

Fedyszyn v Rubin

2010 NY Slip Op 33280(U)

November 16, 2010

Supreme Court, Nassau County

Docket Number: 21014/08

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

DONNA FEDYSZYN AND CRAIG FEDYSZYN,

Plaintiffs,

- against -

MATTHEW RUBIN AND ROBERT ARKEN,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 21014/08
Motion Seq. No.: 01
Motion Date: 08/26/10

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition</u>	<u>2</u>
<u>Affirmation in Reply</u>	<u>3</u>

Upon the foregoing papers, it is ordered that the application is decided as follows:
Plaintiffs move, pursuant to CPLR § 3212 , for an Order awarding them Summary Judgment on the issue of liability against defendants Matthew Rubin (“Rubin”) and Robert Arken (“Arken”) for injuries sustained in a motor vehicle accident and for an immediate trial on the issue of damages. Defendants oppose the motion.

Plaintiffs commenced this action by filing a Summons and Complaint in November, 2008, alleging negligence against the defendants in that defendant Rubin was careless and reckless in his operation of a vehicle and his negligence caused serious injury, pursuant to Insurance Law §5102 (a), to plaintiff Donna Fedyszyn (“D. Fedyszyn”). Her husband and

plaintiff, Craig Fedyszyn, is alleging loss of his wife's services, companionship, society, consortium, and support, as a result of her injuries.

FACTS OF THE CASE

On February 12, 2008, at about 5:45 p.m. in Huntington, New York, the parties were involved in a motor vehicle accident occurring on Duryea Rd., a highway divided by a solid double yellow line. The road was covered with a light coat of snow and it was snowing at the time. Defendant Rubin, en route to his place of business and traveling with a front seat passenger and co-worker, was progressing eastbound in a SUV, a Toyota Forerunner, owned by his brother, defendant Arken. In an attempt to enter his place of employment in the office buildings on his left hand side of the road, he activated his left signal indicating his intent to make a left hand turn. An operator of a truck, traveling westbound and directly opposite defendant Rubin, waved defendant Rubin on indicating that it was safe for him to make the turn. Defendant Rubin's vehicle crossed the solid yellow lines and progressed in front of the truck; however the truck obscured his view. He attempted to complete the turn when he came in contact with plaintiffs' vehicle, a Cadillac sedan, which was traveling westbound in the right lane. The impact caused plaintiff D. Fedyszyn to momentarily lose consciousness and her vehicle ended up on the side of the road, where it made contact with a fire hydrant. Shortly thereafter, she was transported to the hospital for emergency treatment by a fire department ambulance. Plaintiff sustained injuries which required further treatment, including surgery.

There is dispute as to which vehicle struck the other; however, the damage to the plaintiffs' vehicle indicates impact to left front bumper and left front side panel. Defendant Rubin testified that his vehicle was damaged in the right front area.

PROCEDURE

Plaintiffs are seeking Summary Judgment only as to the defendants' liability and has affirmed that they are accepting defendant Rubin's version of the facts, as set forth in his deposition, that defendant Rubin attempted to make a left hand turn while his vision was obstructed by a truck and made contact with plaintiffs' vehicle in the process. Defendants argue that plaintiff D. Fedyszyn was driving in excess of the speed limit and traveling in a "non lane."

Plaintiffs submit the following pictorial evidence: views of Duryea Rd. where the accident took place, depicting the street on a clear day and on a wintry day; views of traffic on Duryea Rd. indicating vehicles occupying right and left lanes of west bound traffic; traffic sign at the intersection of Duryea Rd. and Rt. 110 stating "Right Lane Must Turn Right"; traffic sign on Duryea Rd. with notation, "No Parking Any Time"; and the damage to plaintiffs' vehicle. Plaintiffs also submit sworn affidavits from a private investigator stating that the section of roadway in dispute had no shoulder, and from an engineer stating that the width of the westbound lane of Duryea Rd. was sufficient for vehicles to travel two abreast. In addition, plaintiffs submit a Traffic Control Order, dated January 20, 1988, for the installation of twelve (12) "No Parking Any Time" signs along the same section of Duryea Rd.

SUMMARY JUDGMENT

The standards for summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is; therefore, entitled to summary judgment as a matter of law. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). Thus, when faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the

matter; its task is to determine whether or not there exists a genuine issue for trial. *See Miller v. Journal-News*, 211 A.D.2d 626, 620 N.Y.S.2d 500 (2d Dept.1995).

CPLR § 3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers, the plaintiffs' papers in this case, justify holding as a matter of law, that the defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant. *See Marine Midland Bank, N.A. v. Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610, 563 N.Y.S.2d 449 (2d Dept.1990).

When, on a motion for summary judgment, only issues of fact remain which relate to the extent and amount of damages, the court may, when appropriate for the expeditious disposition of the controversy, order an immediate trial of such issues of fact raised by the motion, before a referee, before the court, or before the court and a jury, whichever may be proper. *See Caplan v. Tofel*, 33 A.D.3d 748, 822 N.Y.S.2d 760 (2d Dept. 2006).

