Goodman v Clear Channel Outdoor, Inc.
2016 NY Slip Op 30692(U)
March 16, 2016
Supreme Court, Bronx County
Docket Number: 309129/2012
Judge: Mary Ann Brigantti
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

_____X

JOAN GOODMAN,

DECISION/ORDER

Plaintiff,

-against- Index No.: 309129/2012

CLEAR CHANNEL OUTDOOR, INC., et als.,

Defendants.

_____X

The following papers numbered 1 to 5 read on the below motion noticed on October 30, 2015, and duly submitted on the Part IA15 Motion calendar of **December 16, 2015**:

Papers Submitted	Numbered
Defs' Notice of Motion, Exhibits	1,2
Pl.'s Aff. In Opp., Exhibits	3,4
Defs.' Reply Aff.	5

Upon the foregoing papers, defendants Clear Channel Outdoor, Inc. and Daniel B. Berkman ("Berkman")(collectively, "Defendants"), move for summary judgment, dismissing the complaint of the plaintiff Joan Goodman ("Plaintiff") pursuant to CPLR 3212. Plaintiff opposes the motion.

I. Background

This matter arises out of an alleged motor vehicle accident that occurred on April 13, 2012. Plaintiff testified that on that date, she was driving her vehicle and had just exited off of the Major Deegan Expressway at Exit 3. Plaintiff proceeded down the off-ramp and approached a traffic light at the East 138th Street intersection. Plaintiff brought her vehicle to a stop at this intersection because the light was red and traffic was "full." The road that Plaintiff was traveling on was a one-way roadway that consisted of two travel lanes. Plaintiff was in the right travel lane, and had intended to turn left at the intersection. While she was waiting for the traffic signal to change, there were two vehicles ahead of her in the right lane, and one or two vehicles ahead

of her in the left lane. Plaintiff testified that she thought that the left-hand lane was a "left turn only" lane, but did not know for sure. There was no left turn signal on the traffic light, and there were no markings to indicate it was a left-turn only lane.

The traffic light eventually turned green and the two vehicles in front of Plaintiff turned to the left. Plaintiff testified that the vehicles in the left lane turned to the left as well. Plaintiff then began to make a left hand turn. She believed that she was about two-thirds of the way into her turn when her vehicle was struck on the driver's side by another vehicle. Plaintiff testified that she never saw the other vehicle before the impact. She was moving at a speed of not more than five miles per hour at the point of impact. She did not know the speed of the other vehicle. Plaintiff was under the impression that vehicles in the left-hand lane were required to turn left.

Defendant Berkman testified that at the time of the accident, he was driving a utility boom truck and was taking Exit 3 off of the Major Deegan Expressway. Berkman proceeded down in the left lane of the roadway and he approached a red traffic light at the intersection of East 138th Street and the off-ramp/service road. Berkman testified that it was his intention to go straight through the intersection and across East 138th Street. When the light turned green, Berkman was looking straight ahead, and proceeded to go straight. He was traveling at approximately five miles per hour for about five seconds when he heard the sound of tired screeching. As soon as he heard the screeching, he applied the brakes and came to a stop in about two seconds. His foot was on the gas from the time the light changed until the time he applies the brakes for a total of five seconds. He then exited his truck and saw that the front passenger side of his vehicle came into contact with the driver's side of another vehicle.

A representative from the City of New York Department of Transportation testified that this accident location - the northbound Major Deegan off-ramp intersection East 138th Street - is a two lane roadway and there are no markings in the official DOT drawings indicating that the left lane is a "left-turn only" lane. In other words, there is no indication that the left lane vehicles cannot go straight into the intersection and cross East 138th Street and proceed across East 138th Street to Gerard Avenue.

On these facts, Defendants move for summary judgment. They argue that Plaintiff was the sole cause of the accident, as she violated Vehicle and Traffic Law §1160(b) by turning left

from the right lane of travel. Moreover, there is no evidence that Defendants contributed to the accident, as Berkman confirmed that the impact occurred only seconds after he began to move his vehicle.

In opposition, Plaintiff argues that there are issues of fact as to Defendants' negligence that precludes summary judgment. Plaintiff testified that when the light turned green, the vehicles in front of her turned left from the right lane, and the vehicles to her left also turned left. Plaintiff stresses that she was two-thirds of the way through her turn when the impact occurred. Photographs of Plaintiff's vehicle after the accident depict damage to its entire driver's side Plaintiff further contends that Berkman's testimony raises an issue of fact as to whether he operated his vehicle with reasonable care. Berkman testified that while waiting for the traffic light to change, he did not know if there were any vehicles next to him and could not recall whether any vehicles were ahead of him or had gone through the light. He testified that he cannot see vehicles next to him from the cab of his truck. When asked if he has a blind spot, he replied "I don't know. I never really tried to look for that." The first time Berkman saw Plaintiff's vehicle was after the accident, when he got out of the truck. Berkman only became aware of the accident when he heard brakes screeching, and it sounded like he was pushing something. Berkman also testified that he waited two seconds after he heard the screeching sound to apply his brakes.

In reply, Defendants contend, inter alia, that it is undisputed that Plaintiff violated Vehicle and Traffic Law, and Defendants cannot be held liable for the accident where Berkman testified without opposition that the impact occurred within five seconds of him moving his vehicle from a stopped position.

II. Applicable Law and Analysis

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox*

Film Corp., 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

It is well-settled that even drivers who have the right of way have a duty to exercise reasonable care and avoid a collision with another vehicle (*see Nevarez v. S.R.M. Mgt. Corp.*, 58 A.D.3d 295 [1st Dept. 2008]). This duty includes the responsibility to observe what should be observed (*see Basabe v. Carrozza*, 106 A.D.3d 641 [1st Dept. 2013]). A driver with the right of way will not be entitled to summary judgment absent a demonstration that the sole proximate cause of the accident was the other driver's negligence (*see Galagotis v. Armenti*, 133 A.D.3d 818 [2nd Dept. 2015][internal citations omitted]).

In this matter, Defendants have failed to conclusively establish that Plaintiff was solely at fault for this collision, and there are issues of fact regarding Berkman's awareness of his surroundings that preclude entry of summary judgment in his favor. While the record demonstrates that Plaintiff was struck while she was turning left from the right lane of travel in violation of Vehicle and Traffic Law §1160(c), Berkman testified: (1) that he did not see Plaintiff's vehicle at any time before the impact; (2) that he did not know whether there were other vehicles around him before the impact occurred; (3) that he could not see vehicles next to him from the cab of his truck, even when looking in the mirror; and (4) admitted that he "never really tried to look" to see if he had a blind spot next to him while driving the truck (Berkman EBT at 26-28). Further, Plaintiff testified that two vehicles in front of her successfully

completed left turns from the right lane before she began her turn. Plaintiff tetsified that she was two-thirds of the way through her turn at the time of impact, and post-accident photographs depict damage to the entire driver's side front door of Plaintiff's vehicle. It is true that a driver with the right of way who only had seconds to react and avoid a collision is generally not negligent (*see Rooney v. Madison*, 134 A.D.3d 634 [1st Dept. 2015]). Here, however, in light of Berkman's testimony and the photographs, there are triable issues of fact as to whether or not the accident resulted, in part, from any failure of Berkman to exercise due care by failing to observe Plaintiff's vehicle, and if so, in what proportion (*see Rodriguez v. CMB Collision, Inc.*, 112 A.D.3d 473 [1st Dept. 2013], citing *Calcano v. Rodriguez*, 91 A.D.3d 468 [1st Dept. 2012]; *Thoma v. Ronai*, 82 N.Y.2d 736 [1993]; *Antaki v. Mateo*, 100 A.D.3d 579 [2nd Dept. 2012]).

III. Conclusion

Accordingly, it is hereby

ORDERED, that Defendants' motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 3/16, 2016

M Brigantti

Hon. Mary Ann Brigantti, J.S.C.