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| <b>Smolinski v DeMuth</b>  |
| 2014 NY Slip Op 31733(U)   |
| June 18, 2014  |
| Sup Ct, Wayne County   |
| Docket Number: 74494/2013  |
| Judge: Dennis M. Kehoe   |
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STATE OF NEW YORK  
SUPREME COURT : COUNTY OF WAYNE

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SHANE E. SMOLINSKI,  
Plaintiff,

-vs-

CHARLES C. DeMUTH,  
CHARLES CRAIG DeMUTH, D.V.M., P.C.  
Defendants

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DECISION

Index No. 74494

2013

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Attorneys for Plaintiff

Rupp, Baase, Pfalzgraf, Cunningham & Coppola, LLC  
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Attorneys for Defendants

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The Plaintiff has moved for an order granting summary judgment against the Defendants as to the issues of negligence and proximate cause, as well as the issue of serious injury, in this personal injury action. The Defendants have opposed the motion in its entirety, maintaining that there are factual issues which must await determination at trial.

The action arises from a motor vehicle accident which occurred on January 26, 2012 at approximately 1:15 P.M. at the intersection of Routes 33 and 237 in the Town of Byron, New York. The Plaintiff was operating a borrowed GMC pick-up truck on Route 33, and the Defendant Dr. Charles

DeMuth was operating a Honda on Route 237. The intersection was controlled by a four-way flashing signal. The Plaintiff's travel was controlled by a flashing yellow light, while the Defendant's vehicle was controlled by a flashing red light.

At his deposition, the Defendant testified that he stopped for the flashing red light, at which time he was to the Plaintiff's left. However, the Defendant then proceeded to enter the intersection and collided with the Plaintiff's vehicle in Plaintiff's own lane, which then pushed that vehicle into a third vehicle stopped at the intersection to the Plaintiff's right. (The third vehicle is not involved in this action). The Defendant also testified that he never saw the Plaintiff's vehicle until the time of impact, although he admitted that there was nothing to impair his line of vision. Finally, the Defendant conceded that the Plaintiff had the right of way, and that it was his responsibility to yield the right of way to the Plaintiff's vehicle.

At his deposition, the Plaintiff testified that he was traveling less than 50 miles an hour in a 55 mph zone because he had taken his foot off the gas pedal as he approached the flashing light. He saw the Defendant's vehicle stop at the intersection, but the Plaintiff maintains that the Defendant entered the intersection at the same time as the Plaintiff, and

that there was only a “split second before we had impact”. The Plaintiff’s position is that his actions in no way contributed to the accident, and that the Defendant’s failure to yield was the sole proximate cause of the collision.

Traditionally, there has been considerable reluctance on the part of the courts to grant summary judgment in negligence actions, as it is considered a “drastic remedy”. A plaintiff has the burden of establishing as a matter of law that the sole proximate cause of the accident was the defendant’s negligence in order to prevail on a summary judgment motion. In this action, the Defendants argue that they have submitted evidence, based upon sworn deposition testimony, that the Plaintiff was also negligent, thereby creating triable issues of fact.

It is well settled that even if a vehicle has the right of way at an intersection “the driver may nevertheless be found negligent if he or she falls to use reasonable care when entering the intersection.” (*Halbina v Brege*, 41 AD3d 1218 (4<sup>th</sup> Dept, 2007)). A driver cannot proceed blindly into an intersection, even when he or she had the right. The driver has a duty to keep a proper lookout.



However, in this action, the Court finds that there is no evidence that the Plaintiff failed to exercise such reasonable care. The facts of this case are similar to those presented in Limardi v McLeod, 100 AD3d 1375 (4<sup>th</sup> Dept, 2012)). In Limardi, the appellate court upheld the trial court's finding that there were no triable issues of fact with respect to the Plaintiff's comparative negligence. The Court held that, as the Plaintiff had the right-of-way, he was entitled to anticipate that the Defendant would obey the traffic laws, and that there was no evidence that the Plaintiff failed to operate his vehicle in an appropriate manner.

Here, this Court finds that the Plaintiff exercised reasonable care and that this record does not support the Defendant's contention that the Plaintiff was negligent due to any alleged failure to take evasive action when the Defendant entered the intersection. The Defendant's assertions as to the existence of triable fact issues rest largely on speculation and on a strained reading of the deposition testimony. Therefore, the Plaintiff has met his burden of establishing that the Defendant was negligent as a matter of law and that his negligence was the sole proximate cause of the accident.

Turning to the issue of serious injury, the Court has reviewed the submitted medical records, including the expert opinions offered by the respective parties. The Plaintiff maintains that he suffered a serious injury as that term is defined by every subdivision of Insurance Law §5102(d) (other than loss of a fetus). Immediately after the accident, the Plaintiff was taken to the United Memorial Hospital Emergency Department, where he was diagnosed with a lumbosacral sprain. He was released to follow up with his own doctor. The Plaintiff proceeded to consult two chiropractors, the second of whom treated the Plaintiff regularly for low back pain. The Plaintiff also experienced left leg pain and tingling, prompting the chiropractor to refer the Plaintiff for an MRI. The study indicated the existence of a disc protrusion which allegedly was the cause of the radicular pain in the Plaintiff's left leg. The Plaintiff then consulted an orthopedic surgeon, who performed a disectomy, during which the doctor visualized an annular tear. The surgeon subsequently referred the Plaintiff for a functional capacity evaluation, to determine his range of motion.

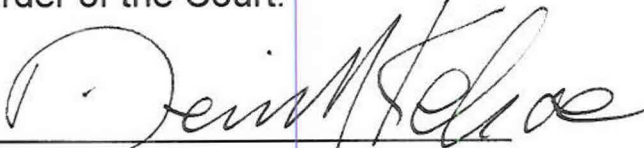
After reviewing the exhibits submitted by the parties, the Court concludes that the Plaintiff has failed to meet his burden of proof in establishing his right to summary judgment on the issue of serious injury.

The Court has reviewed the voluminous medical records submitted by the Plaintiff but is unable to determine as a matter of law that the Plaintiff's physical condition meets any of the definitions set forth in §5102(d), nor can the Court conclude as a matter of law that the accident was a proximate cause of the alleged injuries. Moreover, while the parties have offered expert opinions from their respective doctors as to the issues of physical injury, causation, and treatment, the Court must again agree with the Defendant that it cannot determine matters of credibility on the papers. The so-called "battle of the experts" cannot be resolved on a motion for summary judgment. Therefore, the Plaintiff's motion for summary judgment on the issue of serious injury must be denied.

Therefore, it is the determination of this Court that the Plaintiff's motion for summary judgment against the Defendants is granted as to the issues of the Defendant's negligence and sole proximate cause, but is denied as to the issue of serious injury.

This Decision shall constitute the Order of the Court.

Dated: June 18, 2014  
Lyons, New York

  
Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

14 JUL -3 P4:16

SUPREME AND COUNTY COURT  
WAYNE COUNTY  
JUL 18 2014