

Sando v Angilletta

2021 NY Slip Op 33022(U)

December 20, 2021

Supreme Court, Richmond County

Docket Number: Index No. 153126/2018

Judge: Catherine M. DiDomenico

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

-----X
WENDOR SANDO,
Plaintiff,

Part- IAS 11
Present: Hon. Catherine DiDomenico

-against-

DECISION AND ORDER

FRANK J. ANGILLETTA and
EDWARD F. KARAVEE,
Defendants.
-----X

Index No. 153126/2018
Motion Sequence Nos.: 002

EDWARD F. KARAVEE,
Plaintiff,

-against-

Index No. 153378/2018

FRANK J. ANGILLETTA,
Defendant.
-----X

Recitation as required by CPLR 2219(a) of the papers considered in the review of Motion
Sequence Number 002

	<u>Numbered</u>
Notice of Motion by Defendant Karavee (002),	1
Affirmation in Opposition by Defendant Angilletta,	2
Reply Affirmation by Defendant Karavee	3
Transcript of Proceedings from 6/10/21	4
Memorandum of Law by Defendant Karavee	5
Correspondence from Defendant Angilletta	6

Upon the foregoing cited papers, the Decision and Order is as follows:

Present Motion

Defendant, Edward Karavee, moves by Notice of Motion (Seq. No. 002) for an order granting him summary judgment on the issue of liability relating to a motor vehicle accident which occurred on August 2, 2018. In support of his application, Defendant Karavee has submitted the deposition transcripts of each of the involved parties to establish the relevant facts. Defendant Karavee has also offered the MV-104 police accident report related to the occurrence. However, as there is no indication that the report is certified, and it contains inadmissible

hearsay, it has not been considered by this Court. See *Ging v. F.J. Sciamè Constr. Co., Inc.*, 193 A.D.3d 415 (1st Dept. 2021). By Order dated July 17, 2019 the two above captioned actions were consolidated for purposes of a joint trial. While the present motion has only been filed under Index Number 153126/2018, it will arguably have collateral effect on the consolidated matter which involves the same accident and the same parties. See *Rodriguez v. Martinelli*, 68 A.D.3d 843 (2d Dept. 2009).

The present motion was argued on the record of June 10, 2021 and a transcript of those proceedings was considered in relation to this motion. At the conclusion of the record it was established that the issues of law raised during oral argument required additional briefing. Defendant Karavee filed a supplemental memorandum of law on June 28, 2021. By letter dated June 30, 2021 Defendant Angilletta’s counsel indicated that he found no additional relevant caselaw.

Many of the facts relevant to the present motion are undisputed. On August 2, 2018 Defendant Karavee was operating a 2013 Honda Accord on the Staten Island Expressway. Plaintiff Wendor Sando was a passenger in the Karavee vehicle. Prior to the accident Defendant Karavee was traveling in the furthest right lane which exited the expressway. Defendant Angilletta admits in his deposition testimony that just before the accident he “passed out” but then woke up just before his vehicle made contact with Defendant Karavee’s vehicle. When Defendant Angilletta awoke he was drifting into Defendant Karavee’s established lane and was unable to avoid making contact with his vehicle. Defendant Angilletta states that his vehicle “clipped” the “rear side” of the Karavee vehicle and as a result, both the Angilletta and Karavee vehicles came into contact with a metal guardrail on the expressway’s shoulder. Plaintiff Sando’s deposition testimony also supports the undisputed narrative. Plaintiff testified that the vehicle he was traveling in was slowing down to exit the expressway when it was struck on the driver’s side rear bumper by the Angilletta vehicle, which caused it to spin into the exit sign on the side of the road.

In support of his motion Defendant Karavee argues that he did nothing to cause the accident and could have done nothing to avoid it. As a result, he requests an order granting him summary judgment dismissing the case against him. In opposition, Defendant Angilletta argues that while he may have caused the initial impact¹, a triable question of fact exists as to whether Defendant Karavee could have taken any evasive action to avoid crashing into the guardrail on the side of the expressway. In support of this position Defendant Angilletta notes that Defendant Karavee testified that he did not apply his brakes or turn his steering wheel before hitting the

¹ While not raised as a point in opposition to the present motion, Defendant Angilletta has indicated that he may have suffered a medical emergency which resulted in him losing consciousness.

guardrail. As such, Defendant Angilletta argues that Defendant Karavee could be partially responsible for the impact with the guardrail and the resulting injuries as a reasonably prudent person under similar circumstances would have taken evasive action.

Applicable Law

The proponent of a summary judgment motion has the initial burden of making a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. See *Otty Cab Corp. v. Nazir*, 72 N.Y.S.3d 517 (2d Dept. 2017). A movant’s burden can be satisfied by the submission of sworn affidavits or deposition testimony in proper evidentiary form. See *Charlie Fox, Inc. v. Diallo*, 48 N.Y.S.3d 264 (2d Dept. 2016). Once a prima facie showing of entitlement to summary judgment has been established, the burden shifts to the non-moving to raise a material issue of fact. See *Ubillus-Tambini v. Ischakov*, 36 N.Y.S.3d 410 (2d Dept. 2016). Generally, unsworn motor vehicle accident reports do not constitute evidence in admissible form for the purposes of supporting, or defeating, a summary judgment motion. See *Hegy v. Colter*, 262 A.D.2d 606 (2d Dept. 1999).

Decision


Here, Defendant Karavee has met his initial burden of establishing his entitlement to summary judgment as a matter of law. Defendant Karavee’s deposition testimony indicates that his vehicle was unexpectedly struck in the driver’s side rear by Defendant Angilletta’s vehicle while he was slowing down to exit the expressway. It is well established law that a vehicle that is hit in the rear when stopping is entitled to summary judgment on the issue of liability. See *Morgan v. Flippen*, 173 A.D.3d 735 (2d Dept. 2019). While the contact points between the vehicles at issue do not lend themselves to the typical “rear end” collision, the undisputed fact that Defendant Angilletta passed out and drifted into Defendant Karavee’s established lane of travel supports summary judgment. Pursuant to VTL §1128(a) the operator of a motor vehicle has the obligation to not change lanes until it is safe to do so. See *Castro v. Hatim*, 174 A.D. 3d 464 (1st Dept. 2019). Considering the undisputed deposition testimony of the parties, Defendant Karavee has met his burden of establishing that Defendant Angilletta’s unsafe lane change was the sole proximate cause of this accident. See *Raza v. Gunik*, 129 A.D.3d 700 (2d Dept. 2015); *Reyes-Diaz v. Quest Diagnostic Inc.*, 123 A.D.3d 790 (2d Dept. 2014). Defendant Angilletta had a duty not to enter a lane of moving traffic until it was safe to do so, and his failure to heed this duty constitutes negligence per se. See *Sanchez v. Oxcin*, 157 A.D.3d 561 (1st Dept. 2018).

As the movant has established his entitlement to summary judgment as a matter of law, the burden shifts to the non-moving party, in this case Defendant Angilletta, to raise a material

question of fact. **See *Paula v. City of New York*, 249 A.D.2d 100 (1st Dept. 1998).** Defendant Angilletta does not dispute how this accident occurred. The only argument he raises in opposition is that Defendant Karavee had a duty to take evasive action to avoid hitting the guardrail and that his failure to do so contributed to Plaintiff’s injuries. Under some limited circumstances a party who has time to act may have a duty to take evasive actions to avoid an accident. **See e.g. *Tornabene v. Seickel*, 186 A.D.3d 645 (2d Dept. 2020).** However, this duty does not arise when there is “little to no time” for evasive action to be taken. **See *Lupowitz v. Fogarty*, 295 A.D.2d 576 (2d Dept. 2002); see also *Garcia v. BLS Limousine Serv. Of N.Y., Inc.* 2021 NY Slip OP 06653 (1st Dept. 2021).** Here the deposition testimony of the parties reveals that Defendant Karavee had little to no time after the first impact to attempt to avoid the second impact with the guardrail. Moreover, unlike the cases where a duty to take evasive action before an *initial* impact arises, Defendant Karavee’s vehicle was thrown into an uncontrolled spin and forced into the guardrail by the initial impact which was admittedly caused by Defendant Angilletta’s negligence. Under these circumstances, Defendant Angilletta has failed to raise a triable issue of fact sufficient to defeat summary judgment. **See *Fernandez v. American United Transp., Inc.*, 177 A.D.3d 704 (2d Dept. 2019); see also *Rooney v. Madison*, 134 A.D.3d 634 (1st Dept. 2015); *Obiotta v. Dukes Sys. Corp.*, 132 A.D.3d 421 (1st Dept. 2015); *Joaquin v. Franco*, 116 A.D.3d 1009 (2d Dept. 2014).**

Accordingly, for the reasons set forth above, Defendant Karavee’s motion for summary judgment is hereby granted in its entirety. As summary judgment has been granted, all claims and cross claims against Defendant Karavee are hereby dismissed with prejudice. Defendant in the related case under index number 153378/2018 shall have ten days from service of this Decision to concede liability, or Plaintiff in that action shall have the right to file a motion for summary judgment under the principals of res judicata and collateral estoppel. This constitutes the Decision and Order of the Court on all issues raised in relation to motion sequence number 002. Any issue raised in that motion and not addressed herein, is hereby denied without prejudice.

Dated: December 20, 2021



Hon. Catherine M. DiDomenico