

Pico v Psillos

2014 NY Slip Op 31388(U)

May 21, 2014

Supreme Court, Suffolk County

Docket Number: 11-22927

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 43 - SUFFOLK COUNTY

PUBLISH

PRESENT:

Hon. ARTHUR G. PITTS
Justice of the Supreme Court

MOTION DATE 9-30-13
ADJ. DATE 11-14-13
Mot. Seq. # 002 - MD

-----X
GIANNA M. PICO, an infant under the age of 18
years, by her mother and natural guardian,
REBEKAH DUFFY, REBEKAH DUFFY,
individually and SCOTT FROUM,

Plaintiffs,

- against -

NICHOLAS J. PSILLOS and TOWN OF ISLIP,

Defendants.
-----X

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Upon the following papers numbered 1 to 34 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 13; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 14 - 22; 23 - 29; Replying Affidavits and supporting papers 30 - 34; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Nicholas Psillos and Town of Islip seeking summary judgment dismissing the complaint is denied.

The plaintiff Rebekah Duffy, on behalf of her daughter, the infant plaintiff Gianna Pico, commenced this action to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Connetquot Avenue and Union Boulevard in the Town of Islip on January 27, 2011. The accident allegedly occurred when the front of the vehicle operated by the plaintiff and owned by her husband, the plaintiff Scott Froum, was struck by a snowplow operated by the defendant Nicholas Psillos and owned by the defendant Town of Islip when it crossed over the double yellow line separating the northbound and southbound lanes of Connetquot Avenue. The infant plaintiff was a front seat passenger in the vehicle operated by her mother, the plaintiff, at the time of the accident.

Following the commencement of the instant action on behalf of the infant plaintiff, a separate action, assigned index number 36375/11, was commenced by Rebekah Duffy and Scott Froum against Nicholas Psillos and the Town of Islip seeking damages for the personal injuries allegedly sustained by Rebekah Duffy in the subject accident, and for the loss of services allegedly suffered by Scott Froum. Thereafter, by order dated May 25, 2012, this Court granted the defendants' motion for consolidation, and ordered that the two actions be consolidated under index number 22927/11, and that the caption be amended to read *Gianna M. Pico, an infant under the age of 18 years, by her mother and natural guardian, Rebekah Duffy, Rebekah Duffy, individually, and Scott Froum, plaintiffs, against Nicholas J. Psillos and Town of Islip, defendants.*

The defendants now move for summary judgment on the basis that § 1103(b) of the Vehicle and Traffic Law absolves them from liability for the subject accident's occurrence. In particular, the defendants assert that the plaintiffs are unable to establish that Nicholas Psillos operated the Town of Islip's snowplow with reckless disregard for the safety of others at the time of the accident's occurrence. In support of the motion, the defendants submit copies of the pleadings, the parties' deposition transcripts, and the affidavit of the deputy town attorney, Michael Walsh. The plaintiffs oppose the motion on the grounds that it is procedurally defective, since the defendants failed to submit all of the pleadings, and that the submitted deposition transcripts are inadmissible, because they are unsigned. The plaintiffs further contend that there are triable issues of fact as to whether Nicholas Psillos operated the snowplow with reckless disregard for the safety of others at the time of the accident's occurrence. In opposition to the motion, the plaintiffs rely on the same evidence submitted in support of the defendants' motion for summary judgment. The plaintiffs also submit a certified copy of the police accident report and the affidavit of Rebekah Florez, formerly known as Rebekah Duffy.

It is axiomatic that on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, *supra*), and it must view the evidence in the light most favorable to the party opposing the motion (*see Boyce v Vazquez*, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Thus, to obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof, in admissible form, to warrant the court to direct judgment in the movant's favor (*see Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). 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 [2d Dept 2004]).

