

**Anderson v Commack Fire Dist.**

2017 NY Slip Op 32530(U)

November 28, 2017

Supreme Court, Suffolk County

Docket Number: 12-36752

Judge: Daniel Martin

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INDEX No. 12-36752  
CAL. No. 15-02113MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 9 - SUFFOLK COUNTY

**PRESENT:**

Hon. DANIEL MARTIN

MOTION DATE 4-12-16  
ADJ. DATE 10-7-16  
Mot. Seq. # 001 - MotD

-----X

COURTNEY ANDERSON,  
  
Plaintiff,  
  
- against -  
  
COMMACK FIRE DISTRICT, COMMACK  
FIRE DEPARTMENT, AND JOHN M.  
MUILENBURG,  
  
Defendants.  
  
-----X

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Upon the following papers numbered 1 to 23 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 17 ; Answering Affidavits and supporting papers 18 - 20 ; Replying Affidavits and supporting papers 21 - 23 ; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

**ORDERED** that the motion by defendants for summary judgment dismissing the complaint against them is granted to the extent stated herein, and is otherwise denied.

This action was commenced by plaintiff Courtney Anderson to recover damages for injuries she allegedly sustained on June 22, 2012 when the motor vehicle she was operating collided with a Commack Fire Department fire truck.

Defendants Commack Fire District (Fire District), sued herein as Commack Fire District and Commack Fire Department, and John M. Muilenburg now move for summary judgment in their favor on the ground that their actions did not constitute "reckless disregard" for the safety of others pursuant to VTL § 1104 and, as such, they are not liable for plaintiff's alleged injuries. In its answer, the Fire District admits that it operates the entity known as Commack Fire Department and that it is the owner of the fire truck in question. In support of their motion, defendants submit copies of the pleadings, a transcript of plaintiff's General Municipal Law § 50-h hearing testimony, transcripts of the deposition

testimony of the parties, an affidavit of Joseph Licausi, various uncertified dispatch records, five indecipherable photographs, and a copy of an uncertified MV-104A police accident report.

At her General Municipal Law § 50-h hearing, plaintiff testified that at approximately 2:20 p.m. on the date in question, she was operating her motor vehicle eastbound in the left lane of Jericho Turnpike, approaching its intersection with Indian Head/Harned Road at between 20 and 25 miles per hour. She explained that the road running north and south at that intersection is known as Indian Head Road north of its intersection with Jericho Turnpike, and Harned Road south of Jericho Turnpike. Plaintiff indicated that she had her radio on in her car, that it was drizzling, that the traffic signal regulating her direction of travel was steady green, and that she heard sirens, but did not see any flashing lights. She stated that, in response to hearing the sirens, she turned off her car radio and took her foot off her vehicle's accelerator pedal. Plaintiff testified that at the time she lifted her foot off the accelerator pedal, she was 8 to 10 car lengths from the intersection, that there were no vehicles ahead of her, and that the sirens that she heard for sixty seconds did not sound like they were moving toward her or away from her but, rather, remained at a constant level. Plaintiff stated that there were two large trucks stopped at a red left-turn signal in the left turning lane of Jericho Turnpike, facing eastbound, waiting to make a left turn to head north on Indian Head Road, which obscured her vision in the northbound direction. She also recalled seeing vehicles stopped in the westbound left turning lane of Jericho Turnpike awaiting their opportunity to turn south onto Harned Road. She indicated that there were no vehicles in the eastbound right lane of Jericho Turnpike.

Plaintiff testified that as soon as her vehicle entered the intersection in question, it collided with the side of a Commack fire truck, impacting it between its first and second axle. Describing the impact as "extreme," she testified that it caused her vehicle to be pushed in a southerly direction, and that she lost consciousness temporarily. Plaintiff stated that when she awoke, she had an interaction with the three firefighters who had been aboard the fire truck. She testified that she told the two non-driver firefighters that "[she] had a green light" and that she subsequently overheard one of those two non-driver firefighters say to the other "You went through the red light. You didn't stop." Plaintiff also testified that she did not observe the fire truck prior to the collision.

Subsequently, at her deposition, plaintiff testified that at the time of her accident, the weather was "[r]aining, foggy," and that the roadway was wet. She indicated that when she heard sirens, she reduced the speed of her vehicle from 45 miles per hour to "close to 20 miles per hour." She again explained that she looked in all directions in an attempt to locate the source of the sirens, but that she saw nothing and the sirens did not sound as though they were approaching her. However, with regard to her ability to see things to her left (northerly), she testified that the two large trucks stopped in the left turning lane of Jericho Turnpike obscured her vision. Plaintiff stated that the fire truck in question was traveling southbound on Indian Head/Harned Road and her vehicle collided with its right side while both vehicles were positioned underneath the traffic light.

At his deposition, defendant John Muilenburg testified that on the date in question he was the driver of an "area ladder," a fire truck with a large ladder mounted on top, responding to an alarm as a 14-year volunteer member of the Commack Fire Department. Mr. Muilenburg explained that at the time of the accident, he had also been a professional firefighter with the FDNY for nine years. He indicated

that he received extensive training, both with the FDNY and the Commack Fire Department, in the operation of emergency vehicles. He testified that he has been driving various fire trucks for the FDNY since 2006 and believes he received a "chauffeur's training certificate" attesting to his qualification to operate such vehicles.

Regarding the events leading up to the accident in question, Mr. Muilenburg testified that he was operating the fire truck southbound on Indian Head Road, that it was not raining, and that the roads were dry. He stated that his fire truck was in the process of responding to one alarm with its lights, siren, and horn engaged when it was redirected, by radio, to a second alarm, which he later remembered was for an automatic fire alarm having been set off, and which was considered an "emergency" call. Mr. Muilenburg testified that the fire truck he was operating was equipped with two types of sirens: electronic and mechanical. He further testified that the emergency lights on the fire truck were all controlled by one switch and that they were activated at all times subsequent to it pulling out of the fire station. He indicated that there were two firefighters in the truck with him: Allan Blatt, who was in the "officer's" seat, and Michael Pollens, who was in the "crew cab."

Mr. Muilenburg testified that the intersection of Indian Head/Harned Road and Jericho Turnpike was controlled by a traffic light and that he had traveled through that intersection more than ten other times in the course of responding to alarms. He stated that as the fire truck was approaching that intersection, it was traveling at approximately 25 miles per hour, that the light controlling its direction of travel was illuminated red, and that he had changed the "tone" of their sirens to a "more noticeable" one. He indicated that upon reaching the entrance to the intersection, he followed standard procedure by bringing the fire truck to a complete stop, waited until the traffic traveling westbound on Jericho Turnpike came to a halt, and then directed his attention to the eastbound traffic. Mr. Muilenburg stated that he observed a "40-something-foot" tractor-trailer as the first vehicle in the eastbound Jericho Turnpike left turning lane, followed by additional vehicles, all of which were stopped. He denied seeing any vehicular traffic in the eastbound left lane of Jericho Turnpike, as his vision was obscured by the tractor-trailer, but that there were two vehicles stopped in the right lane. He explained that he slowly accelerated to enter the intersection, proceeded southbound past the stopped westbound vehicles, and then turned his head to the right in order to observe the eastbound traffic, which he believed was stopped. He stated that he was able to peer into the "five or six-foot" gap between the cab of the tractor-trailer and its trailer, and saw eastbound vehicles stopped. He explained that, at the time, he believed those stopped vehicles were in the eastbound left lane of Jericho Turnpike, and only later realized that they were actually situated in the eastbound right lane of Jericho Turnpike.

Mr. Muilenburg testified that as the front of the fire truck passed the stopped tractor-trailer at approximately five miles per hour, he directed his vision forward (southbound) and, subsequently, heard a loud crash. He stated that after he heard the crash, he brought the fire truck to a complete stop, then instructed Firefighter Pollens to check on the driver of the vehicle that collided with them. Mr. Muilenburg indicated that an older gentleman later approached him and stated that he had witnessed the accident, that the fire truck "did nothing wrong," that "she came out of nowhere," and that "[s]he was flying." Mr. Muilenburg further stated that he had separate conversations with both Firefighter Blatt and Firefighter Pollens, during which he asked each if they "ever saw her [prior to the collision]," and each replied in the negative.

Nonparty Allen Blatt testified that he is an eight-year volunteer firefighter for the Commack Fire Department and that he was a passenger in the fire truck at the time it was struck by plaintiff's vehicle. Firefighter Blatt indicated that as the fire truck was approaching the intersection in question, it was traveling at approximately 15 miles per hour because it was "coming to a stop," and that it had its emergency lights and sirens activated. He stated that the color of the signal controlling the fire truck's direction of travel was red and that the driver, Mr. Muilenburg, brought the fire truck to a halt for "[t]hree to five seconds" before slowly moving the truck into the intersection, having ensured that westbound traffic on Jericho Turnpike had stopped. Firefighter Blatt indicated that the fire truck's electronic siren, mechanical siren, and air horn were in use as it moved forward. He testified that after the fire truck had successfully passed through the westbound lanes of Jericho Turnpike, Firefighter Muilenburg stopped for approximately two to three seconds before proceeding through the eastbound lanes. Firefighter Blatt stated that during those two to three seconds, he "was making sure that we still had the sirens going, the warning devices on, and [that he] was looking to see if any traffic was coming or if they were stopping." He testified that he didn't see any vehicles approaching as they began moving through the rest of the intersection at "[b]etween 5 and 10 miles an hour." However, Firefighter Blatt recalled that five to seven seconds after stopping, while his vision was directed forward, he saw a car approaching from his right side in his peripheral vision a "split second" before the impact. Firefighter Blatt explained that the front of the fire truck had nearly reached the southern boundary of Jericho Turnpike when it was struck in its right side by plaintiff's vehicle, which had a green light regulating its direction of travel.

At his deposition, nonparty Michael Pollens testified that he is a volunteer firefighter with the Commack Fire Department and was a passenger on the fire truck at the time of the accident in question. He stated that he was sitting in the cab behind the passenger seat of the fire truck, facing its rear. Firefighter Pollens indicated that the fire truck's lights and sirens were continuously activated from the time the truck left the firehouse and, at a time three seconds before the accident, both the electronic sirens and the mechanical sirens were turned on. He testified that the fire truck at no point exceeded the speed limit as "it can't get that high" without "traveling for a while and for a straight distance" because it is a heavy vehicle. He further testified that he felt the fire truck come to a complete stop prior to entering the intersection in question and that he never saw plaintiff's vehicle before he heard the sound of it colliding with the truck. He indicated that, following the accident, he exited the fire truck, walked toward plaintiff's vehicle, asked her if she was alright, and that she stated "she was looking down and texting."

Nonparty witness Joseph Licausi provided an affidavit in which he states that he was in a vehicle stopped in the westbound left turning lane of Jericho Turnpike at the time of the incident in question and that he observed the events as they unfolded. Specifically, Mr. Licausi states that he observed the fire truck "heading south on Harned Road with its emergency lights and sirens activated." He avers that the fire truck "approached the intersection, slowed down, stopped, sounded the air horn and after all vehicles approaching the intersection stopped to yield the right of way to the fire truck, the fire truck proceeded forward." Mr. Licausi states that he then observed plaintiff's vehicle traveling eastbound on Jericho Turnpike at approximately 40 miles per hour. He asserts that he honked his horn and flashed his lights in an attempt to alert her to the presence of the fire truck, but that she never slowed down, eventually impacting the passenger side of the fire truck.

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A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 26 NY3d 40, 19 NYS3d 488 [2015]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*Nomura, supra*; see also *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*Daliendo v Johnson*, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*Nomura, supra*; see also *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

Drivers of emergency vehicles have a primary obligation to respond quickly to preserve life and property and to enforce criminal laws (*Saarinen v Kerr*, 84 NY2d 494, 602 NYS2d 297 [1994]). Vehicle and Traffic Law § 1104 provides that a person operating an “authorized emergency vehicle” has the qualified privilege to disregard certain traffic laws during an emergency operation (see Vehicle and Traffic Law § 1104 [b] (1)-(4); *Criscione v City of New York*, 97 NY2d 152, 736 NYS2d 656 [2001]; *Szczerbiak v Pilat*, 90 NY2d 553, 664 NYS2d 252 [1997]; *Saarinen v Kerr, supra*; *Carollo v Martino*, 58 AD3d 792, 873 NYS2d 102 [2009]; *Mouzakes v County of Suffolk*, 94 AD3d 829, 941 NYS2d 850 [2d Dept 2012]). Vehicle and Traffic Law § 1104 (b) (2) states that “[t]he driver of an authorized vehicle may . . . [p]roceed past a steady red signal . . . but only after slowing down as may be necessary for safe operation.” However, the driver of an emergency vehicle is not relieved of his or her duty to drive with due regard for the safety of others and will not be protected when he or she recklessly disregards the safety of others (see *Mouzakes v County of Suffolk, supra*).

The “reckless disregard” standard requires proof that the driver intentionally committed an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow (*Pollak v Maimonides Med. Ctr.*, 136 AD3d 1008, 1008-1009, 25 NYS3d 646 [2d Dept 2016], quoting *Ferrara v Village of Chester*, 57 AD3d 719, 720, 869 NYS2d 600 [2d Dept 2008]; see also *Campbell v City of Elmira, supra*; *Saarinen v Kerr, supra*). Further, “the reckless disregard standard of care in Vehicle and Traffic Law § 1104 (e) only applies when a driver of an authorized emergency vehicle involved in an emergency operation engages in the specific conduct exempted from the rules of the road by Vehicle and Traffic Law § 1104 (b). Any other injury-causing conduct of such a driver is governed by the principles of ordinary negligence” (*Kabir v County of Monroe*, 16 NY3d 217, 220, 920 NYS2d 268, 268-269 [2011]).

Defendant John Muilenburg has established a prima facie case of entitlement to summary judgment in his favor (see generally *Alvarez v Prospect Hosp., supra*). Mr. Muilenburg testified at his deposition that the fire truck he was operating was responding to an emergency, that its lights and sirens were activated, that he stopped the fire truck before entering the intersection, and that he proceeded slowly through the intersection. Therefore, he established prima facie entitlement to the exemption in

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Vehicle and Traffic Law § 1104 (*see Hemingway v City of New York*, 81 AD3d 595, 916 NYS2d 167 [2d Dept 2011]).

As to defendant Commack Fire District, defendants' counsel relies solely on his contention that defendant Muilenburg's actions did not constitute reckless disregard for the safety of others. However, this argument neglects to consider General Municipal Law § 205-b, which states, in part, that "fire districts created pursuant to law shall be liable for the negligence of volunteer firefighters duly appointed to serve therein in the operation of vehicles owned by the fire district upon the public streets and highways of the fire district, provided such volunteer firefighters, at the time of any accident or injury, were acting in the discharge of their duties." The Court of Appeals opined that General Municipal Law § 205-b was enacted "to expand rather than to limit liability" of municipal defendants (*Thomas v Consol. Fire Dist. No. 1*, 50 NY2d 143, 148, 428 NYS2d 443 [1980]). The plain language of the statute "reflects the Legislature's dual purposes in enacting section 205-b: first, to immunize volunteer firefighters from civil liability for ordinary negligence and, second, to shift liability for such negligence to the fire districts that employ them" (*Lynch v Waters*, 82 AD3d 1719, 1722, 922 NYS2d 884 [4th Dept 2011]). The Commack Fire Department, on the other hand, is "an improper party because it could not be held answerable for the negligence of individual firefighters" (*Knapp v Union Vale Fire Co.*, 141 AD2d 509, 509, 529 NYS2d 132 [2d Dept 1988]). Here, there exists a question of fact as to whether Firefighter Muilenburg was negligent in failing to see plaintiff's vehicle approaching from the west before moving the fire truck through the eastbound lanes of Jericho Turnpike (*see DiFranco v Essig*, 2 AD3d 669, 768 NYS2d 633 [2d Dept 2003]; *Knapp v Union Vale Fire Co.*, *supra*). Thus, defendant Commack Fire District has not eliminated the triable issue of whether Firefighter Muilenburg's actions constitute negligence and expose the Fire District to liability therefore. Accordingly, defendant Commack Fire District's motion for summary judgment dismissing the complaint against it is denied.

Plaintiff opposes defendants' motions, arguing that defendant John Muilenburg's actions as driver constituted "wilful negligence" and "reckless disregard" for the safety of others. Plaintiff submits an expert affidavit of Peter J. Cokelet.

Peter J. Cokelet states that he is a professional motor vehicle collision investigator and reconstructionist. He opines, based upon his analysis of the various evidence adduced in this matter, that Firefighter Muilenburg had numerous methods available to him to avoid the accident in question. He further suggests that Firefighter Muilenburg should have spent more time assessing whether any vehicles were approaching from the west on Jericho Turnpike.

As to defendant driver John Muilenburg personally, the Court finds that plaintiff has failed to raise a triable issue as to his liability (*see Colletti v Pereira*, 61 AD3d 804, 876 NYS2d 716 [2d Dept 2009]; *DiFranco v Essig*, *supra*; *Tobacco v North Babylon Fire Dep't*, 251 AD2d 398, 674 NYS2d 125 [2d Dept 1998]; *see also Schleger v Jurcsak*, 108 AD3d 515, 969 NYS2d 103 [2d Dept 2013]). To find reckless disregard, plaintiff must show "more than a momentary judgment lapse" on the part of Firefighter Muilenburg (*Saarininen v Kerr*, *supra* at 502). It is undisputed that Mr. Muilenburg was acting in furtherance of his duties as a volunteer firefighter for the Commack Fire Department at the time of the incident. Firefighter Muilenburg also testified that the fire truck's emergency lights and sirens were activated prior to entering the intersection. And, while the parties may disagree as to whether

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Firefighter Muilenburg brought the fire truck to a complete stop before entering the intersection, he was not required to do so. Vehicle and Traffic Law § 1104 requires only that the operator of an emergency vehicle with lights and sirens activated slow down, not stop. Furthermore, Mr. Muilenburg testified that he entered the intersection slowly and that it appeared that all lanes of travel had come to a stop before he moved the fire truck through that intersection. Thus, plaintiff has not raised a triable issue as to Mr. Muilenburg's alleged reckless disregard (*see Saarinen v Kerr, supra*).

Accordingly, defendants' motion for summary judgment dismissing the complaint is granted as to John Muilenburg, but denied as to the Fire District.

Dated: November 28, 2017

  
A.J.S.C.

FINAL DISPOSITION  NON-FINAL DISPOSITION