

Frankonis v J.R. Hacking Corp.

2012 NY Slip Op 30622(U)

March 8, 2012

Sup Ct, Queens County

Docket Number: 3185/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

RICHARD FRANKONIS and CARYN KORCOIAN,

AMENDED DECISION

Plaintiffs,

Index No.: 3185/2010

- against -

Motion Date: 06/09/11

J.R. HACKING CORP., JALEL T. JAQUANI
and KIMBERLY FRANK,

Motion No.: 14

Defendants.

Motion Seq.: 3

- - - - - x

The following papers numbered 1 to 11 were read on this motion by defendant KIMBERLY FRANK for an order pursuant to CPLR 3212 granting the defendant summary judgment on the issue of liability and dismissing the complaint and all cross-claims against her:

Papers Numbered

Notice of Motion-Affidavits-Memorandum of Law.....	1 - 5
Affirmation in Opposition-Affidavits.....	6 - 8
Reply Affirmation.....	9 - 11

The following decision amends, supercedes and replaces this Court's previous decision dated August 15, 2011, entered on August 24, 2011, based on a motion which was fully submitted on June 9, 2011, Motion No. 14, Sequence No. 3.

This is a personal injury action in which plaintiffs, RICHARD FRANKONIS and CARYN KORCOIAN seek to recover damages for injuries they each sustained as a result of a motor vehicle accident that occurred at approximately 10:50 p.m. on May 31, 2009, on the westbound side of East 57th Street between 1st and 2nd Avenues in the County of New York, State of New York.

At the time of the accident, plaintiffs CARYN KORCOIAN and

RICHARD FRANKONIS were rear seat passengers in the taxi cab owned by defendant J.R. HACKING CORP. and operated by defendant JALEL T. JAQUANI. The taxi cab was in the middle westbound lane of East 57th street intending to make a right turn from the middle lane onto the entrance of the 59th Street Bridge which is located between the intersections of 1st Avenue and 2nd Avenue. The vehicle being operated by defendant Kimberly Frank was also proceeding westbound on 57th Street. Frank's vehicle was situated in the right lane, to the right of the taxi cab. There are three lanes of traffic proceeding westbound in that location. Ms. Frank intended to proceed straight ahead through the intersection from the right lane. The two vehicles collided when the taxi made its right turn from the middle lane towards the bridge entrance and struck the Frank vehicle which was proceeding straight across the entrance. In his affidavit, the taxi driver, Mr. Jaquani, stated that the reason he turned right from the middle lane was because he believed that the Frank vehicle was also going to turn right onto the bridge entrance just as he was doing.

Defendant Frank contends that the accident occurred as she was proceeding, with the right of way, on East 57th Street, when the taxi cab vehicle failed to yield the right of way and suddenly made a right turn in front of her vehicle. The plaintiffs, who were allegedly injured in the accident, commenced this action against both drivers by filing a summons and complaint on February 10, 2010. Issue was joined by service of the Frank's verified answer dated May 6, 2010.

Defendant Frank now moves for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and dismissing the plaintiffs' complaint as well as all cross-claims against her. In support of the motion, Frank submits an affidavit from counsel, Tracy Morgan, Esq.; a copy of the pleadings; an affidavit from defendant Kimberly Frank; a copy of the transcript of the examination before trial of the co-defendant Jalel R. Jaquani; and a copy of the police accident report (MV-104).

In her affidavit, dated April 9, 2011, defendant Frank states that in the area where the accident occurred there are three lanes of traffic in the westbound direction. When proceeding westbound, the entrance to the 59th Street Bridge is a right turn which is situated between the intersections of 2nd Avenue and 1st Avenue. Ms. Frank was driving in the right lane adjacent to the entrance but she did not intend to turn right onto the bridge. As she was proceeding through the intersection with a green traffic signal in her direction, " the taxi in the lane to the left of my lane turned right and struck the left side

of my vehicle." She states, "the taxi attempted to make a right turn from the middle lane of traffic. I had no indication or warning that the taxi was going to turn into my lane and strike my vehicle." Ms. Frank also states that there were no markings on the road or any street signs indicating that vehicles traveling in the right lane must turn right. She states that there were also no lane markings or signs which permit a vehicle in the middle lane to make a right turn from that lane. A photograph submitted by Ms. Frank depicts the area where the accident occurred and indicates that there are no signs or lane markings directing right turns onto the bridge entrance.

Ms. Frank's counsel contends that the actions of Mr. Jaquani in attempting to make a right turn from the middle lane without yielding to the Frank vehicle, which had the right of way, was the sole proximate cause of the accident. Counsel contends that the actions of the co-defendant violated VTL §§ 1160(a); 11603(a) and 1128(a) which require a driver of a vehicle intending to make a right turn to approach the intersection as close as possible to the right hand curb. In addition the co-defendant left his lane without ascertaining that the lane change could be made with reasonable safety.

Counsel argues that Ms. Frank's affidavit, as well as the taxi driver's admission to the police officer contained in the police report, to the effect that he attempted to make a right turn from the middle lane and in the process entered the right lane of travel and struck the Frank vehicle, demonstrates that Mr. Jaquani was negligent as a matter of law. Moreover, counsel contends that Ms. Frank had the right to assume that the co-defendant's vehicle would not disobey the traffic rules.

In opposition to the motion, Mr. Jaquani's counsel, Carol S. Dibari, Esq., submits her affidavit as well as an affidavit from Mr. Jaquani dated July 24, 2009 and a copy of the transcript of his examination before trial taken on December 1, 2010.

At his examination before trial, Mr. Jaquani testified that on May 31, 2009 he picked up the plaintiffs in Manhattan and was taking them to Queens via the 59th Street Bridge. In order to get to the bridge he was traveling westbound on 57th Street. He stated that he stopped at a red light at the entrance to the bridge. At that time he was in the middle lane and Ms. Frank was in the right lane next to him. They had been stopped for about one minute before the light changed to green. At that point Jaquani put his right turn signal on indicating that he intended to turn right onto the bridge entrance. He stated that he believed that he was permitted to make a right turn from the middle lane. He stated that he made a wide turn, staying in his

lane the entire time, at which point he claims he was hit by the Frank vehicle which was proceeding straight in the right lane. He testified that he saw the Frank vehicle moving but he assumed it was going to make a right turn onto the bridge. He made a right turn believing Frank was also going to turn right. Jaquani didn't recall if there were designated turning lanes painted on the street and he didn't know if there were signs noting that vehicles in both lanes were permitted turn right. In his affidavit, Mr. Jaquani stated that although the Frank vehicle was going straight when the vehicles collided, he believed that "she was supposed to enter the bridge from her lane." He stated that if the Frank vehicle intended to go straight across she should have been in either the middle or left lane.

In her affirmation in opposition the motion, Ms. Dibari contends that the evidence submitted raises triable issues of fact as to whether the Frank vehicle properly proceeded straight on 57th Street from the right lane, whether the taxi driver properly made a right turn from the middle lane, and whether Ms. Frank was comparatively negligent in failing to observe the Joquani vehicle making the right turn in time to make an effort to avoid the collision. Counsel argues that Ms. Frank should have observed the taxi preparing to make a right turn, should have seen the taxi in the process of making a right turn and should have been on the proper lookout, looking to see what was there to be seen and thereby could have avoided the collision.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

Upon review of the Kimberly Frank's motion, the co-defendant's opposition Frank's reply thereto this court finds as follows:

It is not disputed that Jaquani made a right turn from the middle lane of 57th Street in order to reach the entrance ramp to the 59th Street Bridge. It is also undisputed that at the same time Frank was proceeding straight ahead in the right lane and that contact occurred while Jaquani was attempting the right turn. There was no proof submitted by either party that the Frank vehicle was required to turn right and there was no proof in the record to show that there were lane markings or street signs which permit traffic in the middle lane to lawfully turn right.

Vehicle and Traffic Law § 1128(a) requires that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

Vehicle and Traffic Law § 1160(a) requires that, "the driver of a vehicle intending to turn at an intersection shall do so as follows:(a) Right turns. Both the approach for a right turn and a right turn shall be made as close as practicable to the right hand curb or edge of the roadway or, where travel on the shoulder or slope has been authorized, from the shoulder or slope."

Vehicle and Traffic Law § 1163(a) states that:

"a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety."

Further, a driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require him to yield (see Kann v Maggies Paratransit Corp., 63 AD3d 792[2d Dept. 2009]; Palomo v Pozzi, 57 AD3d 498 [2d Dept. 2009]; Berner v Koegel, 31 AD3d 591[2d Dept. 2006]; Gabler v Marley Bldg. Supply Corp., 27 AD3d 519 [2d Dept. 2006]). In addition, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (see Laino v Lucchese, 35 AD3d 672 [2d Dept. 2006]; Berner v Koegel, 31 AD3d at 592[2d Dept. 2006]; Bongiovi v Hoffman, 18 AD3d 686 [2d Dept. 2005]).

Here, it is Frank's contention that Jaquani was negligent as a matter of law in attempting to make a right turn from the middle lane of 57th Street onto the entrance of the 59th Street Bridge in violation of VTL § § 1128(a), 1160(a) and 1163(a) and that said negligence was the sole proximate cause of the accident. This Court agrees.

Here, Ms. Frank established her prima facie entitlement to judgment as a matter of law through the submission of her affidavit, the police report, the photograph of the scene and the deposition testimony of co-defendant Jaquani. Since Mr. Jaquani made a right turn into the path of the Frank vehicle, which was lawfully proceeding straight ahead, without yielding the right of way, and admitted that he just assumed the Frank vehicle was going to turn right, his testimony established that he failed to make a right turn from the right lane as required by law, failed to make a lane change without first ascertaining that the lane

change could be made with safety, and failed to yield the right of way to the Frank vehicle. As such Mr. Jaquani was negligent as a matter of law (see Vainer v DiSalvo, 79 AD3d 1023 [2d Dept. 2010]; Tojek v Root, 34 AD3d 1210 [2d Dept. 2006]; Blangiardo v Hirsch, 29 AD3d 841[2d Dept. 2006]; Gomez v. Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005]). Ms. Frank, who had the right-of-way and was lawfully proceeding straight ahead in the right lane was entitled to anticipate that the taxi would obey the traffic laws which required him to yield, and therefore his violation of Vehicle and Traffic Law §§ 1128(a), 1160(a) and 1163(a) was the sole proximate cause of the accident (see Ahern v Lanaia, 924 NYS2d 802 [2d Dept. 2011]; Rivera v. Corbett, 69 AD3d 916 [2d Dept. 2010]). Joquani was negligent in failing to see that which, under the circumstances, he should have seen, in making a right turn from the middle lane and in crossing in front of the Frank vehicle when it was hazardous to do so (see Summers v Teddy Cab Corp, 50 AD3d 671[2d Dept. 2008]).

Further, Frank established, prima facie, her entitlement to judgment as a matter of law as the evidence submitted in support of her motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on her part(see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]).

In opposition to the defendant's prima facie showing, Jaquani failed to raise any material questions of fact as to whether the Ms. Frank was comparatively negligent (see Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see Moreno v Gomez, 58 AD3d 611, 612 [2d Dept. 2009]; Moreback v Mesquita, 17 AD3d 420, 421 [2d Dept. 2005]). Although a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle (see Demant v Rochevet, 43 AD3d 981 [2d Dept. 2007]), there was no testimony by any of the parties that Ms. Frank failed to keep a proper lookout or failed to exercise due care to avoid colliding with the taxi which crossed the highway in front of her (see Moreback v. Mesquita, 17 AD3d 420 [2d Dept. 2005]; Meretskaya v Logozzo, 2 AD3d 599 [2d Dept. 2003]). It has been recognized that a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (see Yelder v Walters, 60 AD3d 734 [2d Dept. 2010]; Jaramillo v Torres, 60 AD3d at 735 [2d Dept. 2009]; DeLuca v Cerda, 60 AD3d 721 [2d Dept. 2009]).

Further, there was no question of fact raised as to the plaintiff's comparative negligence as there was no proof submitted that the Frank vehicle was required to turn right from the right lane as suggested by counsel. There was also no proof submitted to indicate that the taxi was permitted to make a right

turn at that location from the middle lane. The sole proximate cause of this accident was Mr. Jaquani's incorrect assumption that the right lane was a turning lane and that the Frank vehicle was going to be making a right turn as well as his attempt to make a right turn across the right lane of traffic on East 57th Street directly into the Frank vehicle's path.

Thus, the co-defendant failed to raise a triable issue of fact, proffering only speculative assertions that the defendant may have been comparatively negligent which are unsupported by the testimony of the parties (see Gorelik v Laidlaw Tr. Inc., 50 AD3d 739 [2d Dept. 2007]; Ishak v Guzman, 12 AD3d 409 [2d Dept. 2004]).

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the motion for summary judgment by defendant Kimberly Frank is granted and the plaintiffs' complaint and all cross-claims are dismissed against her and the Clerk of Court is directed to enter judgment in her favor.

Dated: Long Island City, N.Y.
March 8, 2012

ROBERT J. MCDONALD
J.S.C.