

Gross v Espana

2018 NY Slip Op 34436(U)

March 21, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 15-611384

Judge: Peter H. Mayer

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SHORT FORM ORDER

INDEX No. 15-611384
CAL. No. 17-00071MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 17 - SUFFOLK COUNTY

PRESENT:

Hon. PETER H. MAYER
Justice of the Supreme Court

MOTION DATE 6-13-17 (001)
MOTION DATE 6-12-17 (002)
ADJ. DATE 7-14-14
Mot. Seq. # 001 MD
002 XMotD

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GEORGE K. GROSS,

Plaintiff,

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- against -

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NERY O. ESPANA, MATIAS PAIZ, and
ROSEMAR CONSTRUCTION, INC.,

Defendants.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the defendant Rosemar dated May 12, 2017, and supporting papers (including Memorandum of Law dated ____); (2) Notice of Cross Motion by the plaintiff, dated May 29, 2017, supporting papers; (3) Affirmation in Opposition by the defendant Rosemar, dated July 7, 2017, and supporting papers; (4) Reply Affirmation by the plaintiff, dated July 12, 2017, and by Rosemar dated July 12, 2017, and supporting papers; (5) Other ____ (and after hearing counsels' oral arguments in support of and opposed to the motion); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing e-filed papers, the motion is decided as follows: it is

Gross v Espana
Index No. 15-611384
Page 2

ORDERED that the motion by defendant Rosemar Contracting, Inc., i/s/h/a Rosemar Construction, Inc., for summary judgment dismissing the complaint and all cross claims asserted against it is denied; and it is

ORDERED that the cross motion by plaintiff for sanctions against defendant Rosemar Contracting, Inc., i/s/h/a Rosemar Construction, Inc., for spoliation of evidence, and for leave to amend the caption to reflect the correct name of the corporate entity is decided as set forth herein.

Plaintiff commenced this action seeking to recover damages for personal injuries he allegedly sustained on May 27, 2015 as a result of a motor vehicle accident at the intersection of Long Neck Boulevard and Route 24, also known as Flanders Road, in Southampton in Suffolk County, New York. In the area of the accident, Flanders Road typically has one lane for westbound traffic and two lanes for eastbound traffic. However, because of ongoing road work being performed in the area by defendant Rosemar Contracting, Inc., i/s/h/a Rosemar Construction, Inc. (“Rosemar”), pursuant to a contract with the New York State Department of Transportation (NYSDOT), Flanders Road was reduced to one lane for all traffic. At the time of the accident, plaintiff was traveling west on Flanders Road in the lane of travel that is normally designated for vehicles traveling east. Espana, after obeying the stop sign on Long Neck Boulevard, turned left onto Flanders Road into the lane normally designated for traffic traveling east, was confronted with plaintiff’s motorcycle coming from the opposition direction, and a collision occurred.

In his complaint, as amplified by his bill of particulars, plaintiff alleges, inter alia, that Rosemar was negligent in the manner in which it changed the traffic pattern. Issue has been joined, discovery completed and the note of issue filed. Rosemar now seeks summary judgment dismissing the complaint, arguing that the lane closure was not a proximate cause of the accident, and that the traffic control plan was set up in accordance with the NYSDOT mandated plans and specifications. Plaintiff cross-moves for sanctions against Rosemar for spoliation of evidence.

As an initial matter, contrary to plaintiff’s argument, Rosemar’s motion for summary judgment is timely. According to the court’s computerized records, the note of issue was filed on January 12, 2017, and Rosemar’s motion was filed on May 12, 2017, the 120th day.

“A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie that [it] was not at fault in the happening of the subject accident” (*Faust v Gerde*, 150 AD3d 1204, 1204, 52 NYS2d 898 [2d Dept 2017]; *Pollack v Margolin*, 84 AD3d 1341, 1342, 924 NYS2d 282 [2d Dept 2011]). Although the issue of proximate cause is generally for the trier of fact to determine, “liability may not be imposed upon a party who merely furnishes the condition or occasion for the occurrence of the event but is not one of its causes” (*Canals v Tilcon New York, Inc.*, 135 AD3d 683, 684, 23 NYS3d 320 [2d Dept 2016]; see *Faust v Gerde*, supra; *Batista v City of New York*, 101 AD3d 773, 956 NYS2d 85 [2d Dept 2012]). Nevertheless, it is well established that the burden on the movant is such that summary judgment must be denied even if the existence of a triable issue of fact is only arguable (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 786 NYS2d 382 [2004]; *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93 [1968]).

