Giaculli v Jankowski
2016 NY Slip Op 32834(U)
December 14, 2016
Supreme Court, Orange County
Docket Number: 005048/2014
Judge: Gretchen Walsh
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To commence the statutory time period for appeals as of right CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE
--X

ORIGINAL

ROBERT GIACULLI and NORA GIACULLI, Individually, and as Parents and Natural Guardians of Cxxxx G and Txxxx G,

Plaintiffs,

-against -

WILLIAM JANKOWSKI,

Defendant.
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Index # 005048/2014
Motion Seq. # 1
Motion Date: 9/29/16
DECISION & ORDER

WALSH, J.

Defendant William Jankowski ("Defendant") moves this Court for an order granting summary judgment dismissing the Complaint of Plaintiffs Robert Giaculli and Nora Giaculli, individually, and as parents and Natural Guardians of CxxxxG ("CG") and TxxxG ("TG") (collectively "Plaintiffs") pursuant to CPLR 3212 in its entirety.[1] Plaintiffs oppose the motion.

PROCEDURAL BACKGROUND

Plaintiffs commenced this action by filing their Summons and Complaint with the Orange County Clerk's Office on July 8, 2014 (Def's Ex A). Defendant filed a Verified Answer asserting three affirmative defenses and a counterclaim on or about October 17, 2014. Plaintiffs served Defendant with a Verified Bill of Particulars in February, 2015 (Def's Ex B). Plaintiffs' Note of Issue was filed with the Court on June 6, 2016. Pursuant to a conference held May 26, 2016, the Court extended Defendant's time to file the Motion for Summary Judgment to 45 days from the service/filing of the Note of Issue (Def's Ex D).

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[1]Defendant originally moved for an order pursuant to CPLR 3212 and Insurance Law 5104 and 5102 (d) dismissing Plaintiff "TG's" complaint. This branch of Defendant's motion shall be granted without opposition since in their opposition, Plaintiffs have agreed that "TG" did not sustain a serious injury and therefore, have consented to the dismissal of TG's claim (see Affirmation of Kirk O. Orseck, Esq. in Opposition dated September 7, 2016 ["Orseck Opp. Aff."] at ¶ 2).

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by CG, arising from an accident which occurred on April 6, 2014 at approximately 4:15 pm while Defendant was operating his 2004 Chevrolet pick-up truck on Carpenter Avenue in the Town of Wallkill, New York as CG, who was 12 years of age at the time of the accident, was riding her bicycle with her 9 year old sister, TG, standing on the pegs at the back of the bicycle holding on to CG's shoulders. The minor girls were riding downhill on Wisner Avenue, a street which intersects with Carpenter Avenue. It is not disputed that there is a blinking yellow light for traffic proceeding on Carpenter Avenue and a blinking red light and a stop sign for traffic proceeding on Wisner Avenue. The vehicle and bicycle collided in the intersection.

THE PARTIES' CONTENTIONS

In their Verified Bill of Particulars, Plaintiffs claim that Defendant was negligent in the operation of his vehicle by operating it at excessive speed; failing to keep his vehicle under control; failing to take proper actions after observing CG's bicycle; and failing to stop or turn his vehicle to prevent contact with CG's bicycle (Def's Ex B).

Defendant claims "that it is 'more likely' or 'more reasonable' to conclude under the circumstances of this matter that plaintiff's negligent action caused the happening of this accident" (Affirmation of Michael J. Hickey, Esq. dated July 15, 2016 ["Hickey Aff."]). "Hickey Aff. at ¶ 42"). Defendant claims that the sole proximate cause of the accident was the negligent action of cyclist CG when she disregarded the stop sign and red blinking light and, without warning, entered the intersection and struck the right side of Defendant's vehicle. Defendant further claims that under the "emergency doctrine," he is not liable.[2]

To support his motion for summary judgment, Defendant submits (1) his counsel's affirmation, together with various exhibits; (2) an affidavit from his expert, Richard S. Hermance, a Certified Accident Reconstructionist by the National Accreditation Commission for Traffic Accident Reconstruction, sworn to July 15, 2016 ("Hermance Aff."); and (3) relevant excerpts from the deposition transcripts of CG ("Ex. E"), TG ("Ex. F"), Defendant ("Ex. I") and Corinne Jankowski, an adult passenger in Defendant's vehicle at the time of the accident ("Ex. J").

