

Kublall v County of Suffolk

2021 NY Slip Op 33489(U)

September 24, 2021

Supreme Court, Suffolk County

Docket Number: Index No. 606541/2018

Judge: Joseph A. Santorelli

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ORIGINAL

SHORT FORM ORDER

INDEX No. 606541/2018

CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 6-15-2021

SUBMIT DATE 8-19-2021

Mot. Seq. # 02 - MG

-----X

KENNETH KUBLALL,

Plaintiff,

-against-

COUNTY OF SUFFOLK, SUFFOLK
COUNTY POLICE DEPARTMENT, and
CRAIG M. TOMASINO,

Defendants.

-----X

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Upon the E-file document list numbered 29 - 41, 44 - 47 & 48 on the motion of the plaintiff, it is,

The plaintiff seeks an order pursuant to CPLR 3212 granting summary judgment. The defendants filed opposition to the application arguing that there are issues of fact as to whether Officer Tomasino was operating his vehicle during in "emergency operation".

The plaintiff seeks recovery of damages for personal injuries sustained as the result of a motor vehicle accident on February 24, 2017 at approximately 4:00 am, eastbound on the Long Island Expressway/Route 495 at or near the overpass of Carlls Straight Path, Town of Huntington, County of Suffolk, State of New York. The plaintiff alleges that he was a highway maintenance worker operating a "protector vehicle" truck. The plaintiff explains that he was operating a large dump truck with "a crash attenuator attached to the rear of the dump truck". The plaintiff was in the "protector vehicle" which was parked for thirty seconds to a minute before the accident. He explained that he was in the driver's seat and the vehicle's "clearance lights" and brake lights were illuminated to help people see the vehicle. The plaintiff's vehicle was struck in the rear by a police car being operated by defendant Police Officer Craig M. Tomasino. A photograph produced by the plaintiff shows that the defendant's police vehicle had the emergency lights activated.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admission." If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense, his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary facts,

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cannot support or defeat a motion by summary judgment (*Olan v. Farrell Lines, Inc.*, 105 AD 2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); *Spearman v. Times Square Stores Corp.*, 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-Miller, *New York Civil Practice* Sec. 3212.09)).

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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must "show facts sufficient to require a trial of any issue of fact" CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer, supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

Vehicle and Traffic Law § 1104 states

- (a) The driver of an authorized emergency vehicle, when involved in an emergency operation, may exercise the privileges set forth in this section, but subject to the conditions herein stated.
- (b) The driver of an authorized emergency vehicle may:
 - 1. Stop, stand or park irrespective of the provisions of this title;

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2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as he does not endanger life or property;
4. Disregard regulations governing directions of movement or turning in specified directions...

(d) An authorized emergency vehicle operated as a police, sheriff or deputy sheriff vehicle may exceed the maximum speed limits for the purpose of calibrating such vehicles' speedometer. Notwithstanding any other law, rule or regulation to the contrary, a police, sheriff or deputy sheriff bicycle operated as an authorized emergency vehicle shall not be prohibited from using any sidewalk, highway, street or roadway during an emergency operation.

(e) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall such provisions protect the driver from the consequences of his reckless disregard for the safety of others.

In *Kabir v County of Monroe*, 16 NY3d 217, 230-231 [2011], the Court held that

section 1104 (e) establishes a reckless disregard standard of care "for determining ... civil liability for damages resulting from the privileged operation of an emergency vehicle" (*Saarinen*, 84 NY2d at 500); if the conduct causing the accident resulting in injuries and damages is not privileged under Vehicle and Traffic Law § 1104 (b), the standard of care for determining civil liability is ordinary negligence.

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see *Xian Hong Pan v Buglione*, 101 AD3d 706, 955 NYS2d 375 [2d Dept 2012]; see also *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007], citing *Carhuayano v J & R Hacking*, 28 AD3d 413, 414, 813 NYS2d 162; *Milskiy v Solanky*, 8 AD3d 353, 777 NYS2d 734; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86). Drivers must maintain safe distances between their cars and cars in front of them (Vehicle and Traffic Law § 1129 [a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages, to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (see *Johnson v Phillips*, 261 AD2d 269, 271, 690 NYS2d 545 [1st Dept 1999]).

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Based upon a review of the motion papers the Court concludes that the plaintiff has made a prima facie showing of his entitlement to judgment as a matter of law dismissing the defendants' defense that "this action is governed by Section(s) 1103 and 1104 of the Vehicle and Traffic Law". In opposition, the defendants did not rebut that presumption. The facts of this action show that Officer Tomasino was not pursuing any of the actions outlined in outlined in VTL 1104(b) and therefore was not involved in the privileged operation of an emergency vehicle. Accordingly, the plaintiff's motion for summary judgment dismissing the VTL 1103 and 1104 defenses is granted.

Here, the plaintiff also established a prima facie entitlement to judgment as a matter of law on the issue of liability. The defendants were then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition to the motion, defendants failed to rebut the prima facie showing. This motion by the plaintiff for an order awarding summary judgment in his favor on the issue of liability is granted; and it is

ORDERED that all attorneys shall appear on **November 8, 2021 at 9:30 a.m.** via Microsoft Teams in Courtroom A361 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York, as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in the matter being dismissed or a default being granted.

The foregoing shall constitute the decision and Order of this Court.

Dated: September 24, 2021



HON. JOSEPH A. SANTORELLI
J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION