Lee v Verstraete

Supreme Court of New York, Wayne County

August 13, 2019, Decided

79418

Reporter
2019 N.Y. Misc. LEXIS 4781 *; 2019 NY Slip Op 29270 **

[**1] Robert E. Lee, Plaintiff, against Kyle M. Verstraete, GARY VERSTRAETE, AND MARBLETOWN VOLUNTEER FIRE DEPARTMENT, INC., Defendants.KYLE M. VERSTRAETE AND GARY VERSTRAETE, Third-Party Plaintiffs, against THE TOWN OF ARCADIA, Third-Party Defendant.

Counsel: [*1] For Plaintiff: John A. Schuppenhauer, Esq., of counsel, THE SCHUPPENHAUER LAW FIRM.

For Kyle M. Verstraete and Gary M. Verstraete, Defendants and Third-Party Plaintiffs: Alan J. DePeters, Esq., of counsel, TREVETT CRISTO P.C.

For Marbletown Volunteer Fire Department, Inc., Defendant: David B. Garwood, Esq., of counsel, PINSKY LAW GROUP, PPLC.

For Third-Party Defendant: Sandra A. Allen, Esq., LYNCH LAW OFFICE, PLLC.

Judges: JOHN B. NESBITT, Acting Supreme Court Justice.

Opinion by: JOHN B. NESBITT

Opinion

John B. Nesbitt, J.

Plaintiff's claims against defendants Kyle and Gary Verstraete and the Marbletown Volunteer Fire Department, Inc. ("Marbletown Fire Department") are barred by Volunteer Firefighter' Benefit Law (VFBL) §19 and General Municipal Law (GML) §205(b). Accordingly, defendants' motions to dismiss the complaint are granted, and plaintiff's motion to amend his complaint is denied.

The material facts are uncomplicated and largely undisputed. In the morning of January 19, 2016, plaintiff Robert Lee and defendant Kyle Verstraete, as members of the Marbletown Fire Department, were dispatched and in route to a structure fire on Lembke Road in the Town of Arcadia. They met at the fire house to pick up their gear, and, with [*2] Verstraete driving, employed Kyle's father's (Gary) truck to drive to the fire scene with the vehicle's emergency lights activated. They did not get there. While northbound on Welcher Road in snowy weather and on wet pavement not far from the hamlet of Fairville, Verstraete failed to negotiate a sharp right curve about 200 feet east of the Norsen Road intersection. The vehicle slid into the opposite lane and across the road into a guardrail. The vehicle went over the guardrail and down embankment sixty feet, rolling over three times before coming to rest. South of the crash, facing northbound traffic, was a "90 Degree Curve" warning sign combined with a speed recommendation of twenty (20) mph in the posted forty-five (45) mph speed zone. At his EBT, Verstraete testified that, at the time of the accident, he was going under the posted speed limit "due to the snow," but nevertheless "too fast as far as the curve obviously or else we wouldn't have crashed." Both Lee and Verstraete suffered injuries as a result.

The Accident Reconstruction Report issued by the Wayne County Sheriff's Office concluded:

> There are a couple of legal issues which are identified as to the cause of the crash and [*3] severity of injuries. Section 1180(e), failing to reduce speed for a special hazard, the hazards being the intersection and the sharp curve. Section 1229-c(3), operating a motor vehicle and have a passenger in the front seat without a seatbelt.
> A witness to the operation of the vehicle, prior to the crash, noted that the vehicle was operating with emergency lights. This is significant since 1104b

> allows the operator of certain emergency vehicles to disregard certain statutes with regard to speed and stopping among other things when operating in an emergency mode. The statute also requires in 1104c the use of a siren or other warning device in conjunction with the lighted emergency lighting. There is no evidence either way with regards to the siren but the lighting was clearly observed. No charges should be filed since section 1104(e) states that an authorized emergency vehicle may operate outside normal Vehicle and Traffic Laws as long as they exercise due care, this standard does not appear to have been [b]reached.

This action ensued. Passenger Lee claims that driver Verstraete did not exercise the appropriate standard of care in operating the vehicle. That failure to exercise the proper care was the proximate cause of the crash [*4] and Lee's resulting injuries. Lee has added the Marbletown Volunteer Fire Department as a defendant. He alleges in his complaint against Marbletown that Verstraete was a member of that department and acting as such at the time of the crash. That relationship and status, alleges Lee, means that Marbletown is "responsible for the actions taken by [Verstraete] causing the said accident that occurred." (Complaint ¶30) It therefore follows, argues Lee, that inasmuch as those actions were "careless and negligent" (id. at ¶18), Marbletown is "further responsible for the injuries and damages suffered by [Lee]" (id. at ¶30).

Defendants Marbletown and Verstraete move against the complaint, seeking its dismissal, albeit on different grounds. The first moving party - Marbletown - predicates its motion upon CPLR 3211 (a)(2) and 3211 (a)(5). Marbletown argues that dismissal of the complaint as against it is required upon two grounds. First, Marbletown argues that Lee's exclusive remedy is provided in the NY Volunteer Firefighters' Benefit Law (VFBL), which bars actions seeking recovery for injuries covered by the VFBL. As such, argues Marbletown, the Court lacks subject matter jurisdiction over Lee's claims, inasmuch as his [*5] remedy lies exclusively under the VFBL. Second, as a matter of law, Marbletown argues that it is not responsible for any negligence of its firefighters in the performance of their duties. That responsibility reposes with the town in which Marbletown is incorporated, that being the Town of Arcadia, and the fire protection district it serves and Marbletown located.

The Verstraete defendants motion is made under CPLR 3212 and General Municipal (GML) §205-b. In pertinent part, GML §205-b provides that "[m]embers of duly organized volunteer fire companies in this state shall not be liable civilly for any act or acts done by them in the performance of their duty as volunteer firefighters, except for willful negligence or malfeasance." Defendants argue that, under the facts and circumstances of this case, even viewed most favorably to plaintiff's claims, "there can simply be no doubt," that Kyle Verstraete's manner of operation of the vehicle did not constitute "willful negligence or malfeasance." As such, defendants argue, this action should be dismissed against Kyle Verstraete as well as Gary Verstraete, the latter's liability predicated upon the former's.

Plaintiff opposes both motions, and moves to amend his complaint [*6] to allege that Kyle Verstraete's conduct in operating his vehicle was "willful negligence" and "reckless," and further to add the Town of Arcadia as a party defendant. Plaintiff argues that there is at least an issue of fact whether Mr. Verstraete's manner of driving rose to the level of willful negligence or recklessness, and, given the numerous Vehicle and Traffic Law violations that occurred incident to the crash, a more than strong case can be made that it did. As such, not only Verstraete is liable, but also the Town of Arcadia under a *respondeat superior* theory.

After long thought and careful analysis, the Court grants both defendants motions for judgment dismissing the complaint and denying plaintiff's motion to amend the same. First, the Court finds, as a matter of law, upon the papers submitted, that plaintiff fails to demonstrate a triable issue whether the conduct of Kyle Verstraete constituted willful negligence or malfeasance. These terms are not statutorily defined. One treatise opines:

> "Willful and wanton negligence" has been declared to be acting consciously in disregard of another person's rights or acting with reckless indifference to the consequences, with [**2] the defendant [*7] aware, from his or her knowledge of existing circumstances and conditions, that the defendant's conduct probably would cause injury to another. Willful or wanton negligence involve a greater degree of negligence than gross negligence, particularly in the sense that in the former an actual or constructive consciousness of the danger involved is an essential ingredient of the act of omission
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> * * *
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> "Willful or wanton negligence" signifies the entire absence of care for the life, person, or property of others, with an element of conscious disregard of

> the rights or safety of others, which deserves extra punishment in tort.
> * * *
> In using "willful," it has been said that to constitute willful negligence, the act done or omitted to be done must be intended or must involve "such reckless disregard of security and right as to imply bad faith." (3 American Law of Torts §10:4 [2019 Update][footnotes omitted]).

The jury charge set forth in New York Pattern Jury Instructions is in the same vein:

> PJI 2:10A Common Law Standard of Care - Gross Negligence or Willful Misconduct
>
> In this case, you must decide whether defendant was guilty of (gross negligence, willful misconduct). Negligence is a failure to exercise [*8] ordinary care. (Gross negligence, willful misconduct) is more than a failure to exercise reasonable care.
> Gross negligence means a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others.

Willful misconduct occurs when a person intentionally acts or fails to act knowing that his conduct will probably result in injury or damage. Willful misconduct also occurs when a persons acts in so reckless a manner or fails to act in circumstances where an act is clearly required, so as to indicate disregard of the consequence of his action or inaction (1A NY PJI 2:10A).

In *Gonzalez v Iocovello* (93 N.Y.2d 539, 715 N.E.2d 489, 693 N.Y.S.2d 486 [1999]), cited and quoted by plaintiff, the Court viewed the "reckless disregard" duty of care found in Vehicle and Traffic Law §1104 as requiring the trier of fact "to determine whether the actor has intentionally done 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' and has done so with conscious indifference to the outcome" (id. at 551 [internal quotation marks and citation omitted]).

Even viewing the record evidence most favorably to plaintiff, the Court finds no triable facts upon which a jury could [*9] find that defendant Kyle Verstraete acted with conscious or reckless disregard of a perceptible and highly probable risk that his manner of vehicle operation would result in loss of control and crash of the vehicle. To find otherwise would be counter-intuitive, inasmuch as he would be ignoring his own safety as much as his passenger's. So too, the environmental factors that ostensibly contributed to the accident - snow in the air impairing visibility, wet pavement impairing traction, and the sudden sharp road curve - were only evident [**3] or more pronounced as Verstraete proceeded northward toward the site of the house fire. Whatever else may be said of Verstraete's driving, it does not bespeak conscious indifference to a highly probable risk that calamity would ensue. The accident was unfortunate but is not actionable. Accordingly, the complaint must be dismissed as against Kyle Verstraete as well as against Gary Verstraete (*Sikora v Keillor*, 17 A.D.2d 6, 230 N.Y.S.2d 571 [2nd Dept 1962], aff'd 13 NY2d 610, 191 N.E.2d 88, 240 N.Y.S.2d 601 [1963]).

The Court also grants the motion of defendant Marbletown based upon VFBL §19, which provides that the benefits of The VFBL are the exclusive remedy of a volunteer firefighter as against certain political subdivisions, as well as those persons or agencies "acting [*10] under governmental authority in furtherance of the duties or activities in relation to which a [line of duty] injury resulted." The same provision would extend to the Town of Arcadia; as such, the plaintiff's motion to add the Town as a defendant is denied.

Counsel for the defendants shall submit a proposed order consistent with this decision upon notice to plaintiff's counsel.

Dated: *August 13, 2019*

Lyons, New York

JOHN B. NESBITT

Acting Supreme Court Justice

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