

Lennon v Rosario

2008 NY Slip Op 31962(U)

July 11, 2008

Supreme Court, Greene County

Docket Number: 0020065/8610

Judge: Joseph C. Teresi

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STATE OF NEW YORK
SUPREME COURT
THOMAS LENNON,

COUNTY OF GREENE

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 06-586
RJI NO. 19-06-2614

JOSE A. ROSARIO, P&M SERVICES
TRANSPORT and ALBERT C. PINE,

Defendants.

Supreme Court Greene County All Purpose Term, May 9, 2008
Assigned to Justice Joseph C. Teresi

APPEARANCES:

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TERESI, J.:

On December 7, 2005, plaintiff was a passenger in a pickup truck operated by defendant Albert Pine (hereinafter "Pine") and was injured when Pine's vehicle struck Defendant Jose

Rosario's (hereinafter "Rosario") tractor trailer at the intersection of State Route 23 and State Route 9W in the Town of Catskill, New York. Plaintiff commenced this action against both defendants seeking damages caused by the defendants' collision. Discovery is now complete and Pine brings this motion for summary judgment. Plaintiff cross moves for summary judgment for a finding that both defendants are liable for the motor vehicle accident or alternatively to have each defendant's affirmative defense of contributory negligence dismissed.

"Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue." Napierski v. Finn, 229 AD2d 869, 870 (3rd Dept. 1996). On a motion on for summary judgment, the movant must establish by admissible proof, the right to judgment as a matter of law. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986), Gilbert Frank Corp. v. Federal Insurance Co., 70 NY2d 966 (1988). A movant fails to meet their burden by "pointing to gaps in... proof", rather the movant's obligation on the motion is an affirmative one. Antonucci v. Emeco Industries, Inc., 223 A.D.2d 913, 914 (3d Dept. 1996).

If the movant establishes their right to judgment as a matter of law, the burden then shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact. Zuckerman v. City of New York, 49 NY2d 557 (1980). In opposing a motion for summary judgment, one must produce "evidentiary proof in admissible form. . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient." Id. at 562. Moreover, all evidence must be viewed in the light most favorable to the opponent of the motion. Amidon v. Yankee Trails, Inc., 17 A.D.3d 835 (3d Dept. 2005); Crosland v. New York City Transit Auth., 68 NY2d 165 (1986).

In this action Pine was faced with an alleged emergency situation. At the time of the

collision, Rosario was making left hand turn onto State Route 23 (westbound) from State Route 9W southbound exit ramp. Rosario's tractor trailer was crossing the two eastbound lanes and was into the westbound lanes of State Route 23, when Pine's vehicle, traveling east on State Route 23, struck it. Pine claims that he was traveling 55 miles per hour and was only approximately four hundred feet from Rosario's vehicle when he first saw it. He first saw Rosario's vehicle stopped in the right lane of State Route 23 (eastbound), which caused him to change lanes to the left lane of State Route 23 (eastbound). He explained that after he changed lanes Rosario's vehicle began to move, so he applied his breaks and sounded his horn. The two vehicles then collided.

The Third Department has consistently held that "when a driver is faced with sudden and unexpected circumstances leaving little or no time to react... the driver is not negligent if his or her actions are reasonable and prudent in the context of the emergency situation." Quinones ex rel. Hall v. Community Action Com'n to Help the Economy, Inc., 46 A.D.3d 1326 (2007).

"Summary judgment in an emergency case is only proper where there are no factual questions concerning the reasonableness of the driver's actions under the circumstances or whether the driver could have done something to avoid the collision." Id. "Generally, a jury must decide whether a driver's reaction to the emergency situation was reasonable or whether the driver could have done something to avoid a collision." Aloi v. County of Tompkins, __ AD3d __, 2008 N.Y. Slip Op. 05621 (3d Dept. 2008).

Here, defendant Pine's moving papers fail to establish, as a matter of law, his entitlement to judgment because he fails to conclusively demonstrate that he did everything he could have done under the circumstances. Pine's motion focuses heavily upon conclusory allegations of

defendant Rosario's negligence, a police report indicating Rosario's responsibility for the collision and his allegation that he was not speeding. Such evidence fails to conclusively prove that Pine took all reasonable steps to avoid this collision. Pine's only alleged evasive action consists of his applying his breaks and sounding the horn. This record falls far short of demonstrating that, as a matter of law, Pine's actions were "reasonable and prudent in the emergency situation". Aloi, supra; King v. Washburn, 273 AD2d 725 (3d Dept. 2000). There are, among others, issues of fact in regard to reasonable speed of the Pine vehicle and the reasonableness of Pine's actions when he just saw the Rosario vehicle.

Accordingly, defendant's motion for summary judgment is denied.

Turning to Plaintiff's motion for summary judgment to dismiss both defendants' affirmative defenses of lack of seat belt being worn and contributory negligence, plaintiff met his initial burden of showing that he is entitled to judgment. Plaintiff affirmatively demonstrated that he was wearing his seat belt and, as a passenger, did not contribute to either Pine's driving or Rosario's driving. Neither defendant raised a genuine issues of fact relative to plaintiff's contributory negligence. Accordingly, plaintiff's motion to dismiss both defendants' affirmative defenses of plaintiff's contributory negligence and lack of a seatbelt is granted.

However, plaintiff's motion for summary judgment for a finding that both defendants are responsible for the collision is denied. There are factual issues, relative to the operation of both vehicles, that have not been established on these papers and must be decided by a jury. Aloi, supra at 2. Specifically, Pine's actions with respect to the emergency situation he faced are replete with factual issues, which precludes summary judgment from being granted.

All papers, including this Decision and Order, are being returned to the attorney for the plaintiff. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel are not relieved from the applicable provisions of that section respecting filing, entry and notice of entry.

SO ORDERED.

Dated: July // , 2008
Albany, New York



JOSEPH C. TERESI, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated March 18, 2008, Affirmation of Jennifer Dominelli Lecakes, dated, March 18, 2008, and Affidavit of Albert C. Pine, dated March 18, 2008 with Exhibits "A" - "J" attached, and accompanying Memorandum of Law of Jennifer Dominelli Lecakes, dated, March 18, 2008.
2. Notice of Cross-Motion, dated April 7, 2008, Attorney's Affirmation of Peter Scagnelli, dated April 7, 2008, and Affidavit of Thomas Lennon, dated April 2, 2008, with attached Exhibits "A" - "F", and accompanying Memorandum of Law in Opposition to Defendant, Albert C. Pine's Motion for Summary Judgment and in Support of the Plaintiff's Cross-Motion of Peter Scagnelli, dated April 7, 2008.
3. Attorney's Affirmation of David S. Howe, dated April 29, 2008, Affidavit of Steven W. Rickard, dated April 29, 2008, with attached Exhibit "1", and accompanying Memorandum of Law of David S. Howe, dated April 29, 2008,
4. Reply Affidavit / Affidavit in Support of Jennifer Dominelli Lecakes, dated, May 2, 2008, with attached Exhibit "A".