

<b>Rabenstein v Suffolk County Dept. of Pub. Works</b>
2013 NY Slip Op 31293(U)
June 14, 2013
Supreme Court, Suffolk County
Docket Number: 06-32354
Judge: Ralph T. Gazzillo
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

***P R E S E N T :***

Hon. RALPH T. GAZZILLO  
Acting Justice of the Supreme Court

MOTION DATE 7-12-12  
ADJ. DATE 4-10-13  
Mot. Seq. # 007 - MD

-----X  
CAROLINE RABENSTEIN, Guardian of the  
Person and Property of ABRAHAM  
RABENSTEIN, and CAROLINE  
RABENSTEIN, Individually,  
  
Plaintiffs,  
  
- against -  
  
SUFFOLK COUNTY DEPARTMENT OF  
PUBLIC WORKS, THE COUNTY OF  
SUFFOLK, PEGGY COSTELLO and CBS  
LINES, INC.,  
  
Defendants.  
-----X

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (007) 1-11; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 12-21; Replying Affidavits and supporting papers 22-24; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,  
  
***ORDERED*** that motion (007) by the defendants, Suffolk County Department of Public Works, the County of Suffolk, Peggy Costello, and CBS Lines, Inc., for summary judgment dismissing the plaintiffs' complaint is denied.

This action arises out of an automobile accident which occurred on December 22, 2005, at the intersection of Health Sciences Drive and Health Science Center Road, in the Town of Brookhaven, County of Suffolk, New York. The defendant, Peggy Costello, a bus driver was operating her vehicle at the intersection when it collided with the vehicle operated by Abraham Rabenstein. It is alleged that defendant Costello passed a flashing yellow light without stopping prior to entering into the intersection and failed to yield to the plaintiff's vehicle already in the intersection, thus causing the contact between the respective vehicles. Defendant Costello was an employee of CBS Lines, Inc. which had an agreement with the County of Suffolk, the owner of the bus involved in the accident. It is alleged that the defendants negligently hired Costello. Causes of action for negligence, and negligent hiring, as well as a derivative claim have been asserted. As a result of this accident, it is claimed that Abraham Rabenstein suffered severe brain injuries, among other injuries.

Defendants Suffolk County Department of Public Works, the County of Suffolk, and Peggy Costello (County defendants), served an answer in which a cross claim was asserted against CBS Lines, Inc. (CBS) for indemnification. Such cross claim was withdrawn by letter dated May 29, 2013 by Sobel Law Group, thus, eliminating any potential conflict. The Suffolk County Department of Public Works and the County of Suffolk, Peggy Costello, and CBS seek summary judgment dismissing the complaint on the basis that they bear no liability for the occurrence of the accident.

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. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). 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” (CPLR 3212[b]; *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]).

In support of this application, the County defendants, Peggy Costello, and CBS lines have submitted, inter alia, an attorney’s affirmation; copies of the summons and complaint, amended complaint, the answer served by the County, and plaintiff’s verified bill of particulars; and copies of the transcripts of the examination before trial of Caroline Rabenstein dated May 18, 2006, Abraham Rabenstein dated January 17, 2008 (unsigned but certified and which is considered (*see, Zalot v Zieba*, 81 AD3d 935, 917 NYS2d 285 [2d Dept 2011]), non-party witness Bernard Anderson dated February 25, 2008, non-party Donald A. Bills dated November 30, 2009, and Peggy Costello dated March 13, 2008 (unsigned) which is considered as adopted as accurate by her as the moving defendant (*see Ashif v Won Ok Lee*, 57 AD3d 700, 868 NYS2d 906 [2d Dept 2008])). Here, the moving defendants have not submitted a copy of the answer served by co-defendant CBS, as required pursuant to CPLR 3212, for this court to determine if any cross claims have been asserted by CBS.

In opposing this application, the plaintiff has submitted, inter alia, an attorney’s affirmation, transcripts of the examinations before trial of Lorin Alterson on behalf of CBS, dated July 7, 2011 and August 31, 2011; Notice of Claim copy of the transcript of the examination before trial of non-party Bernard Anderson; plaintiff’s exhibit 1- Police continuation report; photographs of plaintiff’s vehicle and defendants’ bus; and a brake test report.

