Gomez v Yussuf
2014 NY Slip Op 31682(U)
June 27, 2014
Sup Ct, New York County
Docket Number: 154191/12
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NY
COUNTY OF NEW YORK: PART 22

Index No.: 154191/12

Michael Gomez,

Plaintiff,

-against-

Rabiat Yussuf,

Defendants.

Motion Seq. 01

DECISION/ORDER

HON. ARLENE P. BLUTH, JSC

In this motor vehicle accident/personal injury case, defendant moves for summary judgment dismissing the complaint on both liability and lack of serious injury grounds.

With respect to that branch of defendant's motion alleging no serious injury, the Court finds that defendant failed to fulfill her prima facie burden. Defendant's radiologist, Dr. Pfeffer, failed to rule out trauma as the cause of a herniation and annular tearing at L5/S1. Specifically, in her June 18, 2013 affirmed report, while she noted pre-existing degeneration at the L5-S1 level, she stated that "neurological correlation (in conjunction with medical record review) is advised insofar as etiology of annular tearing (and hence posterior disc herniation) at L5-S1 is indeterminate based solely on MRI criteria". Defendant did not submit the report of a neurologist and the orthopedist report submitted makes no mention of the tear and herniation. Therefore, the serious injury branch of the motion is denied.

However, defendant's motion is granted inasmuch as this Court finds plaintiff's conduct was the sole proximate cause of the accident. Plaintiff was the driver of a car which hit a vehicle owned and operated by defendant at the intersection of Rockaway Boulevard and Beach 56th Street in Queens. Before the accident, the parties were going in opposite directions on Rockaway Boulevard; the opposing lanes are separated by a double yellow line and each driver was in the

lane closest to that dividing line. While both parties had the green light, plaintiff decided to make a left turn onto Beach 56th Street; he did so without ever coming to a full stop, and turned left into defendant's path (plaintiff's deposition transcript, p. 24, lines 11-14). The front end and bumper of plaintiff's car hit the driver's side of defendant's car (trans., p. 23, line 25; p. 24, line 4).

Defendant, who was going straight in the lane closest to the double yellow line, was in the middle of the intersection at the time of impact (defendant's deposition trans., p. 30, lines 6-10). She was hit by plaintiff on her driver's side, somewhere between her front bumper and the driver's door (defendant's deposition trans., p. 27, lines 19-22, p. 30, lines 13-16 and p. 32, lines 12-15). Defendant said she never saw plaintiff until the moment of impact (p. 27, lines 19-22).

There is no question that plaintiff was negligent. He should not have turned left into defendant's path; instead, plaintiff should have yielded to defendant, who was going straight and who had the right of way (Vehicle and Traffic Law §1141). In fact, plaintiff admits that he never even stopped his car before he turned - he turned the wheel to the left and kept moving until he crashed right into the side of defendant's car. Defendant never saw him coming - she did not swerve and remained in her lane, which was next to the yellow line.

Plaintiff argues that there is a question of fact as to defendant's comparative negligence. While plaintiff states he saw the defendant's car halfway down the block and decided to turn anyway, defendant states she never saw plaintiff until the impact when she slammed on her brakes. Plaintiff claims the issue of fact for the jury is whether defendant "saw what there was to be seen". That is, plaintiff claims that defendant should have seen him about to turn across her path because he saw her from half a block away.

This Court disagrees with plaintiff's argument. Defendant's burden on this motion is to establish, through admissible evidence, that the accident was not proximately caused by any negligence on her part (*see Rogers v City of New York*, 52 AD3d 589 [2nd Dept 2008], *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). It is well settled that a driver who has the right of way is entitled to anticipate that other drivers will obey the traffic laws that require them to yield and has no duty to watch for and avoid a driver who might not follow the rules of the road. *See Tiefenthaler v Islam*, 66 AD3d 588 (1st Dept 2009) citing *Dinham v Wagner*, 48 AD3d 349 (1st Dept 2008). Defendant has shown that she was not negligent by presenting admissible evidence (deposition transcripts) that plaintiff made a left turn across the path of her oncoming vehicle in violation of VTL §1141, and that defendant slammed on her brakes, but could not avoid the collision. This fulfills movant's prima facie burden; the burden shifts to the opposition to raise an issue of fact.

Plaintiff fails to raise an issue of fact in opposition, since his contention that defendant failed to "see what there was to be seen" or otherwise failed to avoid the accident was unsupported by any evidence and is mere speculation. The opposition has failed to contest defendant's testimony that she was traveling with the right of way at or below the speed limit and that she was already in the intersection when plaintiff entered it and hit the side of her car with the front of his. Plaintiff could not have already been in the intersection when defendant approached – if he had been, then the front of defendant's car would have hit the passenger side of his car. Because plaintiff crashed into defendant as he was turning left without ever stopping before the turn (and never stated that he ever put on his left turn signal), and defendant was in the lane closest to the double yellow line, there was nothing for defendant to see. It isn't as if she could have seen plaintiff's car waiting to turn - he testified that he never even stopped before

turning left and never waited. Quite simply, plaintiff turned into defendant's car while defendant was in the intersection, and that is why the front of plaintiff's car hit the side of defendant's car.

Here, because the opposition has failed to present any facts to contradict defendant's testimony, summary judgment is appropriate. *See Foreman v Skeif*, 115 AD3d 568 (1st Dept 2014) (Supreme Court properly granted summary judgment when movant presented unrefuted evidence that co-defendant made a left turn across the path of movant's vehicle, and movant applied the brakes but could not avoid the collision). Additionally, a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively at fault for failing to avoid the collision (*see Nova Soto-Bay v Prunty,* 115 AD3d 586, 982 NYS2d 123 [1st Dept 2014] *citing Figueroa v Diaz*, 107 AD3d 754, 967 NYS2d 109 [2d Dept 2013]; *Barbato v Moloney*, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012]).

Accordingly, defendant's motion for summary judgment dismissing this action on the grounds that plaintiff's conduct was the sole proximate cause of the subject accident is granted, and the action is hereby dismissed.

This is the Decision and Order of the Court.

Dated: June 27, 2014
New York, New York

HON. ARLENE P. BLUTH, JSC