

**Rogers v Edelman**

2009 NY Slip Op 32912(U)

December 8, 2009

Supreme Court, Wayne County

Docket Number: 64068/2009

Judge: Dennis M. Kehoe

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STATE OF NEW YORK  
SUPREME COURT COUNTY OF WAYNE

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AUTUMN D. ROGERS and  
EUGENE ROGERS, as Husband and Wife,

Plaintiffs,

-vs-

JANNA K. EDELMAN,

Defendant.

DECISION  
AND  
ORDER

Index No. 64068

2009

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The Defendant has moved by her attorney pursuant to Uniform Rules §202.17(a) for an Order Striking the Plaintiff's IME Notice on the grounds that the time frame set forth in said Notice is objectionable. The Plaintiffs have opposed the application, and they have cross-moved for an Order pursuant to CPLR §3212 granting partial summary judgment on the issue

of negligence only, maintaining that the Plaintiffs have sufficiently established as a matter of law that the Defendant's negligence was the sole cause of the underlying accident. Further, the Plaintiff Eugene Rogers has moved pursuant to §3212 for an Order dismissing the Defendant's Counterclaim, based upon the same allegations. The Defendant has opposed both summary judgment motions, maintaining that there are factual issues which must await determination at trial.

The action arises out of a two-car motor vehicle accident, which occurred on July 16, 2006, on Wilawanna Road in the Town of Ashland, New York. The Plaintiff Eugene Rogers was the operator of his vehicle, in which the Plaintiff Autumn Rogers was a seat-belted passenger. The Defendant Janna Edelman was the operator of her vehicle and the sole occupant of the car. The vehicles were traveling in opposite directions on Wilawanna Road, for which the legal speed limit is 55 mph. The accident occurred when the Defendant attempted to make a left-hand turn into a driveway directly in the path of the Rogers vehicle. Mr. Rogers, whose deposition testimony indicates that he was traveling at or below the speed limit, testified that he saw the Edelman vehicle directly in front of him, that he braked and took evasive action, but was unable to avoid the collision.

The Defendant maintains that there are questions of fact as to whether her conduct was negligent and whether Eugene Rogers bears some comparative fault. Counsel for the Defendant has submitted photographs of the scene, together with his own calculations regarding speed and distance. He questions the accuracy and credibility of Mr. Rogers' deposition testimony, arguing that the Defendant could not be expected to anticipate that, as she was turning, a vehicle would come "careening" down the hill, especially given the "obstructed sight lines."

However, counsel for Mr. Rogers argues - correctly so - that an attorney affirmation not based on personal knowledge is insufficient to defeat a motion for summary judgment. While the Defendant has submitted photographs and deposition testimony, the conclusions which the attorney reaches in his affirmation are based on speculation and conjecture. There is no supporting affidavit from an expert who is qualified to make the determinations suggested by the attorney. Also, in reviewing the Defendant's deposition testimony, the Court finds that her answers are vague regarding the chain of events and that she frequently states that she is unable to respond to counsel's questions, thus failing to controvert the Plaintiffs' testimony in any meaningful way.

In the past, many courts have been reluctant to grant summary judgment on the issue of negligence, especially since questions of comparative fault have often been raised. However, in recent years, more courts have been willing to recognize that summary judgment is appropriate in situations in which the alleged fact issues are based on nothing more than conjecture. In Guadagno v Norward, et al, 43 AD3d 1432 (4<sup>th</sup> Dept, 2007), the Fourth Department found that, based on the credible evidence, the Plaintiff had established as a matter of law that the defendant “was negligent in failing to see that which, under the circumstances, he should have seen, and in crossing in front of (plaintiffs’) vehicle when it was hazardous to do so.” (citations omitted). The accident in Guadango was the result of the defendant’s driving into the path of plaintiff’s oncoming vehicle while attempting to make a left-hand turn into a driveway.


The Defendant has also failed to create a genuine issue of fact as to her claim regarding Mr. Rogers’ alleged comparative negligence. Under these circumstances, the Plaintiff had no duty to anticipate that the Defendant would fail to yield the right of way. (See, e.g. Hillman v Eick, 8 AD3d 989 (4<sup>th</sup> Dept, 2004)).

In summary, based on the credible deposition testimony and the supporting papers, this Court finds that the Defendant's actions were the sole proximate cause of the accident (See, e.g. *Galvin v Zachall*, 302 AD3d 965 (4<sup>th</sup> Dept, 2003)). Therefore, the Plaintiffs' motion for summary judgment on the issue of negligence is granted, and the Plaintiff Eugene Rogers' motion for summary judgment dismissing the Defendant's counter-claim is also granted.

Finally, the Court finds that the time frames set forth in the Plaintiffs' IME Notice are not unreasonable and the Defendant's motion to strike the notice is therefore denied. Should good cause arise for extension of the time periods, further application may be made to the Court.

This Decision constitutes the Order of the Court.

Dated: December 8, 2009  
Lyons, New York

  
Honorable Dennis M. Kehoe  
Acting Supreme Court Justice

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WAYNE COUNTY  
SUPREME AND COUNTY COURT