

D'Ambrosio v Incorporated Vil. of Freeport

2007 NY Slip Op 32968(U)

September 17, 2007

Supreme Court, Nassau County

Docket Number: 8911-05/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

MICHAEL D'AMBROSIO,

Plaintiff,

- against -

INCORPORATED VILLAGE OF FREEPORT and
TERA BAKER,

Defendants.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 8911/05

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The defendant Tera Baker moves for an order pursuant to CPLR 3212 granting summary judgment, dismissing the complaint and all cross claims on the basis there is no material issue of fact regarding the liability of this defendant. The plaintiff opposes the motion. The plaintiff commenced the underlying personal injury action as a result of a claim of personal injuries sustained in a motor vehicle accident on June 19, 2004, at the intersection of Brooklyn Avenue and North Bergen Place, Freeport, New York.

The attorney for defendant Tera Baker states, in a supporting affirmation dated June 18, 2007, based on the testimony and evidence, the defendant Tera Baker established prima facie entitlement to judgment, as a matter of law, by demonstrating the plaintiff went through a stop

sign controlling traffic in the plaintiff's direction. The attorney for defendant Tera Baker asserts the fact the plaintiff may not have seen the stop sign because it was obstructed by foliage does not suffice for the purposes of placing negligence on the defendant Tera Baker, who, at the time of the accident, was proceeding on an intersecting street without a traffic control device. The attorney for defendant Tera Baker avers the law does not require a motorist, such as the defendant Tera Baker, to anticipate the other driver will fail to see a traffic control device or otherwise disregard the provisions of the Vehicle and Traffic Law.

The attorney for the plaintiff states, in a opposing affirmation dated July 10, 2007, there is a triable issue of fact as to the comparative negligence of both drivers, so summary judgment should be denied. The attorney for the plaintiff opines, even if one driver has violated the Vehicle and Traffic Law, and is found negligent, as a matter of law, issues of comparative negligence by the other driver will result in triable issues. The attorney for the plaintiff asserts there can be more than one proximate cause of an accident, and a driver with the right of way has a duty to use reasonable care to avoid a collision. The attorney for the plaintiff points out the defendant Tera Baker testified, at a June 9, 2006 deposition, she never saw the plaintiff's vehicle at anytime before the collision occurred, even though she looked both ways before entering the intersection. The attorney for the plaintiff states notwithstanding the defense counsel's point the defendant Tera Baker's vehicle entered the intersection before the plaintiff's vehicle, the defendant's testimony is unreliable on this issue because she never saw the plaintiff's vehicle before impact. The attorney for the plaintiff contends the stop sign was covered by the foliage of an over grown tree, and the white stop line or bar, both maintained by the codefendant Incorporated Village of Freeport, were obliterated which circumstances are

displayed in photographs take at the scene, exchanged, and used at the deposition and the 50 (h) hearing. The attorney for the plaintiff maintains the motion must be denied because there are questions of fact regarding the defendant Tera Baker's comparative negligence, and there are questions of fact regarding the negligence of the codefendant Incorporated Village of Freeport.

The attorney for defendant Tera Baker states, in a reply affirmation dated July 17, 2007, it is undisputed the plaintiff violated Vehicle and Traffic Law §§ 1142 (a) and 1172 (a) by failing to stop for a stop sign and failing to yield the right of way. The attorney for defendant Tera Baker oppugns the plaintiff's reliance on legal authority since the instant matter is factually inapposite. The attorney for defendant Tera Baker points out the plaintiff fails to present any admissible evidence as to the defendant's speed, and by the plaintiff's admission he testified, at the June 9, 2006 deposition, never saw the defendant's vehicle prior to impact, yet changed his testimony to say he saw the defendant's vehicle simultaneously with the impact between the vehicles, so any testimony by the plaintiff about the speed of the defendant's vehicle would be sheer speculation, where the plaintiff testified, at the 50-h hearing, the defendant's vehicle speed was approximately 25, 35. The attorney for defendant Tera Baker avers the law is clear the failure to stop for a stop sign establishes the driver who failed to yield was the proximate cause of the accident, and here it is uncontroverted the plaintiff failed to stop for the stop sign thus failing to yield the right of way to the defendant's vehicle. The attorney for defendant Tera Baker maintains the plaintiff's allegations regarding the codefendant Incorporated Village of Freeport do not have any legal bearing on the defendant Tera Baker's prima facie entitlement to summary judgment because the defendant Tera Baker was under no legal duty to anticipate the plaintiff would fail to see a traffic sign irrespective of the reason why

the plaintiff failed to see it. The attorney for defendant Tera Baker contends this motion should be granted, and the plaintiff's complaint dismissed as to the defendant Tera Baker.

Vehicle and Traffic Law § 1142 (a) provides:

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

Vehicle and Traffic Law § 1172 (a) provides:

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.

The Second Department holds:

the plaintiff driver had no duty to watch for and avoid a driver who might fail to stop or to proceed with due caution at a stop sign (*Namisnak v Martin*, 244 AD2d 258). "[A]n operator who has the right of way is entitled to anticipate that *160 other vehicles will obey the traffic laws that require them to yield" (*supra*, at 260). Here, there is no evidence of plaintiff's comparative negligence. She had the right of way at the intersection (*Anastasio v Scheer*, 239 AD2d 823), and she had no chance to avoid the accident in the "split second" time span in which the accident occurred (*Caban v Vega*, 226 AD2d 109, 110; *see also, Breckir v Lewis*, 21 AD2d 546, *affd sub nom. Breckir v Pleibel*, 15 NY2d 1027) *Perez v. Brux Cab Corp.*, 251 A.D.2d 157, 159-160, 674 N.Y.S.2d 343 [2d Dept, 1998]; *see also Espinoza v. Loor*, 299 A.D.2d 167, 753 N.Y.S.2d 29 [2d Dept, 2002].

The Court has carefully reviewed and considered all of the parties' papers. The Court finds the defendant Tera Baker established a prima facie entitlement to summary judgment. It is then the plaintiff's obligation to submit evidentiary proof in admissible form raising triable

issues of material fact in order to defeat the motion for summary judgment (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 [1980]). However, in this case, plaintiff attorney's affirmation presented only unsubstantiated assertions and speculation despite reference to testimony (*see generally Hou-Ching Chou v. Wong*, 34 A.D.3d 642, 824 N.Y.S.2d 436 [2d Dept, 2006]).

Accordingly, the motion is granted.

So ordered.

Dated: **September 17, 2007**

ENTER:



J. S. C.

ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

SEP 20 2007
NASSAU COUNTY
COUNTY CLERK'S OFFICE