A snowplow operator engaged in work on a highway is exempt from the rules of the road and may only be held liable for damages caused by an act done in reckless disregard for the safety of others (Vehicle and Traffic Law § 1103 (b); *see Riley v County of Broome*, 95 NY2d 455, 719 NYS2d 623 [2000];

Rockland Coaches, Inc. v Town of Clarkstown, 49 AD3d 705, 854 NYS2d 172 [2d Dept 2008]). “This standard requires more than a showing of a lack of due care—it requires proof that the actor acted in conscious disregard of a “known risk that was so great as to make it highly probable that harm would follow” (***Bliss v State***, 95 NY2d 911, 913, 719 NYS2d 631 [2000], quoting ***Saarinen v Kerr***, 84 NY2d 494, 501, 602 NYS2d 297 [1994]).

The plaintiff Rebekah Duffy testified at an examination before trial that on the day of the accident she was traveling northbound on Connetquot Avenue on her way to drop her daughter, the infant plaintiff Gianna Pico, at a friend’s house, that the roadway was snowy and slushy, and that she observed two Town of Islip snowplows traveling on the southbound side of Connetquot Avenue approximately five to ten seconds before the accident occurred. She testified that one of the snowplows passed her vehicle, but that the second snowplow crossed over the double yellow line and struck the front of her moving vehicle, causing the right passenger side of her vehicle to hit a snow embankment.

The defendant Nicholas Psillos testified at an examination before trial that he was employed with the Town of Islip Highway Department as a heavy equipment operator, that he began his shift the night prior to the subject accident’s occurrence and worked through the night, because of a snow emergency, and that he was operating a six-wheel international dump truck clearing snow from the roadway on the date of the accident. Psillos testified that the dump truck had a rotating beacon on its roof with a light bar across the top of it, that the rear sander of the dump truck had lights on it, and that all of the lights on the dump truck were on and flashing while he was operating it. He testified that, prior to the accident, he was operating the dump truck on the southbound side of Connetquot Avenue, behind the area foreman’s pickup truck, pushing the snow from the roadway towards the curb, and that he observed the Duffy vehicle stopped at a traffic light on the northbound side of Connetquot Avenue. Psillos testified that he was traveling at approximately 25 to 30 miles per hour when the plow on his dump truck “tripped” on a sheet of ice on the roadway, “throwing” him into the opposite lane of travel and causing him to strike the Duffy vehicle. He testified that he tried to avoid the accident by pressing down on the brakes, turning the steering wheel to the right, but the truck slid, and that the impact occurred when he tried to raise the plow’s blade up off the ground to regain control of the vehicle. He further explained that, since the plow has a spring mechanism on it, when it “trips,” it forces the truck to roll forward. Finally, Psillos testified that, prior to the accident, he noticed ice intermittently on the roadway, and that the particular area of the roadway where the accident occurred is prone to ice over.

The infant plaintiff testified at an examination before trial that on the day of the accident she was a front seat passenger in the vehicle operated by her mother, the plaintiff Rebekah Duffy. She testified that she saw the snowplow approximately 10 seconds before the accident occurred, that it was traveling southbound on Connetquot Avenue, and that the snowplow crossed over into the lane that her mother’s vehicle was traveling in and “hit them head on.”

Initially, the Court notes that, contrary to the contentions of the plaintiffs, the unsigned deposition transcript of Nicholas Psillos, which was submitted in support of his motion for summary judgment, is admissible under CPLR 3116(a), since the transcript was submitted by the party deponent himself and, therefore, was adopted as accurate (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept

2008]; *Thomas v Hampton Express*, 208 AD2d 824, 617 NYS2d 831 [2d Dept 1994]; cf. *Santos v Intown Assoc.*, 17 AD3d 564, 793 NYS2d 477 [2d Dept 2005]). In addition, the plaintiffs, in opposition to the motion for summary judgment, also rely upon the unsigned deposition transcripts submitted by the defendants, and the plaintiffs failed to raise any challenges to the accuracy of such unsigned depositions (see *Pavane v Marte*, 109 AD3d 970, 971 NYS2d 562 [2d Dept 2013]; *Carey v Five Bros., Inc.*, 106 AD3d 938, 966 NYS2d 153 [2d Dept 2013]; *Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]; *Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]). Thus, the deposition transcripts qualify as admissible evidence for purposes of the defendants' motion for summary judgment (see *Rodriguez v Ryder Truck, Inc.*, *supra*; *Zalot v Zieba*, *supra*; *Bennett v Berger*, 283 AD2d 374, 726 NYS2d 22 [1st Dept 2001]).

Additionally, "although CPLR 3212(b) requires that a motion for summary judgment be supported by copies of the pleadings, the court has the discretion to overlook the procedural defect of missing pleadings when the record is sufficiently complete" (*Washington Realty Owners, LLC v 260 Wash. St., LLC*, 105 AD3d 675, 675, 964 NYS2d 137 [2d Dept 2013], quoting *Welch v Hauck*, 18 AD3d 1096, 1098, 795 NYS2d 789 [3d Dept 2005], *lv denied* 5 NY3d 708, 803 NYS2d 29 [2005]), and the opposing party had not been prejudiced (see CPLR 2001; see also *Welch v Hauck*, 18 AD3d 1096, 795 NYS2d 789 [2d Dept 2005]). The record will be found to be sufficiently complete where a complete set of the papers are available from the materials submitted despite the movant not having attached all of the pleadings (see *Studio A Showroom, LLC v Yoon*, 99 AD3d 632, 952 NYS2d 879 [1st Dept 2012]). Here, while the defendants did not include a copy of the pleadings for the action brought by Rebekah Duffy and Scott Froum under index number 3637/11, a set of those pleadings was included with the plaintiffs' answering papers. Thus, the record is sufficiently complete, since a set of all of the pleadings in this action have been made available to all of the parties involved as well as the court (see *Carey v Five Bros., Inc.*, *supra*; *Welch v Hauck*, *supra*).

The defendants have failed to establish their prima facie entitlement to judgment as a matter of law that Nicholas Psillos was not operating the snowplow with reckless disregard for the safety of others when the subject accident occurred (see *Faria v City of Yonkers*, 84 AD3d 1306, 924 NYS2d 147 [2d Dept 2011]; *Ryan v Town of Smithtown*, 49 AD3d 853, 854 NYS2d 483 [2d Dept 2008]; *Badalmenti v City of New York*, 30 AD3d 452, 817 NYS2d 134 [2d Dept 2006]). Despite the defendants establishing that, at the time of the accident, the Town's snowplow was engaged in work on a highway as contemplated by Vehicle and Traffic Law § 1103(b), the evidentiary submissions indicate that Nicholas Psillos, just prior to the accident, was traveling at approximately 25 to 30 mph when his blade struck a sheet of elevated ice, causing the snowplow that he was operating to cross over the double yellow lines into the southbound lane, striking plaintiff's vehicle. Nicholas Psillos testified that he knew the area where the accident occurred was prone to icing over, that there was an half-inch sheet of elevated ice on the pavement, which he noticed when he was approximately 50 to 100 feet away from it, that he observed areas of the roadway covered with ice, and that it is common for the plows on the dump trucks to "trip" on ice. Under these circumstances, there are questions of fact as to whether Nicholas Psillos was operating the dump truck at a speed too great for the conditions of the roadway and in conscious disregard of "a known or obvious risk that was so great as to make it highly probable that harm would follow" (*Bliss v State*, 95 NY2d 911, 913, 719 NYS2d 631 [2000], quoting *Saarinen v Kerr*, 84 NY2d 494, 501, 602 NYS2d 297 [1994]; see *Faria v City of Yonkers*, 84 AD3d 1306, 924 147 [2d Dept 2011]; *Bicchetti v County of Nassau*, 49 AD3d 788, 854 NYS2d 401 [2d

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Dept 2008]; *Haist v Town of Newstead*, 27 AD3d 1133, 811 NYS2d 518 [4th Dept 2006]; *Badalamenti v City of New York*, 30 AD3d 452, 817 NYS2d 134 [2d Dept 2005]; *cf. Rockland Coaches, Inc. v Town of Clarkstown*, 49 AD3d 705, 854 NYS2d 172 [2d Dept 2008]). In fact, Nicholas Psillos testified that the dump truck has a lot of power behind it, and that he knew if the plow “tripped” it would roll forward and he could possibly lose control of the vehicle. Accordingly, the defendants’ motion for summary judgment dismissing the complaint is denied.

Dated: May 21, 2014



J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION