

Johnson v Nigro

2019 NY Slip Op 34342(U)

June 17, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 604171/2017

Judge: William G. Ford

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This opinion is uncorrected and not selected for official publication.

dispositive motion practice;

ORDERED that third-party defendant's counsel is hereby directed to serve a copy of this decision and order with notice of entry on counsel for all parties by electronic filing and service via electronic mail forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

FACTUAL BACKGROUND & PROCEDURAL HISTORY

Plaintiff brought this personal injury negligence action electronically filing summons and complaint alleging negligence and seeking recovery of damages for personal injury against defendants arising out of a motor vehicle collision which occurred on August 3, 2016 at approximately 8:24 a.m. at the intersection of Vanderbilt Motor Parkway and Marcus Boulevard in Smithtown, Suffolk County, New York.

The action commenced with plaintiff's electronic filing of the summons and complain on March 7, 2017. Defendants joined issue filing an answer to the complaint on April 4, 2017. Shortly thereafter, defendants as third-party plaintiff commenced a third-party action filing and service a third-party summons and complaint against third-party defendant Aviano on April 18, 2017. Issue joined on the third-party complaint on May 8, 2017 with Aviano's filing of her answer.

Discovery in this matter has come to a close and this action certified as ready for trial with the parties completing their discovery compliance conference on April 18, 2019. Thus, this matter appears on the Calendar Control Part's calendar on June 20, 2019.

Presently, third-party defendant Aviano moves under CPLR 3212 unopposed for judgment as a matter of law dismissing defendants & third-party plaintiffs' third-party complaint and crossclaims against her on the basis that defendant Douglas Nigro's negligence is the sole proximate cause for the motor vehicle collision in this matter. In support of her application, movant annexes to the moving papers copies of examinations before trial for the plaintiff, Aviano, and Nigro, as well as a copy of the certified police accident investigation report for the incident in question.

THE PARTIES' DEPOSITION TESTIMONY

Plaintiff Danielle Johnson was deposed pretrial on July 13, 2018. She testified that on the morning of August 3, 2016 at approximately 8:30 a.m. she was the sole passenger occupying the front seat in her mother's vehicle that was involved in a motor vehicle collision. She and her mother, third-party defendant Aviano were travelling to her work at the Department of Labor in Hauppauge from their shared home. Plaintiff was interning at her mother's office at the time. She recalled that they were due into work at 8:30 a.m. Ms. Johnson could not recall the

prevailing weather conditions at the time of the incident nor could she recall the traffic conditions. She remembered that her mother's intent was to proceed straight through the intersection of Marcus Boulevard and Motor Parkway had the collision not occurred. Plaintiff did not recall the color of defendants' vehicle. She described the subject incident as a two-car collision. Prior to impact, plaintiff did not observe or overhear screeching of tires or brakes or sounding of a car horn.

Immediately after impact, plaintiff retrieved her cellphone from the floor of the vehicle and called 911 to report the incident. She used that same cellphone to document the occurrence taking post-incident photographs. In so doing, Ms. Johnson observed damage to the front driver's side of her mother's vehicle. After the incident, she observed defendant operated a red "truck" which was in the process of making a left-hand turn and was perpendicular to her mother's vehicle immediately prior to collision.

Defendant Douglas Nigro was deposed on July 16, 2018. He testified that on August 3, 2016 at approximately 8:20 a.m. he was involved in a motor vehicle collision. At that date and time, he was operating his mother's 2007 Dodge Durango SUV and was travelling from home on his morning commute to work at a commercial office building located at 350 Motor Parkway in Hauppauge, Suffolk County, New York. Nigro stated that on that particular morning he was due into work at anywhere between 8:00 and 8:30 a.m. and that he was not running late. Prior to the incident, he recalled being on the road for about 15 minutes. His route to work brought him eastbound on Motor Parkway and he intended to enter his job's parking lot via its entrance on Marcus Boulevard, near its intersection with Motor Parkway. Nigro could not recall his highest rate of speed or the posted speed limit in the vicinity of the incident.

Defendant did recall that the intersection between Motor Parkway and Marcus Blvd. was controlled by a traffic light, but he could not recall the color of the light immediately prior to impact. Nor could Nigro specifically recall whether he brought his vehicle to a complete stop at the intersection prior to the incident. His intent was after travelling eastbound in the turning lane of Motor Parkway, to turn across the westbound lanes of oncoming traffic and turn into the driveway of his place of employment's parking lot at Marcus Blvd. In the process of making this turn, defendant stated his vehicle collided with plaintiff's vehicle, which he denied having observed prior to collision. Nigro described the collision as a heavy impact, occurring within 6-7 feet from the sidewalk and driveway near his job's parking lot, with his vehicle's tires just crossing over the righthand turning lane at time of impact. Defendant could not specifically recall having deployed his brakes prior to impact, or whether he attempted engaging any evasive maneuvers. Nor could he recall observing or overhearing screeching or tires, brakes or sounding of a car horn. The impact was characterized by Nigro as medium to heavy impact. After the incident, he observed plaintiff's vehicle as a silver BMW "convertible." He also observed damage to the front seat passenger side of his vehicle and the front driver's side of plaintiff's vehicle as a result of the collision.

Third-party defendant Aviano was also deposed on July 16, 2018. She testified that on the date time and location of the incident, she was operating a 2011 silver BMW XI-5, travelling westbound on Motor Parkway on her morning commute to work at her office located at 395 Oser Avenue, Hauppauge, Suffolk County, New York. Aviano stated she had been travelling on Motor Parkway for approximately 5 minutes prior to the incident, and about 10 minutes into her commute in total. Had the collision not occurred, her stated intent was to proceed to make a

righthand turn from Motor Parkway onto Marcus Blvd. at the intersection. Prior to the incident, Aviano observed moderate traffic on Moto Parkway in the vicinity of the intersection, which observed was controlled by a traffic control light. She claimed that her rate of speed coming into the intersection was between 10 and 15 MPH. At the time of the incident, Aviano's vehicle was fully within the righthand turning lane, and had been there for approximately 1 second before she observed defendant's vehicle turn in front of her causing a collision. Aviano testified that she deployed her vehicle's brake with "heavy force" in an attempt to avoid the collision without success. She recalled a "heavy impact" with no airbag deployment, involving the front driver's side quarter panel and tire of her vehicle colliding with the front passenger's side of defendant's vehicle. After the incident, Aviano gave a statement to police responding to the scene where she informed the officer that defendant "cut across" traffic to enter a parking lot.

STANDARD OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (*Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (*Gniewek v Consol. Edison Co.*, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see Goldstein v. Monroe County*, 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of 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 (*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]); *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman, supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v*

Pomeroy, 35 NY2d 361, 362 NYS2d 131 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

However, where as here, the non-movant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]).

DISCUSSION

The movant in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries (*Montalvo v Cedeno*, 170 AD3d 1166 [2d Dept 2019]; accord *Buchanan v Keller*, 169 AD3d 989, 991, 95 NYS3d 252, 254 [2d Dept 2019][holding that plaintiff-movant seeking summary judgment on liability is no longer required to show freedom from comparative fault in order to establish *prima facie* entitlement to judgment as a matter of law]; quoting *Rodriguez v. City of New York*, 31 NY3d 312 [2018]).

Pursuant to Vehicle and Traffic Law § 1141, the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard (*see Attl v. Spetler*, 137 AD3d 1176, 28 NYS3d 699 [2d Dept 2016]; *Ducie v. Ippolito*, 95 AD3d 1067, 1067–1068, 944 NYS2d 275 [2d Dept 2012]; *Ahern v. Lanaia*, 85 A.D.3d 696, 924 N.Y.S.2d 802; *Lebron v Mensah*, 161 AD3d 972, 973-74, 76 NYS3d 219, 221 [2d Dept 2018]).

The driver of a vehicle intending to turn to the left within an intersection ... 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). “The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield” (*Giwa v Bloom*, 154 AD3d 921, 921, 62 NYS3d 527, 529 [2d Dept 2017]).

In addition to relying on the above cited party deposition testimony, movant also relies upon the certified police accident investigation support to corroborate her contention that defendant Nigro’s negligence is the proximate cause of subject collision. In particular, Aviano seeks to rely on the investigation officer’s narrative report and account of the occurrence. However, since the responding officer has not been argued to be an eyewitness or a separate fact percipient witness to the collision, his account is thus based on the hearsay statements made by the participants (the parties). Accordingly, despite the officer’s business duty to investigate and report, and the overall reliability of the certified report, this hearsay account will not be admitted as evidence to bootstrap the otherwise sworn testimony and accounts of the occurrence provided by the parties. The Second Department has previously stated as much holding that “[p]ursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer’s personal observations and while carrying out police duties. If information contained in a police accident report was not based upon the police officer’s personal observations, it may nevertheless be admissible as a business record “if the person giving the police officer the information contained in

the report was under a business duty to relate the facts to him [or her]" (*Memenza v Cole*, 131 AD3d 1020, 1021-22, 16 NYS3d 287, 289 [2d Dept 2015]; accord *Shehab v Powers*, 150 AD3d 918, 919, 54 NYS3d 104, 106 [2d Dept 2017])[information in a police accident report is "admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties", however also holding that information in a police accident report is inadmissible where the information came from witnesses not engaged in the police business in the course of which the memorandum was made, and the information does not qualify under any other hearsay exception]).

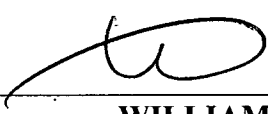
CONCLUSION

Having reviewed the moving papers, the Court finds that movant has met with her *prima facie* burden for entitlement to summary judgment dismissing the third-party complaint and its crossclaims against her. The motion record here is replete with unopposed and uncontroverted evidence which taken together entitles the third-party defendant to an inference that defendant Nigro's failure to yield the right of way on his turn against oncoming traffic constituted negligence and the sole proximate cause of plaintiff's motor vehicle collision. Further, having failed to oppose the application in any way constitutes waiver or a concession of those facts and argument.

Accordingly, the motion is **granted** in its entirety and summary judgment in movant's favor is thereby entered **dismissing** the third-party complaint. The parties are therefore **directed** to submit a change of the caption in accord with this decision and order with the Suffolk County Clerk **no later than 30 days** after service of this decision and order with notice of entry.

The foregoing constitutes the decision and order of this Court.

Dated: June 17, 2019
Riverhead, New York



WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION**

_____ **X** _____ **NON-FINAL DISPOSITION**