

Fortich v City of New York

2017 NY Slip Op 32654(U)

November 3, 2017

Supreme Court, Bronx County

Docket Number: 250825/2012

Judge: Norma Ruiz

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : PART 22

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ALVARO FORTICH, JR.,

Plaintiff,

Index No: 250825/2012

-against-

DECISION/ORDER

THE CITY OF NEW YORK, TULLY CONSTRUCTION
CO., INC. And FRANK DEFILIPPIS,

Defendants.
-----X

HON. NORMA RUIZ:

This negligence action arises out of a pedestrian knock-down that occurred on July 16, 2010, in the construction/work zone in one of two northbound lanes of the Bruckner Expressway closed for public traffic. Defendants collectively seek leave to file this late motion and, upon the granting of such leave, summary judgment on the issue of liability, or alternatively, dismissal on the ground that the complaint fails to state a cause of action.

CPLR 3212(a) provides that a motion for summary judgment may not be made more than 120 days after the filing of the note of issue "except with leave of court on good cause shown." Unless good cause is shown for the delay, an untimely motion for summary judgment must be denied outright (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726-727 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]).

Here, defendants contend that the 120th day following plaintiff's filing the note of issue on October 15, 2015 was February 12, 2016, a national holiday, as was the following Monday, February 15, 2016, and thus the deadline for the instant motion being made was February 16, 2016, making this motion timely. Plaintiff does not oppose defendants' request, and further, plaintiff has had the

opportunity to oppose the motion on its merits. Therefore, the court grants that branch of the motion seeking leave to make this summary judgment motion.

The motion is determined as follows:

Defendants submit a copy of the pleadings, relevant portions of depositions from plaintiff, Frank DeFilippis (“DeFilippis”) William Ryan (“Ryan”; Vice-President-Risk Manager; the police report; the police accident code template; three Tully accident reports; and the affidavit of eyewitness Manny Gomez (“Gomez”), a dump truck operator. In opposition, plaintiff submits a copy of the third supplemental verified bill of particulars, the deposition transcript of DeFilippis, and a Tully accident report.

Defendants contend that VTL § 1103(b) exempts all vehicles engaged in road construction from the “rules of the road and [that therefore, they are] subject only to a recklessness standard” (*Riley v Cty. of Broome*, 263 AD2d 267 [3d Dept], *aff’d* 95 N.2d 455 [2000]). Section 1103(b) further states that VTL § 1202(a), regulating stopping, standing and/or parking, does not apply to “hazard vehicles while actually engaged in hazardous operation on or adjacent to a highway but shall apply to such persons and vehicles when traveling to or from such hazardous operation” (*Riley v Cty. of Broome*, *supra*).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). Summary judgment should be granted only if the court

determines that the movant's papers justify holding, as a matter of law, "that the cause of action or defense has no merit" (*Id.*). The evidence submitted by the movant must be viewed in the light most favorable to the non-movant (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment should be granted only where there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (*see Friends of Animals, Inc., v Associated Fur Mfrs.*, 46 NY2d 1065 [1979]). Once the movant makes a prima facie showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact warranting denial of the motion (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

DeFilippis testified that he and his co-worker had just dropped off a yield sign, and stand and the accident occurred as he was attempting to exit the work zone. Defendants have not established that DeFilippis was engaging in the type of hazardous work that VTL § 1103(b) was intended to address (*see Hofmann v Town of Ashford*, 60 AD3d 1498 [4th Dept 2009]; *Davis v Incorporated Vil. of Babylon, N.Y.*, 13 AD3d 331 [2d Dept 2004]; *Marvin v Town of Middlesex*, 300 AD2d 1112 [4th Dept 2002]).

There are discrepancies in the deposition testimony of the parties and the eyewitness raising issues of fact (*see Ampofo v Brydson*, 144 AD3d 611 [1st Dept 2016]; *Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295 [1st Dept 2008]) as to the applicability of VTL § 1103(b) (*see Arrahim v City of Buffalo*, 151 AD3d 1773 [4th Dept 2017]), and, if so, whether DeFilippis's actions were indeed reckless (*see Deleon v New York City Sanitation Dept.*, 25 NY3d 1102 [2015]; *Dejean v Lawton*, 136 AD3d 359 [2d Dept 2016]). Defendants rely upon DeFilippis's testimony and the accident reports as proof the van's strobe lights were on and that the back-up alarm was beeping as the van


proceeded to reverse. However, plaintiff testified that he neither saw the lights nor heard any warning beep. Defendants also rely upon Gomez's affidavit; however, his statement was silent with regard to whether or not Gomez heard a beeping or saw the van's strobe lights as DeFilippis was backing up. In view of the issues raised in the moving papers, the court need not consider the sufficiency of plaintiff's opposition (*see Powers v 31 E 31 LLC*, 24 NY3d 84 [2014]; *Alvarez v Prospect Hosp.*, *supra*).

For the foregoing reasons, it is hereby

ORDERED that the defendants' motion seeking summary judgment on the issue of liability is denied.

This constitutes the decision and order of the court.

Dated: November 3, 2017



Norma Ruiz, J.S.C.