

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT IAS PART 10  
**Justice**

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SELENA MCGUIRE, No. 8506/02

Plaintiff, Motion  
-against- Date April 18, 2006

THE CITY OF NEW YORK, THE NEW Motion  
YORK CITY DEPARTMENT OF Cal. No. 8  
TRANSPORTATION AND JAMES F.  
RAGON,  
Defendants.

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Plaintiff commenced this action seeking to recover damages for personal injuries alleged to have been sustained on October 15, 2001 due to a motor vehicle accident which occurred on the westbound side of the Belt Parkway approximately 1/4 mile east of Cohancy Street, in the County of Queens, City and State of New York. Plaintiff alleges that a mobile light generator owned by defendant The New York City Department of Transportation (DOT) and operated by defendant James F. Ragon (Ragon) came into contact with the vehicle being driven by plaintiff. Plaintiff alleges that defendant Ragon caused the collision when he improperly backed up his pick-up truck, with the light generator in tow, directly across the lane of on coming traffic at about 1:45 a.m.

Plaintiff moves for an order striking the defendants' answer based upon a failure to comply with a court order directing them to provide plaintiff with a timely verified bill of particulars as to affirmative defenses and the names and addresses of all witnesses of the subject accident; precluding the testimony of the defense expert witness, Dr. Hubert Pearlman, based upon the failure to timely provide a statutorily compliant notice of expert witness pursuant to CPLR § 3101(d); and deeming the defendants' request to charge numbered 10 and 11 with respect to the standard of liability inapplicable as the standard is negligence and not reckless disregard.

#### Contentions of the Parties

Plaintiff asserts that the defendants have consistently failed to comply with statute and court orders regarding discovery. On February 24, 2004, plaintiff served a demand for a verified bill of particulars upon defendants. Such was not supplied until the eve of trial on March 20, 2006. By order dated March 16, 2004, (Flug, J.), defendants were ordered to provide a verified bill of particulars as to affirmative defenses within 30 days and the names and addresses of all witnesses, including witnesses to the occurrence and notice witnesses, within 45 days. By order dated November 15, 2004, (Ritholtz, J.), defendants were ordered to respond to plaintiffs' notice to produce which again sought the names of witnesses and those who were passengers in the vehicle driven by defendant Ragon. Defendants have failed to provide a timely bill of particulars and the witness information. No excuse has been given for the two year delay in providing such discovery.

Plaintiff asserts that she demanded discovery concerning any expert that defendants expected to call at trial pursuant to CPLR § 3101(d). Defendants provided an expert notice and an additional notice of expert but both failed to comply with the specific requirements of the

statute. Therefore, the expert Dr. Pearlman should be precluded from testifying at trial. Plaintiff has been prejudiced as she has not been put on notice as to the specifics of Dr. Pearlman's testimony, the basis therefore, or what his qualifications are. Defendants attempted to remedy their failure by forwarding a document on March 3, 2006 with respect to the expert exchange. However, the trial had already commenced and the preliminary charge hearing had been held. The time to comply had long passed.

Plaintiff also asserts that, contrary to defendants' position at trial, VTL § 1103(b) does not apply in the City of New York where the accident occurred. Therefore, rules of the road would apply and the standard of care to be applied would be negligence and not recklessness. VTL § 1642 authorizes defendant City to supercede certain provisions of the VTL. VTL § 1103 does not apply in New York City. While § 4-02(d)(iv) of the New York City Traffic Regulations does exempt highway workers actually engaged in work from such regulations, it does not allow for such vehicles to be exempt from all state vehicle laws and regulations. The City Traffic Regulations do not claim to supercede any of the VTL sections cited by plaintiff in her request to charge. Nowhere do the regulations call for the standard of conduct to rise to reckless disregard. The request to charge was the first time that defendant City has alleged that the standard of reckless disregard should be applied.

In any event, plaintiff argues that neither the VTL nor the traffic regulation are applicable here because the defendant driver was not actually engaged in work on a highway, engaged in hazardous operation or driving a hazard vehicle. Defendant Ragon was, by his own admission, headed back to the beginning of the job site where he was merely supervising the milling gang. Neither he nor his vehicle were engaging in the type of hazardous work which the statute was intended to address. He was merely traveling from one work site to another. Even if deemed applicable,

VTL § 1103 does not eliminate the duty owed to plaintiff not to act negligently on a construction site. Defendants failed to properly look out, post a flag man, or otherwise warn plaintiff.

Defendants assert, with the respect to the discovery issue, that all of the information requested by plaintiff has been provided. Plaintiff applied at the initial trial for an amended answer asserting an affirmative defense with respect to the reckless disregard standard. Such was served on March 20, 2006. With respect to the witnesses, defendants set forth the names of the three witnesses that they intend to call at trial. In defendants' prior response, the name and address of the defendant driver, James Ragon, was given. The police accident report which was in plaintiffs possession contained the name and address of Barry Shapiro. Defendant Ragon testified at his deposition and specifically mentioned the third witness Fulton Bactawar. Plaintiff deposed Mr. Shapiro the independent eye witness listed on the police accident report. Plaintiff filed the note of issue certifying that discovery was complete and did not advise defendants that further information or a bill of particulars was sought.

As to the expert exchange, defendants assert that two detailed reports with sufficient information were served on plaintiff. Given plaintiff's dissatisfaction therewith, a further expert exchange was made on March 3, 2006.

As to the standard of liability, defendants argue that it is a reckless disregard standard. The law is clear that a highway vehicle engaged in highway operations is entitled to this legal standard.

In reply, plaintiff asserts that defendants should be sanctioned for their meritless argument that the applicable standard of care should be recklessness. Defendants have not cited a single case to support such contention and have not refuted the holding of the case cited by plaintiff

Somersall v. New York Tel. Co., 52 NYS2d 157 which states that VTL § 1103 is not applicable in the City of New York. Defendants, without leave of court, seek to serve an amended answer nunc pro tunc some four years after issue was joined and over a year after the note of issue was filed. Such was rejected by plaintiff.

Decision of the Court

\_\_\_\_\_The motion by plaintiff is denied.

This matter came on for trial on February 23, 2006. During the trial, plaintiff made certain in limine motions. A mistrial was declared on February 28, 2006. To assist in the re-trial of this matter, which is to be conducted on June 19, 2006, plaintiff was directed to make the instant motion with respect to the in limine motion made at the trial.

With respect to the discovery issues raised, it appears that the name and address of one witness was provided to plaintiff in the defendants' response to the preliminary conference order which was served on March 18, 2004. A second witnesses' name and address appears in the police accident report was also exchanged. Defendant Ragon's deposition testimony notified plaintiff of the third witness and the location for him.

As to a bill of particulars for affirmative defenses, the court notes that the original answer of defendants set forth, as affirmative defenses, plaintiff's culpable conduct and limitation of the amounts recoverable by plaintiff pursuant to CPLR § 1601 or GOL § 15-108. The amended answer served by defendants contained additional language with respect thereto but also set forth, as an affirmative defense, VTL §§ 117-a, 117-b and 1103 along with New York City Traffic Regulations § 4-02(d)(1)(iv). CPLR § 3018(b) does not specifically require that the defense set forth in the VTL and New York City Traffic Regulations be

specifically pleaded as an affirmative defense. Plaintiff had deposed defendant Ragon and was placed on notice of the type and nature of the activity in which he was engaged at the time of the accident. A bill of particulars with respect to the claimed exception for highway workers and the use of a reckless disregard standard is not required.

With respect to the preclusion of testimony by the defendant's expert witness, it appears that defendants have previously provided sufficient information on such point so as to warrant denial of that branch of the motion. Further, in light of the delay arising from the mistrial of this action, no substantial prejudice has accrued to plaintiff.

The court finds that the VTL sections raised by defendants are not applicable to this action as the underlying accident occurred in the City of New York. Somersall v. New York Telephone Co., 52 NY2d 157 at 165-166. However, the New York City Traffic Regulations also contain an exception from the rules of the road imposed by said traffic regulations as follows:

"§ 4-02. Compliance With and Effect of Traffic Rules.  
(a) Applicability of Rules. The provisions of these rules apply to all vehicles, operators of vehicles...upon highways...(1) Exceptions. It is a traffic infraction for any person, including government employees, to do any act forbidden by or fail to perform any act required by these rules, except as otherwise provided herein...(iv) Highway workers. Unless specifically made applicable, the provisions of these rules shall not apply to persons, teams, motor vehicles, and other equipment actually engaged in work authorized by the City of New York, the State of New York or the federal government while on a highway."

Such section clearly applies within the City of New York. However, the question arises as to whether defendant Ragon was "actually engaged in work...while on a highway." The deposition testimony of said defendant shows that a

milling operation was being conducted on the roadway at the time of the accident. One run by the milling machine had just been completed and defendant Ragon was in the process of moving the truck with the lights in tow to the beginning area of the job site so that another milling run could be commenced. It, therefore, appears to this court that he was actually engaged in the type of work which would cause the exception in the traffic regulation to come into play. As such language is comparable to that in the VTL, the operator of the vehicle in the instant case is exempt from the rules of the road. Therefore, the standard of care to be utilized upon the retrial of this matter shall be the reckless disregard standard as enunciated in Riley v County of Broome, 95 AD2d 455 at 466, to wit, plaintiff must show that "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". Citing Saarinen v Kerr, 84 NY2d 494 at 501, quoting Prosser and Keeton, Torts § 34, at 213 [5<sup>th</sup> Edition].

Accordingly, the motion by plaintiff is denied. This matter is hereby set down for trial in Part 10, Courtroom 5001, of this Courthouse, at 88-11 Sutphin Boulevard, Jamaica, New York, on June 19, 2006 at 9:30 a.m.

Dated: May 24 , 2006

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**HON. DAVID ELLIOT**