Anderson v Suffolk County Police Dept.
2017 NY Slip Op 30914(U)
April 26, 2017
Supreme Court, Suffolk County
Docket Number: 35114/12
Judge: Jr., Paul J. Baisley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 35114/12
CALENDAR NO.: 201600633MV
MOTION DATE: 9/15/16
MOTION NO.: 001 MOT D

---X
LIISA ANDERSON,

Plaintiff,

-against-

SUFFOLK COUNTY POLICE DEPARTMENT, COUNTY OF SUFFOLK and MOIRA T. LARMOUR,

Defendants.
---X

PLAINTIFF'S ATTORNEY:
CELLINO & BARNES, P.C.
532 Broadhollow Road, Suite 107
Melville, New York 11747

DEFENDANTS' ATTORNEY:
DENNIS M. BROWN
SUFFOLK COUNTY ATTORNEY
P.O. Box 6100
Hauppauge, New York 11788-0099

Upon the following papers numbered 1 to 47 read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers 1-26 ; Notice of Cross Motion and supporting papers ___ ; Answering Affidavits and supporting papers 27-42 ; Replying Affidavits and supporting papers 43-47 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (motion sequence no. 001) of plaintiff Liisa Anderson for summary judgment in her favor is granted to the extent set forth herein, and is otherwise denied.

This is an action to recover damages for injuries allegedly sustained by plaintiff Liisa Anderson as a result of a motor vehicle accident which occurred on January 17, 2012 on Old Country Road, at or near its intersection with Sinnock Court, in Melville, New York. The accident allegedly happened when a marked police vehicle owned by defendant Suffolk County Police Department and operated by defendant Moira Larmour, a police officer, struck plaintiff's vehicle. By her verified complaint, as amplified by her verified bill of particulars, plaintiff alleges that, as a result of the accident, she suffered serious injuries and symptoms, namely, a fractured clavicle.

Plaintiff seeks an order granting summary judgment in her favor on the issue of liability, and a determination that she suffered a serious injury within the meaning of Insurance Law §5102(d). Plaintiff submits, in support of the motion, copies of the pleadings, a notice of claim, a certified police report, the transcript of her 50-h hearing, the transcript of the deposition testimony of defendant Larmour, and the medical report of orthopedic surgeon Dr. David Weissberg. In opposition, defendants argue that plaintiff did not suffer a fractured clavicle and that defendant Larmour's actions are excused by the emergency operation doctrine. Defendants submit, in opposition, a verified bill of particulars, the transcripts of the deposition testimony of defendant Larmour and plaintiff, a certified police report, unaffirmed medical records, and the affirmed medical report of orthopedic surgeon Dr. Alan Zimmerman.

According to the 50-h hearing and deposition testimony of plaintiff, the accident occurred when a marked police car that was traveling in the opposite direction of her vehicle on Old Country Road, without its overhead emergency lights on, crossed into her lane, spun out of control, and collided with her vehicle. According to defendant Larmour's deposition testimony, she was driving westbound on Old Country Road when she observed a vehicle with an expired inspection sticker traveling eastbound. She testified that she made an "exaggerated u-turn" onto a side street, observed that no eastbound traffic was approaching, and began to accelerate when her car spun around two to three times on the wet pavement and collided with plaintiff's vehicle. Although Larmour had no recollection as to whether she activated her overhead police lights or siren, she believes she activated her lights. Larmour's intention was to conduct a traffic stop of the vehicle with the expired inspection in order to issue a summons to the driver.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr., supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr., supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp., supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, evidence must be viewed in the light most favorable to the nonmoving party (*see Chimbo v Bolivar*, 37 NYS3d 339, 2016 NY Slip Op 05969 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]).

Insurance Law §5102(d) defines "serious injury" as "a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment."

Plaintiff's submissions established a *prima facie* case that the alleged injuries to her clavicle constitute "serious injuries" (Insurance Law §5102(d); *see also Perez-Hernandez v M. Marte Auto Corp.*, 104 AD3d 489, 961 NYS2d 384 [1st Dept 2013]; *Diliberto v Barberich*, 94 AD3d 803, 941 NYS2d 884 [2d Dept 2010]; *Elias v Mahlah*, 58 AD3d 434, 870 NYS2d 318 [1st

Dept 2009]; *Loyce v Lacerra*, 41 AD3d 236, 838 NYS2d 530 [1st Dept 2007]; *Boorman v Bowhers*, 27 AD3d 1058, 811 NYS2d 534 [4th Dept 2006]). At her 50-h hearing, plaintiff testified that she received an x-ray of her left shoulder a few days after the accident, and Dr. Weissberg diagnosed her with a fractured clavicle. The affirmed medical report of Dr. Weissberg, dated January 26, 2012, states that an x-ray of plaintiff's left clavicle revealed a "nondisplaced fracture of the mid clavicle" and diagnosed her with a nondisplaced fracture of the clavicle.

In opposition, defendants raised a triable issue of fact as to whether plaintiff sustained a fractured clavicle (*see* Insurance Law §5102(d); *Alvarez v Prospect Hosp., supra*; *Crutchfield v Jones*, 132 AD3d 1311, 17 NYS3d 525 [4th Dept 2015]). The medical report of Dr. Zimmerman states, in relevant part, that plaintiff did not sustain a fracture to her left clavicle, as the allegation was never confirmed on an MRI and plaintiff did not receive any treatment for such an injury. Accordingly, the branch of plaintiff's motion seeking a determination that she suffered a serious injury within the meaning of Insurance Law §5102(d) is denied.

However, the branch of plaintiff's motion for summary judgment in her favor on the issue of negligence is granted. A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (*Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). A plaintiff in a personal injury action moving for summary judgment on the issue of liability must prove, *prima facie*, that the defendant was negligent and that he or she was free from comparative fault (*see Ricciardi v Nelson*, 142 AD3d 492, 35 NYS3d 724 [2d Dept 2016]; *McLaughlin v Lunn*, 137 AD3d 757, 26 NYS3d 338 [2d Dept 2016]). While there can be more than one proximate cause of an accident and it is generally for the trier of fact to determine, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts (*see Estate of Cook v Gomez*, 138 AD3d 675, 30 NYS3d 148 [2d Dept 2016]; *Jones v Vialva-Duke*, 106 AD3d 1052, 966 NYS2d 187 [2d Dept 2013]; *Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]).

Pursuant to Vehicle and Traffic Law §1163(a), "[n]o person shall...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." A motorist is required to "see that which through proper use of [his or her] senses [he or she] should have seen" (*Bongiovi v Hoffman*, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; *see Nohs v Diraimondo*, 140 AD3d 1132, 35 NYS3d 209 [2d Dept 2016]; *Thompson v Schmitt*, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]). The operator of a vehicle with the right of way is entitled to assume that the opposing driver will obey traffic laws requiring him or her to yield (*see Twizer v Lavi*, 140 AD3d 736, 33 NYS3d 351 [2d Dept 2016]; *Kassim v Uddin*, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]; *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; *Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, a driver 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 Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Ducie v Ippolito, supra*; *Vainer v DiSalvo, supra*).

Plaintiff made a *prima facie* showing of entitlement to summary judgment by establishing that defendant Larmour made an improper turn in violation of Vehicle and Traffic Law §1163

(*see Cruz v Skeritt*, 140 AD3d 554, 32 NYS3d 504 [1st Dept 2016]). Plaintiff testified at her 50-h hearing that she saw Larmour's vehicle traveling in the opposite direction on the other side of the double yellow line separating the two opposing lanes of traffic. She testified at her deposition that she then saw Larmour's vehicle cross into her lane, and she braked and attempted to pull over to the right to avoid the collision. The police vehicle spun "out of control," and then the driver's side of plaintiff's vehicle was struck by the front of the police vehicle. Plaintiff further testified that the overhead emergency lights on Larmour's vehicle were not engaged. As plaintiff was entitled to assume that defendant Larmour would not cross over into her lane of travel, and attempted to move to the right to pull over to avoid the collision, she was not contributorily negligent in the happening of the accident (*see Shanahan v Mackowiak*, 111 AD3d 1328, 974 NYS2d 710 [4th Dept 2013]; *Barbaruolo v DiFede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]; *Yelder v Walters*, *supra*; *Williams v Simpson*, 36 AD3d 507, 829 NYS2d 51 [1st Dept 2007]).

Defendant Larmour's deposition testimony reflects that after her"exaggerated u-turn" onto a side street, she observed that no eastbound traffic was approaching, and had begun to accelerate when the car spun around on the wet pavement and collided with plaintiff's vehicle. Even viewing the evidence in the light most favorable to defendants (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]; *Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]) Larmour's deposition testimony supports plaintiff's *prima facie* entitlement to summary judgment. Although Larmour testified that she looked to her left to check oncoming traffic, she turned onto Old Country Road when it was not reasonably safe to do so and failed to see the oncoming traffic through the proper use of her senses (*see* Vehicle and Traffic Law § 1163 [a]; *Nohs v Diraimondo*, *supra*; *Thompson v Schmitt*, *supra*; *Yelder v Walters*, *supra*; *Bongiovi v Hoffman*, *supra*).

The burden now shifts to the non-moving party to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident or as to whether plaintiff's negligence contributed to the accident (*see Alvarez v Prospect Hosp.*, *supra*; *Goemans v County of Suffolk*, 57 AD3d 478, 868 NYS2d m753 [2d Dept 2008]). Defendants argue that Larmour's vehicle was involved in emergency operation, pursuant to Vehicle and Traffic Law §114-b, and she should not be held liable for ordinary negligence. In order to preserve life and property and to enforce criminal laws, Vehicle and Traffic Law §1104 qualifiedly exempts drivers of emergency vehicles from certain traffic laws when they are involved in emergency operation and they may not be held liable to an injured third party unless the driver acted with reckless disregard of others' safety (*see Frezzell v City of New York*, 24 NY3d 213, 997 NYS2d 367 [2014]; *Saarinen v Kerr*, 84 NY2d 494, 602 NYS2d 297 [1994]; *Torres v Saint Vincent's Catholic Medical Centers of New York*, 117 AD3d 717, 985 NYS2d 606 [2d Dept 2014]; *Nurse v City of New York*, 56 AD3d 442, 867 NYS2d 486 [2d Dept 2008]). The "reckless disregard" standard requires evidence that the police officer intentionally acted unreasonably in disregard of a known or obvious risk that was so great as to make it highly probable that harm would be done and did so with conscious indifference to the outcome (*see Frezzell v City of New York*, *supra*; *Ferrara v Village of Chester*, 57 AD3d 719, 869 NYS2d 600 [2d Dept 2008]; *Nurse v City of New York*, *supra*). If the conduct which caused the accident that results in injuries was not privileged under Vehicle and Traffic Law §1104(b), the standard of care is ordinary negligence (*see Kabir v County of Monroe*, 16 NY3d 217, 920 NYS2d 268 [2011]). "This approach avoids judicial second-guessing of the many split-second

decisions that are made in the field under highly pressured conditions and mitigates the risk that possible liability could deter emergency personnel from acting decisively and taking calculated risks in order to save life or property or to apprehend miscreants" (*Frezzell v City of New York, supra*, at 217, *quoting Saarinen v Kerr, supra*, at 502 [internal quotations omitted]).

Defendants failed to raise a triable issue of fact (*Zuckerman v City of New York, supra*). In this case, defendant Larmour was not operating her vehicle in order to save life or property when she maneuvered her vehicle to pursue a driver with an expired inspection sticker (*see Frezzell v City of New York, supra*; *Saarinen v Kerr, supra*; *cf. Criscione v City of New York*, 97 NY2d 152, 736 NYS2d 656 [2001]; *DeLuca v Blanco*, 31 AD3d 600, 819 NYS2d 86 [2d Dept 2006]; *LaMotta v City of New York*, 130 AD2d 627, 515 NYS2d 554 [2d Dept 1987]). As defendant Larmour's conduct was not privileged under Vehicle and Traffic Law §1104(b), the standard of care was ordinary negligence (*see Kabir v County of Monroe, supra*).

Accordingly, plaintiff's motion is granted to the extent of granting summary judgment in her favor on the issue of negligence, and is otherwise denied.

Dated: April 26, 2017

HON. PAUL J. BAISLEY, JR.

J.S.C.