

Ritzul v Consumer Prod. Servs.
2012 NY Slip Op 31777(U)
June 26, 2012
Supreme Court, Queens County
Docket Number: 26881/2009
Judge: Robert J. McDonald
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.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

BRYAN RITZUL and BLAGA RITZUL, Index No.: 26881/2009
Plaintiffs, Motion Date: 12/15/11
- against - Motion No.: 29

CONSUMER PRODUCT SERVICES, WOJCIECH Motion Seq.: 1
KRECIIEWSKI and CHRISTINE VERSAILLES,
Defendants.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by
plaintiffs for an order pursuant to CPLR 2221(e) for leave to
renew plaintiffs' cross-motion for partial summary judgment
against defendants CONSUMER PRODUCT SERVICES and WOJCIECH
KRECIIEWSKI or in the alternative for an order pursuant to CPLR
5015 for relief from the decision of this Court dated March 6,
2012 on the ground that it was procured by a misrepresentation of
fact:

Papers Numbered

Notice of Motion-Affirmations-Exhibits.....1 - 5
Affirmation in Opposition.....6 - 10
Affirmation in Reply.....11 - 13

This is a personal injury action in which plaintiff, Bryan
Ritzul, seeks to recover damages for injuries he sustained as a
result of a motor vehicle accident that occurred on August 29,
2008, on the eastbound lanes of the Long Island Expressway,
approximately 50 feet east of Powells Lane, Old Westbury, New
York.

Plaintiff, Bryan Ritzul, age 65, testified at his examination
before trial, held on November 11, 2010, that he is employed as a
chauffeur. At the time of the accident, he was driving a passenger
in a Lincoln Sedan on the eastbound side of the Long Island

Expressway between exits 39 and 40. He was operating his vehicle in the HOV lane at a speed of 55 miles per hour when an 18-wheel tractor-trailer owned by Consumer Product Services and operated by Wojciech Kreciewski crossed over three lanes of the Long Island Expressway and struck his vehicle. The limousine was equipped with a video camera mounted on the front of the dashboard.

The driver of the tractor-trailer, defendant Wojciech Kreciewski, testified at his examination before trial on March 8, 2011, that his truck was cut-off by a white box truck which came into his lane of traffic. As a result he had to apply his brakes hard, the brakes locked and he lost control of the truck.

Ritzul's attorney moved for an order granting summary judgment against defendants Consumer Product Services and Wojciech Kreciewski on the issue of liability. Plaintiff asserted that the truck driver was negligent as a matter of law based upon his testimony that the accident occurred when the driver of the tractor-trailer lost control of his vehicle, lost his field of vision, left his lane of travel, jackknifed and swerved into the left lanes, striking Ritzul's vehicle. Counsel claims that the defendant violated VTL § 1128(a) and was negligent as a matter of law in changing lanes when it was not safe to do so, in failing to properly signal and in failing to yield the right of way to Ritzul's vehicle and that said negligence was the sole proximate cause of the accident.

By decision dated March 6, 2012 and entered on March 23, 2012, this Court found that the evidence submitted in support of the motion failed to demonstrate that the driver of the tractor-trailer was negligent as a matter of law. The court held that "deposition testimony to the effect that he was abruptly cut off raises a question of fact as to whether Kreciewski was faced with an emergency situation not of his own making. His testimony that he was required to press hard on the brakes to avoid colliding with a vehicle that cut in front of him also raises a question of fact for the jury as to whether his actions were reasonable and prudent when faced with an emergency situation."

Subsequent to the Court's decision, plaintiff's counsel, Blane Magee, passed away. The law firm of Robinson & Yablon was retained by plaintiffs in April 2012. Andrew M. Laskin, Esq., a member of the incoming firm now moves pursuant to CPLR 2221(e) for leave to renew the prior motion and decision of this Court which denied plaintiff's motion for partial summary judgment on liability.

Counsel states that the prior attorney in making the motion for summary judgment did not provide the court with a copy of contemporaneous video footage which was taken from a video camera mounted on the dashboard of Ritzul's limousine. The video footage, a copy of which was provided to the court in support of the instant motion, depicts the defendants' tractor-trailer jackknifing, crossing three lanes of the Long Island Expressway and veering into plaintiff's lane of travel. The video was properly authenticated pursuant to an affidavit from Mr. Ritzul.

Counsel asserts that the video establishes that at the time the tractor-trailer jackknifed he was not cut off by the white box truck. He states that although there is a white box truck seen in the video, the white box truck is in fact several car lengths ahead of the defendant's truck and did not cross into the path of the defendant's truck. Counsel submits, that the video, therefore, demonstrates that the defendant's truck was not faced with an emergency situation and therefore there is no question of fact for submission to a jury. As such, counsel contends, that based upon the video footage, the prior decision should be vacated and the plaintiff should be awarded partial summary judgment on the issue of liability.

Plaintiff's counsel does not, however, provide a reason why the video, which was in plaintiff's possession at the time of the summary judgment motion was not utilized by prior counsel in support of the motion. Counsel merely states that reason why the video was withheld from the court is a mystery. Counsel argues, however, that even though the video was in the plaintiff's possession prior to the summary judgment motion, the court should grant renewal in the interest of justice (citing Mejia v Nanni, 307 AD2d 870 [1st Dept. 2003][although renewal motions generally should be based on newly discovered facts that could not be offered on the prior motion (see CPLR 2221 [e]), courts have discretion to relax this requirement and to grant such a motion in the interest of justice]).

In opposition, plaintiff contends that even after considering the video footage, there are questions of fact as to whether the defendant was faced with an emergency situation causing him to abruptly press on the brakes while proceeding on the Expressway. Plaintiff contends that it is only counsel's speculation that the box truck seen in the video is the same box truck referred to by defendant at his deposition. Defendant's counsel submits that there might have been a box truck that cut off the truck that is not seen in the video. Counsel further argues that the video was not shown to Mr. Kreciewski at the time of his deposition so that he did not have an opportunity to identify the box truck in the video. Further, defendants argue that the plaintiff has failed to provide a reasonable justification for the failure to submit the

video with the original motion despite being aware of the video for almost three years prior to making the motion.

Upon review and consideration of the plaintiffs' motion, defendants' affirmation in opposition and plaintiffs' reply thereto this Court finds as follows:

Pursuant to CPLR 2221 (e), a motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion.

Here, there is no dispute that the video was in plaintiffs' possession prior to the time of the filing of the summary judgment motion. A copy was provided by the plaintiff to defendant in May 2011 and although newly retained, counsel for plaintiff failed to offer a reasonable explanation as to why the video was not utilized in support of the plaintiff's original motion stating only that it is a mystery why the video was withheld from the court (see CPLR 2221[e][3]; Dayan v Darche, 2012 NY Slip Op 4312 [2d Dept. 2012]; Mount Sinai Hosp. v Country Wide Ins. Co., 85 AD3d 1136 [2d Dept. 2011]; Brown Bark I, L.P. v Imperial Dev. & Constr. Corp., 65 AD3d 510 [2d Dept. 2009]).

Moreover, this Court has reviewed the dashboard camera video and finds that it is not sufficient in and of itself to definitively prove that the court's decision was based upon a misrepresentation of the facts. As pointed out by defense counsel, the video does not depict the scene to the right of the truck which is where the box truck is alleged to have come from. Further, the assertion by plaintiff that the box truck seen in front of the defendant's truck in the video is the same truck referred to by the driver is surmise on the part of plaintiff's counsel. As the video was not utilized at the defendant's deposition, there is no evidence in the record identifying the box truck in the video as the one referred to by the driver.

Accordingly, based upon the foregoing, it is hereby

ORDERED that the motion of plaintiffs BRIAN RITZUKL and BLAGA RITZUL for leave to renew the prior motion for summary judgment is denied, and it is further,

ORDERED that the plaintiff's motion for an order pursuant to CPLR 5015 vacating the prior order on the ground that it was

procured by misrepresentation is denied.

Dated : June 26, 2012
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.