In his affidavit Richard S. Hermance, an expert in the field of scientific automobile accident reconstruction and cause analysis opines that "within a reasonable degree of certainty based upon his expertise in the field of accident reconstruction and causation ... the sole

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[2]Defendant did not assert the affirmative defense in his answer. Notwithstanding, the Court will consider the doctrine in determining this motion (*see Bello v Transit Auth. of N.Y. City*, 12 AD3d 58 [2d Dept 2004]).

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proximate cause of the accident was the negligent and improper operation of the bicycle upon which the plaintiffs were riding in that the operator of the bicycle, 'CG', failed to yield the right of way at the intersection, disregarded and failed to comply with the traffic control devices at the intersection including the stop sign and red blinking light and failed to comply with New York State Vehicle and Traffic Law, including but not limited to Sections 1110, 1111, 1113, 1142, 1172, 1231 and 1232" (Hermance Aff. at ¶ 15). Mr. Hermance bases his opinion upon an inspection and examination of the intersection of Carpenter Avenue and Wisner Avenue; an inspection of Defendant's 2004 Chevrolet pick-up truck; the police report[3]; photographs taken by the police; the EMS report; photographs taken of Plaintiff's bicycle; the medical records of CG and TG; and the deposition testimony of the parties (*id.* at ¶5).

At her deposition, CG testified that in the months prior to the accident, she rode her bike every day and it operated properly. There were no problems with the brakes. Although she does not remember the accident, she does remember riding her bicycle down Wisner Avenue, which she described as steep. CG further testified that she was aware that there was a blinking red light at the bottom of Wisner Avenue and that she knew it meant that she was supposed to stop and on other occasions before the accident, she stopped at the blinking red light when she was riding her bicycle. She did not know whether there was a stop sign located there (Ex. E, at 23-23; 56).

Defendant testified that on the day of the accident, he was driving a 2004 Chevy Silverado pickup truck that he been purchased new in 2004 (Ex. I, 34). The vehicle was regularly inspected and he did not have issues with its operation (*id.* at 38-40). At the time of the accident, he was operating the vehicle with his adult daughter as a passenger in the front seat, after having spent the day moving furniture from his house to his parents' barn, which was located about five miles away. He took the same route each time through the intersection of Carpenter Avenue and Wisner Avenue. The accident occurred on the fourth trip (*id.* at 40). Defendant testified that the road was dry, straight and level, the speed limit on Carpenter Avenue was 45 mph, there were no issues with the road surface, and nothing obstructing his view from his vehicle (*id.* at 36-44). Defendant further testified that he was traveling south toward the intersection and when asked about the vegetation surrounding the road there he responded "Trimmed, clean. Nothing in the way" (*id.* at 52). Defendant testified that as he was approaching the intersection, he slowed down a little bit and looked around. The music, heater and air conditioner were not on but he doesn't recall whether he was conversing with his daughter (*id.* at 54). As he approached the intersection his speed was thirty or thirty-five (*id.* at 57). Defendant was approximately two hundred feet from the intersection when he first saw CG's moving bicycle which was located on the corner of Wisner and Carpenter (*id.* at 55-66). The bicycle hit "part of the front fender and the door and the mirror" (*id.* at 57-58). Defendant testified that he applied his brakes when he first saw Plaintiffs and swerved into the opposite lane in order to avoid them (*id.* at 58). After the impact, his vehicle traveled approximately fifty feet (*id.*).

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[3]The police accident report is not in admissible form. Therefore, the Court will not consider it in its determination.

LEGAL DISCUSSION

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. 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 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v NYU Medical Center*, 64 NY2d 85 [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 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P Day Realty Corp v Aeroxon Prods*, 148 AD2d 499 [2nd Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus* Co, 79 AD2d 1014 [2nd Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*see Friends of Animals v Associated Fur Mfrs*, 46 NY2d 1065 [1979]).

