

Nicholas v Robillard

2023 NY Slip Op 31409(U)

April 20, 2023

Supreme Court, Kings County

Docket Number: Index No. 513771/2017

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of April, 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

-----X
GEORGE NICHOLAS,

Plaintiff,

Index No. 513771/2017

-against-

Decision and Order

Mot. Seq. #05

JEAN B. ROBILLARD, GCF
TRANSPORTATION, LLC, JULIO J. RIVERA
N.Y. PRESBYTERIAN HOSPITAL,

Defendants.

-----X

The following e-filed papers read herein:

NYSCEF Doc. Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmation) _____
Reply Affidavits (Affirmation) _____

94-104
110-117; 122-123
119; 126

Upon the foregoing papers, defendants Julio J. Rivera (“Rivera”) and N.Y. Presbyterian Hospital (collectively “Defendants”) move (Motion Seq. 05) for an order pursuant to CPLR §3212, granting them summary judgment dismissing

Plaintiff's complaint, and all cross-claims asserted against them by co-defendants Jean B. Robillard and GCF Transportation, on the grounds they are insulated from liability pursuant to the privileges established under Vehicle and Traffic Law §114-b and §1104. Plaintiff Georges Nicholas ("Plaintiff") and co-defendants Jean B. Robillard and GCF Transportation ("Co-Defendants") oppose the motion, asserting there are material facts in dispute as to whether the foregoing privileges are applicable given Defendants' actions herein, thereby precluding summary judgment.

BACKGROUND

This is a personal injury action arising out of a motor vehicle accident occurring on April 23, 2016, at approximately 4:30 p.m., on Flatbush Avenue at the intersection of Prospect Place, in the County of Kings, City and State of New York. Plaintiff testified at a June 2, 2021 deposition that on April 23, 2016, he was a passenger in a bus¹ operated by co-defendant Jean Robillard for approximately twenty minutes before the accident occurred. Defendant Rivera² testified at a November 12, 2021, deposition that he was operating an ambulance owned by defendant N.Y. Presbyterian Hospital. In response to an emergency call, he began traveling on Prospect Place after he had "fully" activated the lights and sirens of the

¹ Plaintiff also referred to the "bus" interchangeably as "shuttle bus" or "dollar van". In fact, over the course of their depositions, the parties regularly interchanged these terms.

² Defendant Rivera conducted his deposition under the name "Julio Prendergast", confirming therein that "Prendergast" was a legal name change (NYSCEF Doc. No. 104, at ps. 1-11). The Court references "Julio J. Rivera" herein given the caption of the matter and the parties' consistent reference to "Julio J. Rivera" throughout this proceeding.

ambulance (NYSCEF Doc. No. 104, at ps. 39-40, Rivera EBT Tr.). He turned from Prospect Place onto Flatbush Avenue and, while “going straight”, he encountered the “dollar van” driven by co-defendant Jean Robillard.

Defendant Rivera witnessed the “dollar van” begin to yield to the right, approximately half a car length ahead of him. He then proceeded at 5-10 miles per hour, seeking to go around the “dollar van”, but was affected by “major construction” in the area. While proceeding around the “dollar van”, he felt a “rub” against the “patient compartment” of the ambulance. There was no direct impact between the ambulance and the “dollar van” (NYSCEF Doc. No. 104, at ps. 42 and 48-53).³ Finally, defendant Rivera testified that after feeling the impact of the “rub”, he immediately pulled over and notified his dispatch of the accident, whereupon his ambulance was taken out of service (*id.* at p. 54).

Both Plaintiff and co-defendant Jean Robillard testified, to varying degrees, that they observed emergency lights and heard sirens coming from the ambulance operated by defendant Rivera. Plaintiff’s testimony was that he saw the “flashing lights” from the ambulance coming “from the back”, “behind the bus” (NYSCEF Doc. No. 101, at ps. 53-54). Co-defendant Jean Robillard testified that he heard the ambulance sirens behind him for about “two or three minutes” and that he looked in his mirrors and “saw the ambulance coming behind” him before the accident

³ The “rub” to the right side of the ambulance also was consistent with the photographic evidence submitted by Defendants (NYSCEF Doc. No. 102).

occurred (NYSCEF Doc. No. 103, at ps. 45-46). The testimony of Plaintiff and co-defendant Jean Robillard is consistent with that of defendant Rivera.

DISCUSSION

A. The Standard of Review

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853 [1985]). The "failure to make such a *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers" (*id.*).

When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Derise v Jaak*, 127 AD3d 1011, 1011 [2d Dept 2021]; *Sosa v 46th St. Dev LLC*, 101 AD3d 490, 492 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]; *Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499 [2d Dept 1989]).

The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012]). It "must clearly appear that no material triable issue of fact is presented" (*Rebecchi v*

Whitmore, 172 AD2d 600, 600 [2d Dept 1991]). In order to avoid summary judgment, the non-moving party “must make a showing by producing evidentiary proof in admissible form” (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067-1068 [1979]).

B. New York Vehicle and Traffic Law §114-b and §1104

At issue in this matter is the application of New York Vehicle and Traffic Law §114-b and §1104 (hereinafter “VTL §114-b” and “VTL §1104”). Of particular relevance is whether the “reckless disregard” negligence standard, set forth in subsection [e] of VTL §1104, applies in this case.

VTL §114-b, titled “Emergency Operation”, defines said operation as follows:

“The operation, or parking, of an authorized emergency vehicle, when such vehicle is engaged in transporting a sick or injured person, transporting prisoners, delivering blood or blood products in a situation involving an imminent health risk, pursuing an actual or suspected violator of the law, or responding to, or working or assisting at the scene of an accident, disaster, police call, alarm of fire, actual or potential release of hazardous materials or other emergency. Emergency operation shall not include returning from such service.”

VTL §1104, titled “Authorized Emergency Vehicles”, which applies to an authorized emergency vehicle involved in an emergency operation (as defined in VTL §114-b), states, in relevant part:

“(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;
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.

(c) Except for an authorized emergency vehicle operated as a police vehicle or bicycle, the exemptions herein granted to an authorized emergency vehicle shall apply only when audible signals are sounded from any said vehicle while in motion by bell, horn, siren, electronic device or exhaust whistle as may be reasonably necessary, and when the vehicle is equipped with at least one lighted lamp so that from any direction, under normal atmospheric conditions from a distance of five hundred feet from such vehicle, at least one red light will be displayed and visible.

(d) . . .

(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” (emphasis added).

C. The Reckless Disregard Negligence Standard

VTL §1114(e) dictates that the “manner in which an authorized emergency vehicle is operated in an emergency situation may not form the basis for civil liability unless the driver acted in reckless disregard for the safety of others” (*Woodard v Thomas*, 77 AD3d 738, 739 [2d Dept 2010]). The “reckless disregard”

standard requires proof that the [driver] intentionally committed an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow” (*id.*); *see also Saarinen v Kerr*, 84 NY2d 494, 501 [1994]; *Kaffash v Vill. of Great Neck Estates*, 190 AD3d 709, 710 [2d Dept 2021]. More than a momentary lapse in judgment is required (*Saarinen, supra*, at 502). 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, 230-231 [2011]).

D. Analysis

The Court finds that defendant Rivera’s operation of the ambulance falls within the definition of “emergency operation” as permitted under VTL §114-b (*Criscione v City of New York*, 97 NY2d 152, 157-158 [2001]; *Jimenez-Cruz v City of New York*, 170 AD3d 975, 976-977 [2d Dept 2019]. Plaintiff’s arguments to the contrary are without merit. Specifically, defendant Rivera was entitled to “disregard regulations governing directions of movement or turning in specified directions” (VTL § 1104(b)(4) and to “stop” his vehicle regardless of other traffic laws (VTL § 1104(b)(1) (*Jones v Albany County Sheriff’s Department*, 123 AD3d 1331, 1333 [3d Dept 2014]). Further, Defendants have established that Rivera was engaged in privileged conduct pursuant to VTL §1104[b] [1 and 4] (*Cable v. State of New York*, 182 AD3d 569, 571 [2d Dept 2020]).

The manner in which defendant Rivera operated the ambulance did not rise to the level of reckless disregard for the safety of others and, therefore; the reckless disregard negligence standard applies in this matter (VTL §1104[e]). Conversely, the ordinary negligence standard does not apply.

Nothing in the maneuvers performed by defendant Rivera, or how he otherwise operated the ambulance, can be described as reckless. Nor do his actions present as having been of such obvious risk that would have made it highly probable that harm would follow. That defendant Rivera may have acted out of indifference to the outcome of his actions likewise is unsupported on the record before the Court. The corroborated testimony of defendant Rivera established that with the lights and sirens of the ambulance “fully” activated, and while traveling at no more than 5-10 miles/per hour, he sought to go around the bus, incurring a “rub” against the bus in the process.

No credible evidence is submitted in opposition by Plaintiff or Co-Defendant which supports the contention that defendant Rivera took his gaze from the road, operated the ambulance with excessive speed, or otherwise undertook any other dangerous maneuvers, to indicate a degree of behavior which would extinguish the protections of VTL §1104[e] (*Jobson v SM Livery, Inc.*, 175 AD 3d 1510, 1512 [2d Dept 2019]). Nor does either opposition present any expert testimony to this same effect (*McLoughlin v City of Syracuse*, 206 AD3d 1600, 1602 [4th Dept 2022]).

Plaintiff and Co-Defendant have failed to raise any triable issues of fact (*Proce v Town of Stony Point*, 185 AD 3d 975 [2d Dept 2020] and *Zuckerman, supra*, at 562).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of defendants Julio J. Rivera and N.Y. Presbyterian Hospital for summary judgement is granted and Plaintiff's Complaint is dismissed as to same defendants; and it is further

ORDERED that all cross-claims asserted by co-defendants Jean B. Robillard and GCF Transportation LLC against defendants Julio J. Rivera and N.Y. Presbyterian Hospital likewise are dismissed; and it is further

ORDERED that the action is severed and shall continue against the remaining defendants.

This constitutes the decision and order of the Court.

E N T E R



J.S.C.

Hon. Wavny Toussaint
J.S.C.