

Tirone v Skok

2015 NY Slip Op 32998(U)

July 31, 2015

Supreme Court, Erie County

Docket Number: Index No. 800077/2014

Judge: Patrick H. NeMoyer

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At a Special Term of the Supreme Court, State of New York, at the courthouse in Buffalo, New York on the 31 day of JULY, 2015

STATE OF NEW YORK :
SUPREME COURT : COUNTY OF ERIE

JULIE TIRONE,
v.
KATHLEEN SKOK,
Plaintiff,
Defendant.

DECISION and ORDER
INDEX NO. 800077/2014

APPEARANCES: KATHERINE A. GILLETTE, ESQ., for Plaintiff
RICHARD POVEROMO, ESQ., for Defendant

PAPERS CONSIDERED: the NOTICE OF MOTION FOR SUMMARY JUDGMENT of Defendant and the AFFIDAVIT of Lisa M. Diaz-Ordaz, Esq., with annexed exhibits;
the AFFIDAVIT of Kathleen Skok;
the AFFIDAVIT of Michelle Parrish;
the AFFIDAVIT of Richard P. Weisbeck, Jr., Esq., with annexed exhibits;
the AFFIDAVIT OF CHRISTOPHER A. PUCKETT, with annexed exhibits; and
the REPLY AFFIDAVIT of Lisa M. Diaz-Ordaz, Esq., with annexed exhibits.

Plaintiff commenced this action to recover damages for personal injuries sustained at about 10:00 a.m. on June 11, 2013 at the intersection of Hamlin and Girard Avenues in East Aurora, Erie County. The injuries were sustained when plaintiff, while jogging north along Hamlin Avenue through the intersection, ran into the driver's side of the SUV of defendant, who was proceeding straight through the intersection after having stopped her vehicle behind a stop sign controlling westbound traffic on Girard Avenue. The intersection, which is formed by two

relatively narrow residential streets, is governed by four stop signs and features defined and narrow crosswalks that line up with the sidewalks that meet at all four corners of the intersection.

By her own account, buttressed by that of the driver of the vehicle proceeding directly behind hers, defendant made a full and prolonged stop at the stop sign. Defendant looked to her left for ten seconds, then looked to her right for a similar time, then glanced left again before proceeding slowly into the intersection. When plaintiff contacted defendant's vehicle, its front end was in or near the crosswalk on the opposite side of the intersection from the stop sign in question. It appears that plaintiff was jogging inside the west curb of Hamlin, i.e., in the southbound traffic lane of Hamlin. Defendant denies having seen plaintiff at any time before, or even as, plaintiff ran into the side of her car. The driver behind defendant observed plaintiff take "approximately two strides and run into the driver's side door of" defendant's vehicle. The impact was outside the crosswalk but within the intersection.

Plaintiff claims to have looked for approaching cross traffic when she was about "a house and a half away from the intersection." Seeing none, plaintiff, whose workout involved alternating intervals of slow and fast running, began to sprint as she approached the intersection. Plaintiff acknowledges that she was listening to music through head phones and was looking down at her feet at the time and thus did not see defendant's vehicle at any time before impact. As plaintiff ran into the side of defendant's car, the mirror struck her shoulder, knocking plaintiff around and to the ground and in turn causing her to sustain a fractured left foot, among other injuries. After the accident, plaintiff admitted her fault in its occurrence.

Now before the Court is a motion by defendant for summary judgment dismissing the complaint on the ground that, as a matter of law, plaintiff's conduct was the sole proximate cause of the accident and her injury. The Court deems defendant's argument to include the

component contentions that defendant was not legally at fault in the occurrence of the accident, that defendant's negligence, if any, was not a proximate cause of the accident, and that plaintiff was guilty of comparative fault that was at least a proximate cause of the accident. The motion is opposed by plaintiff, albeit not vigorously in relation to the sub-issues of whether she was comparatively at fault and whether such comparative fault was at least a proximate cause of the accident. Upon its consideration of the parties' respective submissions, this Court renders the following determinations:

The Court concludes that defendant failed to sustain her burden of demonstrating her entitlement to judgment as a matter of law dismissing the complaint. Defendant failed to establish that she was free from negligence as a matter of law and/or that any such negligence on her part was not a proximate cause of the accident and plaintiff's injuries. On the other hand, the Court concludes that defendant sustained her burden insofar as she sought to demonstrate that plaintiff, as a matter of law, was guilty of culpable conduct that was at least a proximate cause of the accident.

Addressing first the issue of plaintiff's own fault and causal role in bringing about the accident, the Court see no alternative but to determine as a matter of law that plaintiff was negligent in crossing a street in such a way as to run into the side of a moving car that she admittedly failed to see or hear at any point before the impact (*cf.* Vehicle and Traffic Law § 1152 [a]; Vehicle and Traffic Law § 1151 [b]). Clearly, in attempting to cross the intersection on foot, plaintiff was under a duty to keep a proper lookout for cross traffic and employ her senses in such a way as to perceive what was obviously there to be perceived. In sprinting across the intersection while looking down, and indeed in running directly into the side of defendant's vehicle without even seeing it, plaintiff failed to fulfill her duty as a matter of law. Although it is not clear that plaintiff violated the Vehicle and Traffic Law merely by crossing the street other

than in the marked crosswalk (see Vehicle and Traffic Law § 1151, 1152, 1155), plaintiff's crossing of the intersection other than in the marked crosswalk appears to have been the product of her running in the street, rather than on the adjacent sidewalk, which is a violation of Vehicle and Traffic Law § 1156 (a), which statutory violation amounts to negligence per se (see *Long v Niagara Frontier Transp. Auth.*, 81 AD3d 1391, 1392 [4th Dept 2011]; see also *Stalikas v United Materials*, 306 AD2d 810, 811 [4th Dept 2003], *affd* 100 NY2d 626 [2003]). Given the scenario, the Court sees no alternative but to conclude that plaintiff's demonstrable negligence was at least a proximate cause of the accident and injury. However, for reasons stated *infra*, the Court cannot accept defendant's postulate that plaintiff's fault was the sole proximate cause of the accident and injury, to the exclusion of any alleged negligence on the part of defendant.

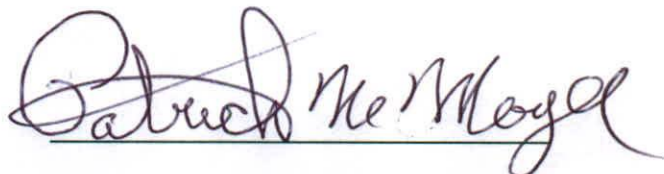
The Court rejects defendant's argument that she was as matter of law not negligent in her operation of her vehicle at the time and place of the accident. Although defendant emphasizes that she made a lengthy stop at the stop sign, the issue here is not whether she was or was not negligent in failing to stop, but rather whether she may have been negligent in proceeding into the intersection after coming to a complete stop behind the stop sign. It is at least arguable on this record that defendant was negligent in proceeding across the intersection at a time when it was not possible to do so in complete safety (see *generally* Vehicle & Traffic Law § 1142 [a]). It is also arguable on this record that defendant failed to maintain a proper lookout before and while proceeding across the intersection, and otherwise failed to "exercise due care to avoid colliding with any bicyclist, pedestrian or domestic animal upon any roadway" (Vehicle & Traffic Law § 1146). Although defendant emphasizes that she looked both ways before proceeding into the intersection, the matter here is not where plaintiff may have looked for extended period of times, but rather where she may have failed to look for an extended period of time while she was looking elsewhere, or what she failed to perceive while supposedly

looking left along Hamlin Avenue. Defendant acknowledges that, despite looking in various directions, she never saw the jogging plaintiff before the collision, meaning that defendant likewise may be guilty of failing to see what obviously was there to be seen, whether to the left of the intersection before defendant proceeded therein, or, as apparently was the case, well within the intersection as defendant proceeded through it. Under the circumstances, it will be for the trier of fact to determine whether defendant was negligent in the operation of her vehicle and whether such negligence, like plaintiff's demonstrated culpable conduct, played a causal role in the accident.

Accordingly, the motion of defendant for summary judgment dismissing the complaint is DENIED. However, pursuant to its authority under CPLR 3212 (e), the Court GRANTS defendant partial summary judgment on the issues of whether plaintiff was comparatively negligent and whether such negligence was a proximate cause of the accident and injuries.

All counsel are to report for a status conference to be held August 26, 2015, at 1:30 p.m., in Part 34 at 50 Delaware Avenue.

SO ORDERED:



HON. PATRICK H. NeMOYER, J.S.C.

GRANTED

JUL 31 2015

BY



KEVIN J. O'CONNOR
COURT CLERK