Here, Defendant claims that under the "emergency doctrine" he is not liable as a matter of law for the accident. "New York has long recognized the 'emergency doctrine' which provides that when a person is faced with 'a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration,' he or she will not be held liable upon a finding that he or she 'took reasonable and prudent [action] in the emergency context'"(*Ward v Cox*, 38 AD3d 313, 314 [1st Dept 2007], *quoting Caristo v Sanzone*, 96 NY2d 172, 174 [2001], *quoting Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]). As a threshold question, the Court must determine whether Defendant has sufficiently demonstrated that an emergency existed as a matter of law. Although the Court agrees with Defendant that he was entitled to assume that CG would obey the traffic laws requiring her to yield (*see McCain v Larosa*, 41 AD3d 792, 793 [2d Dept 2007]; *Exime v Williams*, 45 AD3d 633 [2d Dept 2007]), there is a significant conflict on material issues of fact between Defendant's original deposition testimony and the corrections made on the errata sheet, which create a credibility issue as to whether an emergency existed.

When questioned at his deposition, Defendant testified that he first saw the bicycle when he was two hundred feet away from the intersection, and there was nothing obstructing his view. He admits to not remembering whether he was engaged in a conversation with his adult daughter who was sitting in the front passenger seat. He also testified that he was traveling at 30 to 35 mph at impact and that his car traveled approximately 50 feet after the impact. Thereafter, he supplied an errata sheet in compliance with CPLR 3116 (1), changing three responses to deposition questions which provided material facts regarding how the accident occurred. First, the response

to when he first saw the bicycle was changed from 200 feet to 15 feet. The explanation provided for the correction by Defendant was that he "Didn't understand question 'First saw it'?" Second, Defendant changed the response to his rate of speed from 30 to 35 mph to 5 mph, and the distance his vehicle traveled after impact was changed from 50 feet to "almost stopped at impact" (Ex. I, errata sheet). Defendant offers no explanation for the second two changes. Notwithstanding Defendant's claim that he didn't understand the question regarding the first change on the errata sheet, the question put to Defendant at the deposition was straightforward. "How far away from the intersection were you when you first saw it?" was not phrased in a manner that rendered it not understandable. In any event, Defendant did not ask for a clarification of the question at the deposition. The explanation offered for the changes is either lacking or insufficient to extinguish the factual issue as to how much time and distance was between Plaintiffs' bicycle and Defendant's vehicle prior to the impact, as well as the Defendant's rate of speed and travel distance after impact. These facts are obviously material and were the facts on which Defendant's expert relied in rendering his opinion regarding the cause of the accident based on his accident reconstruction. Although, it is noteworthy that Defendant's expert failed to address the specific distance Defendant's vehicle was when he first saw the bicycle. It is further noteworthy that Defendant's expert claims that there is a "hillside embarkment on Carpenter Avenue which . . . severely limits the defendant driver's view of vehicles coming down Wisner Avenue towards the intersection" and Defendant testified that he had an unobstructed view of the bicycle as he was approaching the intersection. "Where there is a significant conflict on a material issue between the original deposition testimony and the correction on the errata sheet a credibility issue is created that cannot be resolved by summary judgment" (*Breco Envtl. Contrs. v Town of Smithtown*, 31 AD3d 359, 360 [2d Dept 2006]; *see also Rizzo v Moseley*, 74 AD3d 942 [2d Dept 2010]; *Nyer v Putnam Nursing & Rehab. Ctr.*, 62 AD3d 767 [2d Dept 2008]; *Natale v Woodcock*, 35 AD3d 1128 [3d Dept 2006]).

Here, the Court finds that Defendant has not shown *prima facie* entitlement to relief under the emergency doctrine. Based upon the inconsistencies in Defendant's testimony and his expert's report as to the location of Defendant's vehicle when Defendant first observed the infant Plaintiff, together with the inconsistent evidence regarding Defendant's vehicle's rate of speed, Defendant has failed to demonstrate *prima facie* entitlement to relief under the emergency doctrine (*see Franco v G. Michael Cab Corp.*, 71 AD3d 1082 [2d Dept 2010]). Defendant has not sufficiently demonstrated that "faced with a sudden and unexpected circumstances, not of his own making, he acted reasonably prudent in the context of the emergency" (*see Franco v G. Michael Cab Corp., supra.*).

