

Draper v Vonderahe

2009 NY Slip Op 31600(U)

June 30, 2009

Supreme Court, Nassau County

Docket Number: 11688/07

Judge: F. Dana Winslow

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

**TRIAL/JAS, PART 6
NASSAU COUNTY**

ANTHONY DRAPER,

Plaintiff,

-against-

**MOTION SEQ. NO.: 001
MOTION DATE: 4/20/09**

**CYNTHIA VONDERAHE, VICTOR HOFFMAN and
CORINNE PLEICKHARDT,**

INDEX NO.: 11688/07

Defendants.

The following papers having been read on the motion (numbered 1-4):

Notice of Motion.....	1
Notice of Cross Motion.....	2
Reply Affirmation.....	3
Affirmation in Opposition.....	4

Relief Requested:

Defendant Corinne Pleickhardt, moves pursuant to CPLR 3212 for an order dismissing the plaintiff's complaint, together with any and all cross-claims asserted against her (Sequence #001).

Defendant, Victor Hoffman, moves pursuant to CPLR 3212 for an order dismissing the plaintiff's complaint together with any and all cross-claims asserted against him (Sequence #002).

Factual and Procedural Background:

The underlying action was commenced by the plaintiff, Anthony Draper, to recover for personal injuries he sustained as a result of a motor vehicle accident which occurred on November 19, 2006 (*see* Goodman Affirmation in Support at Exhs. A, B).

Said accident involved the following four vehicles: a 1998 Dodge Intrepid owned and operated by the plaintiff, Anthony Draper [hereinafter the Draper Vehicle]; a 1996 Ford Taurus owned and operated by defendant, Cynthia Vonderahe [hereinafter the Vonderahe vehicle]; a 2005 Jeep owned and operated by defendant, Victor Hoffman [hereinafter the Hoffman Vehicle]; and a 1996 Oldsmobile owned and operated by defendant Corinne Pleickhardt [hereinafter the Pleickhardt vehicle] (*id.* at ¶2; *see also* Exhs. A, B).

The Draper vehicle was involved in three separate impacts, the first of which involved the Vonderahe Vehicle, the second of which involved the Hoffman vehicle, and the third of which involved the Pleickhardt vehicle (*id.* at Exh. A).

Deposition Testimony of the Parties

Defendant, Cynthia Vonderahe, testified that on the night of the accident she was traveling southbound on the Meadowbrook State Parkway in the center lane at approximately 55 to 65 miles per hour (*id.* at Exh. G at pp. 14,23). Immediately prior to impact with the Draper vehicle, she was still proceeding between 55 and 65 miles per hour (*id.* at p.25). Ms. Vonderahe stated that an unidentified vehicle traveling in front of her car suddenly slowed down to between five and ten miles per hour (*id.* at pp. 26,27). In attempting to avoid that vehicle, she abruptly moved her vehicle about “a foot” into the left lane where upon the left rear quarter panel of her vehicle was impacted by the right front portion of the Draper vehicle (*id.* at pp. 31,32,35). Subsequent to this impact, Ms. Vonderahe states that she signaled to move her vehicle to the right and she parked her vehicle “off the road alongside the guardrail.”(*id.* at pp. 36,64). As to the plaintiff’s vehicle, Ms. Vonderahe testified that after the impact the Draper vehicle “went alongside the concrete divider in the center and came to a stop . . . approximately 100 feet further from where the impact was.”(*id.* at p. 39). This divider is located between the southbound and northbound lanes of the Meadowbrook State Parkway (*id.*). She testified that both herself and the plaintiff got out of their respective vehicles in an attempt to “exchange information” but that any communication was rendered impossible due to the traffic (*id.*

at pp. 41, 45,61,62). Ms. Vonderahe testified that within one to two minutes the plaintiff subsequently got back into his car and attempted to cross three lanes of traffic to come over to the right side when the passenger side of the Draper vehicle was hit by the front portion of the vehicle operated by defendant, Corinne Pleickhardt (*id.* at pp. 45, 67,68).

The plaintiff, Anthony Draper, testified that on the evening of the accident, he was operating his vehicle southbound on the Meadowbrook State Parkway in the center lane of traffic (*id.* at Exh. I at pp. 9,11.). As he approached the exits for the Southern State Parkway, his vehicle was initially impacted on the passenger side by the Vonderahe vehicle (*id.* at pp.13,14,16, 52). As a result of that impact, his vehicle was “moved” into the left lane and it began “zigzagging” and “wiggling” (*id.* at pp.17,54,93,94). The plaintiff states that “once I was able to straighten the car out, it was under control for about two seconds” and proceeding in the left lane when it was impacted from the rear by the Hoffman vehicle (*id.* at pp. 98). Mr. Draper testified that a half a minute elapsed between the impact with the Vonderahe vehicle and the impact with the Hoffman vehicle (*id.*). As a result of this second impact, the plaintiff was rendered unconscious and does not recall the events which followed (*id.* at 99,107).

Defendant Hoffman testified that he was traveling southbound on the Meadowbrook Parkway in the left hand lane (*id.* at Exh. H at pp.19,21). He testified that ten seconds prior to the accident, there was large van, SUV or four by four immediately in front of his vehicle and which suddenly swerved out from in front of his vehicle to the right and continued southbound (*id.* at pp. 78,79). The defendant states that it was within “zero and two seconds” thereafter that the front of his vehicle came into contact with the rear portion of the Draper vehicle (*id.* at pp. 35,79). Mr. Hoffman states that he did not make any attempt to avoid the plaintiff’s vehicle as there was traffic moving on his right and a cement barrier to his left (*id.* at p. 37).

Defendant Corinne Pleickhardt testified that on the night of the subject accident she was traveling southbound on Meadowbrook Parkway in the right hand lane (*id.* at

Exh. J at pp. 17, 19,20). She stated that “two or three seconds” prior to impact, she observed the front portion of the Draper Vehicle approaching from her left and “going perpendicular with the Meadowbrook Parkway” (*id.* at pp. 23,24). She further testified that the “front” portion of the Draper vehicle came into contact with the corner of the driver’s side of her vehicle (*id.* at p.27). She states that upon observing the Draper vehicle she applied heavy pressure to her brakes (*id.* at p. 26).

Motions for Summary Judgment

Counsel for moving defendant Corinne Pleickhardt contends that when the Draper vehicle came towards the Pleickhardt vehicle from across three lanes of traffic, she was confronted with an emergency situation not of her own making (*see* Goodman Affirmation in Support at ¶¶15,16,18). Counsel further contends that as the defendant’s actions in response to the emergency were reasonable, no cause of action in negligence can be maintained and the complaint should accordingly be dismissed (*id.*).

Counsel for defendant Hoffman argues that an emergency situation was created when the Draper vehicle, after being impacted by the Vonderahe vehicle and forcibly diverted into the left hand lane of traffic, came to rest by the center divider obstructing the flow of traffic in the left lane (*see* Gumpert Affirmation in Support at ¶¶66,67). Counsel posits that the within complaint must be dismissed as defendant Hoffman acted reasonably in response thereto and that said emergency was not of the defendant’s own making but rather was the result of negligence on the part of the plaintiff and defendant Vonderahe (*id.* at ¶¶66,68).

The plaintiff opposes both the applications interposed herein arguing that there are material issues of fact, the existence of which precludes the granting of summary judgment (*see* Affirmation in Opposition at ¶¶8,9,10,12). With particular regard to defendant Pleickhardt, counsel for the plaintiff contends that there are questions of fact as to whether Ms. Pleickhardt was paying sufficient attention to the surrounding traffic conditions which existed both before and after the subject accident and whether the

actions undertaken to avoid the accident were reasonable under the extant circumstances (*id.* at ¶¶10,17,19).

As to the defendant Hoffman, counsel for the plaintiff argues that various questions remain including whether Mr. Hoffman afforded sufficient attention to the surrounding traffic conditions, the reasonableness of his actions in attempting to avoid colliding with the Draper vehicle, as well as with respect to the actual circumstances surrounding the happening of the impact between the Hoffman vehicle and the Draper vehicle (*id.* at ¶¶7,9,17,18,19).

Finally, counsel argues that the emergency doctrine is a jury charge, and not a matter of law and thus an improper basis upon which to grant summary judgment to a moving defendant (*id.* at ¶12).

Standard for Summary Judgment

It is well settled that a the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation (CPLR 3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Zuckerman v City of New York*, 49 NY2d 557

[1980], *supra*). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient and to defeat the application and the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]). When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist (*Sillman v Twentieth Century Fox*, 3 NY2d 395 [1957], *supra*).

In the instant matter, both of the moving defendants herein rely primarily upon the Emergency Doctrine as the legal predicate for dismissal of the plaintiff's complaint. The doctrine is a recognition that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Rivera v New York City Tr. Auth.*, 77 NY2d 322 [1991]; *Bello v Transit Authority of New York City*, 12 AD3d 58 [2d Dept 2004]). A motorist faced with an emergency situation is not under an obligation to exercise his or her best judgment and any errors in judgment are insufficient to constitute negligence (*Calzareth v Yip*, 248 AD2d 661 [2d Dept 1998]; *Fermin v Graziosi*, 240 Ad2d 365 [2d Dept 1997]; *Greifer v Schneider*, 215 AD2d 354 [2d Dept 1995]).

