Letourneau v Plunkett
2016 NY Slip Op 32528(U)
September 9, 2016
Supreme Court, Suffolk County
Docket Number: 13-2122
Judge: Joseph Farneti
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SHORT FORM ORDER

COPY

INDEX No. 13-2122
CAL. No. 15-02056MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 4-14-16
ADJ. DATE 5-19-16
Mot. Seq. #003 - MG; CASEDISP

ANN LETOURNEAU,

Plaintiff,

- against -

JAMES G. PLUNKETT and JESSICA CORDTS,

Defendants.

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Upon the following papers numbered 1 to 24 read on this motion for summary judgment ; Notice of Motion and supporting papers 1 - 14 ; Answering Affidavits and supporting papers 15 - 19 ; Other 20 - 24 ; it is,

ORDERED that defendants' motion for summary judgment dismissing all claims against them is granted.

This action was commenced by plaintiff Ann Letourneau to recover damages for injuries she allegedly sustained on November 12, 2010, when a motor vehicle she was operating on Route 347 in Port Jefferson Station, New York was struck by a vehicle operated by defendant James G. Plunkett and owned by defendant Jessica Cordts, who was riding as a passenger at the time.

Defendants now move for summary judgment on the grounds that plaintiff was the sole proximate cause of the accident in question, that plaintiff failed to yield the right-of-way, and that plaintiff violated Vehicle and Traffic Law § 1141. In support their motion, defendants submit copies of the pleadings, deposition transcripts of the parties, two pages of a certified MV-104A police accident report, and a transcript of the deposition testimony of nonparty witness Catherine M. Garrison.

At her deposition, plaintiff testified that she was operating her vehicle eastbound on Route 347 in Port Jefferson Station, New York at approximately 7:30 p.m., that the weather was clear, that the roadway was dry, and that it was dark out. She indicated that she intended to make a left turn into the Home Goods shopping center, which is located on the north side of Route 347 at the corner of Terryville Road. Plaintiff testified that in the area of her intended left turn, Route 347 has two lanes heading westbound and two eastbound lanes of travel, a left turning lane on its eastbound side, and is not regulated by any traffic control devices. Plaintiff stated that she drove her vehicle into the left turning lane, waited several minutes, then initiated her left turn toward the shopping center. She indicated that she began moving her vehicle approximately halfway across the westbound left lane of Route 347, that she looked right again "just to make sure," and that she "saw a car coming in the left lane straight at [her]." Plaintiff testified that she then applied her vehicle's brakes and "saw the two headlights heading towards [her]." She further testified that the other vehicle "was going at such a rate of speed that . . . [she] didn't have a chance to get out of his way." Plaintiff testified that the front of defendants' vehicle struck the front passenger side of her vehicle "around a second-and-a-half" after she first saw it.

Defendant James G. Plunkett testified that on the date and time in question, he was operating his girlfriend Jessica Cordts' vehicle westbound on Route 347, and that she was in the passenger seat. He indicated that he thinks the speed limit at the subject location was 45 miles per hour and that he was traveling in the left lane at "[a]bout 45, 50 [mph]." Plunkett testified that he first saw plaintiff's vehicle stopped in the left turning lane when he was "about eight car lengths" from it. He further testified that "[a]t the very last minute" plaintiff's vehicle pulled out in front of him at a fast rate of speed. Plunkett stated that his vehicle was only approximately half a car length from plaintiff's vehicle when she began her left turn. He testified that at the time of the impact, his foot was on the gas pedal and he did not turn his steering wheel or honk his horn.

Defendant Jessica Cordts testified that prior to the accident, Plunkett had stopped at a red traffic light at the intersection of Route 347 and Terryville Road, which is located "a couple of hundred feet" east of the accident location. Cordts testified that upon said traffic light turning green, they proceeded westbound on Route 347 and Plunkett operated her motor vehicle to a maximum speed of approximately 40 miles per hour before the impact. Cordts explained that she only saw plaintiff's vehicle for "maybe a second" before her vehicle came in contact with it, that plaintiff's vehicle had either "slowed" or was at rest immediately prior to the impact, and that she saw plaintiff's passenger-side door was positioned directly in front of her at the time. She testified that she did not hear any horns sound, exclamations by Plunkett, or tires screeching prior to the impact.

Nonparty witness Catherine M. Garrison was deposed and testified that at the time of the accident in question, she was stopped in the shopping center parking lot located on the north side of Route 347 and her vehicle was parallel to that road. Ms. Garrison indicated that as she was stopped, she saw a vehicle stopped in the left turning lane of eastbound Route 347. She stated that she believed the vehicle was stopped in anticipation of either coming across the westbound lanes of Route 347 or making a U-turn. Ms. Garrison testified that she saw a vehicle traveling westbound "within the speed limit" and that the vehicle facing north "started to pull out," striking the westbound vehicle.

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP***, 26 NY3d 40, 19 NYS3d 488 [2015]; ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (***Nomura***, *supra*; *see also* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (***Daliendo v Johnson***, 147 AD2d 312, 543 NYS2d 987 [2d Dept 1989]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

A driver who has the right-of-way is entitled to anticipate that other drivers will obey the traffic laws requiring them to yield to the driver with the right-of-way (*see* Vehicle and Traffic Law § 1128 [a]; ***Vazquez v New York City Tr. Auth.***, 94 AD3d 870, 941 NYS2d 887 [2d Dept 2011]; ***Bonilla v Calabria***, 80 AD3d 720, 915 NYS2d 615 [2d Dept 2011]). "The driver of a vehicle intending to turn to the left . . . into [a] . . . driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard" (Vehicle and Traffic Law § 1141; *see* ***Attl v Spetler***, 137 AD3d 1176, 28 NYS3d 699 [2nd Dept 2016]). The failure to do so constitutes negligence as a matter of law (***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 777, 949 NYS2d 124, 125 [2d Dept 2012]; ***Vainer v DiSalvo***, 79 AD3d 1023, 1024, 914 NYS2d 236, 237 [2d Dept 2010]). "Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision . . . a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (***Attl v Spetler***, *supra* at 1176; *see also* ***Ahern v Lanaia***, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; ***Heath v Liberato***, 82 AD3d 841, 918 NYS2d 353 [2d Dept 2011]; ***Kann v Maggies Paratransit Corp.***, 882 NYS2d 129, 130, 63 AD3d 792 [2d Dept 2009]).

