

**Poulin v Bond**

2017 NY Slip Op 30608(U)

February 3, 2017

Supreme Court, Suffolk County

Docket Number: 15-1219

Judge: Joseph Farneti

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and Indian Head Road, in the Town of Smithtown, New York. The accident allegedly occurred when the vehicle operated by defendant Bond collided with the vehicle operated by defendant Zeoli, which was then propelled into plaintiff's vehicle.

Plaintiff now moves for summary judgment in her favor on the issue of liability, arguing that defendants were involved in a collision, which caused defendant Zeoli's vehicle to come in contact with her vehicle. Plaintiff submits, in support, copies of the pleadings, the transcripts of the deposition testimony of plaintiff and Zeoli, and Zeoli's statement included in the police report.

Defendant Zeoli cross-moves for summary judgment dismissing the complaint against him, arguing that defendant Bond's violation of Vehicle and Traffic Law § 1141, by turning left without yielding the right-of-way, was the proximate cause of their collision, which caused his vehicle to come in contact with plaintiff's vehicle. Zeoli submits, in support, the transcript of the deposition testimony of defendant Bond. In opposition, plaintiff and defendant Bond argue that issues of fact exist as to whether defendant Zeoli was contributorily negligent. Bond submits, in opposition, his witness statement.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (*Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Pursuant to Vehicle and Traffic Law § 1141, a vehicle intending to turn left within an intersection must yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection. A driver who attempts to make a left turn when it is not reasonably safe to do so, such as when another vehicle is lawfully present in the intersection and the driver fails to see this through proper use of his senses, is in violation of this provision of the Vehicle and Traffic Law (see *Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Krajiniak v Jin Y Trading, Inc.*, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; *Loch v Garber*, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]).

Further, a motorist is required to “see that which through proper use of [his or her] senses [he or she] should have seen” (*Bongiovi v Hoffman*, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; see *Nohs v Diraimondo*, 140 AD3d 1132, 35 NYS3d 209 [2d Dept 2016]; *Thompson v Schmitt*, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]). The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey traffic laws requiring him or her to yield (see *Kassim v Uddin*, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]; *Ducie v Ippolito*, *supra*; *Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Dominguez v CCM Computers, Inc.*, 74 AD3d 728, 902 NYS2d 163 [2d Dept 2010]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). However, “[a] driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection” (*Gause v Martinez*, 91 AD3d 595, 596, 936 NYS2d 272 [2d Dept 2012], quoting *Todd v Godek*, 71 AD3d 872, 872, 895 NYS2d 861 [2d Dept 2010]; see *Adobe v Junel*, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; *Shui-Kwan Lui v Serrone*, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]). Nevertheless, as a matter of law, a driver is not comparatively negligent in failing to avoid the collision if he or she has a right-of-way and only has seconds to react to a vehicle that has failed to yield (see *Foley v Santucci*, *supra*; *Ducie v Ippolito*, *supra*; *Breen v Seibert*, 123 AD3d 963, 999 NYS2d 176 [2d Dept 2014]; *Bennett v Granata*, 118 AD3d 652, 987 NYS2d 424 [2d Dept 2014]; *Vainer v DiSalvo*, *supra*; *Yelder v Walters*, *supra*). Finally, even where there is evidence that another driver involved in the accident was negligent as a matter of law due to a violation of the Vehicle and Traffic Law, “the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law” (*Pollack v Margolin*, 84 AD3d 1341, 1342, 924 NYS2d 282 [2d Dept 2011]; see *Regans v Baratta*, 106 AD3d 893, 965 NYS2d 171 [2d Dept 2013]; *Shui-Kwan Lui v Serrone*, *supra*).

Defendant Zeoli established *prima facie* entitlement to summary judgment dismissing the complaint against him by showing that defendant Bond was the proximate cause of the accident involving plaintiff’s vehicle and that he was not contributorily negligent (see Vehicle and Traffic Law § 1141; *Foley v Santucci*, *supra*). Likewise, plaintiff’s submissions establish a *prima facie* case that Bond’s negligence was the sole cause of the accident. Plaintiff testified that she was stopped at a red light in the right turning lane on Indian Head Road for approximately ten seconds when the front of Zeoli’s vehicle collided with the front driver’s side of her vehicle. Prior to the impact with her vehicle, plaintiff witnessed the Zeoli and Bond vehicles collide in the intersection when Bond, attempting to turn left from Route 25 onto Indian Head Road, collided with Zeoli’s westbound vehicle. Zeoli testified that as he approached the subject intersection from a distance of 50 feet, he observed Bond begin to turn left from a stopped position, so he attempted to swerve from the left lane into right lane and applied his brakes in order to avoid a collision. Zeoli then observed Bond stop his attempt to complete the left turn for a “split second,” but then continue his turn at which time the front driver’s side of Zeoli’s vehicle collided with the front passenger side of Bond’s vehicle in the intersection. Zeoli further testified that the traffic light changed to yellow as he was proceeding through the intersection, and that he swerved to the right and his vehicle was three-quarters into the right lane upon impact.

By failing to yield the right-of-way when Zeoli was already lawfully in the intersection and making a left turn into the path of Zeoli's vehicle, Bond violated the Vehicle and Traffic Law and was negligent as a matter of law (*see* Vehicle and Traffic Law § 1141; *Palomo v Pozzi*, 57 AD3d 498, 869 NYS2d 153 [2d Dept 2008]; *Spivak v Erickson*, 40 AD3d 962, 836 NYS2d 676 [2d Dept 2007]). Additionally, as Zeoli was lawfully in the intersection at the time of impact (*see Palomo v Pozzi, supra*), he was entitled to assume that Bond would obey traffic laws requiring him to yield (*see Kassim v Uddin, supra; Ducie v Ippolito, supra; Ahern v Lanaia, supra*). Although Zeoli had a duty to use reasonable care to avoid the collision, he was not comparatively at fault, as he testified that the incident happened within a few seconds, and that he swerved into the right lane and applied his brakes in an effort to avoid the collision with Bond (*see Foley v Santucci, supra; Ducie v Ippolito, supra*). Zeoli also testified that due to the impact with Bond's vehicle, his vehicle was propelled into plaintiff's vehicle, which was positioned in the southbound right turning lane of Indian Head Road.

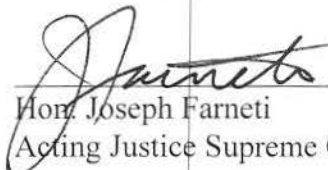
Defendant Bond's submissions in opposition to the cross motion failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra*). Bond argues that there was conflicting testimony as to which lane of westbound traffic the accident occurred and as to the color of the traffic light when Zeoli entered the intersection. Bond contends that he began his left turn when Zeoli was eight to ten car lengths from the intersection, which was not an immediate hazard. However, the fact that Zeoli was unable to travel through the intersection without being struck by Bond's vehicle is evidence that Zeoli's approaching vehicle was an immediate hazard (*see Yelder v Walters, supra*). Plaintiff argues that a triable issue of fact exists as to whether Bond's vehicle was moving or stopped at the time of impact to his vehicle. However, because Bond did not have the right-of-way when he proceeded to turn left across the westbound lanes of traffic and failed to see Zeoli's approaching vehicle through proper use of his senses, it is immaterial whether the accident occurred in the right or left westbound lane or whether Bond's vehicle was stopped or moving at the time of impact (*see Foley v Santucci, supra; Ducie v Ippolito, supra; Salce v Check*, 23 AD3d 451, 805 NYS2d 608 [2d Dept 2005]). Plaintiff failed to raise a triable issue of fact that Zeoli was contributorily negligent in not using reasonable care to avoid the accident by sounding his horn (*see Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; *Doxtader v Janczuk*, 294 Ad2d 859, 741 NYS2d 368 [4th Dept 2002]; *Miesing v Whinnery*, 233 AD2d 551, 649 NYS2d 246 [3d Dept 1996]). Bond's and plaintiff's assertion concerning Zeoli's excessive rate of speed was speculative and insufficient to raise a triable issue of fact (*see Adobea v Junel, supra; Yelder v Walters, supra*). Bond's deposition testimony inferred that the traffic light controlling Zeoli's direction of traffic was yellow as he testified that it was "about to be red," but his previous statement contained in the police report provided that "[Zeoli] went through red." However, Bond's statement is insufficient to raise a triable issue of fact as it is self-serving and hearsay without an exception (*see Hazzard v Burrowes*, 95 AD3d 829, 943 NYS2d 213 [2d Dept 2012]; *Noakes v Rosa*, 54 AD3d 317, 862 NYS2d 573 [2d Dept 2008]; *Casey v Tierno*, 127 AD2d 727, 512 NYS2d 123 [2d Dept 1987]).

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With regard to plaintiff's motion, she established *prima facie* entitlement to summary judgment on the issue of liability only as to defendant Bond by proffering evidence that her vehicle was stopped at an appropriate location within the roadway while waiting to make a right turn and was struck by defendant Zeoli's vehicle only after Zeoli's vehicle was struck by defendant Bond's vehicle. As the accident occurred within a matter of seconds, plaintiff had no ability to avoid the collision (*see Yelders v Walters, supra*). Furthermore, she did not engage in any culpable conduct that contributed to the happening of the accident (*see Medina v Rodriguez, 92 AD3d 850, 939 NYS2d 514 [2d Dept 2012]; Valerio v Johnson, 40 Misc 3d 1225[A], 975 NYS2d 712 [Sup Ct, Queens County 2013]*).

Accordingly, defendant Zeoli's motion for summary judgment dismissing the complaint against him is granted. In light of the determination granting summary judgment in favor of defendant Zeoli, plaintiff's motion for summary judgment on the issue of liability is granted only as to defendant Bond. The claims against the defendant Zeoli dismissed herein are severed and the remaining causes of action against defendant Bond shall continue (*see CPLR 3212 [e] [1]*).

Dated: February 3, 2017

  
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Hon. Joseph Farneti  
Acting Justice Supreme Court

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION