

Ferdinand v New York City Dept. of Sanitation

2020 NY Slip Op 32920(U)

September 2, 2020

Supreme Court, New York County

Docket Number: 450677/2016

Judge: Laurence L. Love

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LAURENCE L. LOVE PART 62

Justice

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JOSEPH FERDINAND

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF SANITATION, THE
CITY OF NEW YORK, and EDWARD LAPRE

Defendants.

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INDEX NO. 450677/2016
MOTION DATE 8/18/2020
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 75, 76

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Upon the foregoing documents, the motion is decided as follows:

Plaintiff commenced this negligence action, on or about February 16, 2016, by filing a summons and verified complaint, seeking to recover for personal injuries allegedly sustained by plaintiff on August 20, 2015, as a result of a motor vehicle collision between plaintiff and a vehicle owned by the New York City Department of Sanitation ("Sanitation"), operated by sanitation employee Edward Lapre. Defendants, City of New York and Sanitation, joined issue by serving an answer on or about March 8, 2016. Defendant Edward Lapre joined issue by serving an amended answer on or about July 6, 2016. Defendants now move for Summary Judgment, dismissing the action.

Summary Judgment should not be granted where there is any doubt as to the existence of a material issue of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595 (1980). The function of the court when presented with a motion for Summary Judgment is one of issue finding, not issue determination. Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d

395, 165 N.Y.S.2d 498 (1957); *Weiner v. Ga-Ro Die Cutting, Inc.*, 104 A.D.2d331, 479 N.Y.S.2d 35 (1st Dept., 1984) *aff'd* 65 N.Y.2d 732, 429 N.Y.S.2d 29 (1985). The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 (1985). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to the non-moving party. *Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 (1st Dep't 1989). Summary judgment will only be granted if there are no material, triable issues of fact *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 (1957).

Plaintiff alleges that on August 20, 2015, he was involved in a motor vehicle accident with a Sanitation vehicle operated by defendant Edward Lapre on sixth avenue, near the intersection of 34th Street, New York, New York. Plaintiff testified at a General Municipal Law 50-h hearing, that his vehicle was at a complete stop at a red light on sixth avenue, at or near the intersection with 34th Street in Manhattan, when he was allegedly struck in the rear by a sanitation vehicle operated by defendant Edward Lapre.

Edward Lapre appeared for an examination before trial on January 23, 2017. Mr. Lapre testified that on August 20, 2015, he was driving a sanitation vehicle, stopped at a traffic light located near 34th Street and sixth avenue, and then “blacked out.” Mr. Lapre woke up in Bellevue Hospital and was told he suffered a cardiac arrest and a cardiac stent was inserted.

Defendant contends, “Mr. Lapre’s sudden medical emergency was unforeseen and, therefore, under the emergency doctrine, the defendants are entitled to summary judgment.”

[W]hen an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context (see *Caristo v Sanzone*, 96 NY2d 172, 174 [2001]; *Rivera v New York City Tr Auth*, 77 NY2d 322, 327 [1991]).

The operator of a vehicle who becomes involved in an accident as the result of suffering a sudden medical emergency will not be charged with negligence as long as the emergency was unforeseen (see *Van De Merlen v Karpf*, 147 AD3d 1008[2d Dept 2017]; *Serpas v Bell*, 117 AD3d 712 [2d Dept 2014]). Based upon same, defendants seek dismissal of this action.

Plaintiff argues that as Mr. Lapre had a history of severe chest pain, nausea, and other symptoms for a week leading up to the accident, and actually experienced chest pain and shortness of breath the day prior to the accident and on the morning of the accident, up to the time it occurred, that Mr. Lapre's heart attack was not an emergency within the scope of the "emergency doctrine." Plaintiff submits the certified medical records from Bellevue Hospital on August 20, 2015, of defendant Edward Lapre. The medical record states in pertinent part, "[t]he patient was in his usual state of good health until one week ago while on vacation he experienced a single episode of substernal chest pressure/pain lasting a few hours. He describes the sensation as like "an elephant on my chest. The patient reports no recurrence of this chest pain until the morning of presentation when he awoke at 4 a.m. noting the same chest tightness he felt a week ago. The patient went back to sleep but again woke up with similar sensation of substernal chest pressure at 6 a.m., 6/10 in intensity...He notes that the chest pressure persisted throughout the morning and was later associated with decreased appetite and mild nausea...On his way to work 7 a.m., notes that the chest pressure worsened with activity when he climbed the stairs out of the subway."

As discussed in *Benamy v City of New York*, 270 AD2d 183, 705 NYS2d 225 (1st Dept 2000), “numerous factual questions are presented as to the foreseeability of the driver’s incapacity and the ensuing accident given the driver’s history of high blood pressure and his condition on the morning of the accident, at which time he complained of lack of sleep, pain in his hands and sweatiness.”

Defendant submits the affidavit of Deputy Medical Director of the Department of Sanitation of the City of New York, Dr. Pascale Kerlegrand. Dr Kerlegrand affirms, “My review of Mr. Lapre’s records revealed no known history of pre-existing health problems involving cardiac issues prior to and including August 20, 2015.” However, it is unclear to the Court whether Dr. Kerlegrand reviewed records limited to the Department of Santation’s own medical records or whether they included additional medical history from Mr. Lapre’s private medical doctors. Additionally, Dr. Kerlegrand does not reference any review or knowledge of the information presented within Mr. Lapre’s Bellevue Hospital records which discuss medical issues for a week prior to the date of the incident. As such, there remain questions of fact regarding defendant’s heart condition and whether the cardiac arrest was foreseeable and Defendants have failed to demonstrate their *prima facie* entitlement to judgment as a matter of law, because they did not come forward with competent or expert medical evidence to establish the existence of the claimed medical emergency and its unforeseeable nature (see *Serpas v Bell*, 117 AD3d 712 [2d Dept 2014]).

ORDERED that defendants’ motion is denied in its entirety.

9/2/2020
DATE


HON. LAURENCE L. LOVE, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE