is noted that section 202.17 directs preclusion of any records not thus disclosed "unless an order to the contrary is made, or unless the judge presiding at the trial in the interests of justice and upon a showing of good cause...."

Defendants do not deny that plaintiff's bill of particulars had disclosed that she would need future knee surgeries and that they had in due course received the records of the orthopedist, as plaintiff's treating physician. Moreover, for purposes of both section 3101(d) and 202.17, defendants' own failures to demand at once the reports that plaintiff had failed to serve and defendants' choice to forbear from making a motion until after the jury had been selected belie their contention that time was of the essence to their defense in this connection and that they were therefore prejudiced by plaintiff's delayed disclosure (*see Reed v City of New York*, 304 AD2d 1; *Freeman v Kirkland, supra*).

[* 8]

For all of the foregoing reasons, defendants' motion is denied. This constitutes the decision and order of the court.

Dated: October 20, 2009

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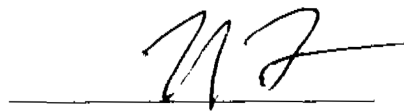

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