

Kirby v S. Helwig & Son, LLC
2020 NY Slip Op 34655(U)
June 9, 2020
Supreme Court, Westchester County
Docket Number: Index No. 50124/2019
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.

ROBERT L. KIRBY and MYLA S. KIRBY, Plaintiff, Action No. 1

- against - Index No. 50124/2019

S. HELWIG & SON, LLC, EUGENE DONALD LENIUS, Defendants. **DECISION & ORDER**
Mot. Seq. 2

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

RUBY CAMPBELL, Plaintiff, Action No. 2

- against - Index No. 20823/2018

J.S. HELWIG & SON, LLC, EUGENE DONALD LENIUS
AND ROBERT KIRBY, Defendants.

x

In an action to recover damages for personal injuries as a result of a motor vehicle accident, the defendant in Action No. 2, Robert Kirby, moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint:

Papers Considered NYSCEF Doc. No.s 41-49, 52, 58-61

- 1. Notice of Motion/Affirmation of Robert J. Spence, Eq./Exhibits A-G;
- 2. Affirmation of Neil R. Kafko, Esq. in Opposition;
- 3. Reply Affirmation of Robert J. Spence, Esq.;
- 4. Affirmation of Jeffrey Samel, Esq. in Opposition/Exhibit A;
- 5. Reply Affirmation of Robert J. Spence, Esq.

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Factual and Procedural Background

Plaintiffs commenced these separate actions for personal injuries sustained as a result of a motor vehicle accident that occurred on May 17, 2018, on westbound Interstate 84, in Dutchess County¹.

Robert L. Kirby's vehicle was traveling in the right lane of westbound I84. Ruby Campbell was a passenger in the Kirby vehicle. Eugene Donald Lenius was operating a tractor trailer in the left lane of westbound I84. The tractor trailer was owned by J.S. Helwig & Son, LLC. The tractor trailer was attempting to change lanes from the left lane to the right lane when it struck the Kirby vehicle.

Kirby, as defendant in Action No. 2, moves for summary judgment dismissing the complaint in Action No. 2 on the grounds that he was not negligent in the happening of the accident and the accident was solely caused by the tractor trailer's unsafe lane change. Kirby submits, inter alia, his deposition transcript, Campbell's deposition transcript, a certified police accident report, and a dash camera video of the accident.

The police accident report states that both vehicles were traveling westbound on I84 with the Kirby vehicle in the right lane and the tractor trailer in the left lane. Kirby advised the responding officer that the tractor trailer changed lanes unsafely and subsequently made contact with his vehicle. Lenius advised the officer that the Kirby vehicle came out of nowhere as he was changing lanes.

Kirby testified that prior to the accident, he observed the truck in his sideview mirror approaching in the left lane. His vehicle, which was traveling in the right lane, was next to the back of the truck which made Kirby uncomfortable. Kirby attempted to accelerate past the truck. As he approached the front of the truck, the truck entered into his lane striking the driver's side of his vehicle.

In opposition, Campbell argues that while the video of the collision appears to show that the accident was solely caused by the unsafe lane change by the tractor trailer, the motion is premature as Lenius has not appeared for a deposition.

J.S. Helwig and Lenius oppose the motion with an affirmation of counsel and an expert affirmation arguing that issues of fact exist as to whether Kirby was negligent. They argue that there is no evidence that Lenius observed Kirby speeding up after the truck had passed Kirby's vehicle. Counsel states that Lenius is no longer an employee under the control of J.S. Helwig and therefore has not been produced for a deposition.

J.S. Helwig and Lenius submit an expert affidavit of Donald K. Eisentraut, P.E. Eisentraut states that as observed on the dash cam video, Lenius checked the mirrors and the lane to his right before attempting a lane change when the right front of the truck struck the driver side of the Kirby vehicle. Eisentraut states that the dash cam is mounted high on the windshield near the centerline of the cab. Eisentraut opines that

¹ In an order entered May 13, 2019, this Court joined Action No. 1 & Action No. 2 for trial.

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the Kirby vehicle sped up to maintain a position off the front right fender of the tractor cab which is a known blind spot for commercial motor vehicles. Eisenstraut states that the view of the dash cam does not represent the driver's view since the camera is placed remotely from the driver's position. Using the actual dimensions of the vehicles, Eisenstraut opines that Lenius did not have a clear view of the Kirby vehicle as it remained in the truck's blind spot.

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]).

"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).

Vehicle & Traffic Law 1128 provides, in pertinent part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

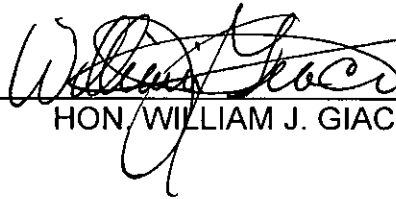
Kirby demonstrated prima facie entitlement to judgment as a matter of law by establishing that he was operating his vehicle within the right lane of traffic when Lenius made an unsafe lane change from the left lane to the right lane (see Vehicle & Traffic Law 1128[a]; *Leonard v Pomarico*, 137 AD3d 1085 [2d Dept 2016]; *Rivera v Corbett*, 69 AD3d 916 [2d Dept 2010]). No issues of fact were raised in opposition as to Kirby's negligence (see *Shuman v Maller*, 45 AD3d 566 [2d Dept 2007]). The Court finds that the expert's opinion that the Kirby vehicle was in Lenius' blind spot is speculative.

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Accordingly, the motion of the the defendant in Action No. 2, Robert Kirby, for summary judgment, pursuant to CPLR 3212, dismissing the complaint is GRANTED, and the complaint in Action No. 2 is DISMISSED insofar as asserted against Robert Kirby.

Counsel for the remaining parties are directed to appear in the Compliance Part, room 800, for further proceedings, at a date and time to be provided.

Dated: White Plains, New York
June 9, 2020



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