Kinnally v Perlman
2018 NY Slip Op 34148(U)
December 3, 2018
Supreme Court, Westchester County
Docket Number: Index No. 58591/2016
Judge: Charles D. Wood
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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 WESTCHESTER

----------X

MARK RAYMOND KINNALLY, by the co-guardians of his Person and Property, MARK KINNALLY and LISA KINNALLY and MARK KINNALLY and LISA KINNALLY, Individually,

Plaintiffs,

- against -

Index No. 58591/2016
Seqs Nos 4 & 5

ALEXANDER H. PERLMAN, RICHARD I. PERLMAN, SUSAN L. LAMOREAUX, IRON MOUNTAIN INFORMATION MANAGEMENT SERVICES, INC., IRON MOUNTAIN INFORMATION MANAGEMENT, LLC, IRON MOUNTAIN INFORMATION SERVICES, INC., IRON MOUNTAIN, INC. and ARI FLEET, L.T.,

Action No. 1

Defendants.

----------X

SUSAN LAMOREAUX,

Plaintiff,

Index No.
Action No. 2.

-against-

ALEXANDER H. PERLMAN and RICHARD I. PERLMAN,

Defendants.

----------X

WOOD, J.

The following papers were read and considered in connection with Iron Mountain Information Management, LLC, Iron Management Information Services, Inc., Iron Mountain, Inc ("collectively "Iron Mountain") and Ari Fleet, LT., motion for summary judgment (Seq 4); and defendant Susan L Lamoreaux's ("defendant") cross motion for summary judgment on

liability, and opposition of defendants Alexander H. Perlman and Dianne Perlman, as the Adminstratrix of the Estate of Richard I. Perlman ("the Perlmans"), and opposition of plaintiffs:

Iron Mountain's Notice of Motion, Counsel's Affirmation, Exhibits, Memorandum of Law.
Defendant's Notice of Cross-Motion, Counsel's Affirmation.
Plaintiff's/Respondents Counsel's Affirmation in Opposition, Exhibits.
Perlmans' Counsel's Affirmation in Opposition
Iron Mountain's Counsel's Reply Affirmation.
Defendants' Counsel's Reply Affirmation.

Plaintiff, Mark Kinally was a belted, front seat passenger in a vehicle driven by defendant Alexander Perlman ("the driver") owned by the late Richard Perlman ("the Perlman vehicle") that crossed over a broken yellow centerline into opposing lane of traffic, resulting in a collision with a truck operated by defendant, and owned by Iron Mountain. Both Iron Mountain and Ari Fleet, and defendant bring a motion for summary judgment on the issue of liability, dismissing plaintiff's complaint, claiming that there is no triable issue of fact, *inter alia,* the motor vehicle accident was caused solely by the negligence of the driver.

Upon the foregoing papers, the motion is decided as follows:

It is well settled that "a 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]; see Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; see also Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (see Zuckerman v New York, 49 NY2d 557, 562 [1980]; see also Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). Conclusory, unsubstantiated assertions will not suffice to defeat a motion for summary judgment (Barclays Bank of New York, N.A. v Sokol, 128 AD2d

492 [2d Dept 1987]). A party opposing a motion for summary judgment may do so on the basis of deposition testimony as well as other admissible forms of evidence, including an expert's affidavit, and eyewitness testimony (Marconi v Reilly, 254 AD2d 463 [2d Dept 1998]). In deciding a motion for summary judgment, the court is required to view the evidence presented "in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; see Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). The court must accept as true the evidence presented by the nonmoving party and must deny the motion if there is "even arguably any doubt as to the existence of a triable issue" (Kolivas v Kirchoff, 14 AD3d 493 [2d Dept 2005]); Baker v Briarcliff School Dist., 205 AD2d 652,661-662 [2d Dept 1994]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320,324 [1986]).

Generally, Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v City of New York, 721 NYS2d 790 [2d Dept 2000]). A driver is negligent when an accident occurs because "he or she has failed to see that which, through the proper use of her senses he or she should have seen" Ferrara v Castro, 283 AD2d 392, 393 [2d Dept 2001]). A driver is entitled to anticipate that another motorist would obey the traffic laws that required him to yield (Lallemand v Cook, 23 AD3d 533 ([2d Dept 2005]).

As is the case here, a driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic (Eichenwald v Chaudhry, 17 AD3d 403, 404 [2d Dept 2005]). "Crossing a double yellow line into the opposing lane of traffic, in

violation of Vehicle and Traffic Law § 1126(a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's making" (Gadon v Oliva, 294 AD2d 397 [2d Dept 2002]). Courts have held that generally whether an emergency exists and the reasonableness of the response does raise issues of fact, those issues may in appropriate circumstances be determined as a matter of law (Koenig v Lee, 53 AD3d 567 [2d Dept 2008]).

