Jung Ran Kim v Miserendino
2014 NY Slip Op 33990(U)
June 19, 2014
Supreme Court, Queens County
Docket Number: 700107/2012
Judge: Sidney F. Strauss
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIDNEY F. STRAUSS
Justice

IA PART 11

--X
JUNG RAN KIM and YONG SOO LIM,

Plaintiffs,

-against-

S.C. MISERENDINO and RESCUE
HOOK & LADDER CO. NO. 1,

Defendants.
--X

Index No.: 700107/2012

Motion Date: June 4, 2014

Seq. No.: 2

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The following papers numbered E19 to E51 were read on the motion of the defendants, seeking an order pursuant to CPLR 3212, dismissing plaintiffs' complaint on the grounds that, pursuant to V&TL1104, the defendants' actions did not constitute reckless disregard, and pursuant to Insurance Law 5102, dismissing plaintiff Jung Ran Kim ("Jung")'s cause of action on the ground that her injuries do not satisfy the statutory threshold. Defendants also move, pursuant to CPLR 3226(2) and (3), dismissing the action of Yong Soo Lim.

	PAPERS NUMBERED
Notice of Motion - Affirmation - Exhibits..................	E19-E35
Opposition Affirmation - Exhibits..............................	E36-E47
Reply Affirmation - Exhibits.....................................	E48-E51

At the outset, as to plaintiff Yong Soo Lim, the instant motion is denied as moot inasmuch as the parties have stipulated to a discontinuance of the action as it relates to Yong Soo Lim, with prejudice.

As to plaintiff Jong, the court determines the motion as follows:

The underlying action arises out of an automobile collision that occurred on October 19, 2010, between a vehicle operated by the plaintiff and an ambulance owned by the defendant Rescue Hook & Ladder Co. No. 1 ("Red Hook"), driven by the defendant, S.C. Miserendino ("Miserendino"), while acting in the capacity of volunteer EMT for the defendant Red Hook.

Defendants now seek an order dismissing plaintiff's complaint on the ground that the defendant Miserendino's actions, in response to an authorized emergency, did not rise to the level of "reckless disregard," which would result in liability towards the plaintiff, as envisioned by the terms of the Vehicle and Traffic Law Section 1104, et. seq.

Summary judgment is a drastic remedy and should only be granted where there is no doubt as to the existence of triable issues of fact. (*See, Andre v Pomeroy*, 35 N.Y.2d 361 [1974]; *Zuckerman v City of New York*, 49 NYS2d 577 [1980]; *Ugarriza v Shmieder*, 46 NYS2d 471 [1979].) In addition, the parties' competing contentions must be viewed in a light most favorable to the party opposing the motion. (*See, Marine Midland Bank, N.A. v Dino,* 168 AD2d 610 [2nd Dept. 1970].)

In determining whether or not the defendants' actions rise to the level of "reckless disregard" as contemplated by the Vehicle and Traffic Law Section 1104, the plaintiff bears the burden of establishing that the driver of the authorized emergency vehicle intentionally drove in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and did so with conscious indifference to the outcome. (*Saarinen v Kerr*, 84 NY2d 494, *Molinari v New York*, 267 Ad2d 436, *King v Cobleskill*, 237 AD2d 689.) What is critical to making this determination is the nature of the call to which the emergency vehicle was responding. Testimony by the defendant Miserendino, as well as that of non-party Rob Goldberg, co-volunteer EMT riding as a passenger with the defendant on the date in question, indicate that the defendant was responding to a call, and further, that the emergency lights and siren were on from the moment they left the station until the occurrence. They both testified that an unidentified vehicle cut the defendant's vehicle just prior to the accident, causing the defendant ambulance to come into contact with the plaintiff's vehicle. In opposition, plaintiff does not dispute that she heard sirens prior to the accident, but that she did not recall whether she saw any emergency and/or flashing lights from the defendant's ambulance prior to or even after, the accident occurred. (VTL 1104(4)(c); *Abood v Hospital Ambulance Service, Inc.*, 30 NY2d 295 [1972]; *Thain v New York*, 35 AD2d 545 [2d Dept. 1970], aff'd, 30 NY2d 524 [2d Dept. 1972].) Plaintiff also admits in her deposition testimony that the defendant ambulance was not traveling at an excess rate of speed, in fact she states that she could not estimate the speed, "but [she] think[s] it was not so fast," stating that she thought it could have been traveling at more than ten miles an hour but could not say if it was traveling faster than 20 miles per hour.

Despite the undisputed testimony that the defendants' ambulance was not traveling at a high rate of speed, and that the plaintiff heard the siren of the ambulance, plaintiff argues, in opposition to the instant motion, that even if the defendants were responding to an emergency, their actions rise to the level of "reckless disregard." In response, the defendants argue that VTL 1104 provides for qualified immunity when emergency vehicles are responding to any emergency, provided that lights and sirens have been activated. It is a given that the driver of an emergency vehicle may be convicted of speeding if he exceeds the speed limit in the absence of an emergency. (*People v McIntosh*, 35 Misc 2d 865.) However, the exemption of section 1104 will apply even if no actual emergency exists, *provided the driver believes he is on an emergency*

call and has a reasonable basis for such a belief. (emphasis added)(*People v Bisig*, 46 Misc.2d 299 [1965]; *Delgado v. Brooklyn Ambulance Serv. Corp.*, 29 Misc 2d 454 [1961].)