Initially, the Court notes that portion of the MV-104A police accident report entitled "Accident Description/Officer's Notes" constitutes hearsay not subject to an exception, is inadmissible, and has not been considered by the Court in rendering this decision (*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]).

Here, defendants have established their *prima facie* entitlement to summary judgment by submitting evidence that plaintiff's failure to yield the right of way to their oncoming vehicle while attempting to make a left turn across two lanes of traffic, and into a shopping center's driveway, was the sole proximate cause of the subject accident (*see* Vehicle and Traffic Law § 1141; ***Anzel v Pistorino***, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; ***Colandrea v Choku***, 94 AD3d 1034, 943 NYS2d 166 [2d Dept 2012]). Plaintiff had a duty to yield to defendants' vehicle pursuant to Vehicle and Traffic Law § 1141, as well as a "common-law duty to see that which [she] should have seen

through the proper use of [her] senses" (***Botero v Erraez***, 289 AD2d 274, 275, 734 NYS2d 565, 566 [2d Dept 2001]; *see also* ***Ferrara v Castro***, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]).

Defendants having established a *prima facie* case of entitlement to summary judgment, shifted the burden to plaintiff to raise a triable issue of material fact (*see* ***Alvarez v Prospect Hosp.***, *supra*). Plaintiff opposes defendants' motion on the grounds that: (1) the unsigned deposition transcripts submitted by defendants in support of their motion are inadmissible; (2) the accident report is incomplete; and (3) triable facts exist as to whether Plunkett was operating his vehicle at an excessive speed or could have avoided the accident. In opposition, plaintiff submits one photograph and a certified copy of a MV-104A police accident report comprised of six pages.

Plaintiff's argument regarding the admissibility of unsigned transcripts, the service of which upon the various parties has not been proven by movants, is unavailing here. First, as the unsigned deposition transcripts of Plunkett and Cordts were submitted in support of their motion, such transcripts were adopted by each as accurate (*see* ***Gezelter v Pecora***, 129 AD3d 1021, 13 NYS3d 141 [2d Dept 2015]). As to the deposition transcripts of plaintiff and nonparty Catherine M. Garrison, submitted by defendants in support of the instant motion, each has been certified by the court reporter and plaintiff has not challenged the accuracy of those transcripts. Therefore, the Court may consider them (*see* ***Lee v Mason***, 139 AD3d 807, 33 NYS3d 76 [2d Dept 2016]; ***Gezelter v Pecora***, *supra*).

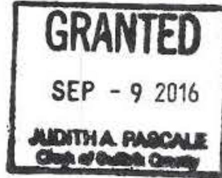
With regard to the MV-104A police accident report, plaintiff is correct in her assertion that movants failed to include in their moving papers the pages of that report which contain the purported contemporaneous written statements of nonparty witnesses Catherine M. Garrison and Margaret R. Humel. As plaintiff has included the missing page in her opposition to this motion, the Court will duly consider Ms. Garrison's written statement. However, the written statement ascribed to Ms. Humel is unsworn, unsigned, and therefore inadmissible hearsay not subject to any exception (*see* ***Daliendo v Johnson***, *supra*).

Plaintiff's final contention is that triable facts exist as to whether defendants were comparatively negligent by operating their vehicle at an excessive speed and failing to take evasive action to avoid her vehicle. Here, neither of the parties has alleged that they saw the other's vehicle for more than two seconds before the impact. Such a brief period of time in which to react is generally insufficient to raise a triable issue of fact with respect to a driver's failure to take evasive action and provide a basis for a finding of negligence on the part of defendants (*see* ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]; ***Lupowitz v Fogarty***, 295 AD2d 576, 744 NYS2d 480 [2d Dept 2002]; *see also* ***Le Claire v Pratt***, 270 AD2d 612, 704 NYS2d 354 [3d Dept 2000]). Plunkett's musing that he "thinks" the speed limit in the area of the accident was 45 mph and that the maximum speed he attained was "[a]bout 45, 50 [mph]," even if accepted as fact, is *de minimis* and not a proximate cause of this accident given defendants' clear possession of the right-of-way, especially when coupled with Ms. Garrison's sworn testimony that defendants were traveling "within the speed limit" (*see* ***Payne v Rodriguez***, 288 AD2d 280, 737 NYS2d 370 [2d Dept 2001]; ***Galvin v Zacholl***, 302 AD2d 965, 755 NYS2d 175 [4th Dept 2003]). Plaintiff's testimony concerning the speed of defendants' vehicle is

vague and fails to raise an issue of fact (*see* ***Yelder v Walters***, *supra*; ***Batts v Page***, 51 AD3d 833, 858 NYS2d 748 [2d Dept 2008]).

Accordingly, defendants' motion for summary judgment dismissing plaintiff's claims against them is granted.

Dated: September 9, 2016



Hon. Joseph Farneti
Acting Justice Supreme Court

__X__ **FINAL DISPOSITION** _____ **NON-FINAL DISPOSITION**

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