

Paul's Nursery, Inc. v Conrad
2011 NY Slip Op 30347(U)
January 28, 2011
Sup Ct, Nassau County
Docket Number: 20545/08
Judge: Karen V. Murphy
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Short Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

PAUL'S NURSERY, INC.,

Plaintiff(s),

Index No. 20545/08

-against-

**Motion Submitted: 11/22/10
Motion Sequence: 001**

ANDREW E. CONRAD,

Defendant(s).

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....X
- Reply.....X
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Plaintiff moves this Court for an Order granting summary judgment in its favor on the issue of liability. Defendant opposes the requested relief.

This action arises from a motor vehicle accident that occurred on April 10, 2008, on the Long Island Expressway. Plaintiff's vehicle was a flat-bed truck, and defendant's vehicle was a tractor-trailer. Plaintiff's driver was not injured in the accident. Defendant, the driver of the tractor-trailer, lost consciousness during the accident, and he was taken from the scene by ambulance.

Plaintiff is seeking \$19,200 in rental charges it claims were incurred when it had to rent a truck for a period of time while the truck damaged in the accident was being repaired. No personal injury claims have been asserted by either party to this action.¹

It is undisputed that, at the time of the accident, the road was dry and level, and that both vehicles were traveling eastbound, in the center lane of the highway. It is also undisputed that there was other traffic on the road at the time, but plaintiff's driver claims that traffic was "medium," while defendant states that traffic was "heavy."

Plaintiff's vehicle was traveling behind defendant's truck for some five to ten minutes prior to the accident, when defendant's truck suddenly stopped and slid horizontally to the right, striking the guard rail. After defendant's truck struck the guard rail, the truck moved forward, but horizontally across the right-most lane of traffic, striking the passenger side of plaintiff's truck, which was located in the center lane. Plaintiff's truck was still traveling eastbound in the center lane at the time of impact. It is undisputed that defendant was rendered unconscious after his truck hit the guard rail.

Defendant's truck ultimately came to rest horizontally, blocking the right-most lane of traffic. Defendant was unconscious and bleeding, and an ambulance was called. Following the impact, plaintiff's driver continued to travel forward, finally pulling over to the shoulder of the roadway.²

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853, 362 N.Y.S.2d 131 [1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact. (*Cauthers v. Brite Ideas, LLC*, 41 A.D.3d 755, 837 N.Y.S.2d 594 [2d Dept., 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the defendant (*Makaj v. Metropolitan Transportation Authority*, 18 A.D.3d 625, 796 N.Y.S.2d 621 [2d Dept., 2005]).

A party moving for summary judgment must make a *prima facie* showing of entitlement as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. (*Winegrad v. New York Univ. Med. Center*, 64 N.Y.2d 851, 476 N.E.2d 642, 487 N.Y.S.2d 316 (1985); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404

¹Plaintiff has represented to the Court that, in October or November 2010, it served Mr. Conrad's employer with a Summons and Complaint related to this accident.

²Following the accident, plaintiff received a summons from police for failure to display a safety "triangle" on its truck.

N.E.2d 718, 427 N.Y.S.2d 595 [1980]). Here, plaintiff must demonstrate that there is no factual dispute as to defendant's liability for the accident. Plaintiff has met its burden.

Although "negligence cases by their very nature do not usually lend themselves to summary judgment . . ." (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 386 N.E.2d 1324, 414 N.Y.S.2d 304 [1979]), there are circumstances where the facts clearly point to the culpability of one party as the cause of an accident. As a general proposition, "there is no legal duty to protect against an occurrence which is extraordinary in nature, and, as such, would not suggest itself to a reasonably careful and prudent person as one which should be guarded against" (*Silver v. Sheraton-Smithtown Inn*, 121 A.D.2d 711, 504 N.Y.S.2d 56 [2d Dept., 1986]).

In the context of motor vehicle accident cases, the *Silver* holding has been most often applied to head-on collision situations, where one driver crosses over into oncoming traffic, resulting in the granting of summary judgment motions on the issue of liability (*Viegas v. Esposito*, 135 A.D.2d 708, 522 N.Y.S.2d 608 (2d Dept., 1987); see also *Studnick v. Selesnick*, 265 A.D.2d 321, 696 N.Y.S.2d 682 (2d Dept., 1999); *Siegel v. Terrusa*, 222 A.D.2d 428, 635 N.Y.S.2d 52 (2d Dept., 1995); *Williams v. Econ*, 221 A.D.2d 429, 633 N.Y.S.2d 392 [2d Dept., 1995]). In this case, plaintiff has established that the circumstances of this accident, although not a head-on collision, constitute an equally extraordinary occurrence.

In support of its motion, plaintiff has submitted, *inter alia*, the deposition testimony of its driver, Leonardo Aureliano, and defendant's deposition testimony. Based on a review of that testimony, it is clear to the Court that, at the time of the impact, defendant's truck was moving perpendicular to the flow of eastbound traffic, and it was being operated by an unconscious driver.

According to defendant's own testimony, he recalls his truck hitting the guard rail on the right, but recalls nothing after that, until the point in time when he was on a gurney, being attended to by emergency medical personnel. Defendant further testified that he was unaware from personal knowledge that his truck came into contact with plaintiff's truck. Defendant admitted that he was not wearing a seat belt, and plaintiff's driver testified that he recalled seeing blood on defendant's head after the accident.

According to Mr. Aureliano, plaintiff's driver, he was following defendant's truck at a distance of approximately two hundred (200) feet, when defendant's truck stopped suddenly, and began to slide horizontally to the right side of the roadway. Mr. Aureliano heard the tires and brakes of defendant's truck screeching. Mr. Aureliano testified that the back of the defendant's truck struck the guard rail, and that the truck then moved forward, in a horizontal direction, across the right lane of traffic, striking plaintiff's truck broadside.

Mr. Aureliano further testified that he was traveling at approximately forty miles per hour before the accident, and that he applied his brakes when he first observed defendant's truck begin skidding to the right. Mr. Aureliano did not jam on his brakes because, according to him, he did not want to lose control of his own truck. According to Mr. Aureliano, the entire incident lasted approximately four or five seconds from the time he first braked until the impact.

Further according to Mr. Aureliano, he had slowed plaintiff's truck to approximately twenty-five miles per hour when defendant's truck impacted the right side of his vehicle. Other vehicles were to Mr. Aureliano's left, preventing him from moving into that lane to avoid the impact. The vehicles behind plaintiff's truck were able to stop in time, without impact.

Based on the foregoing, plaintiff has established his entitlement to summary judgment as a matter of law. The burden now shifts to defendant to come forward with an exculpatory explanation for the collision sufficient to defeat plaintiff's motion for summary judgment. Defendant has met his burden, having raised triable issues of fact for determination by a jury (*Viegas, supra; Vadala v. Carrol*, 91 A.D.2d 865, 458 N.Y.S.2d 382 [4th Dept., 1982]).

Defendant testified that he was traveling eastbound, in the center lane, at approximately forty miles per hour, when the car in front of him "stopped short." According to defendant, there were approximately four car lengths between his truck and the vehicle that stopped short. Defendant applied hard pressure to his brakes, and, according to his testimony, the right front wheel of his truck "locked up." The wheel "jammed" and would not let go. Defendant attempted to rectify the situation, and "fought with it until it couldn't go no more and [he] went into a barricade (guard rail)." According to defendant, he had not experienced any problems with the truck in general, or specifically with the right wheel, prior to the accident.

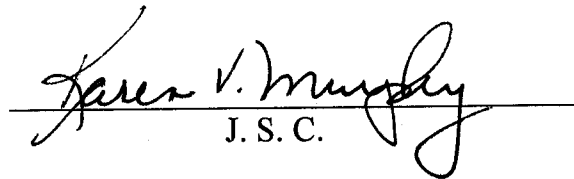
Defendant was not on a cell phone, or a CB radio, and he had not taken any alcohol or medication within the twenty-four hours preceding the accident.

Thus, defendant's exculpatory explanation for the accident presents factual questions properly determined by a jury (*cf. Studnick, supra* [defendant failed to provide an exculpatory explanation for the accident; court properly granted plaintiff's summary judgment motion]; *Siegel, supra* [defendant's hearsay evidence that accident was caused by a tire "blowout" was insufficient to overcome plaintiff's summary judgment motion]), who can also assess the credibility of the parties (*Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR §3212:6*, at 14; *Donato v. ELRAC, Inc.*, 18 A.D.3d 696, 794 N.Y.S.2d 348 (2d Dept., 2005); *Frame v. Mark Markowitz, Inc.*, 125 A.D.2d 442, 509 N.Y.S.2d 372 [2d Dept., 1986]).

Based on the papers submitted, this Court has determined that there are triable issues of fact from which competing inferences may be drawn. Accordingly, plaintiff's summary judgment motion is denied.

The foregoing constitutes the Order of this Court.

Dated: January 28, 2011
Mineola, N.Y.


J. S. C.

ENTERED

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