The doctrine is applicable only to situations wherein an individual is confronted by circumstances which are sudden and unforeseen and not the product of the actor's own making (*Jacobellis v New York State Thruway Authority*, 51 AD3d 976 [2d Dept 2008]). While the existence of an emergency and the reasonableness of an actor's response thereto are typically issues for the trier of fact, under certain circumstances the resolution thereof can be determined as a matter of law (*Bello Transit Authority of New York City*,

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12 AD3d 58 [2d Dept 2004], *supra*; *Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443 [2d Dept 2005]).

In the instant matter, the Court finds that defendant Pleickhardt has demonstrated her entitlement to judgment as a matter of law (*Sillman v Twentieth Century Fox*, 3 NY2d [1957], *supra*). Here, defendant Pleickhardt has demonstrated that she was faced with an emergency situation not of her own making by submitting evidence that the Draper vehicle suddenly careened across three lanes of traffic and into the lane in which she was lawfully operating her motor vehicle (*Held v McMillian*, 45 AD3d 805 [2d Dept 2007]; *Jacobellis v New York State Thruway Authority*, 51 AD3d 976 [2d Dept 2008], *supra*). As referenced above, defendant Pleickhardt testified that it was only two to three seconds prior to impact that the Draper vehicle suddenly approached her vehicle from the left and was moving “perpendicular with the Meadowbrook Parkway” (*Held v McMillian*, 45 AD3d 805 [2d Dept 2007], *supra*; *Moller v Lieber*. 156 AD2d 434 [2d Dept 1989]). Thus, under these circumstances, as defendant Pleickhardt was presented with an emergency to which she had a maximum of three seconds in which to react, any purported failure on the part of defendant Pleickhardt to exercise her best judgment is insufficient to constitute negligence (*Rivera v New York City Tr. Auth.*, 77 NY2d 322 [1991], *supra*; *Held v McMillian*, 45 AD3d 805 [2d Dept 2007], *supra*).

In opposition to defendant’s Pleickhardt’s application, the plaintiff has failed to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557 [1980], *supra*). While the plaintiff argues that there are unresolved issues as to whether Ms. Pleickhardt was paying sufficient attention to the surrounding traffic conditions and whether the actions undertaken to avoid the accident were reasonable, such contentions are speculative and insufficient to defeat a motion for summary judgment (*Bavaro v Martel*, 197 AD2d 813 [2d Dept 1993]; *Williams v Econ*, 221 AD2d 429 [2d Dept 1995]).

As to defendant Hoffman, the Court finds that the defendant has failed to

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demonstrate his entitlement to judgment as a matter of law (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986], *supra*). In the supporting affirmation, the defendant argues that he was confronted with an emergency situation when the Draper vehicle, after being hit by the Vonderahe vehicle, came to rest by the center divider obstructing the flow of traffic in the left lane. However, there is no convincing evidence that the Draper vehicle came to a stop in the left lane of traffic. Rather, the record, as thus far developed, reveals two separate and divergent versions of the specific circumstances surrounding the impact between the Draper and Hoffman vehicles.

Defendant Vonderahe testified that after the impact between her vehicle and the Draper vehicle, the plaintiff's car "went alongside the concrete divider in the center and came to a stop" whereupon the plaintiff exited his vehicle in an attempt to communicate with her. She further stated that within one to two minutes the plaintiff got back into his car and attempted to cross three lanes of traffic to get to the right side of the parkway. However, a review of the plaintiff's testimony reveals that at no point did he ever testify that his vehicle came to any stop next to the concrete divider or that he got out of his vehicle in an attempt to speak with Ms. Vonderahe. Moreover, the plaintiff testified that there was only a half a minute separating the impact between his vehicle and the Vonderahe vehicle and that between his vehicle and the Hoffman vehicle.

Thus, given the sharply contrasting versions of the facts surrounding the impact between the Draper vehicle and the Hoffman vehicle, summary judgment is inappropriate (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986], *supra*).

Based upon the foregoing, the motion interposed by defendant Corinne Pleickhardt, pursuant to CPLR 3212 for an order dismissing the plaintiff's complaint, together with any and all cross-claims asserted against her is hereby **GRANTED** (Sequence #001) and the motion interposed by defendant, Victor Hoffman, pursuant to CPLR 3212 for an order dismissing the plaintiff's complaint together with any and all cross-claims asserted against him is hereby **DENIED** (Sequence #002).

All applications not specifically addressed herein are deemed **denied**.

This constitutes the Decision and Order of the Court.

Dated: *June 30, 2009*

ENTER:

F. Dana Winslow

J.S.C.

ENTERED
JUL 16 2009
NASSAU COUNTY
COUNTY CLERK'S OFFICE