Alvarez v Suburban Propane Partners, L.P.
2019 NY Slip Op 34444(U)
July 23, 2019
Supreme Court, Westchester County
Docket Number: Index No. 64935/2016
Judge: William J. Giacomo
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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 WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

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EDUARDO ALVAREZ and CAROLINA REYES,
Plaintiffs,

Index No. 64935/2016

– against –

DECISION & ORDER

SUBURBAN PROPANE PARTNERS, L.P. and ANTHONY S. LARKIN,
Defendants.
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In an action to recover damages for personal injuries as a result of a motor vehicle accident, the plaintiff moves for summary judgment on the issue of liability, pursuant to CPLR 3212:

Papers Considered

1. Notice of Motion/Affirmation of Lawrence Donovan, Esq./Affidavit of Eduardo Alvarez/Exhibits 1-9;
2. Affirmation of James E. Hacker, Esq. in Opposition/Affidavit of Anthony S. Larkin/Exhibit A/Affidavit of Gregory L. Witte/Exhibit A-B;
3. Reply Affidavit of Lawrence Donovan, Esq.

Factual and Procedural Background

Plaintiff commenced this action against defendants to recover damages for personal injuries sustained in a motor vehicle accident that occurred on September 26, 2015. The accident occurred on Croton Dam Road in the Town of New Castle. The defendant Anthony S. Larkin was operating a propane gas delivery truck, owned by the defendant Suburban Propane Partners, L.P. Larkin was backing the propane truck into a customer's driveway, blocking both lanes of travel. The plaintiff, while operating a Misubishi Fuso truck, was driving southbound on Croton Dam Road. As plaintiff drove around a curve, he observed the propane truck and although he hit the brakes, his truck struck the rear driver's side of the propane truck, causing injuries to plaintiff. The propane truck was operable after the impact and there was no explosion.

Plaintiff moves for summary judgment on the issue of liability arguing that he was not negligent and defendants are solely responsible for the accident.

Plaintiff submits an affidavit and appeared for an examination before trial. Plaintiff testified that he was traveling southbound on Croton Dam Road/Route 134 at 30 mph. Croton Dam Road has one lane of travel in each direction. As plaintiff was approaching a blind turn, he observed the defendant's truck across both lanes of travel. Plaintiff attests that he hit the brakes as hard as he could, but his truck did not stop in time. Plaintiff did not observe any safety cones, flares, flags, or any type of warning that would give notice to oncoming motorists of the truck blocking the roadway.

Plaintiff submits the expert affidavit of Nicholas Bellizzi, a professional engineer. Bellizzi attests that he inspected the accident site and reviewed various documentary evidence. Bellizzi described Croton Dam Road as a two-way, two-lane, asphalt, paved roadway with one lane of travel in each direction separated by a double yellow line. The speed limit is 35 mph. Both sides of the roadway are wooded. The line of sight for motorists, such as plaintiff, traveling southbound was measured by Bellizzi to be approximately 120 feet. Bellizzi states that at 30 mph plaintiff's truck would have travelled 110 feet in 2.5 seconds. He calculates the brake stopping distance for plaintiff's truck traveling at 30 mph to be 60 feet. Bellizzi calculated the total stopping distance for plaintiff's truck traveling at 30 mph as the sum of the brake stopping distance and the distance traveled during a 2.5 second perception reaction time, for a total of 170 feet. Thus, according to Bellizzi, plaintiff needed 170 feet to stop his truck which was less than the 120 feet of sight distance available to him. Bellizzi opines that Larkin failed to operate, control, and navigate his truck in a reasonably safe manner; failed to see what there was to be seen; violated VTL 1211(a) by backing up his truck in an unsafe manner; did not use a helper or traffic spotter; and failed to place any warning devices. Bellizzi opines that Larkin's acts were the sole proximate cause of the collision.

In opposition, defendants argue that issues of fact exist. Larkin submits an affidavit and appeared for an examination before trial. Larkin attests that he was employed as a delivery driver by Suburban Propane and was making a propane delivery to a customer at 203 Croton Dam Road/Route 134. At the time of the accident, he was backing up the truck into the customer's driveway. Larkin pulled the propane truck up past the customer's driveway in the northbound lane. As he began backing into the driveway, the front of the truck was in the northbound lane and the back of the truck was in the southbound lane. Larkin proceeded to back into the driveway and testified that both lanes of traffic were blocked by the propane truck. There was a car stopped in the northbound lane waiting. Larkin, while checking his mirrors, observed the plaintiff's truck in the southbound lane passing the curve coming towards the propane truck. At that point, less than a third of the propane truck was in the driveway. Larkin immediately put the truck in drive to attempt to move it out of the way so that the plaintiff's vehicle would not strike the center of the propane tank. Larkin testified that he "floored it" and "tried to get the truck out of the way as quickly as [he] could" (EBT tr. 91).

The strobe light and four-way flashers were on and the back-up beeper was audible. While backing up, he observed a landscape truck traveling southbound in a

down-hill direction traveling "at a high rate of speed" (EBT tr. 93). As plaintiff's truck came around the curve, its tires locked-up, however, the truck continued to propel forward and struck the propane truck. Although during his deposition, Larkin testified that he could not estimate speed, in his affidavit he attests that based upon his experience and training as a driver, plaintiff was traveling in excess of the 35 mph speed limit.

Defendants submit an expert affidavit of Gregory L. Witte, an accident reconstructionist. Witte reviewed the documentary evidence and performed a site investigation. With respect to Bellizzi's affidavit, Witte attests that there is no independent or scientific determination of plaintiff's speed; no scientific backing for plaintiff's alleged reaction time; an unsupported conclusion that plaintiff applied his brakes forcefully without any scientific backing or inquiry into maintenance logs or an independent brake inspection; the braking analysis that was performed was based on the assumed speed of 30 mph and an assumed coefficient of friction of 0.5 without any supporting arguments or independent evaluation; and Bellizzi's calculation of a perception reaction time of 2.5 seconds was assumed without any scientific conclusions.

Witte attests that the criteria for measuring stopping site distance is the height of the driver's eye – for trucks that is 7.6 feet above the road service – and the height of the object as 2 feet above the road surface. According to Witte, using this criteria, the plaintiff's stopping sight distance is 271 feet from plaintiff's vehicle to the center of the northbound lane, where the front side of the propane truck could clearly be observed. When evaluating the sight distance from the southbound lane, the sight distance drops to 220 feet. Witte sates that both methods create a longer stopping sight distance than the 120 feet as calculated by plaintiff's expert. Based upon this criterion, Witte opines that plaintiff had from 220 to 271 feet of stopping distance to bring his truck to a complete halt. If plaintiff was traveling at 30 mph, he could have stopped the truck and avoided the collision. Witte also disputes the road surface friction of .50 as measured by Belilzzi. Witte states that the road surface friction was .60 on the downhill slope faced by plaintiff. Witte also attests that the perception reaction time is 1-1.2 seconds, not the 2.5 seconds stated by plaintiff's expert. Witte opines that the accident was the sole result of plaintiff's excessive speed, distraction, defective brakes, or the failure to respond to the warning signs ahead of the curve.

Discussion

The proponent of a motion for summary judgment 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 (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible

form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *see Zuckerman v City of New York*, 49 NY2d at 562).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (*see Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]). The plaintiff is not required to demonstrate freedom from comparative fault in order to establish a prima facie entitlement to summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Portalatin v City of New York*, 165 AD3d 1302, 1303 [2d Dept 2018]).

Vehicle and Traffic Law 1211(a) provides that the driver shall not back-up a vehicle unless such movement can be made with safety and without interfering with other traffic. Viewing the evidence in the light most favorable to the non-moving party, the plaintiff failed to establish a prima facie showing of entitlement to partial summary judgment on the issue of liability.

The evidence demonstrates that the strobe light, four-way flashers, and back up beeper were all operable on the truck and in use at the time of the accident. The propane truck was a third of the way into the driveway when the plaintiff's truck became visible to Larkin. Moreover, defendant's expert affidavit demonstrates that a vehicle traveling southbound on Route 134, such as plaintiff's truck, could have stopped in sufficient time upon observing the propane truck backing up into the driveway. Thus, issues of fact exist as to whether Larkin took the proper precautions before backing up the propane truck into the customer's driveway.

Accordingly, the plaintiff's motion for summary judgment on the issue of liability pursuant to CPLR 3212 is DENIED.

The parties are directed to appear in the Settlement Conference Part, room 1600, on **August 27, 2019, at 9:15 a.m.** for further proceedings.

Dated: White Plains, New York
July 23, 2019

HON. WILLIAM J. GIACOMO, J.S.C.