Peggy Costello testified to the extent that in 1999 she received her Class A license and drove a tractor trailer across country. She had prior employment with Swift Transportation, and also with We Transport, Inc., Sea Cost Transportation, and Montauk Bus, all school bus companies. In 2003, she was employed with CBS, whom she stated was subcontracted by the County of Suffolk to operate certain bus routes for the County. Costello testified that both CBS and Suffolk County oversee her work: CBS provides the management for the drivers, and the County deals with CBS, not the driver. Bill Stonestreet was her immediate supervisor. She reported to no one in Suffolk County. She had a two week training program when she started working with CBS, but there was nothing concerning safety or avoiding accidents. On the date of the accident, December 22,

2005, she had a class A license. The route she had been driving for the last nine months started at 5:30 a.m and ended at 4:35 p.m. The S60 run involved the Health Science Drive, three-quarters of the way from Coram to the Smith Haven Mall. The accident occurred about one quarter mile prior to the Stony Brook Hospital which was scheduled for 11:25 a.m. Her last scheduled stop prior to the accident was about ten to fifteen minutes earlier at Setauket. She described the weather as sunny and cold. She had been driving the bus from 6:00 a.m. until the time of the accident. She experienced no mechanical difficulties with the bus, and there was nothing on the windshield obstructing her view.

Costello testified that she was traveling south on Health Science Drive, and at its intersection with Health Science Center Road, there was a blinking yellow light. Health Science Center Road had a blinking red light. She described Health Science Drive where the accident occurred as having an upgrade and a slight curve to the right. There are two straight lanes and one turning lane. In the opposite direction, there were two travel lanes and a left turn lane. She was traveling in the right travel lane going straight. She saw the blinking yellow traffic light from about 300 feet as she approached the intersection. The posted speed limit was 30 miles per hour. Her greatest rate of speed from when she turned onto Health Science Drive from Nichols Road was 25 miles per hour, including when she was about 300 feet from the intersection with the blinking yellow light. At about 100 feet from the intersection, she was still traveling about 25 miles per hour. She took her foot off the accelerator about three car lengths (each car length being about six to eight feet long) from the stop line. She then stated she was about one bus length from the stop line when she took her foot off the accelerator. She continued that the bus had an engine re-starter which engages and immediately starts to slow the bus when the foot is taken off the accelerator pedal, so the bus slowed about two to three miles per hour. She did not apply her brake until she realized the other car was not going to stop at the flashing red light at the intersection. She first observed the plaintiff's Jeep from about 35 feet from his stop line (from the loading zone road) traveling about 25 to 30 miles per hour, as it was about to make a left turn. The plaintiff then accelerated to about 30 to 35 miles per hour about three feet from the stop line and remained at that speed until the collision. As she approached her stop line, the bus was traveling about 22 miles per hour. Costello testified that the front of her bus was already over her stop line, under the traffic light, at the time of impact. She stated that four to five second lapsed from the time she first saw the plaintiff's Jeep until the time of impact. About a second and a half prior to the accident, when she was already over the stop line, she sounded her horn, applied her brake and steered to the left. The bus had traveled about 25 to 30 feet from when she first saw the Jeep and when she sounded the horn, applied her brake, and turned the wheel to the left. She continued that the front of the bus was about three feet over the stop line when the accident occurred. She stated that the impact to the Jeep was on the driver's side front quarter-panel and the right side front corner of the bus. The left headlight on the bus was also broken in the accident.

Caroline Rabenstein testified to the extent that her husband was going to a chaplaincy luncheon meeting at Stony Brook when the accident occurred. Abraham Rabenstein testified to the extent that he had did not remember the accident. He did not remember driving before the accident or being at the scene.

Non-party witness Bernard Anderson testified to the extent that he was involved in an automobile accident on December 22, 2005, near the HSC loading dock near Stony Brook University Hospital between 11:30 and 11:35 a.m. as a passenger on the bus involved in the accident. In 2005, he was familiar with Health Sciences Drive. He testified that the bus traveled on Health Sciences Drive and was in the process of making a right turn to drop off at the Hospital. He described Health Sciences Drive as a two-way road, separated by painted lines, with two travel lanes in each direction. The bus was in the right travel lane. He saw the plaintiff's Jeep prior to the accident and believed the accident occurred at the loading area where the cars park. Cars traveling out of the loading area must turn either right or left as it is a T intersection. He stated that there was no



