

Farago v County of Suffolk

2011 NY Slip Op 32245(U)

August 15, 2011

Supreme Court, Suffolk County

Docket Number: 08-37094

Judge: Arthur G. Pitts

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 43 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 12-22-10 (#005)
MOTION DATE 1-28-11 (#006)
ADJ. DATE: 6-16-11
Mot. Seq. # 005 - MG
006 - MD

-----X

ANDREW S. FARRAGO,

Plaintiff,

- against -

COUNTY OF SUFFOLK, SUFFOLK COUNTY
POLICE DEPARTMENT, SUFFOLK COUNTY
HIGHWAY PATROL MOTORCYCLE
DIVISION, COX RADIO, INC., and ROBERT
GILLMAN,

Defendants.

-----X

COSTELLA & GORDON, LLP
Attorney for Plaintiff
7 Twelfth Street
Garden City, New York 11530

CHRISTINE MALAFI
Attorney for Defendant County of Suffolk
100 Veterans Memorial Highway, P.O. Box 6100
Hauppauge, New York 11788

CRUSER MITCHELL & NOVITZ, LLP
Attorney for Defendant Cox Radio
175 Pine Lawn Road, Suite 301
Melville, New York 11747

RUSSO APOZNANSKI & TAMBASCO
Attorney for Defendant Gillman
875 Merrick Avenue
Westbury, New York 11590

Upon the following papers numbered 1 to 24 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13, 14 - 16; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 17 - 18, 19 - 20; Replying Affidavits and supporting papers 21 - 22, 23 - 24; Other ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the defendant Cox Radio, Inc. for an order pursuant to CPLR 3025 (b) for leave to serve an amended answer which includes the affirmative defense of release, and upon amendment, pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against it, is granted; and it is further

ORDERED that this motion by the defendant Robert Gillman for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint is denied.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at approximately 1:20 p.m. on July 15, 2007 at the intersection of Pinelawn Road and Old East Neck Road in the Town of Huntington. The plaintiff was riding his motorcycle in a charity event called the WBAB Sticky Fingers Run (Run), involving a procession of approximately 1,000 motorcycles. The accident allegedly happened when the vehicle driven by the defendant Robert Gillman (Gillman) proceeded across the lane of travel occupied by the plaintiff's motorcycle. The plaintiff alleges, *inter alia*, that defendant Cox Radio, Inc. (Cox), the owner and operator of radio station WBAB, which sponsored the charity event, was negligent in allowing the plaintiff and Gillman to proceed through the subject intersection without police supervision.

The first branch of Cox's motion seeks leave to serve an amended answer to include the affirmative defense of release. Pursuant to CPLR 3025(b) leave to serve an amended pleading should be freely given upon such terms as are just. Leave to amend will generally be granted provided the opponent is not surprised or prejudiced by the proposed amendment, and the proposed amendment appears to be meritorious (*see Kiaer v Gilligan*, 63 AD3d 1009, 883 NYS2d 224 [2d Dept 2009]; *Kinzer v Bederman*, 59 AD3d 496, 873 NYS2d 692 [2d Dept 2009]; *Charleson v City of Long Beach*, 297 AD2d 777, 747 NYS2d 802 [2d Dept 2002]). Courts are unlikely to deny the request if the proposed amendment does not prejudice the opponent by changing the basic issues of the action, or, by adding significant factual allegations of which the party is unaware (*Symphonic Electronic Corp., v Audio Devices, Inc.*, 24 AD2d 746, 263 NYS2d 676 [1st Dept 1965]; *Rogers v South Slope Holding Corp.*, 255 AD2d 898, 680 NYS2d 772 [4th Dept 1998]; *see also Francis v Bein-Aime*, 4 Misc 3d 1002[A], 791 NYS2d 869 [Sup Ct, Bronx County 2004]; *Rodriguez v State*, 153 Misc 2d 363, 581 NYS2d 972 [Ct Cl 1992]). It is also the established rule that the legal sufficiency or merits of a proposed amendment of a pleading will not be examined on the motion to amend unless the insufficiency or lack of merit is clear and free from doubt (*Vista Properties, LLC v Rockland Ear, Nose & Throat Assocs., P.C.*, 60 AD3d 846, 875 NYS2d 848 [2d Dept 2009]; *Goldstein v Brogan Cadillac Oldsmobile Corp.*, 90 AD2d 512, 455 NYS2d 19 [2d Dept 1982]). Thus, the party opposing the motion to amend, must overcome a heavy presumption of validity in favor of the movant and demonstrate that the facts alleged and relied upon in the moving papers are obviously not reliable or are insufficient (*Otis Elevator Co. v 1166 Ave. of the Americas Condominium*, 166 AD2d 307, 564 NYS2d 119 [1st Dept 1990]; *Daniels v Empire-Orr, Inc.*, 151 AD2d 370, 542 NYS2d 614 [1st Dept 1989]).

Here, a review of the record reveals that the plaintiff signed a release in favor of Cox before his participation in the WBAB Sticky Fingers Run, that the plaintiff was questioned about the release at his deposition on January 28, 2010, and that counsel for Cox wrote to counsel for the plaintiff on February 4, 2010, asserting Cox's reliance on the defense of release. In opposition to the motion, the plaintiff asserts that he would be prejudiced by the service of an amended answer. However, he does not indicate the manner, or any specifics, of the alleged prejudice to him. It is clear that the plaintiff has not overcome the

heavy presumption in favor of Cox, the moving party herein. Accordingly, the motion seeking an order for leave to serve an amended answer is granted.

Furthermore, while a party may be said to waive an affirmative defense by failing to assert it either in an answer or in a motion to dismiss (*see* CPLR 3018 (b); *Bryant v Broadcast Music, Inc.*, 27 AD3d 683, 810 NYS2d 910 [2d Dept 2006]), the waiver of an unpleaded defense may be retracted and serve as a basis for an affirmative grant of relief in the absence of surprise and prejudice (*see Rogoff v San Juan Racing Assn.*, 54 NY2d 883, 444 NYS2d 911 [1981]; *Kuhl v Piatelli*, 31 AD3d 1038, 820 NYS2d 149 [3d Dept 2006]; *Shelis v County of Fulton*, 14 AD3d 919, 789 NYS2d 737 [3d Dept 2005]; *Lewick v Kelsey*, 24 AD3d 918, 806 NYS2d 732 [3d Dept 2005]). Here, despite Cox's failure to include the defense of release in its answer, the plaintiff was well aware of its reliance on the defense of release as the issue was thoroughly explored during the depositions of the parties. Thus, the plaintiff has not been surprised or prejudiced by Cox's failure to include the defense in its answer prior to making the instant motion for summary judgment. In that light, the Court will consider Cox's motion for summary judgement without first requiring the service of the proposed amended answer.

The second branch of Cox's motion seeks an order granting summary judgment dismissing the complaint on the grounds of release, and that it owed no duty to the plaintiff to shut down intersections along the route of the motorcycle procession. In support of the motion, Cox submits, *inter alia*, the pleadings, the depositions of the parties, a copy of the subject release, and a letter from WBAB to the Suffolk County Highway Patrol.

At his deposition, the plaintiff testified that he had participated in similar events such as this one, that the police usually keep ahead of the procession to close off intersections as it proceeds, and that there were 700 to 1,000 motorcycles in this procession. This event was scheduled to start at the Dave and Buster's restaurant in Farmingdale and to end at the Great South Bay. He arrived at the start site at approximately 12:30 p.m., and was asked to sign a release form in order to participate in the Run. He was handed the form, and he signed it without reading it. The participants on their motorcycles were lined up in rows of two awaiting the start of the procession, and he was lined up approximately two-thirds of the way back in line. When the Run started, the procession made a right turn out of the restaurant parking lot onto a side street, and then made a left turn onto Pinelawn Road. Before he could reach Pinelawn Road, one of the motorcycles in front of him had a small mishap that delayed those behind it. His was the first motorcycle to get around the resulting stoppage of traffic. When he made the left turn onto Pinelawn Road, he could not see the rear end of the procession, but he proceeded at a slow rate of speed while waiting for a friend to catch up to him. Once the friend was behind him, he increased his speed hoping to catch up to the procession.

The plaintiff further testified that Pinelawn Road runs north and south, with two lanes in each direction. He was traveling to the left side of the right lane of travel as he approached the intersection of Pinelawn Road and Old East Neck Road. He first saw the traffic light at the intersection when he was 200 feet from the intersection, but he did not know the color of the light, nor did he feel the need to continue to observe the light inasmuch as he was participating in a procession. He stated that he did not see any police

at the intersection, that no one ever told him that he could proceed through a red light, and that he did not remember if the intersection just before the intersection at Old East Neck Road had been closed off by the police. The plaintiff indicated that he first saw the Gillman vehicle five to ten seconds before the impact. He observed the vehicle pull out into the intersection, and stop halfway into the right lane on Pinelawn Road. He moved his motorcycle into the left lane, but saw the other vehicle proceed into the intersection and stop again at the line between the right and left lanes on Pinelawn Road. He tried to veer behind the vehicle. However, the left rear of his motorcycle came into contact with the driver's side rear quarter panel of the other vehicle. The plaintiff also testified that he never caught up to, or saw, the procession after he made the left turn onto Pinelawn Road, that he was traveling at approximately 35 miles per hour before his accident, and that he never noticed the color of the traffic light at the subject intersection.

Sargent Michael Trentini, of the Suffolk County Highway Patrol, was deposed on March 17, 2010. He testified that he was in charge of police efforts to provide services to the Run, that he spoke with the sponsors of the Run in preparation for its start, and that he suggested a change in route to Pinelawn Road, which was accepted by the sponsors. He stated that normal procedure is for police officers to close off intersections to allow processions such as these to travel as a group, and that the officers "leap frog" to the next intersection as the procession passes a given intersection. That is, they leave an intersection that has been passed by the procession and race ahead of the procession to close off a more distant intersection. Sargent Trentini further testified that police officers do not instruct participants to ignore traffic signals, that no police officer gave Run participants any instructions as to how to proceed if there was a break in the procession, and that, if there is a break in a procession, participants should obey all traffic lights. He stated that 90% of the procession was not affected by the break that occurred in this instance.

Jason Steinberg, the director of marketing and promotion for Cox, was deposed on March 17, 2010. He testified that, prior to the Run, he wrote to Sargent Dini of the Suffolk County Highway Patrol advising him of the details of the planned event, and that he had two or three follow up conversations with the Sargent regarding the matter. He was present at the start of the Run on July 15, 2007, and he recalled being told that the route had been changed for safety reasons, as well as the convenience of the public. Mr. Steinberg further testified that "bikers" were given a release form to read, but that some participants merely sign the form. The police department did not give out any instructions regarding traffic lights, and neither did Cox, but that participants were told not to "break" the line of the procession. Later, he left the start site in his car, intending to follow the route of the procession but not actually following behind it, when he came upon the plaintiff's accident. There were two police cars at the scene, and he spoke with the officers and the plaintiff. He indicated that it was his understanding that there was a break in the procession because of an earlier situation that occurred before the plaintiff's accident.

At his deposition, Gillman testified that he was traveling west on Old East Neck Road approaching the intersection with Pinelawn Road prior to this accident. He observed that the traffic light was red, and he stopped for the light. Being the first in line, he intended to make a left turn and to head south on Pinelawn Road, once the traffic light turned to green. He waited, while the traffic light went through a number of red/green cycles, for a "caravan" of motorcycles to pass through the intersection. After waiting for about 15 minutes, the caravan passed, but the traffic light was still red. He waited another one to two

minutes for the traffic light to turn to green. Gillman indicated that no stragglers passed the subject intersection during those one to two minutes. After the traffic light turned to green, he looked left and then right, he observed that traffic had stopped in both the north and south lanes of travel, and he proceeded into the intersection. He had crossed one and one-half lanes of the northbound lanes of Pinelawn Road when he felt an impact to his vehicle. He stated that he was going “five to ten, ten to fifteen” miles per hour at the time of the impact, that he was looking straight ahead as he proceeded through the intersection, and that he never saw the plaintiff’s motorcycle before the impact. Gillman further testified that the vehicles stopped in the northbound lanes of Pinelawn Road just before he proceeded into the intersection were not motorcycles.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O’Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties’ competing interest must be viewed “in a light most favorable to the party opposing the motion” (*Marine Midland Bank, N.A. v Dino & Artie’s Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]; *Rebecchi v Whitmore, supra*).

Cox has established its entitlement to summary judgment herein on the ground of release. The subject release provides in pertinent part:

THE UNDERSIGNED
HEREBY RELEASES, WAIVES, DISCHARGES AND
COVENANTS NOT TO SUE ...Cox Radio Long Island/WBAB ...
their officers and employees, all for the purpose herein referred as
“releasees,” from all liability to the undersigned, his personal
representatives, assigns, heirs and next of kin for any and all loss or
damages, and any claim or demands therefore on account of injury to
the person or property or resulting death of the undersigned, whether
caused by the negligence of the releasee or otherwise while the
undersigned is participating in the event.

Exculpatory provisions in a contract, including a release or a covenant not to sue, are generally enforced although they are disfavored by the law and closely scrutinized by the courts (*Lago v Krollage*, 78 NY2d 95, 571 NYS2d 689 [1991]). Thus, the language of the exculpatory agreement must express the intention of the parties in unequivocal terms in order to relieve a defendant from liability for negligence

(*Lago v Krollage, id.*; *Gross v Sweet*, 49 NY2d 102, 424 NYS2d 365 [1979]). It must appear absolutely clear that the agreement extends to negligence or other fault of the party (*Gross v Sweet, id.*, *Van Dyke Prods. v Eastman Kodak Co.*, 12 NY2d 301, 239 NYS2d 337 [1963], *Ciofalo v Vic Tanney Gyms*, 10 NY2d 294, 220 NYS2d 962 [1961]). “That does not mean that the word ‘negligence’ must be employed for courts to give effect to an exculpatory agreement; however, words conveying a similar import must appear” (*Gross v Sweet, supra*).

A party will not be excused from an agreement he or she executed by reason of his or her having failed to read it (*Martino v Kaschak*, 208 AD2d 698, 617 NYS2d 529 [2d Dept 1994]; *Huang v Cheng*, 182 AD2d 600, 583 NYS2d 370 [1st Dept 1992]; *Sofio v Hughes*, 162 AD2d 518, 556 NYS2d 717 [2d Dept 1990]). Moreover, an individual who signs or accepts a written contract, absent fraud or other wrongful conduct on the part of the other contracting party, “is conclusively presumed to know its contents and to assent to them, and there can be no evidence for the jury as to his [or her] understanding of its terms” (*Metzger v Aetna Ins. Co.*, 227 NY 411, 416, 125 NE 814 [1920]; see *Gillman v Chase Manhattan Bank*, 73 NY2d 1, 537 NYS2d 787 [1988]; *Da Silva v Musso*, 53 NY2d 543, 444 NYS2d 50 [1981]; *Daniel Gale Assoc. v Hillcrest Estates*, 283 AD2d 386, 724 NYS2d 201 [2d Dept 2001]).

Here, the plaintiff failed to raise a triable issue of fact with regard to whether the release was procured by duress, illegality, fraud, or mutual mistake (see *Mangini v McClurg*, 24 NY2d 556, 301 NYS2d 508 []; *Seff v Meltzer, Lippe, Goldstein & Schlissel, P.C.*, 55 AD3d 592, 865 NYS2d 323 [2d Dept 2008]; *Shklovskiy v Khan*, 273 AD2d 371, 709 NYS2d 208 [2d Dept 2000]; *Martino v Kaschak, supra*).

In addition, Cox has established its entitlement to summary judgment on the ground that it did not owe a duty to the plaintiff to prevent motorists from entering the intersections along the procession route. It is clear that Cox, as a mere sponsor of a charitable fund raiser, had no power or right to close off the subject intersections. In addition, the record reveals that representatives of Cox notified the proper authorities of the nature and details of the Run well in advance of its scheduled date. The plaintiff and Cox’s codefendant have failed to raise a triable issue of fact regarding Cox’s duty to do more than organize the event and to turn control of the public thoroughfares over to the Suffolk County Highway Patrol and/or the Suffolk County Police Department.

Accordingly, Cox’s motion for summary judgment dismissing the complaint and all cross claims against it is granted.

Gillman moves for summary judgment dismissing the complaint against him on the grounds that he did not owe any duty to the plaintiff. The gravamen of Gillman’s argument is that the plaintiff failed to obey the traffic control device at the subject intersection. The conduct of motorists at an intersection controlled by traffic signals is subject to the provisions of VTL § 1111 and not the more general provisions of the Vehicle and Traffic Law such as those set forth in §§ 1140 or 1141, which govern the conduct of drivers at intersections that are not controlled by traffic lights (see *Dicke v Anci*, 31 AD3d 696, 821 NYS2d 93 [2006]; *Saggio v Ladone*, 21 AD3d 407, 799 NYS2d 586 [2005]; *Rudolph v Kahn*, 4 AD3d 408, 771 NYS2d 370 [2004]; *Le Clarie v Pratt*, 270 AD2d 612, 704 NYS2d 354 [2000]). Section 1111 of the Vehicle and Traffic

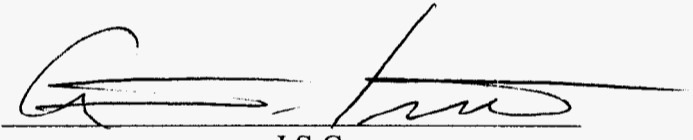
Law permits motorists approaching an intersection with a green traffic signal to proceed through the intersection provided they yield to vehicles lawfully within the intersection and exercise reasonable care under the circumstances (see *Shea v Judson*, 283 NYS2d 393 28 NE2d 885 [1940]). A motorist facing a green traffic signal thus has the right to assume that the light is red for cross traffic and that such traffic will obey the law by stopping for the red light and remaining stationary until the light has changed to green (see *Baughman v Libasci*, 30 AD2d 696, 292 NYS2d 588 [1968]). However, a motorist proceeding under a green light is not authorized to blindly and wantonly enter the intersection without keeping a proper lookout or employing a reasonable speed (see *Nuziale v Paper Transport of Green Bay Incorporated*, 39 AD3d 833, 835 NYS2d 316 [2007]).

Here, Gillman has failed to establish his entitlement to summary judgment. There are multiple issues of fact regarding the happening of the accident including, but not limited to, whether traffic was stopped in the northbound lanes of Pinelawn Road before Gillman entered the intersection, and whether Gillman stopped his vehicle twice within the intersection. The court's function on summary judgment is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility (see *Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rennie v Barbarosa Transport, Ltd.*, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]).

Accordingly, Gillman's motion for summary judgment dismissing the complaint against him is denied.

The claims against Cox Radio, Inc. dismissed herein are severed and the remaining causes of action shall continue (see CPLR 3212 [e] [1]).

Dated: August 15, 2011



J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION