

Zinerco v Heim

2009 NY Slip Op 30660(U)

March 16, 2009

Supreme Court, Nassau County

Docket Number: 15994/07

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

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

MARGARET ANN ZINERCO, THOMAS J.
ZINERCO & CONCETTA ZINERCO,

Plaintiff,

- against -

ROBERT L. HEIM,

Defendant.

TRIAL / IAS PART 31
NASSAU COUNTY

Index No. 15994/07

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

The plaintiffs move for summary judgment on liability. The defendant opposes this motion. The underlying personal injury action arises from an alleged motor vehicle accident on May 2, 2007, at approximately 5:20 p.m., at the intersection of Route 107 and Central Avenue, Bethpage, New York. This Court has carefully reviewed and considered all of the papers submitted with respect to this motion.

The plaintiffs' attorney points, in a supporting affirmation dated November 7, 2008, to a May 2, 2007 police report of the incident with respect to the contributing factors for the accident, and states the only things listed was the failure to yield the right

of way and the traffic control was disregarded by the defendant operator. The plaintiffs' attorney contends the plaintiffs' vehicle while driving on Central Avenue approached the intersection where the traffic light was green for that vehicle, and red for the vehicles traveling on Route 107. The plaintiffs' attorney notes a non-party witness, who is listed in the police report, was stopped at the red light, and observed the contact between the two vehicles.

The plaintiff operator states, in a supporting affidavit dated November 6, 2008, driving on Central Avenue, approaching its intersection with Route 107 with a green light for the plaintiff, and seeing cars stopped for the red light on Route 107. The plaintiff operator states her vehicle entered the intersection with the traffic light still green, and being struck by the defendant's car after entering the intersection. The plaintiff operator asserts never expecting anyone to disregard a red light, and enter the intersection. The plaintiff operator claims there was no opportunity to avoid the accident caused by the defendant, who entered the intersection against a red light

Barry Weckstein states, in a supporting affidavit dated October 29, 2008, witnessed the incident, and his car was stopped for a red light on Route 107 approximately 1 to 2 cars behind the vehicle driven by the defendant, the first car stopped at that red light. Weckstein states he looked straight ahead, while stopped for that red light, and all of a sudden the defendant's car just took off into the intersection while the traffic control light was still red for the defendant. Weckstein asserts he saw the car

driven by the plaintiff Margaret Zinerco, who had a green light, and the defendant caused the accident.

The defense attorney notes, in an opposing affirmation dated November 20, 2008, there have been no depositions conducted in this action. The defense attorney contends there is considerable likelihood the Court has not been presented with all of the facts and circumstances surrounding the instant action. The defense attorney asserts there are triable issues of fact to be resolved. The defense attorney avers, while the plaintiff operator's affidavit indicates there were cars stopped at the red light on Route 107, the plaintiff does not indicate whether she saw the defendant's vehicle stopped at the red light prior to entering the intersection. The defense attorney notes the mere fact Weckstein does not recall if it was the car directly in front of him that pulled into the intersection, or the car that was two cars in front of him, raises numerous issues of fact, to wit accuracy and recollection of the observation, and an unobstructed viewing of the incident.

The defendant states, in an opposing affidavit dated November 19, 2008, he was involved in an automobile accident at the subject site. The defendant states he traveled northbound on Route 107 within the prescribed speed limit to get to work at Slomin's, in Hicksville, New York. The defendant claims, as he approached the subject intersection, he noticed traffic light was green, but as he traveled through the intersection, the green light changed to yellow as he entered the intersection. The defendant asserts, while he was midway through the intersection, his vehicle came into contact with the plaintiff's

vehicle traveling westbound on Central Park Avenue, that is the plaintiff's vehicle entered the intersection from the defendant's right hand side. The defendant avers he applied the brakes, as he saw the other vehicle enter the intersection, however he did not have any opportunity to avoid the accident. The defendant states the plaintiff operated caused the accident by entering the intersection and disregarding a red light when he had the right of way.

The plaintiffs' attorney points out, in a reply affirmation dated December 4, 2008, the May 2, 2007 police report of the incident is certified, and clearly admissible contrary to the defense assertion otherwise. The plaintiffs' attorney contends the defendant's self-serving affidavit fails to properly oppose this motion where the defendant claims the light for him was yellow when he entered the intersection. The plaintiffs' attorney notes the defendant fails to state the position of his vehicle when he saw the light was yellow, his speed when he entered the intersection, applied the brakes or at the time of impact. The plaintiffs' attorney also mentions the defendant does not state looking to his left or right prior to entering the intersection, neglects to say what color the light was for him when the accident occurred, and fails to contradict the police report which faults him for the accident. The plaintiffs' attorney asserts the points of contact described by the defendant, to wit the front of his car and the rear driver side of the plaintiff's car, clearly establish the plaintiff was in the intersection prior to the defendant having almost cleared it at the time of the accident.

“Negligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination” (*Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474). It is well settled that summary judgment is a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Andres v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131). For the purpose of determining the existence of a triable issue of fact, the allegations of a party opposing summary judgment must be accepted as true (*Rizk v. Cohen*, 73 N.Y.2d 98, 103, 538N.Y.S.2d229, 231 (1989)). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (*see, Whelen v. G.T.E. Sylvania Inc.*, 182 A.D. 2d 446). Under CPLR 3212(b), a motion for summary judgment “shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” “The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact.” Summary judgment is the procedural equivalent of a trial (*Museums at Stony Brook v. Village of Patchogue Fire Dept.*, 146 A.D. 2d 572). The court’s role is issue finding rather than issue determination (*see, e.g., Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395; *Gervasio v. Di Napoli*, 134 A.D.2d 235, 236; *Assing v.*

United Rubber Supply Co., 126 A.D.2d 590). Nevertheless, “the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated” (*Gervasio v. Di Napoli, supra*, 134 A.D.2d at 236, quoting from *Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo*, 110 A.D.2d 616, *aff’d* 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (*see, Andre v. Pomeroy*, 35 N.Y.2d at 364; *Assing v. United Rubber Supply Co., supra*).

Vehicle and Traffic Law § 1111 provides, in pertinent part:
Whenever traffic is controlled by traffic-control signals, other than lane direction control signal indications provided in section eleven hundred sixteen, exhibiting different colored lights, or colored lighted arrows, successively, one at a time or in combination, only the colors green, yellow and red shall be used, and said light shall indicate and apply to drivers of vehicles and to pedestrians as follows: (a) Green indications: (1) Traffic, except pedestrians, facing a steady circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited; (b) Yellow indications: (1) Traffic, except pedestrians, facing a steady circular yellow signal may enter the intersection; however, said traffic is thereby warned that the related green movement is being terminated or that a red indication will be exhibited immediately thereafter; (d) Red indications: (1) Traffic, except pedestrians, facing a steady circular red signal, unless to make such other movement as is permitted by other indications shown at the same time, 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 shall remain standing until an indication to proceed is shown except as provided in paragraph two of this subdivision.

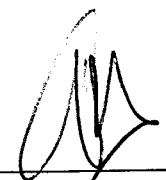
Here, there is an issue of fact which requires resolution by a trier of fact. The plaintiffs claim the occurrence is due solely to the defendant's negligence, to wit entering the intersection against a red, yet the defendant claims the occurrence is due solely to the plaintiff operator's negligence, to wit the plaintiff improperly operated the other vehicle with the defendant was already in the intersection having entered it with a yellow light.

Accordingly, the motion is denied with leave to renew after discovery is complete.

So ordered.

Dated: **March 16, 2009**

ENTER:



J. S. C.

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

MAR 19 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE