Nocera v Isola
2020 NY Slip Op 35147(U)
September 23, 2020
Supreme Court, Orange County
Docket Number: Index No. EF002086-2019
Judge: Maria S. Vazquez-Doles
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To commence the statutory time
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 ORANGE
---X
JASON A. NOCERA,
Plaintiff,

-against-

HEATHER C. ISOLA,
Defendant.
---X

DECISION AND ORDER
INDEX NO.: EF002086-2019
Motion Date: 07/02/2020
Sequence No. 1

VAZQUEZ-DOLES, J.

The following papers numbered 1 to 11 were considered in connection with the motion by defendant Heather C. Isola for an Order, pursuant to CPLR 3212, granting partial summary judgment to defendant and against plaintiff Jason A. Nocera on the issue of liability, and dismissing the complaint against her;

PAPERS	NUMBERED
Notice of Motion/Affirmation is Support of Motion(Mazzaro)/ Exhibits A-E..	1 - 7
Affidavit in Opposition to Motion(Cambareri)/Exhibits 1-2...........	8 - 10
Affirmation in Reply...	11

Upon the foregoing it is **ORDERED** that defendant's motion for summary judgment on the issue of liability, and to dismiss plaintiff's complaint, is **DENIED**.

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on June 2, 2018 on Rte. 17K at the entrance to the parking lot of Quickway Twin Cone, Town of Walkill, Orange County, New York. Plaintiff commenced this action by filing a summons and complaint

[* 1]
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on March 19, 2019. Issue was joined with service of Notice of Appearance and Answer on behalf of defendant on April 23, 2019. Discovery demands and responses were exchanged, and plaintiff and defendant were both deposed on November 07, 2019. (Exhibits D & E). By Notice of Motion originally returnable June 02, 2020 and adjourned at the request of the plaintiff to July 02, 2020; defendant moves for summary judgment on the issue of liability and for dismissal of the complaint against her.

Facts

The following relevant facts are undisputed.

On the afternoon of June 02, 2018,[1] defendant, while operating a 2009 Nissan Versa, was travelling northwest on Rte. 17K in the vicinity of Quickway Twin Cone in the Town of Wallkill. Plaintiff, while operating a 2004 Chrysler Sebring, also travelling on Rte. 17K, was approaching from the opposite direction. At that location there are three businesses – a gas station, a diner, and an ice cream shop – that all share a common parking lot with three separate entrances, none of which are specific to any business. The weather was clear and sunny, and the roadway was dry. Traffic conditions were light. The highway consisted of one lane in each direction separated by a double yellow line. Beyond this, the parties' testimony differs significantly.

Defendant's Testimony

On the date of the accident, defendant, completed her work shift and was on her way to pick up a pizza before returning home (Def Tr., pp. 13, 21, 49). She was about two minutes away from the Riverside Pizzeria (*id* at p. 13). There were no other vehicles in front or behind her as she

[1] Plaintiff approximates the time of the accident to be 4pm (Exhibit E, p. 10 at 15-18). Defendant approximates the time to have been 3:15-3:20 pm (Exhibit D, p. 7 at 6-7). The police report records the time as 4:38 pm (Exhibit A).

travelled along Rte. 17K (*id* at p. 49). "[Plaintiff] was turning left as I was going straight. He was coming in the opposite direction" (*id* at p. 17, lines 19-21). Defendant did not see plaintiff's car until "[She] noticed him about two car lengths away once he was turning.... left in front of me." (*id* at p. 18, line 21-23). "He was completely diagonal as I seen him, noticed him and pulled out in front of me." (*id* at p. 20, lines 10-12). Defendant attempted to avoid a 'T-bone' collision by braking hard and steering to the left (*id* at p. 21, lines 5-7). A collision occurred and defendant's vehicle spun out (*id*, line 8*)*. The accident occurred "[o]n 17K, the road. In my lane. Not his lane. Not the parking lot" (*id* at p. 18, lines 17-18).

Plaintiff's Testimony

On the date of the accident, plaintiff was on his way from his father's house to get ice cream at the Twin Cone ice cream shop [on Rte. 17K] in Bloomingburg (Pl Tr., p. 17, lines 12-18). Plaintiff did not recall if there was any traffic in front of or behind him from the beginning of his trip to Twin Cone and the time of the accident (*id* at p. 17, 18). Plaintiff was by the entrance to Twin Cone when he first observed defendant's vehicle, which "was by the underpass, before the exit getting off. Like ample amount of room for me to make that turn." (*id* at p.22, lines 15-20). Plaintiff testified he was already making a left hand turn into the parking lot when he first observed defendant's vehicle, which he estimated to be approximately one-tenth of a mile away (*id* at pages 19, lines 20-24; p.22, lines 13-24). Plaintiff further testified that he had "already passed the shoulder" and was "in the parking lot [at the time of the accident]." (*id* at p. 20, lines 20-21; p. 21 lines 2-5, 16-17). Plaintiff testified that the accident occurred "in the parking lot [,]" after which he was "spun into the bushes.... [T]here is a curb. [I]was hit and launched over the curb into the bushes." (*id* at p. 25, lines 14-22).

Defendant's Motion for Summary Judgment

In support of this motion, Defendant argues that a violation of a statute that establishes a specific standard of care results in a finding of negligence *per se* as a matter of law. VTL §1141 requires "The driver of a vehicle intending to turn left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection so close as to constitute an immediate hazard." Defendant further argues that plaintiff's failure to properly yield right-of-way to defendant's oncoming vehicle in violation of VTL §1141 was the sole proximate cause of this accident. Defendant asserts that there is no evidence that she was negligent or that she caused or contributed to the accident and is therefore entitled to summary judgment and dismissal of the complaint against her. Defendant also points out the plaintiff was ticketed for failure to yield, although this ticket was later reduced in court to jaywalking.

Plaintiff's Opposition

Plaintiff opposes Defendant's motion and avers that enough distance existed between his and defendant's vehicle as he turned left such that it did not constitute a hazard. Plaintiff also supplies a satellite map image taken from Google Maps to demonstrate the scene and involved distances. However, this image does not bear the date and time of the photo and will not be considered by the Court.

Analysis

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact (*see Piccirillo v Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, and not issue determination (*see Sillman v Twentieth Century-*

Fox Film Corp., 3 NY2d 395 [1957]). The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party" (*Jastrzebski v N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]).

The Court is obliged to draw all reasonable inferences in favor of the non-moving party (*see Rizzo v Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995]). Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted (*see Anyanwu v Johnson*, 276 AD2d 572 [2d Dept 2000]). Where facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility, summary judgment must not be granted (*see Jastrzebski, supra*, 223 AD2d at 678).

Defendant's argument is based upon plaintiff's alleged failure to yield right of way to her vehicle as plaintiff turned left to enter a parking lot. "A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident." *Aponte v Vani* 155 AD3d 929, 930 [2d Dept 2017] (internal citations omitted)). Moreover, the operator of the left turning vehicle must yield the right of way to on-coming traffic, "…so as not to constitute an immediate hazard." *Aponte v Vani*, 155 AD3d 929, 930 [2d Dept 2017], (citing VTL 1141).

In the matter at bar, there are several disputed material facts. The defendant testified that she did not see plaintiff's vehicle until it was approximately two car lengths away before the accident occurred. Plaintiff testified, however, that he observed defendant's oncoming vehicle from approximately one-tenth of a mile away. Secondly, defendant testified that plaintiff pulled out in front of her, while plaintiff testified that he did not recall if his vehicle was moving or stopped at the moment of impact.

Additionally, defendant testified that the collision took place in front of the entrance to Twin Cone (Ex. D, p. 23, lines 9-12). However, it is unclear from plaintiff's deposition testimony precisely which of the three parking lot entrances he was turning into. Finally, defendant testified that the accident occurred in the roadway, not the parking lot (Exhibit D, p. 18, lines 14-18). Plaintiff, however, testified that his vehicle was entirely within the parking lot at the time the accident occurred (Exhibit E, p. 21, lines 2-5). The diagram contained in the police accident report indicates that the accident took place in the roadway, with defendant's vehicle entirely in the traffic lane, while showing plaintiff's vehicle to be only partially so.

Giving plaintiff the benefit of every inference on defendant's application, as the Court is bound to do, there is no possibility of resolving liability on the facts before the Court. In the face of the conflicting testimony as to the facts, as contained in the deposition transcripts and exhibits, defendant has failed to establish that the negligence of plaintiff was the sole proximate cause of the accident as a matter of law. (*see Sperling v Akesson*, 104 AD3d 840 [2nd Dep't 2013]. Accordingly, the resolution of this conflicting evidence is reserved for the trier of fact. (See *Ampolini v. Long Is. Light Co.,* 186 AD2d 772 [2nd Dept. 1992]), and it is hereby

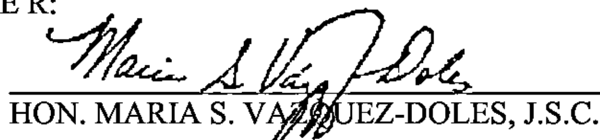
ORDERED that Defendant's motion is denied, and it is further

ORDERED that all parties appear for a virtual settlement conference on November 16, 2020 at 2:30p.m.. A link shall be forwarded by the part clerk.

This decision shall constitute the order of the Court.

ENTER:

Dated: September 23rd, 2020
Goshen, New York



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of Record via NYSCEF