It is undisputed that the driver crossed the yellow line into oncoming traffic. Plaintiff and the driver were members of the SUNY New Paltz collegiate basketball team. The driver left his off-campus house in New Paltz intending to drive his fellow team member, plaintiff and another person to the scheduled practice. While the driver was driving on route 32N, his vehicle lost control on ice and skidded across the roadway. Plaintiff claims that defendant was driving the truck at an excessive, dangerous and unsafe rate of speed for the dangerous and hazardous road conditions, consisting of ice and snow on the roadway, and weather conditions consisting of snow, sleet and rain, which contributed to an emergency of defendant's own creation.

To support their motions, movants argue that defendant was not traveling at a negligent rate of speed; attempted to take all reasonable evasive measures; and was not a contributing factor to this accident. Thus, movants claim they are entitled to summary judgment dismissing plaintiff's complaint against them because defendant was not negligent in the operation of the subject truck during an emergency situation in which a vehicle slid into her lane of travel and caused an accident, and her actions were reasonable and prudent.

The driver testified that on the day of the accident, as he was traveling on Route 32, he does not remember if there was any precipitation coming down, but there was partial snow on the roadway on Route 32, although it had been plowed, he called the roadway wet and slushy, but did not see any ice. He did not have any difficulty maneuvering the Perlman vehicle before Main Street. He explains that Route 32 is one lane in each direction separated by a double

yellow line with small shoulder not enough to fit a whole car. The car in front of him had passed the same location the driver had, but the driver lost control of the Perlman Vehicle, and the driver testified that he assumes that his car hit ice because it felt that the car skid. The Perlman Vehicle started moving toward the left towards the center divider of the roadway, and he saw the truck. The driver testified that he was unable to stop the collision with the truck.

Movants argue that plaintiff cannot assert a viable causes of action against movants, as defendant as the operator of the subject Iron Mountain truck, acted reasonably in light of the emergency situation and was not required to anticipate the Perlman vehicle sliding across the yellow line into oncoming traffic and collide with the Iron Mountain truck. Movants also point out that plaintiff does not dispute that the Perlman vehicle entered defendant's lane mere seconds prior to the collision. Within these seconds, defendant testified that she braked and attempted to move her vehicle to the shoulder on the right side of the road, while continuing to maintain control of the subject truck through the emergency situation.

Dr. John Zolock, PhD., PE,a licensed professional engineer, upon an analysis of photographs, various documents, and a re-creation of the accident, estimated that defendant was traveling at a maximum speed of forty four miles per hour when she first observed the Perlman vehicle sliding towards her, well below Route 32's speed limit of fifty five miles per hour and that due to her braking, was like traveling 25 miles per hour at point of Impact (Brevans Aff in Suport Ex Q). The expert's opinion was that prior to impact, the driver was driving approximately 48 mph, and the truck between 41 and 44 mph. At 3 to 4 seconds before impact, defendant was likely able to perceive the Perlman vehicle losing control and yawing in the opposite lane before it presented a hazard to defendant's lane of travel, the road was wet, snowy and slushy. After braking and just before impact, defendant steered the truck to the

right to avoid the collision and the truck right side tires traveled onto the right shoulder of the trucks lane of travel; the truck traveled 162 feet post impact over 18 seconds from a speed of 18 mph to rest, with defendant maintaining control over the truck.

Joseph Sala, an Exponent Engineering & Scientific Consulting, opined that the accident was not avoidable by defendant, and one could not expect a reasonably alert and attentive driver to have responded in a fashion that would prevent the Perlman vehicle from striking her truck; and no actions on the part of defendant contributed to this accident.

Bruce E. Ketcham, Electrical engineer, opined that under New York law, drivers are only required to drive at reasonably prudent and safe speeds when encountering hazardous road conditions. Neither New York law nor federal regulations require a specific reduction in vehicle speed.

In light of movants' submissions, the subject accident constitutes a classic emergency situation, implicating the "emergency doctrine" (Graci v Kingsley, 146 AD3d 864, 865 [2d Dept 2017]). The emergency doctrine provides that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (Ardila v Cox, 88 AD3d 829, 830 [2d Dept 2011]). A driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic (Ardila v Cox, 88 AD3d at 830). Movants submitted sufficient evidence to establish, prima facie, that defendant was presented with an emergency situation not of her own making when the Perlman vehicle crossed over the yellow line, and that she acted reasonably in response to that emergency by applying the brakes and swerving to the right.

In opposition, plaintiff, and the Perlmans failed to raise a triable issue of fact. Even if defendant could conceivably have swerved her truck to avoid the collision, as some of the experts suggest, such vehicular agility was not required. (Gajjar v Shah, 31 AD3d 377, 378, [2d Dept 2006]). Plaintiff's speculation that defendant's speed contributed to the cause of the collision, or that defendant could have prevented her vehicle from colliding with the Perlman vehicle was insufficient to defeat movants' respective motions for summary judgment.

Plaintiff and Perlman Defendants failed to satisfy this burden because under any reasonable view of the evidence, defendant's conduct was not negligent. She was faced with an emergency situation not of her own making, and she acted reasonably in response to that emergency (Alvarado v New York City Transit Auth., 106 AD3d 845, 846 [2d Dept 2013]).

It is undisputed that the posted vehicle speed limit on Route 32 South near Cameo Lake Road, by the accident scene was 55 miles per hour. According to plaintiff, and joined by the Perlman defendants, this was not an unavoidable collision, in that defendant's alleged excessive rate of speed prevented her from stopping and avoiding contact with the Perlman vehicle. Defendant's truck that she was driving was equipped with a tracking system "Omnitracs Critical Events Recorder" which recorded her speed. She was traveling at speeds between 41 and 44 miles per hour in the 30 seconds before the Perlman Vehicle began to cross into her lane of travel. Her speed recorder documented her speed as 43 mile per hour moments before she began braking to avoid a collision with the Perlman vehicle.

Plaintiff offers the affidavit of Lewis Grill, trucking practices, truck operation, safety and reconstruction expert attesting to the negligence of both defendant and Iron Mountain. He attests that he has been working in the trucking industry since 1968, as a truck driver training instructor and other tasks. He opines that it is good and accepted safety practices for drivers of

trucks of the weight, size dimension and kind of the vehicle operated by defendant must reduce their speed to maintain safe stopping distance, and in this no more than 27.5 miles per hour in roads with posted speed limits of 55 miles per hour in order to maintain safe stopping distances on wet slippery roads covered with ice and or snow.

Also offered was plaintiff's vehicle safety and accident reconstruction expert, Robert D. Klingen, who concludes that had defendant been operating her truck at a safe rate of speed, she would have had sufficient time and distance to avoid the collision with the Perlman vehicle. This expert opines that defendant violated NYS Vehicle and Traffic Law 1180(a), and other Federal Motor Carrier Safety Regulations mirrored by the New York State Commercial Driver's Manual, New York State laws and manuals, and federal regulations as well, by her unsafe driving, the dangerous speed and poor driving choices she made while operating her vehicle on slippery, ice and a snowy roadway, predictably prevented her from decelerating and/or stopping to avoid contact with the Perlman Vehicle.

Plaintiff's experts concur in their respective opinions, based upon the actual hazardous road and weather conditions (ice, snow, wet and slippery roads with reduced traction), that defendant should have been driving at a speed no more than 27.5 miles per hour in accordance with trucking industry safety standards and practices, good and accepted driving practices, provisions of the Federal Motor Carrier Safety Regulations, statements of the United States Department of Transportation, and other authorities.

Plaintiff's expert Alicia C. Wasula, PhD, a certified consulting meteorologist attests that steady precipitation began in New Paltz at approximately 11PM on December 28, 2015, which was a mix of snow, sleet and freezing rain. By 7AM on December 29th, 1.4 inches of new snow had fallen and the temperature was 27 degrees. At the time of the accident, a mix of freezing rain and sleet was falling.

However, movants' expert notes that the manuals and guides raised by plaintiff are merely a study guide and not a standard of care imposed by law on all drivers of commercial trucks (Bruce Ketchan, Ex S)

Based upon this record, and review of the experts reports, plaintiff's experts contentions that defendant contributed to the accident by failing to maintain a proper speed under the prevailing weather and road condition were speculative at best, and insufficient to defeat a motion for summary judgment (Eichenwald v. Chaudhry, 17 AD3d 403, 404 [2005]). New York State law provides that "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing" (VTL §1180). While plaintiff argues that there are unresolved issues of fact as to whether defendant violated VTL §1180 (a) by allegedly proceeding at an excessive speed in view of the wet road conditions, this may be considered to be a triable issue of fact in other situations where the speed caused the accident, but does not hold true for the facts before this court.

Moreover, the argument that Iron Mountain was required to shut down its fleet in light of the winter weather conditions which were fairly routine at the place of the accident has no basis in law or fact. Iron Mountain employees testified that there was some wet snow overnight, and no dangerous condition on the road that would warrant shutting down its fleet.

Defendant's speed elicited by the experts and the deposition testimony was lower than the posted speed limit. Defendants experts Dr. Joseph Sala and Dr. John Zolock opined that defendant did not contribute to the accident in any way, and concluded that her conduct, including her speed, was reasonable.

In conclusion, even though the evidence is viewed, as it must be, in the light most favorable to plaintiff and the driver as the nonmoving parties, they fail to raise an issue of fact of defendant's non-compliance with governing Vehicle and Traffic Law sections, and any contributing factor of defendants' conduct prior to or during the accident.

NOW, therefore for the above stated reasons, it is hereby

ORDERED, that Iron Mountain and Ari Fleet, LT., (Seq 4), and defendant, Susan L. Lamoreaux (Seq 5) motions for summary judgment are Granted, and the complaint is dismissed as against them; and it is further

ORDERED, that the remaining parties are directed to appear in the Settlement Conference Part on January 15, 2019 , at 9:15 a.m. in courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: December 3 , 2018
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF