

Acosta v City of New York

2010 NY Slip Op 33500(U)

December 15, 2010

Supreme Court, New York County

Docket Number: 114067/09

Judge: Barbara Jaffe

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

PRESENT: Hon. BARBARA JAFFE

PART 5

Justice

DEBORAH ACOSTA and MANUEL ACOSTA,

Plaintiff/Petitioner,

- v -

THE CITY OF NEW YORK, THE NEW YORK CITY DEPARTMENT OF SANITATION and ANN MARIE JAMES,

Defendant/Respondent.

INDEX NO. 114067/09
MOTION DATE 10/19/10
MOTION SEQ. NO. 002
CALENDAR NO. 2

The following papers, numbered 1 to 5 were read on this motion for/to

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answer — Affidavits — Exhibits
Replying Affidavits

PAPERS NUMBERED	
1	
2	

Cross-Motion: Yes No

FILED

DEC 23 2010

NEW YORK COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

J.S.C.

DATED:

Dated: 12 16 / 10
DEC 16 2010

BARBARA JAFFE S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
DEBORAH ACOSTA and MANUEL ACOSTA,

Plaintiffs,

-against-

THE CITY OF NEW YORK, THE NEW YORK CITY
DEPARTMENT OF SANITATION and ANN MARIE
JAMES,

Defendants.
-----X

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Index No. 114067/09
Motion Date: 10/19/10
Motion Seq. No.: 001
Calendar No.: 2

DECISION & ORDER

FILED

JAN 23 2010

NEW YORK
COUNTY CLERK'S OFFICE

By notice of motion dated January 18, 2010, plaintiffs moves pursuant to CPLR 3212 for an order granting summary judgment in its favor against all defendants. The municipal defendants oppose and by notice of cross-motion dated March 12, 2010, cross-move pursuant to CPLR 2210, New York Military Law § 304, and 50 USC Appendix § 525 for an order staying the matter, and denying the motion for summary judgment.

I. FACTS

On October 15, 2008, plaintiff Deborah Acosta's car was hit from behind by defendants' vehicle, driven by defendant James. (Affirmation of Joel A. Horowitz, Esq., in Support of Motion, dated Jan. 18, 2010 [Horowitz Aff.]). Plaintiff first became aware of James who had honked her horn when the light turned green, when she was stopped at a red light on the West

Side Highway at 22nd or 23rd Street. (Affirmation of Lynn M. Leopold in Opposition to Plaintiff's Motion and Supplemental Affirmation in Further Support of City's Cross-Motion, dated Aug. 30, 2010 [Leopold Supp. Aff.], Exh. 4 at 24). Plaintiff slowed down as she approached a yellow light at 15th or 16th Street, and completely stopped at the red light on 14th Street. (*Id.* at 26-27, 29). As she stopped, she changed the radio station, returned her hand to the wheel, and was then hit by defendant's vehicle. (*Id.* at 29-30). The impact was great enough to propel her car into the middle of the intersection. (*Id.* at 30-31).

A police report prepared immediately after the accident reflects James's statement that plaintiff "stopped short at a yellow light." (Horowitz Aff., Exh. A).

A safety officer with the Department of Transportation testified that the Sanitation Department truck caused "extensive damage" to the rear of plaintiff's vehicle, that the truck left skidmarks measuring 55 feet, and that the truck was traveling in excess of 25 miles per hour when it hit plaintiff's car. (Leopold Supp. Aff., Exh. 5 at 22, 25, 42-46). The officer thus concluded that the accident was James's fault. (*Id.* at 45).

II. PERTINENT PROCEDURAL BACKGROUND

Given James's military service, by order dated April 30, 2010, I stayed the matter in my discretion to the extent that the motion for summary judgment was held in abeyance pending James's return from service, ordered defendants to notify plaintiffs and the courts as to her status (Leopold Supp. Aff., Exh. 1), and did not consider whether defendants had satisfied the statutory requirements of 50 USCA Appendix § 502 (SCRA) or New York Military Law § 304 (*Id.*). Discovery continued, and plaintiff and the safety officer testified at depositions held on June 23, 2010. (Leopold Supp. Aff., Exhs. 4, 5).

III. CONTENTIONS

Plaintiffs contend that they are entitled to summary judgment because defendants had a duty to observe the roadway and keep a safe distance between vehicles, that defendants are presumed liable for hitting plaintiff in the rear of her vehicle, and that the presumption of liability cannot be rebutted. (Horowitz Aff.).

In opposition to plaintiff's motion, the municipal defendants argue that there exist issues of fact that preclude judgment in favor of plaintiff, specifically plaintiff's comparative negligence in stopping at a yellow light. They also contend that plaintiff improperly relies on the police report which they claim is inadmissible. (Affirmation of Anthony Bila, ACC, in Support of Cross-Motion and in Opposition to Plaintiff's Motion, dated March 12, 2010 [Bila Aff.]).

In reply, plaintiff maintains that defendants have not established the existence of any triable issues of fact absent a non-negligent excuse for hitting plaintiff's car. (Affirmation of Joel A. Horowitz, Esq. in Opposition to the Supplemental Papers Submitted on the Cross-Motion and in Support of Plaintiff's Summary Judgment Motion, dated Sept. 22, 2010).

In support of its cross-motion, the municipal defendants argue that they are entitled to a continuing stay under SCRA and New York Military Law because James is serving in the military, that she is an indispensable witness, and that they cannot offer a meaningful defense in *respondeat superior* without her. (Bila Aff.). In support, they offer an intra-office memo dated February 17, 2010 reflecting that James is on extended military leave effective December 5, 2009 and until further notice, and an affidavit from the director of DOTS personnel management division stating that he conducted a search of James's file which reflects that she was called to the Military Service by the U.S. Department of Defense and is expected to return by December

2011, and an indecipherable “mobilization order” on which the director relies. (Leopold Supp. Aff., Exhs. 2, 3; Bila Aff., Exh E).

In opposition to defendants’ cross-motion, plaintiffs argue that defendants have failed to establish grounds for a stay absent satisfaction of the evidentiary requirements of the statute. (Horowitz Supp. Aff.).

IV. ANALYSIS

Under both the SCRA and New York Military Law, a party serving in the military may obtain a stay of any proceedings against her. In order to justify a stay, the SCRA requires a letter setting forth the manner in which the military requirements affect the servicemember’s ability to appear, an availability date, and a letter from a commanding officer stating that the military duty prevents an appearance and that military leave is not authorized. (50 USC Appendix § 502).

Here, absent evidence from anyone with knowledge of James’s whereabouts or the nature of her duty, defendants offer an insufficient basis for relief. Nor have they shown grounds for their own entitlement to a stay.

Here, moreover, there is substantial evidence of liability. “A rear-end collision with a stationary vehicle creates a prima facie case of negligence, requiring judgment unless defendant can proffer a non-negligent explanation for [a] failure to maintain a safe distance between the cars.” (*Mitchell v Gonzalez*, 269 AD2d 250, 251 [1st Dept 2000]; accord *Figueroa v Luna*, 281 AD2d 204, 206 [1st Dept 2001]). That plaintiff’s vehicle suddenly stopped short does not rebut the presumption of negligence, as it does not relieve the defendant of the duty to maintain a safe distance. (*Ewens v Roy*, 45 AD3d 353 [1st Dept 2007]; *Moustapha v Riteway Int’l Removal, Inc.*, 283 AD2d 175 [1st Dept 2001]; *Mitchell*, 269 AD2d at 251). This is no less true where plaintiff

stops at a yellow light. (*Hakakian McCabe*, 38 AD3d 493, 494 [2d Dept 2007]).

Plaintiffs have thus established that Deborah Acosta was properly stopped at a red light for a few seconds before being hit from behind by defendant James, who had been traveling behind her for at least 10 blocks. James's witness concluded that the accident was caused solely by her when she collided with plaintiff at a high speed. Even if defendants were to establish that the light was yellow when plaintiff stopped, the presumption of negligence is not thereby rebutted. (*See Hakakian*, 38 AD3d at 494; *see also Mitchell*, 269 AD2d at 251 [wet roadway not sufficient defense]; *Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999] [presumption applies even where emergency is asserted]). Accordingly, plaintiff has established her entitlement to summary judgment against the municipal defendants who have not rebutted the presumption.

Because James is unavailable to testify in her defense, the case remains stayed as to her.

V. CONCLUSION

It is hereby

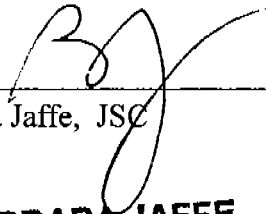
ORDERED, that plaintiff's motion for summary judgment on liability is granted as to defendants City of New York and the New York City Department of Sanitation only; it is further

ORDERED, that an assessment of damages against defendants City of New York and the New York City Department of Transportation is directed, it is further

ORDERED, that a copy of this order with notice of entry be served by the movant upon the Clerk of the Trial Support Office (Room 158), who is directed, upon the filing of a note of issue and a statement of readiness and the payment of proper fees, if any, to place this action on the appropriate trial calendar for the assessment hereinabove directed, note of issue to be filed by February 22, 2011; and it is further

ORDERED, that the action against defendant Ann Marie James is to be stayed pending her availability.

This constitutes the decision and order of the court.



Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: December 15, 2010
New York, New York

DEC 15 2010

FILED

DEC 23 2010

NEW YORK
COUNTY CLERK'S OFFICE