

**O'Rourke v Carucci**

2012 NY Slip Op 31450(U)

May 24, 2012

Sup Ct, Suffolk County

Docket Number: 09-48776

Judge: Arthur G. Pitts

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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 43 - SUFFOLK COUNTY

**COPY**

**PRESENT:**

Hon. ARTHUR G. PITTS  
Justice of the Supreme Court

MOTION DATE 11-9-11  
ADJ. DATE 3-15-12  
Mot. Seq. # 001 - MG; CASEDISP

-----X		
KEVIN O'ROURKE and GIUDITTA	:	GRUENBERG & KELLY, P.C.
PACI-O'ROURKE,	:	Attorney for Plaintiffs
	:	3275 Veterans Memorial Highway, Suite B9
Plaintiffs,	:	Ronkonkoma, New York 11357
	:	
- against -	:	
	:	DAVID S. KRITZER & ASSOCIATES PC
RALPH CARUCCI and UNITED PARCEL	:	Attorney for Defendants
SERVICE,	:	180 East Main Street, Suite 204
	:	Smithtown, New York 11787
Defendants.	:	
-----X		

Upon the following papers numbered 1 to 20 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers (001) 1-14; Notice of Cross Motion and supporting papers    ; Answering Affidavits and supporting papers 15-18; Replying Affidavits and supporting papers 19-20; Other    ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that motion (001) by the defendants, Ralph T. Carucci and United Parcel Service, pursuant to CPLR 3212 for an order granting them summary judgment dismissing the complaint on the issue of liability is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff, Kevin O'Rourke, on December 31, 2008 at about 10:40 a.m., when he was involved in a motor vehicle accident involving his vehicle and a vehicle owned by United Parcel Service and operated by the defendant, Ralph T. Carucci. The collision occurred on West Main Street, approximately fifty feet east of Griffing Avenue, Riverhead, New York, when the defendants' vehicle was stopped and struck in the rear by the plaintiff's vehicle. The derivative claim asserted on behalf of the plaintiff's spouse was withdrawn at the plaintiff's examination before trial.

The defendants seek summary judgment dismissing the complaint on the bases that the UPS truck was in a stopped position, parked and unoccupied, when it was struck in the rear by the plaintiff's vehicle, despite the plaintiff having observed the defendants' vehicle from approximately 1000 feet before striking it.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

In support of this motion, the defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and complaint, answer, plaintiff's verified and first, second and third supplemental verified bills of particulars; unsigned but certified transcripts of the examination before trial of the plaintiff dated April 28, 2011 with proof of mailing, and non-party witness police officer Timothy Murphy dated December 17, 2010 with proof of mailing, the signed transcript of Ralph Carucci dated May 18, 2011; an uncertified copy of the MV 104 Police Report; and a certified copy of the climatic report for December 2008.

Initially, the Court notes that the unsworn MV-104 police accident report constitutes hearsay and is inadmissible (*see Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Coller*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]).

In opposing this application, the plaintiff has submitted, inter alia, an attorney's affirmation; and copies of three photographs.

Kevin O'Rourke testified to the effect that the accident occurred on December 31, 2008. There had been heavy snow in the morning until about 10:30 a.m. His four wheel drive vehicle was equipped with all weather tires. There was about ½ to 1 inch of snow on the ground. He was traveling east on Main Street (Route 25), Riverhead. He passed through the green light at the intersection of Main Street and Griffing Avenue on his left, traveling about 25 miles per hour. The accident occurred after he passed through that intersection. After that point, Main Street continued ahead, with a right turn lane for traffic intending to travel south on Peconic Avenue. Just prior to the intersection, Main Street snaked from right to left, then straightened. It was plaintiff's intention to make the right turn at the intersection onto Peconic Avenue. One car length after the traffic light at Griffing Avenue, or about five car lengths from the place where the accident occurred, he saw the defendant's vehicle, which he described as a "big, large UPS van like truck." He stated it was stopped or parked in the middle of the roadway just before the beginning of the right turn lane, where Main Street goes straight. He described Main Street where the truck was parked as wide enough for two vehicles. He testified that there were no lights operating on the truck. His speed was about 25 miles per hour. Ahead of him was a white van which did not obstruct his view in any way. When he noticed that the UPS truck was not moving, he was about 2 ½ to 3 ½ car lengths from it. He did not change the speed of his vehicle. He did not apply his brakes. Rather, he tried to go around the UPS truck, steering to his left. He applied his brakes when he was about 2 ½ car lengths behind the UPS truck. He followed behind the white

