

Caliendo v New York City Tr. Auth.

2010 NY Slip Op 32118(U)

July 23, 2010

Sup Ct, NY County

Docket Number: 107838/2008

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

Index Number : 107838/2008

CALIENDO, MODIANO

vs

NEW YORK CITY TRANSIT

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. 107838/08

MOTION DATE 5/12/10

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

FOR THE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

The following papers, numbered 1 to ___ were read on this motion for summary judgment and cross motions for summary judgment

| | Papers Numbered |
|---|-----------------|
| Notice of Motion— Affirmation — Exhibits A-H | <u>1-2</u> |
| Notice of Cross Motion—Affirmation— Exhibits A-F | <u>3-4</u> |
| Notice of Cross Motion—Affirmation — Exhibits A-B | <u>5-6</u> |
| Affirmation In Opposition and in Reply | <u>7</u> |
| Reply Affirmation In Further Support | <u>8</u> |

FILED
JUL 30 2010
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes (2) No

Upon the foregoing papers, it is ordered that plaintiff's motion for summary judgment, the cross motion for summary judgment by defendants Seacrest Fish Stores, Inc. d/b/a Demartino Wholesale Fish Market and Michael Benvenuto, and the cross motion by defendants New York City Transit Authority and John Romero are decided in accordance with the annexed memorandum decision and order.

Dated: 7/23/10
New York, New York

 _____, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

HON. MICHAEL D. STALLMAN

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21**

-----X
MODIANO CALIENDO,

Plaintiff,

Index No. 107838/2008

- against -

NEW YORK CITY TRANSIT AUTHORITY, JOHN
ROMERO, SEACREST FISH STORES, INC. d/b/a
DEMARTINO WHOLESALE FISH MARKET, and MICHAEL
BENVENUTO,

Defendants.

FILED
Decision and Order
JUL 30 2010
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-----X
HON. MICHAEL D. STALLMAN, J.:

In this action, plaintiff alleges that, on January 10, 2008, at approximately 8:30 am, a truck owned by defendant Seacrest Fish Stores, Inc. d/b/a DeMartino Wholesale Fish Market swerved into and collided with the New York City Transit Authority (NYCTA) bus in which plaintiff was a passenger. The first cause of action is brought against NYCTA and John Romero; the second cause of action is brought against defendant Seacrest Fish Stores, Inc. d/b/a DeMartino Wholesale Fish Market (DeMartino) and Benvenuto.

In their answer, DeMartino and Benvenuto admitted that Benvenuto was the driver of the vehicle, with the knowledge and consent of DeMartino. Sharron Affirm., Ex B [Verified Amended Answer, Paragraph "Second"]. NYCTA and Romero admitted in their answer that Romer was the bus driver. Sharron Affirm., Ex C [Amended Verified Answer ¶ 4].

Plaintiff now moves for summary judgment in her favor against DeMartino and Benvenuto. DeMartino and Benvenuto cross-move for summary judgment dismissing the complaint as against them. NYCTA and Romero cross-move for summary judgment dismissing the complaint as against

them as well. This decision addresses the motion and the two cross motions.

DISCUSSION

At his deposition, Benvenuto testified that he was a delivery truck driver employed by DeMartino. Sharron Affirm., Ex G [Benvenuto EBT], at 6. On the date of the accident, Benvenuto testified that he had turned onto Madison Avenue from 27th Street, and that he was in the right lane. *Id.* at 9, 11, 13. He testified that a yellow cab was in front of his vehicle in his lane, by about two car lengths. *Id.* at 14, 17. He claims that, when he saw the brake lights of the cab go on, he stepped on his brakes and veered to the left. *Id.* at 20. According to Benvenuto, he was still traveling at 25 to 30 miles an hour, and still about two car lengths behind the cab. *Id.* Benvenuto testified that he did not use his “signal light” before he turned left, and he did not look to his left before he turned left. *Id.* at 21. When asked if his vehicle made contact when he veered to the left, Benvenuto claimed that a bus hit his vehicle in the back, that “the driver’s side mirror” made contact with “[t]he back of the truck. The box truck in the back.” *Id.* at 21-22. Benvenuto stated that he did not see the bus before contact. *Id.* at 21. At Romero’s deposition, when asked what part of the truck and part of the bus made contact, he answered, “His left side rear, top of the cab to the mirror, to the bus mirror.” Lewyn Affirm., Ex C [Romero EBT], at 33.

Based on Benvenuto’s deposition testimony, plaintiff has established a prima facie case for summary judgment in plaintiff’s favor against DeMartino and Benvenuto, based on a violation of Vehicle & Traffic Law §1128 (a). Benvenuto’s deposition testimony establishes that he moved his truck into the traffic lane of the NYCTA bus without first ascertaining that he could do so with safety, and collided with the NYCTA bus. *Summers v Teddy Cab Corp.*, 50 AD3d 671, 672 (2d Dept 2008); *Williams v New York City Tr. Auth.*, 37 AD3d 827, 828 (2d Dept 2007).

DeMartino and Benvenuto argue that the NYCTA bus rear-ended Benvenuto's vehicle, citing *Franco v Breceus* (70 AD3d 767 [2d Dept 2010]). *Franco* is inapposite. *Franco* involved a rear-end collision with a stopped vehicle. Here, DeMartino and Benvenuto concede that the truck driven by Benvenuto was neither stopped nor stopping at the time of contact. Lewyn Affirm. ¶ 26.

However, DeMartino and Benvenuto raise triable issues of fact as to whether the taxicab's stop created an emergency situation, and thus whether Benvenuto's actions were reasonable under the circumstances.

“While a defendant will not be considered negligent for his or her conduct if he or she is faced with an emergency situation, not of his or her own making, has little or no time to consider an alternative course of conduct and acts reasonably under the circumstances, it generally remains a question for the trier of fact to determine whether an emergency existed and, if so, whether the defendant's response thereto was reasonable. Furthermore, merely encountering an emergency does not completely absolve one from liability; it simply requires that one's conduct be measured against that of a reasonable person confronted with similar circumstances in a similar time frame within which to react.”

Schlanger v Doe, 53 AD3d 827, 828 (3d Dept 2008)(citations omitted); *Ward v Cox*, 38 AD3d 313, 314 (1st Dept 2007). “Even where an emergency is found to exist, [however,] that does not automatically absolve one from liability; a party may still be found negligent if the acts in response to the emergency are found to be unreasonable.” *Esposito v Wright*, 28 AD3d 1142, 1143 (4th Dept 2006).

Here, Romero, the NYCTA bus driver, testified at his deposition that “The cab made a short stop in front of the truck. In order so the truck will not rear end the cab, the truck went to my lane, the second lane.” Romero EBT, at 36. Romero and Benvenuto each testified that the taxicab had stopped to pick up a passenger. Romero EBT, at 51; Benvenuto EBT, at 25.

As plaintiff indicates, “[d]rivers must maintain safe distances between their cars and cars in

front of them (Vehicle and Traffic Law § 1129 [a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages.” *Johnson v Phillips*, 261 AD2d 269, 271 (1st Dept 1999). However, plaintiff did not submit any expert affidavit as to whether Benvenuto had maintained a safe distance, given the speed at which he claimed he was driving, i.e., 25 to 30 miles an hour. Moreover, triable questions of fact arise as to the traffic conditions at issue. Although the accident occurred around 8:30 a.m., during rush hour, Benvenuto described the traffic conditions as moderate, and that he stopped only one time to attempt a right-hand turn onto 30th Street. Benvenuto EBT, at 12. Meanwhile, Romero testified at his EBT that traffic conditions were “slow,” “moderate to heavy, in-between moderate and heavy.” Romero EBT, at 26. Benvenuto claimed at his deposition that he was still traveling at 25 to 30 miles an hour. Benvenuto EBT, at 20. However, Romero testified that he observed the taxicab in the first lane approximately two and a half car lengths ahead of the bus, and that traffic, including the truck, was going about five to eight to ten miles per hour. Romero EBT, at 25, 49.

Plaintiff also argues that Benvenuto should have anticipated that the taxicab ahead of him might stop to pick up passengers. However, this argument assumes that the taxicab had lawfully stopped to pick up the passenger. In addition, the awareness that a taxicab stops to pick up passengers would not preclude a jury from finding an emergency situation. *Cf. Kuci v Manhattan and Bronx Surface Tr. Operating Auth.*, 88 NY2d 923, 924 (1996)(“That a driver was aware that cars often made right turns in front of buses would not preclude a jury from deciding that, as to the events in issue in this case, the driver did not anticipate being suddenly cut off by this particular car”).

As plaintiff indicates, when Benvenuto was asked how much time passed from the time that

he first saw the cab brake lights go on until the time that the cab stopped, he first answered, "Maybe twenty seconds. Ten to twenty seconds." Benvenuto EBT, at 18. At that point, his counsel held a discussion off the record, and when the deposition resumed, counsel stated that Benvenuto wanted to "clarify his previous answer" to "a split second." *Id.* at 19. The inconsistency in Benvenuto's deposition raises an issue of his credibility, which is for the trier of fact, and not for the court. "On a motion for summary judgment, the court's function is issue finding, not issue determination, and any questions of credibility are best resolved by the trier of fact." *Martin v Citibank, N.A.*, 64 AD3d 477, 485 (1st Dept 2009). Even if Benvenuto's testimony were disregarded, Romero's deposition testimony corroborates Benvenuto's assertion that the taxicab made a sudden stop.

Thus, DeMartino and Benvenuto raise triable issues of fact as to whether the taxicab's stop created an emergency situation, and whether Benvenuto's actions—i.e., swerving into an another lane of traffic without signaling or looking—were reasonable under the circumstances, even if Benvenuto had been presented with a sudden emergency. Therefore, plaintiff's motion for summary judgment in her favor against DeMartino and Benvenuto is denied, and DeMartino and Benvenuto' cross motion for summary judgment is denied.

NYCTA and Romero's cross motion for summary judgment dismissing the complaint is denied. The above analysis of the law of emergency applies to the bus as well as the truck. NYCTA and Romero contend that the collision between the bus and the truck was unavoidable. When asked how far up ahead the truck was before there was contact, Romero testified, "He was about two, three feet, less maybe." When asked what part of the truck and part of the bus made contact, Romero answer, "His left side rear, top of the cab to the mirror, to the bus mirror." Romero EBT, at 33. However, as discussed above, Romero testified that traffic was going about five to eight to ten miles

per hour. Romero EBT, at 25, 49. Given the credibility issues raised by the different accounts of the vehicles' speeds, and given that NYCTA and Romero do not submit the affidavit of an expert concluding that the collision was unavoidable, based on the alleged distance between the bus and truck and on the alleged speed of the two vehicles, NYCTA and Romero have not demonstrated entitlement to judgment as a matter of law.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion against defendants Seacrest Fish Stores, Inc. d/b/a DeMartino Wholesale Fish Market and Michael Benvenuto is denied; and it is further

ORDERED that the cross motion for summary judgment by defendants Seacrest Fish Stores, Inc. d/b/a DeMartino Wholesale Fish Market and Michael Benvenuto is denied; and it is further

ORDERED that the cross motion by defendants New York City Transit Authority and John Romero is denied.

Dated: July 23, 2010
New York, New York

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J.S.C.

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JUL 30 2010
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