VTL 1144 requires drivers to yield the right of way and, among other precautions, stay clear of an intersection where an emergency vehicle's red rotating lights, siren and air horn have been activated. (*Tobacco v North Babylon Fire Dept.*, 251 AD2d 398 [2d Dept. 1998].) Where no evidence has been submitted that the defendant Miserendino acted with "reckless disregard for the safety of others" (Vehicle and Traffic Law § 1104 [e]; see, *Szczerbiak v Pilat*, 90 NY2d 553 [1997]; *Saarinen v Kerr*, 84 NY2d 494 [1994]; *Notorangelo v State of New York*, 240 AD2d 716 [2d Dept. 1997]), the court must find in favor of summary judgment for the defendants.

The standard of "reckless disregard" requires more than a mere lack of due care under the circumstances, which standard is associated with ordinary negligence. "It requires evidence that 'the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome" (*Saarinen v Kerr*, supra, quoting Prosser and Keeton, Torts § 34, at 213 [5th ed]). Under the circumstances of this case, the plaintiff has not met his burden in establishing intent on the part of the defendant Miserendino. The operator of an authorized emergency vehicle who is engaged in an emergency operation is afforded the benefits of Vehicle and Traffic Law Section 1104, including protection from civil liability unless engaged in acts of reckless disregard. (*Gonyea v County of Saratoga*, 23 AD3d 790 [3d Dept 2005].) Reckless disregard, which removes the protection from liability of an authorized emergency vehicle engaged in an emergency operation under V&T 1104, is described as the conscious or intentional doing of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow, and done with conscious indifference to the outcome. (see *Saarinen v Kerr*, supra; *Gonyea v County of Saratoga*, supra; *Hemingway v City of New York*, 81 AD3d 595 [2d Dept. 2011]; *Puntarich v County of Suffolk*, 47 AD3d 785 [2d Dept. 2008].)

The reckless disregard test, which requires a showing of more than a momentary judgment lapse, is better suited to the legislative goal of encouraging emergency personnel to act swiftly and resolutely while at the same time protecting the public's safety to the extent practicable. (*Rusho v State of New York*, 24 Misc3d 752 [2009].) The manner in which an emergency responder operates his or her vehicle in responding to an emergency may form the basis of civil liability to an injured third party if the responder acts in reckless disregard for the safety of others. (*Krulik v County of Suffolk*, 62 AD3d 669 [2d Dept. 2009].) Reckless disregard for the safety of others requires more than a showing of lack of due care. (*Saarien v Kerr*, supra.) In this instance, defendant Miserendino testified that after the accident he admitted to his immediate superiors that he had been negligent in driving the ambulance; that the accident happened due to his actions in responding to a vehicle making an illegal left turn, suddenly veered in front of defendants' ambulance, giving defendant driver just seconds to react by either hitting the unidentified vehicle or getting too close to the plaintiff, just before the ambulance came into contact with the plaintiff's vehicle. However, even with such a statement, V&T 1104

was drafted to insulate emergency responders from liability for ordinary negligence, with the acknowledgment that accidents can occur when responding swiftly. Thus, the requirement that in order to hold such defendants responsible, a plaintiff must establish that the actions rise above ordinary negligence to that of "reckless disregard".

Based upon the testimony proffered by both plaintiff and defendants, it is clear that the actions of the defendant driver did not rise to the level of reckless disregard. To the extent that the plaintiff proffers an affidavit in English, inasmuch as it is clear from plaintiff's deposition testimony that a Korean translator was required, the affidavit, tailored solely to support the opposition affirmation of plaintiff's counsel and without any translation, is without probative value. It is clear from recent Second Department rulings that "the absence of a translator's affidavit, required of foreign-language witnesses, renders the witness's English-language affidavit facially defective and inadmissible." (See, *Reyes v Arco Wentworth Mgt. Corp.*, 83 AD3d 47 [2d Dept. 2011]; *Martinez v 123-16 Liberty Ave. Realty Corp.*, 47 AD3d 901 [2d Dept. 2008].) This Court is bound by the holding in *Reyes v Arco Wentworth Mgt. Corp. supra*, "[t]he requirement of CPLR 2101 (b) that affidavits of non-English-speaking witnesses be accompanied by a translator's affidavit setting forth the translator's qualifications and the accuracy of the English version submitted to the court makes sense." (*Reyes v Arco Wentworth Mgt. Corp.*, supra.)

Based upon the foregoing, the court need not address that branch of defendants' motion seeking dismissal of plaintiff Yong's complaint on the ground that her injuries failed to satisfy the threshold requirement of Insurance Law 5102.

Accordingly, defendants' motion seeking to dismiss plaintiff's complaint on the ground that there is no liability, is granted. The complaint is dismissed.

Dated: June 19, 2014

SIDNEY F. STRAUSS, J.S.C.