van which successfully maneuvered past the UPS truck. He did not feel his vehicle slide as he tried to maneuver past the UPS truck. After looking at a photograph of his vehicle after the accident, he testified that the passenger side headlight was the part of his vehicle which struck the defendant's vehicle. He stated that he called the police and stated he was angry, but he did not tell the officer who responded to the scene that his vehicle slid.

Ralph Carucci testified that he had been employed by UPS for over 20 years as a package car driver. He was driving an UPS P-700 truck on December 31, 2008. When he picked up that vehicle, he performed an inspection, and completed a DVIR form, or Driver's Vehicle Inspection Report, indicating that he inspected the lights, including four-way flashers and directionals, among other things. Everything was working at the inspection. The accident occurred on West Main Street, Riverhead where he had parked his truck facing east, on the right side of the roadway, in front of the Long Island Science Center. He made a delivery to the Science Center and also to the bank next door. There was no sign prohibiting parking at that spot. Main Street, at the site of the accident had one travel lane in each direction, and a right turn lane for traffic traveling east. He had previously made deliveries there and parked his vehicle there. He further described that about two thirds of his vehicle was on the sidewalk at the time. His lights were illuminated. After he made the two deliveries, he was walking toward his vehicle, when he saw the accident. He had seen the plaintiff's vehicle at the intersection of Griffing Avenue and West Main Street, traveling on West Main Street, approximately 40 feet from the rear of his vehicle. He observed the front passenger side quarter panel strike the left rear (rear driver's side) of his vehicle. He stated that when he saw the plaintiff's car, he knew he would not hold the road, the wheels stopped rolling on the car, they locked up, and he continued to travel another 15 to 20 feet. There was about three inches of snow on the road, and no plows had come through yet. There was no damage to his truck. He could not see the lines on the road or by the sidewalk.

Timothy Murphy testified to the effect that he was working for the Riverhead Police Department as a police officer, performing routine patrol in a marked police unit. He set forth his experience and training working with the police department. He received a call on December 31, 2008 concerning an accident involving the UPS truck, which occurred in an area he regularly patrolled. It was snowy out, with about one to two inches of snow on the road. Part of the road was visible, and some areas were slushy. The accident occurred on West Main Street about fifty feet east of the intersection with Griffing Avenue, and just before the beginning of the right turn lane on West Main Street. When he arrived, he observed that there was an UPS truck which had been rear-ended by a light colored or white Suburban. The UPS vehicle was on the shoulder portion of the roadway right against, or partially on, the curb of the sidewalk. He stated that the driver of the Suburban told him he was negotiating a curve and slipped on the snow covered roadway and struck the UPS vehicle in the rear.

Murphy's first determination was that the primary cause of the accident was environmental, but he stated the speed of the Suburban contributed to the accident. He did not issue any violations as he did not witness the speed of the vehicle. Based upon the substantial amount of damage to the front of the suburban, it was his opinion that the speed of the suburban was over thirty miles per hour. P.O. Murphy testified that the law for stopping and standing in the roadway is that it is permissible as long as there is a travel portion of the highway next to the vehicle so that a vehicle can pass by. He continued that there was a travel portion on the roadway where vehicles could pass by the stopped UPS truck, and that it gave adequate room for vehicles to pass. Officer Murphy testified that the UPS truck was parked legally, and if it was not, he would have issued a summons. He continued that there was no sign prohibiting parking where the UPS truck was stopped.

He further testified that even if the UPS truck were parked illegally, there was enough travel portion of the roadway that the other motorists could go around it. There were no skid marks on the road from the plaintiff's vehicle.