PLAINTIFFS' ARGUMENT

The plaintiffs established their *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting evidence that the defendant driver failed to yield the right-of-way to plaintiff D. Fedyszyn who was lawfully operating her vehicle. *See CPLR § 3212(f); Falcone v. Ibarra*, 67 A.D.3d 858, 889 N.Y.S.2d 238 (2d Dept. 2009). Vehicular and Traffic Law § 1141 provides 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. Plaintiff D. Fedyszyn, who had the right-of-way, was entitled to anticipate that a motorist who made a left turn directly into the path of oncoming traffic would obey the traffic laws, which required him to yield. *See Stanford v. Dushey*, 71 A.D.3d

988, 900 N.Y.S.2d 64 (2d Dept. 2010).

Taken together, defendant Rubin's testimony, the pictorial evidence, the traffic order, and expert affidavits indicate that plaintiff D. Fedyszyn was in a proper lane of traffic, plaintiff D. Fedyszyn's alleged speeding was not proximate cause of the accident, and plaintiff D. Fedyszyn had the right of way.

DEFENDANTS' ARGUMENT

In opposition, defendants' argument that plaintiff D. Fedyszyn was operating her vehicle in a "non lane" is unavailing. Defendants also allege that plaintiff D. Fedyszyn was speeding at 35 or 40 miles an hour; however, defendant Rubin testified that he did not see her until she made contact with his vehicle. *See Defendants' Affirmation in Support, Exhibit 6, p.12, ln.12-17.* Defendant Rubin argues that he was completely stopped before entering into plaintiff D. Fedyszyn's lane, but he testified that the front of his vehicle was already extended beyond the truck in the left eastbound lane, indicating that he had already started to complete his turn without ensuring that the way was clear. *See Defendants' Affirmation in Support, Exhibit 6, p. 22, ln. 11-16.* Defendant Rubin also testified that his way was obstructed before he entered into the path of plaintiff D. Fedyszyn's vehicle. *See Defendants' Affirmation in Support, Exhibit 6, p. 86, ln. 7-15.*

Vehicle and Traffic Law § 1143 provides that the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right-of-way to all vehicles approaching on the roadway to be entered or crossed. The fact that defendant Rubin's view was obstructed was not justification for his failure to yield the right-of-way. *See Murchison v. Incognoli, 5 A.D.3d 271, 773 N.Y.S.2d 299 (1st Dept. 2004).* Defendant Rubin proceeded to cross the right eastbound lane and admittedly failed to see plaintiff D. Fedyszyn's vehicle at any

time before the impact, thereby failing to see what was he should have seen by employing the use of his senses. *See id.* As such, defendant Rubin had no right to proceed across the right lane and into the office parking lot until it was reasonably safe to do so.

Defendants' speculative and conclusory assertions that plaintiff D. Fedyszyn was speeding and failed to take reasonable evasive action to avoid the accident, were unsupported by the record, and were insufficient to defeat plaintiffs' motion for summary judgment. Defendants failed to demonstrate the existence of a triable issue of fact as to whether plaintiff D. Fedyszyn was negligent in allegedly failing to brake or otherwise avoid the collision, relying only on plaintiff D. Fedyszyn's testimony that she did not remember what actions she took immediately before she made contact with defendants' vehicle. *See Torro v. Schiller* 8 A.D.3d 364, 777 N.Y.S.2d 915 (2d Dept. 2004).

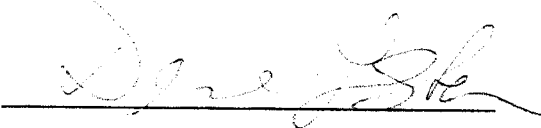
As to defendant Arken, Vehicle and Traffic Law § 388, provides in part that "every owner shall be liable for injuries... resulting from the negligence of any person using the vehicle with the permission of such owner". He is therefore vicariously liable to plaintiff D. Fedyszyn for her injuries arising out of the acts and/or non acts of defendant Rubin. *See Miceli v. Tramutolo*, 237 A.D.2d 495, 655 N.Y.S.2d 591 (2d Dept.1997).

In sum, the record does not support the defendants' contention that there are issues of fact as to whether the plaintiff D. Fedyszyn was negligent in the operation of her vehicle. Accordingly, the motion for summary judgment is granted. Further, as defendants have not alleged that additional discovery would yield any facts indicating that plaintiff D. Fedyszyn was at fault justifying the denial of the plaintiffs' motion, the motion for an immediate trial on the issue of damages is granted.

All parties shall appear for Trial on the issue of damages in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on December 15, 2010 at 9:30 a.m.

This constitutes the decision and order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

ENTERED

NOV 22 2010

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

Dated: Mineola, New York
November 16, 2010