

Marafioti v Reisman

2008 NY Slip Op 30654(U)

February 25, 2008

Supreme Court, Nassau County

Docket Number: 0910-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

MICHELE MARAFIOTI,
Plaintiff,

- against -

JUDITH M. REISMAN,
Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 910/07

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, 3</u>
Replying Affidavits	<u>4</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order pursuant to CPLR 3212 granting summary judgment to the plaintiff against the defendant on the issue of liability. The defendant opposes this motion. The underlying personal injury action arises from an accident on October 9, 2006, at approximately 10 a.m., on West Broadway, at or near its intersection with Henley Road, in Woodmere, in the County of Nassau. The plaintiff claims to have been traveling east at the time of the accident, and the defendant was traveling southwest when the front of the defendant's Toyota four door sedan came in contact with the front of the plaintiff's 2001 Yamaha motorcycle when the defendant attempted to make a left turn into the path of the plaintiff's motorcycle. The plaintiff avers to have had the right of

way. The plaintiff alleges, as a result of the accident and the negligence of the defendant, the plaintiff sustained serious injury as defined in Insurance Law § 5102 (d), including a fracture, and incapacitation from household duties from the date of the accident, and from school for two weeks immediately following the date of the accident, and intermittently afterwards.

The plaintiff's attorney points to, in a supporting affirmation dated December 3, 2007, examinations before trial of the plaintiff on September 13, 2007, the defendant on October 12, 2007. The plaintiff's attorney notes, at the accident site, West Broadway is a two-way street with one lane for each direction of travel, and there is no traffic control device at Henley Street and West Broadway for either direction of travel. The plaintiff's attorney cites Vehicle and Traffic Law § 1141, which provides:

The driver of a vehicle intending to turn to the 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 or so close as to constitute an immediate hazard.

The plaintiff's attorney also mentions the legal authority of the Second Department on this issue, and states that Court held entitlement to judgment, as matter of law is demonstrated when the proponent shows the vehicle operator violated Vehicle and Traffic Law § 1141 when the vehicle operator made a left turn directly into the path of the other traffic as the other traffic legally proceeded with the right of way. The plaintiff's attorney states the defendant admits driving on West Broadway for two minutes about three quarters of a mile prior to the accident, and stopped at the intersection of Henley Street

and West Broadway. The plaintiff's attorney notes the defendant admittedly made a left turn without ever looking again toward West Broadway, and claims never seeing the plaintiff's motorcycle. The plaintiff's attorney contends the five photographs, marked for identification at the plaintiff's deposition, taken of the scene and vehicles conclusively confirm the accident occurred in the plaintiff's lane of traffic. The plaintiff's attorney points out the defendant's left turn was in violation of Vehicle and Traffic Law § 1160 (b), and the defendant's deposition testimony, as well as the five photographs conclusively demonstrate the defendant's left turn was not made in that portion of the right half of the intersection in violation of Vehicle and Traffic Law § 1160 (b), which provides:

Left turns on two-way roadways. At any intersection where traffic is permitted to move in both directions on each roadway entering the intersection, an approach for a left turn shall be made in that portion of the right half of the roadway nearest the center line thereof and by passing to the right of such center line where it enters the intersection and after entering the intersection the left turn shall be made so as to leave the intersection to the right of the center line of the roadway being entered. Whenever practicable the left turn shall be made in that portion of the intersection to the left of the center of the intersection.

The plaintiff's attorney notes the defendant was shown the photograph marked as defense exhibit "A," at the defendant's deposition, and testified the photograph was a fair and accurate depiction of the accident immediately following the occurrence. The plaintiff's attorney insists it is clear from the photograph, and the defendant's confirmation of the position of the defendant's vehicle at the point of impact that the defendant made a left

turn in violation of Vehicle and Traffic Law § 1160 (b). The plaintiff's attorney contends the plaintiff has made a *prima facie* showing that the defendant made a left turn into the path of the plaintiff who had the right of way, so the plaintiff is entitled to summary judgment regarding the liability issue under CPLR 3212.

The defense attorney states, in an opposing affirmation dated January 22, 2008, the plaintiff's claims that his highest rate of speed while on West Broadway was 20 to 25 miles per hour, and the defendant sped up to 50 or 60 miles per hour to start a turn is contradictory, and defies reality from an observation of the photographs, so issues of fact are created. The defense attorney points out there is an independent witness who informed the police officer who responded to the accident that the plaintiff passed his vehicle at a high rate of speed just before the impact. The defense attorney contends, even in negligence cases where many of the facts are conceded, such as here, the defendant making a left turn, standing alone, is insufficient to support summary judgment to the plaintiff.

The plaintiff's attorney states, in a reply affirmation dated January 28, 2008, the undisputed violations of the Vehicle and Traffic Law by the defendant here establish *prima facie* evidence of negligence. The plaintiff's attorney states the defendant has failed to offer any evidence in admissible form that would shift the burden to the plaintiff, and points specifically to the exhibits, including among other items the police report. The plaintiff's attorney asserts he spoke with an eyewitness named Karlinsky on January

4, 2008, who stated, in sum and substance, the defense attorneys annoyed him, and Karlinsky told those defense attorneys he was not a witness to the accident, and did not see the accident. The plaintiff's attorney avers the defendant turned into the wrong lane of traffic onto the street the defendant intended to enter, thus the defendant created a dangerous situation by turning from a point that is never a legal turn. The plaintiff's attorney contends, from the photographs and the defendant's testimony, one can determine the defendant made the turn before the intersection, and having no expectation of a turn from that spot, the plaintiff did not have time to react, so evasive action was impossible. The plaintiff's attorney claims the defendant, who admitted turning into the wrong lane of traffic, did not see the plaintiff because the defendant made that left turn without ever looking for oncoming West Broadway traffic. The plaintiff's attorney also notes the plaintiff was unaware of the speed of the defendant's car at the point of contact, but irrespective of the defendant's speed, what is important is the defendant came into the plaintiff's lane of traffic, and the defendant started the left turn without warning giving the plaintiff no time to react. The plaintiff's attorney points out the defendant did not stop because it would be impossible to be moving at 20 to 60 miles per hour from a stop when the defendant was just starting the turn. The plaintiff's attorney argues the defense fails to raise a triable issue which would stave off summary judgment.

The defense attorney points to, in a supplemental affirmation dated February 4, 2008, the affidavit dated February 1, 2008 of Irwin Karlinsky, who states he resides in

Delray Beach, Florida. Karlinsky states he drove his car on West Broadway near the intersection with Henley Road on October 9, 2006, at approximately 10:00 a.m..

Karlinsky also states, as he proceeded eastbound on West Broadway, a motorcycle passed him on his left at a high rate of speed. Karlinsky asserts he heard a crash seconds later, and the motorcycle was involved in an accident with a car. Karlinsky avers he stopped at the scene, and told the responding officer what he observed. The defense attorney contends, based upon the evidence submitted, the plaintiff's motion for summary judgment should be denied.

This Court has reviewed and considered all of the papers submitted by all of the parties on this motion. The plaintiff has demonstrated a *prima facie* entitlement to summary judgment, as a matter of law, by establishing the defendant violated Vehicle and Traffic Law § 1141 when the defendant made a left turn directly into the path of the plaintiff's motorcycle as the plaintiff legally proceeded into the intersection with the right-of-way. In addition, the defendant admitted never seeing the plaintiff nor the motorcycle prior to making that left turn (*Berner v. Koegel*, 31 A.D.3d 591, 592, 819 N.Y.S.2d 89 [2nd Dept, 2006]). This Court finds the defendant failed to raise a triable issue of fact, and the defense submissions, including Karlinsky's sworn statement do not support the defendant's contention that a triable issue of fact exists as to whether the plaintiff was comparatively negligent in the operation of the motorcycle, including attempting to avoid the collision. This Court also finds the plaintiff had the right-of-way,

the motorcyclist was entitled to anticipate the operator of the car would obey the traffic laws, which required the defendant to yield to the plaintiff (*Berner v. Koegel*, 31 A.D.3d, *supra*, at 592-593).

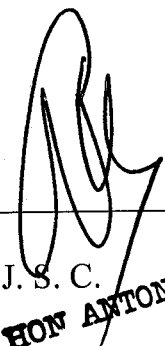
It is ORDERED that partial summary judgment is granted to the plaintiff against the defendant on the issue of liability. A trial is ordered on the issue of damages.

A copy of this order shall be served and accompany the note of issue when filed to add this matter to the Calendar Control Part of this court for March 18, 2008 for trial on the issue damages. Entry of judgment is stayed pending a determination of damages.

So ordered.

Dated: **February 25, 2008**

ENTER:



J. S. C.

HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

FEB 28 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**