

Nicoletti v Drevitch

2010 NY Slip Op 30603(U)

March 22, 2010

Supreme Court, Richmond County

Docket Number: 102181/09

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF RICHMOND DCM PART 3

Index. 102181/09
 Motion No.: 001

CYNTHIA M. NICOLETTI and JOSEPH NICOLETTI,

Plaintiff

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**PETER A. DREVITCH, NORMAN L. DREVITCH and
 SUSAN DREVITCH**

Defendants

The following items were considered in the review of the following motion for Summary Judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Plaintiffs moved for summary judgment on the issue of liability pursuant to CPLR § 3212. Plaintiff's motion is denied in its entirety.

Facts

On Monday, February 23, 2009, at approximately 5:30 P.M., plaintiff, Cynthia M. Nicoletti, was driving a 2008 Nissan eastbound on Oakdale Street up a small hill before the intersection of Oakdale Street and Beach Road. Defendant, Peter A. Drevitch, was traveling westbound on Oakdale Street in a 1998 Dodge and attempted to make a left turn onto Beach Road. There were no traffic

controls at this intersection on this date. Plaintiff claims she saw defendant's vehicle turn left, but it is not clear where the vehicles were with respect to each other. Defendant claims that he saw plaintiff's vehicle "traveling over the rise" on Oakdale Street. The vehicles came in contact with each other in the intersection. The points of impact were the left-front of plaintiff's 2008 Nissan, which made contact with the passenger-side fender of defendant's 1998 Dodge. Plaintiff's vehicle required towing. Plaintiff claims that the accident caused injuries to her neck, shoulder, chest, knees, and back. Plaintiff filed a motion for partial summary judgment on the issue of liability on December 7, 2009.

Discussion

A motion for summary judgment will be granted if the evidence submitted entitles a party to relief as a matter of law.¹ Disputed facts must be construed in the light most favorable to the non-moving party.² The motion is denied if there are any triable facts that must be determined by a fact finder.³ Summary judgment on the issue of liability should not be granted when competing inferences can be reasonably drawn as to the defendant's conduct.⁴

Plaintiff argues that defendant violated Vehicle and Traffic Law § 1411 and is liable pursuant to the common-law rule that defendant failed to "see what there is to see."⁵ Plaintiff claims that defendant caused the collision by making a left turn when plaintiff had the lawful right of way. The Appellate Division Second Department held in *Kiernan v. Edwards* that a plaintiff may be entitled to summary judgment if the defendant testifies to not seeing the plaintiff's vehicle before impact. The issue of liability in *Kiernan* was decided in favor of the plaintiff because "unless its appearance

¹ CPLR § 3212 [b]

² *Midland Bank v. Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990].

³ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁴ *Rennie v. Barbarosa Transport, Ltd.*, 151 AD2d 379, [1st Dept 1989],

⁵ *Weigand v. United Traction Co.*, 221 N.Y. 39, [1917].

in this case was truly talismanic, what there was to see was the Kiernan car.”⁶ If the defendant in that case had looked for oncoming vehicles, he would be able to describe where the plaintiff’s vehicle was in relation to his vehicle. It is the defendant’s failure to reasonably observe his surroundings while operating a vehicle that makes him liable. In this case, plaintiff failed to show that defendant did not see plaintiff’s car. Defendant states in his affidavit that he saw plaintiff’s vehicle “traveling over the rise” on Oakdale Street before the impact. This fact is relevant because a fact finder can make a determination about the credibility of defendant’s statement as well as weigh it against other facts in the record. Defendant’s testimony could aid the fact finder in determining liability by reconstructing the moments before the collision. Therefore, summary judgment based on this argument is denied.

Plaintiff claims she is entitled to summary judgment based on the Court of Appeals decision of *Andre v. Pomeroy* which held that if “there is no conflict at all in the evidence, the defendant’s conduct fell far below any permissible standard of due care, and plaintiff’s conduct [. . .] was not really involved.”⁷ However, the reliance on *Andre* in this case is misplaced. In *Andre*, the defendant made a clear admission of liability that the court found incontrovertible. Defendant in the case before us disputes the issue of liability. The “conflict” or claim by defendant is that plaintiff’s vehicle was not within or close enough to the intersection to constitute an immediate hazard.⁸

Plaintiff argues further that defendant violated Vehicle and Traffic Law § 1411. The statute states in pertinent part that: “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.” In this case, it is unclear where the vehicles were with respect to each other before defendant began turning onto Beach Road. For defendant to be in violation of the statute, there must be no issue of fact as to the location and speed of plaintiff’s vehicle at the time she

⁶ *Kiernan v. Edwards*, 97 AD2d 750, [2nd Dept 1983].

⁷ *Andre v. Pomeroy*, 35 NY2d 361, [1974].

⁸ *Bogorad v Fitzpatrick*, 38 AD2d 923, [1st Dept 1972].

entered the intersection.⁹ In this case, plaintiff has failed to demonstrate her entitlement to summary judgment on the issue of liability based on Vehicle and Traffic Law § 1411.

There are also a number of factors that provide additional grounds for denying summary judgment. The hill before the intersection may very well obscure the line of sight of approaching vehicles. This is a question of fact that can change a jury's determination of liability in this case.¹⁰ The police report states that the time of the accident was 5:30 p.m. Exhibits in the record state that sundown on that day was at 5:40 p.m. Defendant states in his affidavit that he observed "a vehicle, without headlights activated, traveling eastbound." It is unclear whether dusk was a factor in this accident. It should be left to a fact finder to determine whether headlights are relevant to this case.

Conclusion

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue."¹¹ A court's function on a summary judgment motion is issue identification, not resolution. Here the record shows, that defendant is able to testify where plaintiff's vehicle was prior to the collision. The small hill before the intersection raises issues that a jury can consider in weighing liability. There is also an issue whether it was necessary to have headlights on ten minutes before sundown. Based on the foregoing factors and construing the facts in the light most favorable to the non-moving party, the motion for summary judgment on the issue of liability is denied.

Accordingly, it is hereby;

ORDERED, that Cynthia M. Nicoletti and Joseph Nicoletti's motion for summary judgment on liability is denied; and it is further

⁹ *Sherwood v. Fleming*, 33 AD2d 880, [4th Dept 1969].

¹⁰ *Lake v. Suchan*, 285 AD2d 722, [App Term 2001].

¹¹ *Moskowitz v. Garlock*, 23 AD2d 943 [3rd Dept 1965].

ORDERED, that the parties return to DCM Part 3 on Tuesday, April 6, 2010 at 9:30 a.m. for a preliminary conference.

Dated: March 22, 2010

ENTER,

Joseph J. Maltese
Justice of the Supreme Court