

Cox v McCormick Farms, Inc.
2015 NY Slip Op 30525(U)
April 14, 2015
Supreme Court, Wyoming County
Docket Number: 44722
Judge: Michael M. Mohun
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At a term of the Supreme Court held in and for the County of Wyoming, at the Courthouse in Warsaw, New York, on the 14th day of April, 2015.

PRESENT: **HONORABLE MICHAEL M. MOHUN**
Acting Supreme Court Justice

STATE OF NEW YORK
SUPREME COURT: COUNTY OF WYOMING

**ELMER G. COX, JR., and
REBECCA A. COX, his wife,**

Plaintiffs,

v.

DECISION AND ORDER
Index No. 44722

**MCCORMICK FARMS, INC., and
SYNERGY, LLC,**

Defendants.

The defendant, McCormick Farms, Inc., [hereinafter, McCormick], by notice of motion dated November 11, 2014, having moved pursuant CPLR §3212 for an order dismissing the complaint as against it and directing that summary judgment be entered herein in its favor; and the defendant, Synergy, LLC, [hereinafter, Synergy] by notice of motion dated December 15, 2014, having also moved for an order pursuant CPLR §3212 dismissing the complaint as against it and directing that summary judgment be entered herein in its favor; and McCormick, by notice of cross-motion

dated January 6, 2015, having cross-moved, upon additional grounds, for an order dismissing the complaint as against it and directing that summary judgment be entered herein in its favor; and said motions and cross-motion having duly come on to be heard.

NOW, upon reading the pleadings of the parties; and on reading and filing the notice of motion of McCormick, dated November 11, 2014, supported by the affirmation of James P. Youngs, Esq., attorney for McCormick, dated November 11, 2014, together with the annexed exhibits; the notice of motion of Synergy, dated December 15, 2014, supported by the affirmation of Stephen M. Sorrells, Esq., attorney for Synergy, dated December 15, 2014; the affirmation of J. Michael Hayes, Esq., Attorney for the plaintiffs, dated January 2, 2015, responding to both the motion of McCormick and the motion of Synergy, together with the annexed exhibits; the responding affidavit of Plaintiff Elmer G. Cox, sworn to on December 30, 2014; the notice of cross-motion of McCormick, dated January 6, 2015, supported by the affirmation of Christina M. Verone-Juliano, Esq., dated January 6, 2015; the responding affirmation of Stephen M. Sorrells, Esq., dated January 6, 2015; the sur-reply affirmation of J. Michael Hayes, Esq., dated January 8, 2015; the reply affirmation of Christina M. Verone Juliano, Esq., dated January 12, 2015; and after hearing Stephen M. Sorrells, Esq., for Synergy, James P. Youngs, Esq., for McCormick Farms, and Anthony J.

Zitnik, Esq., for the plaintiffs, and due deliberation having been had, the following decision is rendered.

The case arises from a motor vehicle accident. On the morning of March 5, 2012, Plaintiff Elmer Cox was driving a tractor-trailer delivering hay to dairy farms in the course of his employment as a truck driver for M&T Trucking. At the start of the day, 48 large bales of hay – weighing 1400 pounds a piece – had been loaded into his trailer. After dropping half of his load at a farm in Attica, New York, he proceeded to the Plato Brook dairy farm at 5401 Curriers Road in the Village of Arcade, New York, to deliver the remainder.

The weather was bright, sunny and cold, and the roads were clear. There was snow on the ground, with one to two inches of new snow having fallen during the previous night. As one witness described it in his deposition testimony, it was “one of them [sic.] mornings where you got a real thin layer of snow with almost blinding sunlight, reflect [sic.] off the snow.” When Mr. Cox made his right turn from Curriers Road into the entrance of the farm, the right rear wheels of his trailer missed the driveway and went into the 4-foot-deep drainage ditch adjacent to the driveway running along Curriers Road. This caused the entire tractor-trailer to roll over to the right onto its side. Mr. Cox is suing to recover for the injuries he suffered as a result. His wife’s cause of action is derivative in nature.

McCormick owns the farm on Curriers Road, and Synergy leases part of it for its operations.

In his deposition testimony, Mr. Cox gave the following description of the accident. In making his turn, he "went to swing wide like I normally swing," and he "slowed right down to probably zero to five miles an hour going around" [because] "it was icy so I took extra cautious [sic.] going around making the right-hand turn." After he had gotten the entire truck "almost all the way into the driveway," however, he "felt a movement" as the right rear wheels of the trailer "slipped right into the ditch," causing the tractor-trailer to then "roll[] over on its passenger side." John Innes, an M&T employee who spoke with Mr. Cox at the scene of the accident shortly after it occurred, testified at his deposition that Mr. Cox admitted to him that "he didn't see the ditch and he cut it short." Innes also testified that Cox had told him "he thought he swung wide enough, and by the time the trailer wheels fell into the ditch he knew it was too late." Matthew Flint, a truck driver who had successfully made a left-hand turn into the driveway with his tractor-trailer 25 minutes before Mr. Cox arrived, stated in his deposition testimony that it was his impression that the accident occurred because Mr. Cox had failed to make a wide enough turn into the driveway. As he put it, "[t]o us it was as simple as he pulled in like a car, not a semi." Flint explained that "[w]ith a 50 foot trailer behind you, you have to swing,

overcompensate everything to miss everything," whereas a car, having "[a] shorter wheel base can turn tighter, closer to objects." Flint also testified that when he asked Cox "what he thought happened," Cox told him that because of the bright sunlight he "just couldn't make out the driveway, sun blindness." Flint had no difficulty seeing the driveway and avoiding the ditch when he steered his tractor-trailer into the driveway. Similarly, Innes testified that, although "there was snow there," "[w]hen I got there I could see the ditch."

Jarome George, a Synergy employee who worked at the farm, testified that the driveway was "partially bare" of snow and was not in need of plowing on the morning of the accident. His duties at the farm included plowing the driveway when needed, a task which he accomplished using equipment belonging to McCormick. With regard to the condition of the ditch at the time of the accident, George stated that it "was pretty much empty [of snow], other than the dusting we got or that little accumulation that present day or the day before [sic]." George also testified that Wyoming County maintains the ditch, not the defendants.

Synergy argues that the careless driving of Cox was the sole cause of the accident. To establish this, Synergy has submitted, in addition to the deposition testimonies of the witnesses and several photographs of the accident scene, the affidavit of Thomas C. Onions, an accident

reconstruction expert. Onions states that the plaintiff's description of the accident "virtually defines 'off-tracking'," which is the term used to refer to the fact that the rear wheels of any vehicle with two or more axles will "track inside the circular path of the front wheels" when the vehicle makes a slow steady turn. The amount of "off-tracking" produced increases with the length of the vehicle. Consequently, "off-tracking" will be most pronounced with very long vehicles like the tractor-trailer driven by Mr. Cox. In fact, as Onions explains, to safely drive a truck, a truck driver must be well acquainted with the "off-tracking" characteristics of that truck. In his affidavit he points out, quoting from the New York State Commercial Driver's Manual (a study guide issued to individuals seeking to take the test to obtain a New York State Commercial Driver's License), that truck drivers are required to "[s]teer the front [of their truck] wide enough around a corner so the rear end does not run over the curb, pedestrians, or other vehicles," and must "[i]n turns, check [their] mirrors to make sure the rear of [their] vehicle will not hit anything." Thus, the ability to negotiate turns is a basic competence for any truck driver, and the duty to operate the truck safely includes the duty to see that the rear wheels do not leave the driving surface during turns. With respect to the plaintiff's claim that the defendants were negligent in failing to place markers along the edge of the driveway where it crossed the ditch, Onions states that no such markers were needed under

the circumstances because "the ditch was prominent, measuring approximately 7 feet wide and 4 feet deep," and was "there to be seen." "It should have been and could have been avoided through proper and normal driver attention." Since Mr. Cox failed to keep his rear wheels from going into the ditch when turning into the Curriers Road farm, Onions concludes from his review of the evidence that Cox's actions "were the sole competent producing cause of this accident without any contribution on the part of SYNERGY, LLC."