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [1999]; see also Vehicle and Traffic Law § 1129 (a)). The defendants herein have demonstrated their prima facie entitlement to summary judgment on the issue of liability by showing that this was a rear-end collision, that the defendants' vehicle was stopped at the time of the impact, and that the plaintiff failed to maintain control of his vehicle, or to use reasonable care to avoid colliding with the defendants' vehicle. The plaintiff testified that the van in front of him safely passed the UPS vehicle. Officer Murphy testified that the UPS vehicle was legally parked, and he did not issue a summons. He also stated that there was sufficient room on the roadway for the plaintiff to pass the UPS vehicle. Here, the plaintiff's testimony established that he breached his duty to maintain a reasonably safe distance between his vehicle and the vehicles ahead of him, and to be aware of traffic conditions, such as the stopped UPS vehicle (see, *Kachuba v A&G Cleaning Service, Inc.*, 273 AD2d 277, 709 NYS2d 851 [2d Dept 2000]). It is concluded that the plaintiff's failure to observe traffic conditions and maintain a safe distance was the proximate cause of the accident.

A driver is negligent where an accident occurs because he or she has failed to see that which through proper use of his or her senses he or she should have seen (*Hull v Spagnoli et al*, 44 AD3d 1007, 844 NYS2d 416 [2d Dept 2007]; *Breslin v Rudden et al*, 291 AD2d 471, 738 NYS2d 674 [2d Dept 2002], appeal denied, 98 NY2d 605, 746 NYS2d 456 [2002]). Here, the plaintiff saw the UPS vehicle, but initially failed to see that it was stopped and parked on the side of the roadway. Officer Murphy testified that the vehicle was legally parked away from the area which prohibited parking or stopping just east of where it was parked. Plaintiff's conclusory assertions that the defendants were illegally parked is without basis and unsupported by evidentiary submissions. The plaintiff testified that the defendants' vehicle was parked on the roadway before the right turn lane started.

Based upon the foregoing, it is determined that the stopped UPS vehicle was not the proximate cause of the accident. Instead, the proximate cause of the accident was the failure of the plaintiff to operate his vehicle with reasonable care considering the weather and road conditions, to maintain proper control of his vehicle, and to observe traffic conditions and that the UPS vehicle was stopped and parked.

While the plaintiff testified that when he applied his brakes, his vehicle did not slide, Officer Murphy testified that the plaintiff told him that his vehicle slid on the roadway as he was executing the curve and trying to avoid the defendants' UPS vehicle. Whether or not the plaintiff's vehicle slid is insufficient as a matter of law to rebut the inference of negligence created by the rear-end collision and raise a triable issue of fact to defeat summary judgment (*Shamah v Richmond County Ambulance Service, Inc*, 279 AD2d 564, 719 NYS2d 287 [2d Dept 2001]; *Sabbagh v Raymond Shalom*, 289 AD2d 469, 735 NYS2d 593 [2d Dept 2001]). While the plaintiff testified that the UPS truck did not have its lights on, and the defendant driver testified that his lights were on, the record demonstrates that the defendants' vehicle was legally parked, thus

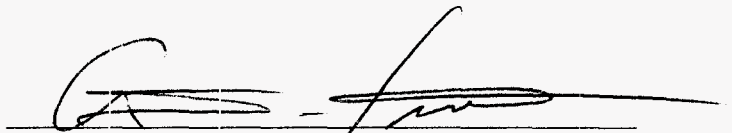
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obviating the necessity for warning lights. Thus, the plaintiff has not raised a factual issue with regard to liability or proximate cause on this issue.

In opposition, the plaintiff has failed to raise a factual issue or to come forward with a non-negligent explanation for the occurrence of the accident. Although an attorney's affirmation was submitted in opposition to defendants' motion, the affidavit of an attorney lacking personal knowledge of the events giving rise to the cause of action or defenses without setting forth evidentiary facts, cannot support or defeat a motion for summary judgment (*Olan v Farrell Lines, Inc.*, 64 NY2d 1092, 481 NYS2d 370 [1985]). Consequently, the plaintiff failed to meet the burden of establishing through admissible evidentiary proof, the existence of a triable issue of fact sufficient to defeat the summary judgment motion.

Accordingly, the defendants' motion for summary judgment dismissing the complaint is granted and the complaint is dismissed with prejudice.

Dated: May 24, 2012

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION