

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. GEOFFREY J. O'CONNELL

Justice

TRIAL/IAS, PART 6
NASSAU COUNTY

BRIAN GUNDER,

Plaintiff(s),

INDEX No. 10449/04

-against-

MOTION DATE: 1/10/06

KEITH MARESCA, ANGELA MARESCA AND
MASSAPEQUA FIRE DEPARTMENT,

Defendant(s).

MOTION SEQ. No. 1-MD

The following papers read on this motion:

- Notice of Motion/Affirmation/Exhibits
- Memorandum of Law
- Affirmation in Opposition/Exhibits
- Affirmation in Opposition/Exhibits
- Reply

Defendants KEITH and ANGELA MARESCA seek an Order granting them summary judgment dismissing all claims and cross claims asserted against them. Plaintiff BRIAN GUNDER and defendant MASSAPEQUA FIRE DEPARTMENT oppose.

In this action plaintiff BRIAN GUNDER seeks damages for injuries sustained on September 30, 2003. On that date BRIAN GUNDER was operating a motorcycle which came into collision with a Jeep operated by KEITH MARESCA and owned by ANGELA MARESCA. This accident occurred on Merrick Road, in Massapequa, New York.

MARESCA brings this application for summary judgment contending that he is not liable for the accident. He claims that he was operating his vehicle in the course of his duties as a volunteer fireman, and,

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as there has been no demonstration that he engaged in "gross negligence" the claims against him must be dismissed pursuant to General Municipal Law § 20.

At his deposition GUNDER testified that he was heading east on Merrick Road in Massapequa. He testified that at the intersection of Merrick Road and East Shore Drive there was a left turning lane for traffic traveling westbound on Merrick Road. He testified that this was separated from the east bound lanes by a double yellow line.

GUNDER testified that it was clear and light out and he saw MARESCA's jeep prior to the accident. He testified that MARESCA had his left turn directional light blinking and a blue emergency flashing light on his jeep. GUNDER also testified that he heard sirens from the firehouse and saw fire trucks leaving the station located on East Shore Road. He testified that as he approached the intersection, MARESCA turned left in front of him and that his motorcycle came into contact with the rear passenger side back panel of the Jeep.

MARESCA testified that he was a volunteer fireman at the time of the accident and received a call approximately three to four minutes prior to the accident. He testified that he was responding to the call to the firehouse and was stopped at the intersection behind another vehicle. MARESCA testified that when the light turned green he saw that all of the cars in the eastbound lanes were stopped and he began to turn left. MARESCA testified that the vehicle in front of him began the left turn and stopped to yield right of way to the fire truck. He testified that he was stopped in mid turn for approximately twenty seconds when he felt the impact of the collision in the rear of the vehicle. He testified that he never saw the motorcycle.

MARESCA also testified that his seven year old daughter was in the Jeep at the time.

General Municipal Law § 205-b provides that members of duly organized volunteer fire companies shall not be civilly liable for any acts done by them in the performance of their duties as volunteer firefighters, except for willful negligence or malfeasance. Counsel for the MARESCAS argues that immunity for MARESCA does not prevent recovery from the injured party, but merely shifts responsibility to the municipality, in this case the MASSAPEQUA FIRE DISTRICT. *Thomas v. Consolidated Fire District Number One*, 50 NY2d 153 (1980). Thus, he argues summary judgment should be granted.

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Both plaintiff and the FIRE DISTRICT oppose. Both argue that there is a triable issue of fact whether MARESCA was performing protected activity.

Counsel for the plaintiff and FIRE DISTRICT notes that MARESCA was not operating a FIRE DISTRICT vehicle at the time, nor responding to a fire itself. He notes that there was no proof that MARESCA was obligated to report to the firehouse at the time he made the left hand turn, nor is there any explanation of why, if reporting to a fire, he had his seven year old daughter in his vehicle. Thus, counsel argues, that a jury could find that he was not performing "any act or acts" in performance of his "... duty as volunteer firefighter"

Plaintiff notes that there are other issues of fact which preclude summary judgment. He notes the account of an independent eyewitness to the accident testified that MARESCA was wholly responsible for the accident. She testified that MARESCA made the left across the double yellow line behind her vehicle, a van, which was at the intersection. She testified that his vehicle was not in the turning lane, and that he moved diagonally, across the turning lane. She also testified that while he had a blue light in his jeep, she heard no sirens blaring. She also testified that she did not see his directional blinking prior to his turn. This witness also testified that the eastbound traffic had already begun to move, including the plaintiff, when the defendant made his turn into their lanes.

This testimony, counsel argues, could lead a jury to find that MARESCA was in fact grossly negligent.

Counsel for the plaintiff also notes that there is no indication that defendant was permitted to ignore the ordinary traffic laws as there is no evidence that he was operating an emergency vehicle. There is a statutory requirement for operation of emergency vehicles in Vehicle and Traffic Law § 1143, which requires that upon immediate approach of an authorized emergency vehicle, equipped with at least one lighted lamp exhibiting *red light* (emphasis added) visible under normal conditions, and when audible signals are sounded, other drivers must yield the right of way.

Based on his own description of his vehicle, MARESCA was not operating an emergency vehicle, thus the other drivers were not obligated to give him the right of way. In addition, this provision of the VTL

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does not relieve the driver of an authorized emergency vehicle from the duty to drive with reasonable care for all persons using the highway.

The FIRE DISTRICT that the provision of the General Municipal Law relied upon by the MARESCAS does not apply. GML § 205-b limits liability of a volunteer fireman in the "operation of vehicles owned by the fire district". Clearly the Jeep owned by ANGELA MARESCA is not titled to, leased by, insured by, or owned by the FIRE DISTRICT.

While the Court does not find this an absolute bar to protection (*Skinner v. Scobbo*, 221 AD2d 334 [2nd Dept 1995]), there still must be a demonstration that reporting to the firehouse is a protected action. It has been held that the negligent operation of a privately owned vehicle by a volunteer firefighter is not so protected. *Mott v. Baldwin Fire Dept.* 45 Misc2d 813 (1965).

A jury could reasonably find that MARESCA's left hand turn, from behind another vehicle, prior to entering an intersection, with a seven year old in his personal vehicle, did not constitute operating the vehicle with reasonable care. *Baines v. City of New York*, 269 AD2d 309, leave to app. denied 95 NY2d 757 (1st Dept. 2000); *Cox v. DuChaine*, 29 AD2d 814 (3rd Dept. 1968); *Allen v. Town of Amherst*, 8 AD2d 996 (4th Dept. 2004); *Tobacco v. North Babylon Volunteer Fire Dept.*, 182 Misc2d 480 (1999) app. disp'd 276 AD2d 551.

MARESCA has not offered any documentary proof that he was a volunteer fire fighter, or proof of what constituted the alleged emergency call to which he had to respond. *Bush v. Smith*, 276 AD 923 (2nd Dept 1950).

The Court agrees with the opposition that the plaintiff has failed to demonstrate that he is entitled to the drastic relief sought. There are questions of material fact which preclude summary judgment on behalf of the moving defendants. *Daliendo v. Johnson*, 147 AD2d 312 (2nd Dept 1999). Based on the proof presented, the motion is Denied.

It is, SO ORDERED.

Dated:

Mar 13, 2006

ENTERED

MAR 24 2006

NASSAU COUNTY
COUNTY CLERK'S OFFICE

BY:  GEOFFREY J. O'CONNELL, J.S.C.