The question of negligence is normally to be left to the jury, and summary judgment is a "drastic remedy which should only be employed when there is no doubt as to the absence of triable issues" Andre v. Pomeroy, 35 N.Y.2d 361, 364 [1974]). Here, however, there is no dispute about the fact that the truck overturned due to the failure of Mr. Cox to negotiate the turn into the driveway. The evidence submitted by Synergy indicates that he did so simply because he failed to recognize the hazard until "it was too late." It is well settled, however, that a motorist "is bound to see what is there to be seen through the proper use of his or her senses" (Colpan v. Allied Central Ambulette, Inc., 97 A.D.3d 776 [2nd Dept., 2012]), and the deposition testimonies established that the driveway and ditch were visible. Moreover, for the careful driver, the presence of a drainage ditch "near the pavement creates no unreasonable danger" (Tomassi v. Town of

Union, et al, 46 N.Y.2d 91, 97 [1978]). In addition, Synergy's submissions are sufficient to exclude negligence on the part of Synergy as a contributing cause of the accident. Therefore, the Court finds that Synergy has presented a prima facie case that the sole proximate cause of the accident was the negligence of the plaintiff, Elmer Cox (see Breen v. Seibert, 123 A.D.3d 963 [2nd Dept., 2014]; Crowe v. Hanley, 123 A.D.3d 755 [2nd Dept., 2014]). McCormick has cross-moved for summary judgment upon the same grounds, and the Court finds that the submissions are sufficient to show, prima facie, that McCormick, too, is entitled to judgment as a matter of law.

Both defendants having met their burdens upon their motions, it was incumbent upon the plaintiffs, in order to avoid summary judgment, to show that a genuine issue of material fact remained to be determined (Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 [1986]). The plaintiffs have not done so. In his affidavit responding to the motions, Elmer Cox states that "[i]t was not determinable, as I turned into McCormick Farms, exactly where the driveway ended and the edge of the ditch began," and "[w]ithout any markers and without the driveway being plowed, it was not possible to determine exactly where the one ended and the other began." These conclusory assertions are insufficient to raise a material issue of fact. Mr. Cox's failure to see the ditch, by itself, hardly establishes that the ditch could not be seen. Furthermore, the photograph that he offers to support

his assertions does not show that the ditch was obscured by snow. On the contrary, the picture appears to show the truck on its side with its rear wheels inside the visible ditch. Finally, Mr. Cox's statement that he "later learned" that "snow at 'driveway level' extended out over a part of the ditch, disguising the edge" is speculative, and is manifestly not based upon Mr. Cox's own knowledge. It therefore does not qualify as proof in admissible form (Zuckerman v. City of New York, 49 N.Y.2d 557, 562 [1980]; Alvarez, supra).

The defendants having established that Elmer Cox's inattentive driving was the sole proximate cause of the accident, and the plaintiffs having failed to show, in response, that summary judgment is precluded because material issues of fact remain to be determined, the Court will grant summary judgment to Synergy and McCormick upon this ground. Having so determined, it is unnecessary for the Court to reach the merits of McCormick's motion for summary judgment on the ground that its tenant, Synergy, was contractually responsible for maintaining the driveway and therefore McCormick cannot have breached any duty owed to the plaintiffs. The Court notes, however, that since McCormick was not an out-of-possession landlord, the Court would not have granted summary judgment on this ground.

NOW, THEREFORE, it is hereby

ORDERED that, for the reasons stated above, the motion of Synergy and the cross-motion of McCormick for summary judgment are granted and the complaint is dismissed in its entirety.

DATED: April 14, 2015
Warsaw, New York



HON. MICHAEL M. MOHUN
Acting Justice of the Supreme Court