light for traffic coming out of the loading area, but there was a traffic light on the main roadway. When he first saw the Jeep, it was moving about 30 to 35 miles per hour, and was to his right, coming out of the loading area, closer to the street on the road leading to Health Science Drive, and was less than a car length from the bus, about a car length from the intersection. He later testified that the Jeep moved about a half car length from the time he first saw the Jeep until the impact occurred, and that he estimated the Jeeps's speed as it traveled one-half car length. He also testified that about one to two minutes passed from when he saw the Jeep until the impact. He stated that the Jeep did not stop prior to the impact, but he saw it try to make a left turn to go around the bus. He did not see a turn signal on the Jeep. At that time, the bus was traveling about 20 to 25 miles per hour. He then stated that he has never had a driver's license or operated a vehicle. He continued that the front of the bus was already in the intersection when the Jeep attempted to make the left turn. He did not see the contact between the bus and the Jeep. He stated that the contact occurred just a little past the intersection. The bus skidded at the time of impact to a little bit past the area where the two roads meet. The front of the bus and the entire driver's side of the Jeep made contact. He did not see any evasive action by the Jeep prior to impact. He heard the sound of the horn from the bus when the Jeep was in the intersection, and so was the bus. The two vehicles were separated by about a car length. The bus was attempting to turn to the right and the Jeep tried to go around the bus.

Non-party witness Donald A. Bills testified to the extent that he was employed by A. Sanchez Construction on the date of the accident. He was digging trenches and running PVC conduit for a parking lot and gates which function with a card reader, at the corner. He and his co-worker, Edison Ramirez, were walking uphill towards the blinking traffic signal. He testified that the light for the Jeep was blinking red at the time. He did not observe whether or not the Jeep came to a stop, but when he saw it, it was traveling about five to ten miles per hour, and it could have stopped right in the middle of the intersection. He was observing the Jeep from its rear. They heard a horn beep for about four or five seconds and looked up and saw the bus impact the Jeep, pushing the Jeep 50 feet or so. When the bus came to a stop, the Jeep rolled off the front of the bus up on to the curb and came to a stop. As he was walking, the bus was coming from his left heading uphill traveling on Health Science Drive. The Jeep was going in the same direction as he was coming from either one of the parking lots or garage, but he did not see it pass him prior to the accident. When he heard the horn, the Jeep was "directly in the middle of the intersection." He thought the bus was traveling about 40 miles per hour and was in the left travel lane, but later stated that he did not know how fast the bus was traveling.

Lorin Alterson testified to the extent that he has been employed by CBS (formerly known as Harran Transportation Company) since 1997, first as the personnel manager and insurance and risk manager, and was responsible for administering the personnel function of the company, maintaining the personnel records, and dealt with hiring, maintaining adherence to federal, state, and local laws and regulations. In 2005, he became director of safety and human resources, but he still performed the same work, which included maintaining accident records, and maintaining driver qualification files. He was aware of an agreement between CBS and Suffolk County. The agreement was initially with Harran, but were transferred over to CBS when Harran ceased operating. He never saw the agreement and was unaware of the terms. George Semke, president of CBS, signed the agreement. Alterson could hire employees without Semke's approval, but the safety director might take the person out on a road test to determine if that person could drive a bus. Peggy Costello was hired by CBS. He never observed her operating a vehicle prior being hired, and did not know who did, but stated someone would have given her a road test and a written test before she was hired. CBS did not contact her former employer, Seacoast, although her attributes were stated to be "satisfactory" and not "outstanding" or "above average." The operations manager has driven the driver's routes and makes sure the drivers are driving in a timely fashion in getting to the stops. However, CBS usually gets a call from a passenger or the County asking where the bus is, and there is no one checking on the drivers. Drivers undergo on-the-road training every

two years, as required by the State, and are observed on occasion by a certified examiner who follows the bus without the driver's knowledge. The bus involved in the subject accident was operated and maintained by CBS and maintained by CBS mechanics, but owned by Suffolk County.

Alterson continued that the actual investigation of accidents is done by the County's claim office, and that CBS did not conduct an accident investigation of the subject accident. He was not aware that Costello had been involved in an accident prior to this accident in which she was found responsible, while she was employed by CBS. He later testified that she had other accidents, but did not recall specific dates or the exact details of the accidents. He continued that the accident record was kept with the driver qualification file, but not the personnel file. He added that not all accidents would be on her motor vehicle record. He reviewed the driver's motor vehicle accident report and the police accident report and determined whether the accident was preventable. He continued that the proper way to approach an intersection, even with the right of way, is with caution. When there is a yellow flashing light, the driver should slow down before the intersection and should be aware that he may be required to stop before entering into it. He indicated that there was damage across the entire front of the bus, including the left front headlight, and that the left side of the Jeep was damaged, suggesting that the Jeep was in the intersection first. He testified that he would have applied his brakes earlier when the Jeep was first seen approaching the intersection at about 25 to 30 miles per hour. Although he would expect the Jeep to stop, he would want to be in a position where he could stop in time and not hit the vehicle.

At his second deposition, Alterson testified that he had received a written report of the accident from Peggy Costello and had also gone to the accident scene and took some pictures the same day. He did not believe that Suffolk County did an investigation of the accident scene while the vehicles were still at the site, and he did not remember if he contacted anyone at the County of Suffolk or the Suffolk County Claims office. He thereafter testified that someone from the County may have been at the scene due to the severity of the accident.

In that this accident involved the plaintiff having a blinking red light, and the defendant having a blinking yellow light, Vehicle & Traffic Law §1113 is read in conjunction with Vehicle & Traffic Law §1142 (*Bartholomew v New York Telephone Company*, 35 AD2d 767, 315 NYS2d 71 [3d Dept 1970], in which it was held that the truck driver had to yield the right of way to the car driver who entered into the intersection). Vehicle & Traffic Law §1142 provides that "... every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection." Vehicle & Traffic Law §1113 provides in pertinent part, "(a) Flashing red indications. Unless to make another movement permitted by other indications shown at the same time, vehicular traffic facing a circular red signal or red arrow with rapid intermittent flashes shall stop at a clearly marked stop line, but if none ..., then shall stop at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the rules applicable after making a stop at a stop sign." Section (b) provides "Flashing yellow indications. Vehicular traffic facing a circular yellow signal or a yellow arrow with rapid intermittent flashes may proceed through the intersection or past such signal only with caution." Vehicle & Traffic Law §1172 (a) requires a driver at an intersection controlled by a stop sign to stop at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection.

In light of the foregoing, it is determined that neither the plaintiff nor the defendant, as they approached the intersection had the right of way, although the plaintiff had a blinking red light and the defendant had a

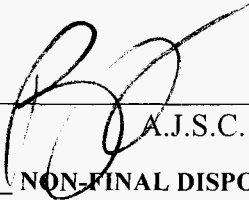
blinking yellow light, as both were obligated to use reasonable care under the circumstances by exercising forbearance and caution regardless of the color of the traffic light (*Talay v DelVicario*, 74 AD2d 601, 424 NYS2d 510 [2d Dept 19980]; *Bartholomew v New York Telephone Company*, supra; *Leach v Patron Cab Corporation*, 27 AD2d 769; 277 NYS2d 58 [3d Dept 1967]). While the plaintiff testified that the plaintiff did not stop at the blinking red light, there are factual issues concerning whether or not the plaintiff was already in the intersection as the defendant approached the yellow light and entered into the intersection, and whether the defendant should have yielded to the plaintiff who constituted an immediate hazard to the defendant pursuant to Vehicle & Traffic Law §1142 (see *Gomez v Hilfiger*, 45 AD3d 728, 844 NYS2d 894 [2d Dept 2007]).

The resolution of conflicting evidence and the credibility of the witnesses is for the jury and not the court to determine (*Talay v DelVicario*, supra). Based upon the foregoing, it is determined that there are multiple factual issues which preclude summary judgment due to the conflicting testimonies of the various witnesses as to, including, but not limited to, the speed of the respective vehicles immediately prior to and at the time of impact, the location of the vehicles immediately prior to the impact, whether the defendant was traveling straight through the intersection or making a right turn at the intersection, whether the defendant failed to exercise due care and apply her brakes to help avoid the collision when she did not see the plaintiff slowing for the red blinking light, and whether the parties were operating their respective vehicle in a safe and reasonable manner required under the circumstances. As set forth in *Doctor v Juliana*, 277 AD2d 1023, 716 NYS2d 196 [4th Dept 2000], whether the parties exercised reasonable care when proceeding into the intersection is a factual issue concerning the negligence of the parties (see *Stiso v Piccarello*, 120 AD2d 516, 501 NYS2d 715 [2d Dept 1986]).

Dated: 6/14/13

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FINAL DISPOSITION



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X

NON-FINAL DISPOSITION

A.J.S.C.