

Rigolini v City of New York

2012 NY Slip Op 30011(U)

January 4, 2012

Supreme Court, New York County

Docket Number: 122049/2003

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
Justice S.C.

PART 5

Index Number : 122049/2003

RIGOLINI, JOHN

vs.

CITY OF NEW YORK

SEQUENCE NUMBER : 007

DISMISS

CAL # 88

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2, 3
4

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 motion

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

RECEIVED
JAN 09 2012
MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

Dated: 1/4/12
JAN 04 2012

Barbara Jaffe
BARBARA JAFFE J.S.C.
NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

Handwritten notes:
1/9/12
[Signature]

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

-----X
JOHN RIGOLINI and MAUREEN RIGOLINI,

Plaintiffs,

-against-

THE CITY OF NEW YORK, CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
EMPIRE CITY SUBWAY COMPANY (LIMITED),
PETROCELLI ELECTRIC CO., INC., TRIUMPH
CONSTRUCTION CORP., and KENNETH J.
DELANY CONTRACTING CORP.,

Defendants.
-----X

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Third-Party Plaintiff,

-against-

TODINO SEWER & WATER SERVICE INC. and
ETNA MAINTENANCE CORP.,

Third-Party Defendants.
-----X

CONSOLIDATED EDISON COMPANY OF NEW
YORK, INC.,

Second Third-Party Plaintiff,

-against-

NICO ASPHALT, INC., ROADWAY
CONTRACTING, INC. and FELIX EQUITIES,

Second Third-Party Defendants.
-----X

Index No. 122049/03

Motion Date: 10/18/11

Motion Seq. No.: 007

DECISION AND ORDER

Index No. 590044/08

FILED

JAN 09 2012

**NEW YORK
COUNTY CLERK'S OFFICE**

Index No. 590224/08

RECEIVED

JAN 09 2012

**MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL**

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By notice of motion dated March 25, 2011, defendant City moves pursuant to CPLR 3211 and/or 3212 for an order summarily dismissing the complaint against it. Plaintiff and defendant Consolidated Edison Company of New York, Inc. (Con Ed) oppose.

I. BACKGROUND

On September 27, 2002, plaintiff John Rigolini, a New York City Fire Department (FDNY) Lieutenant, was allegedly injured when, while he was responding to a fire and riding in an FDNY fire truck, the truck hit a large mound or hump of asphalt in the roadway at 57th Street between Broadway and Seventh Avenues in Manhattan, causing him injuries. (Affirmation of Jessica Wisniewski, ACC, dated Mar. 25, 2011 (Wisniewski Aff.), Exhs. A, E).

On or about March 10, 2003, plaintiffs served City with a notice of claim, asserting claims against it for common law negligence and pursuant to General Municipal Law (GML) § 205-a predicated on violations of the New York City Charter §§ 2903(b)(3) and 2904, 34 RCNY § 2-07, and New York Vehicle and Traffic Law (VTL) §§ 1104, 1120, 1124, 1128, and 1130. (*Id.*, Exh. A). On or about December 23, 2003, plaintiffs served City with their summons and complaint containing the same allegations, and on or about January 14, 2004, City served its answer. (*Id.*, Exhs. B, C).

On May 15, 2007, plaintiff John Rigolini testified at an examination before trial (EBT), as pertinent here, that approximately two weeks before the accident he observed a work crew dig

a hole on 57th Street and perform work below it, and that he had seen the hole with which the truck collided a week and a half before his accident and observed that it was getting bigger but made no complaints to anyone about it. The street appeared to have been repaved before his accident, and he believed that the mound was formed by the repaving when the asphalt that was applied to cover the hole sunk into it. When the truck's tire hit the hole, he was propelled into the ceiling of the truck and hit his head, injuring his neck and back. (*Id.*, Exh. E).

In a verified bill of particulars dated September 28, 2007, plaintiffs specified that the accident occurred on 57th Street, approximately 30 feet east of Broadway Avenue, at or on the double yellow line in the middle of the roadway. (*Id.*, Exh. D).

At an EBT held on January 6, 2009, FDNY Lieutenant Kenneth Voisin testified that on the date of plaintiff's accident, he was driving the FDNY truck with its lights and sirens on as they were responding to a report of a fire. Due to traffic stopped in front of him, Voisin drove the truck into the middle of street and across the double yellow lines, where the truck hit the mound or hole, which he characterized as a sinkhole and had seen one week before the accident. He was driving approximately 20 to 30 miles per hour. (*Id.*, Exh. G).

II. CONTENTIONS

City contends that plaintiff's common law negligence claim is barred by the "firefighter's rule" as he was on duty when he was injured, and that his claim premised on GML § 205-a must be dismissed absent proof of a violation of any of the predicate provisions he cites. Rather, it maintains that sections 2903(b)(2) and 2904 of the New York City Charter and 34 RCNY 2-07 are inapplicable and that the alleged VTL violations are superseded by VTL § 1104 as Voisin was involved in the emergency operation of an FDNY vehicle at the time of the accident and is

thus entitled to have his conduct evaluated by the reckless disregard standard, and there is no evidence that he recklessly operated the truck. (Wisniewski Aff.).

Plaintiffs contend that the reckless disregard standard is inapplicable as Voisin was not engaged in any of the conduct exempted as privileged by VTL § 1104(b), that Voisin's injury-producing conduct was his operation of the truck at an unreasonable speed given the existing conditions in violation of VTL § 1180 and 34 RCNY 4-06, and that there are triable issues as to whether Voison's conduct violated these provisions. To the extent that the reckless disregard standard applies, plaintiffs also assert that triable issues remain as to whether Voison's conduct was reckless. (Affirmation of Barry Salzman, Esq., dated Aug. 1, 2011).

In reply, City observes that plaintiffs do not contest the dismissal of their common law negligence claims, maintains that plaintiffs may not base their ordinary negligence claims on violations of VTL § 1180 or 34 RCNY 4-06 as they failed to allege them in their notice of claim or complaint, and denies that Voison's conduct was reckless. (Reply Affirmation, dated Sept. 13, 2011).

III. ANALYSIS

A party seeking summary judgment must demonstrate, *prima facie*, entitlement to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must rebut the *prima facie* showing by submitting admissible evidence, demonstrating the existence of factual issues that require trial. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872 [1980]). Otherwise, the motion must be denied, regardless of the sufficiency of the opposition. (*Winegrad*,

64 NY2d at 853).

A. VTL § 1104

Pursuant to VTL § 1104(a) and (b), the driver of an authorized emergency vehicle engaged in an emergency operation is privileged in performing the following acts:

1. Stopping, standing or parking;
2. Proceeding past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceeding the maximum speed limits so long as he does not endanger life or property;
4. Disregarding regulations governing directions of movement or turning in specified directions.

If the conduct causes injury, the driver may only be held liable if he failed to “drive with due regard for the safety of all persons . . . [, or] reckless disregard for the safety of others.” (VTL § 1104[e]). If the driver engages in any other injury-causing conduct not specifically enumerated in section 1104(b), he may be held liable pursuant to ordinary negligence principles. (*Kabir v County of Monroe*, 16 NY3d 217 [2011]; *Tatishev v City of New York*, 84 AD3d 656 [1st Dept 2011]).

Here, there is no dispute that Voison was driving an authorized emergency vehicle and was engaged in an emergency operation when the accident occurred. However, absent any evidence that Voison engaged in any of the privileged acts set forth in VTL § 1104 and as plaintiff alleges that the injury-producing conduct was Voison’s operation of the truck at a speed that was unreasonable but not in excess of the speed limit, City is not entitled to the reckless disregard standard in evaluating Voison’s conduct.

B. Ordinary negligence

Plaintiffs do not contest City’s argument that the statutory predicates alleged in their notice of claim and complaint are inapplicable here, and thus their GML § 205-a claim premised on these allegations is dismissed.

Moreover, although plaintiffs’ failure to plead in their notice of claim that Voison was negligent in driving at an unreasonable speed in violation of VTL § 1180 and 34 RCNY 4-06 is not fatal (*see eg Zahra v New York City Hous. Auth.*, 39 AD3d 351 [1st Dept 2007] [plaintiff asserting GML 205-a claim not required to plead in notice of claim specific predicate statute violated]; *Reilly v City of New York*, 271 AD2d 425 [2d Dept 2000] [same]), having also failed to plead it in their complaint or move for leave to amend their complaint, they are now barred from raising these violations are predicates for their GML 205-a claim (*see eg Balsamo v City of New York*, 287 AD2d 22 [2d Dept 2001] [pleading asserting GML 205-e claim must identify particular statute or ordinance allegedly violated]; *Sclafani v City of New York*, 271 AD2d 430 [2d Dept 2000] [failure to identify in complaint or bill of particulars specific statute with which defendant allegedly failed to comply rendered GML 205-a cause of action legally insufficient]). Plaintiffs have thus failed to establish that any triable issues remain as to their GML § 205-a claim.

IV. CONCLUSION

Accordingly, it is hereby

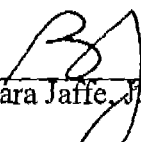
ORDERED, that defendant City of New York’s motion for summary judgment is granted and the complaint and any cross claims against it are dismissed with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; it is

further

ORDERED, that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the Trial Support Office is directed to reassign this case to a non-City trial waiting list. Plaintiffs shall serve, within 20 days of the date of this order, a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

ENTER:



Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

DATED: January 4, 2011
New York, New York
JAN 04 2012

FILED
JAN 09 2012
NEW YORK
COUNTY CLERK'S OFFICE