Gross v Espana
Index No. 15-611384
Page 3

In support of its motion, Rosemar submits, among other things, the deposition transcripts of plaintiff's and Espana's testimony, of Seth Horal, the work zone traffic control foreman employed by Rosemar, and that of Michael Blohm, the New York State engineer supervising the project. Plaintiff testified that in the construction zone area, before the subject intersection, a flagman holding a stop/go sign was directing traffic through the single lane then open for vehicles. Plaintiff testified he was traveling with the flow of traffic, had passed the flagman, and was proceeding to the subject intersection when he observed the pick-up truck driven by Espana in his lane of travel coming towards him. Plaintiff did not recall a flagman at the subject intersection but recalled that traffic cones were in place.

Espana testified that the way in which the traffic cones were set up at the subject intersection to change the traffic pattern was very confusing. Espana testified and states in an affidavit that while stopped at the stop sign, he could see several lanes of traffic marked with cones, but he was not sure which lane was designated for southbound traffic. Espana states there were no directional signs or flag person directing traffic at the subject intersection. It was not until after the accident occurred that he learned the northbound lane was closed and the lanes of traffic were not in the normal direction, and that he had turned into the temporary northbound lane of traffic.

Seth Horal testified that he was working on Flanders Road the day of the accident, and the first thing that was done prior to beginning the road work that morning was to set up the signs based on the traffic plan provided by the NYSDOT. He testified that there were three flagmen directing traffic; two were situated where the truck and machines were running while he was the flagman directing traffic. When questioned specifically about signage on Long Neck Boulevard, Horal testified that every side street had permanent signs indicating road work ahead and a stop sign. In addition to the signs, cones were set up tapering the flow of traffic. Horal clarified that there were no specific directional signs for lanes of traffic on Long Neck Boulevard.

Michael Blohm testified that he is responsible for conducting daily construction inspections, and on the day of the subject accident he inspected the work zone traffic control while it was being set up by Rosemar. According to Blohm's testimony, he advised Horal that there were deficiencies in the cone spacing which had to be corrected, i.e., the cones were placed 80 feet apart when they should have been placed 40 feet apart, and that there were lane assignment issues which needed to be addressed. Blohm explained that he advised Horal that the cars traveling through the work area needed direction signs at the intersections. Blohm further explained that typically, the practice was to put signs on top of the cones to direct cars into the appropriate lane of travel. At the time of his inspection, the signs were not on the cones, and as set forth above, Horal testified that no such directional signs were set up on Long Neck Boulevard.

Based on this evidence, Rosemar's motion must be denied. Rejected is Rosemar's contention that summary judgment dismissing the complaint is warranted because it merely furnished the condition for the accident. The action of Horal in failing to set up the directional signs as advised by the State's inspector, could rationally lead a jury to find there was a causal connection between Rosemar's alleged negligence and plaintiff's injuries (*see Rosario v Monroe*, ___ AD3d ___, 2018 Slip Op 00732 [4th Dept 2018], citing *Ard v Thompson & Johnson Equip. Co., Inc.*, 28 AD3d 1490 [4th Dept] and *McMorrow v Trimper*, 149 AD2d 971, 540 NYS2d 106 [4th Dept 1989], *aff'd* 74 NY2d 830, 546 NYS2d 340 [1989]). Having failed to submit

Gross v Espana
Index No. 15-611384
Page 4

any evidence sufficient to satisfy its initial burden entitling it to summary judgment, the motion must be denied regardless of the sufficiency of the plaintiff's opposition papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

The branch of plaintiff's cross motion for sanctions based on Rosemar's spoliation of photographs taken at the accident site is denied. Plaintiff has failed to establish any prejudice arising from the alleged loss of photographs taken by an employee of Rosemar, inasmuch as other photographs of the accident scene exist (see *Jennosa v 1433 Vermeer Mfg. Co.*, 64 AD3d 630, 883 NYS2d 276 [2d Dept 2009]; see also *Bishop v Curry*, 83 AD3d 1431, 919 NYS2d 735 [4th Dept 2011]). The branch of the cross motion to amend the caption to reflect Rosemar's correct name, "Rosemar Contracting, Inc.," is unopposed, and, thus, granted.

Dated: March 21, 2018



PETER H. MAYER, J.S.C.