Further, "an operator of a motor vehicle traveling with the right-of-way has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles" (*Fried v Misser*, 115 AD3d 910, 910 [2d Dept 2014], *citing Allen v Echols*, 88 AD3d 926 , 926 [2d Dept 2011]; *Pollack v Margolin*, 84 AD3d 1341, 1342 [2d Dept 2011]; *Bonilla v Calabria*, 80 AD3d 720, 720 [2d Dept 2011]; *Todd v Godek*, 71 AD3d 872, 872 [2d Dept 2010]). "A driver who has the right-of-way may still be found partially

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at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in an intersection" (*Jones v Vialva-Duke*, 106 AD3d 1052, 1052-1053 [2d Dept 2013]) *citing Virzi v Fraser*, 51 AD3d 784 [2d Dept 2008]; *Rotondi v Rao*, 49 AD3d 520 [2008]; *Mateiasevici v Daccordo*, 34 AD3d 651, 652 [2d Dept 2006]). "Indeed, a movant seeking summary judgment is required to make a *prima facie* showing that he or she is free from comparative fault" (*see Jones, supra* 106 AD3dat 1053; *see also Mackenzie v City of N.Y.*, 81 AD3d 699 [2d Dept 2011]; *Bonilla v Gutierrez*, 81 AD3d 581 [2d Dept 2011]; *Roman v A1 Limousine, Inc.*, 76 AD3d 552 [2d Dept 2010]). Moreover, "the issue of comparative fault is generally a question for the trier of fact" (*Allen, supra* 88 AD3d at 922; *Wilson v Rosedom*, 82 AD3d 970 [2d Dept 2011]).

Here, Defendant has not demonstrated his *prima facie* entitlement to summary judgment. Defendant's own submissions create a genuine issue of fact as to whether Defendant was located a distance of 200 feet or 5 feet from the intersection when he first saw the bicycle, the rate of his vehicle's speed and the distance traveled after impact. Indeed, Mr. Hermance's expert opinion is based upon the review of Mr. Jankowski's testimony, inter alia, and he opines that Defendant's vehicle "entered the intersection at a speed less than the posted speed limit which is consistent with the pick-up truck proceeding cautiously, and relatively slowly or actually in the process of slowing prior to the intersection. The post impact travel distance was short and is consistent with the pick-up truck entering the intersection at a safe speed" (Hermance Aff. at ¶ 12). The facts `upon which Mr. Hermance's opinion is based present issues of fact for a jury.

Accordingly, Defendant has failed to establish that CG's alleged negligence in failing to stop at the blinking red light and failing to yield to Defendant's right of way was the sole proximate cause of the accident (*see Fried v. Misser,* 115 AD3d 910 [2d Dept 2014]). Therefore, Defendant has failed to establish his *prima facie* entitlement to judgment as a matter of law (*see Vinueza v Tarar*, 100 AD3d 742 [2d Dept 2012]; *Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295 [2d Dept 2008]; *Borukhow v Cuff,* 48 AD3d 726 [2d Dept 2008].

CONCLUSION

The Court has read the following papers with regard to this motion:

(1) Notice of Motion for Summary Judgment dated July 15, 2016; Affirmation of Michael J. Hickey, Esq. dated on July 15, 2016, together with the exhibits annexed thereto; Affidavit of Richard S. Hermance sworn to June 23, 2016;

(2) Affirmation in Opposition of Kirk O. Orseck, Esq. dated September 7, 2016, together with the exhibits annexed thereto; Affidavit of John A. Serth, Jr. P.E.,sworn to August 16, 2016; and

(3) Reply Affirmation of Michael J. Hickey, Esq. dated August 26, 2016.

Based upon the foregoing, it is hereby

ORDERED that the motion of Defendant William Jankowski seeking an order granting summary judgment dismissing the Complaint of Plaintiffs Robert Giaculli and Nora Giaculli, individually, and as parents and Natural Guardians of CxxxxG and TxxxG is granted in part and denied in part, and it is further;

ORDERED that the branch of Defendant's motion seeking to dismiss the claims of the Complaint seeking a recovery based on the injuries allegedly sustained by TxxG is granted on consent; and it is further

ORDERED that the branch of Defendant's motion seeking to dismiss the claims of the Complaint seeking a recovery based on the injuries allegedly sustained by CxxxG is denied; and it is further

ORDERED the parties are directed to appear for a conference before the Hon. Elaine Slobod, J.S.C. on January 19, 2017 at 9:30 a.m. to schedule the trial in this action.

This constitutes the Decision and Order of this Court.

Dated: Goshen, New York
December 14, 2016

ENTER:

HON. GRETCHEN WALSH, J.S.C.

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