

**Knibbs v Frazier**

2012 NY Slip Op 31810(U)

July 9, 2012

Supreme Court, Queens County

Docket Number: 23804/2010

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

- - - - - x

PAMELA KNIBBS, Index No.: 23804/2010
Plaintiff, Motion Date: 06/14/12
- against - Motion No.: 19
LISA FRAZIER, Motion Seq.: 3
Defendant.

- - - - - x

The following papers numbered 1 to 13 were read on this motion by plaintiff, PAMELA KNIBBS, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability;

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
Reply Affirmation.....11 - 13

In this negligence action, plaintiff, Pamela Knibbs, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on January 18, 2010, between the plaintiff's vehicle and the vehicle owned and operated by defendant, Lisa Frazier. The accident took place on Foch Boulevard at its intersection with 165th Street, Queens County, New York. As the plaintiff was traveling eastbound on Foch Boulevard through the intersection with 165th Street, her vehicle collided with the defendant's vehicle which was proceeding northbound on 165th Street and attempting to make a left turn onto Foch Boulevard. Plaintiff did not have any traffic control device controlling her direction of travel while the defendant faced a stop sign in her direction. Plaintiff was allegedly injured as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on September 20, 2010. Issue was joined by service of defendant's verified answer dated May 23, 2011. Plaintiff's prior motion for summary judgment which was made prior to depositions of the parties was denied without prejudice to renew following the completion of discovery. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages only.

In support of the motion, the plaintiff submits an affidavit from counsel, Scott L. Wiss, Esq; a copy of the pleadings; an affidavit from the plaintiff dated November 11, 2011; photographs of the intersection; a copy of the transcript of the examination before trial of the plaintiff; and a copy of the police accident report (MV-104).

In the accident description section of the police report, the officer, who did not witness the accident, describes the accident based upon statements of the two drivers as follows:

"D1(plaintiff) states trav. E/B on Foch. She was struck by D2 who was attempting to make a left turn at location. D2(defendant) states trav. N/B on 165th after proceeding from stop sign. She was struck by D1 at location. PO did not witness. No reported injuries."

In her affidavit dated November 11, 2011, plaintiff states as follows:,

"On January 18, 2010, at approximately 9:55 p.m., I was a driver of a vehicle that was traveling on Foch Boulevard at or near its intersection with 165<sup>th</sup> Street in the County of Queens, City and State of New York. My vehicle had the right of way and was traveling straight when the defendant disregarded the stop sign on 165<sup>th</sup> Street controlling her direction of travel and struck my vehicle. At the place of the accident, the roadway was level and straight and without other obstructions. At the time and place indicated, my car had the right of way. There was no traffic control device for me at the intersection of Foch Boulevard and 165<sup>th</sup> Street, County of Queens, City and State of New York. The defendant has a stop sign controlling her direction of travel. Attached as Exhibit B are photographs of the intersection where the accident happened. As the court will note, the street defendant was on was not controlled by any traffic control device. These photographs fairly and accurately reflect the intersection on the date of the collision. Clearly the defendant was negligent in the operation of her vehicle in disobeying a stop sign and striking my vehicle."

In her examination before trial taken on January 13, 2012, the plaintiff, age 57, testified that she is presently employed in health care administration at Brookdale Hospital. She stated that following the accident she was out of work for approximately three weeks. On January 18, 2010, the date of the accident, the plaintiff was returning to her home after visiting with her parents. She was traveling eastbound on Foch Avenue at a rate of speed of 25 miles per hour. She intended to travel on Foch through the intersection at 165<sup>th</sup> Street. There are no traffic devices at that intersection for vehicles traveling on Foch, however, the traffic on 165<sup>th</sup> Street has a stop sign facing it on the corner of 165<sup>th</sup> and Foch. The traffic on 165<sup>th</sup> Street is required to stop at the stop sign, wait until it is safe to proceed and then make a left or right turn as 165<sup>th</sup> Street does not go through at that point. Plaintiff testified that as she entered the intersection she looked to her right down 165<sup>th</sup> Street and observed the defendant's vehicle moving at a rate of speed of 50 - 55 miles per hour. She stated that she thought the defendant's vehicle would stop at the stop sign, however, the defendant's vehicle did not stop at all, sped up and entered the intersection attempting to make a left turn in front of the plaintiff's vehicle. The plaintiff attempted to swerve her vehicle to the right to move out of the way, however, the front of the plaintiff's vehicle impacted the-side of the defendant's vehicle in the intersection.

Pursuant to VTL § 1142(a): "every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection."

Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant in that the defendant, who had a stop sign facing her direction of traffic, failed to yield the right of way to the plaintiff in violation of VTL § 1142(a). Counsel contends that the plaintiff's vehicle was proceeding lawfully and properly through the intersection and had the right of way as there was no traffic control device in plaintiff's direction. Plaintiff was entitled to assume that the driver of the vehicle controlled by the stop signal would yield (see McNamera v Fishkowitz, 18 AD3d 721 [2d Dept. 2005]).

Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment as to liability because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition to the motion, defendant's counsel, Yamile Al-Sullami, Esq., contends that there are triable issues of fact with respect to plaintiff's negligence in the happening of the accident. Counsel argues that plaintiff's affidavit and deposition testimony do not establish the plaintiff's freedom from culpable conduct. Counsel submits photographs which indicate that the defendant's vehicle sustained damage to the left rear while plaintiff's vehicle was damaged in the left front. Counsel claims that the photographs establish that Ms. Frazier was already in the intersection when it was struck by plaintiff's vehicle and therefore the plaintiff failed to yield to the vehicle already in the intersection. Counsel also contends that there are questions as to plaintiff's speed and whether plaintiff used reasonable care to avoid the accident.

In her examination before trial taken on April 4, 2012, defendant Frazier, age 44, an auxiliary police officer, testified that on the date of the accident she was heading home after attending a meeting at the 113<sup>th</sup> Precinct. She stated that she was traveling on 165<sup>th</sup> Street at a rate of speed of 20 - 25 miles per hour. As she approached the intersection of Foch Avenue she stopped at the stop sign. She looked to her left, than to the right and then left again. She was stopped for ten seconds before proceeding. In her testimony she described the accident as follows: "[A]fter I made the initial stop, the full stop, okay, looked to my left, didn't see it. From there, I don't even know how to recall feet wise from the traffic light on Guy Brewer, but I know her car was coming down. She was much, you know, further away. Then I proceeded to make a left." When she first saw plaintiff's car it was a block away. She then looked to her right. When she looked left again she saw plaintiff's vehicle moving rapidly approximately two car lengths away. She stated that she felt she had enough clearance to go across so she proceeded into the intersection. When she saw Ms. Knibb's vehicle getting closer she tried to speed up to avoid the collision. However, her vehicle was struck in the middle of the intersection by plaintiff's vehicle.

Defendant's counsel contends that the testimony of the two drivers contains conflicting versions of the accident and raises questions of fact as to liability. Counsel states that the evidence shows that the plaintiff was aware that the defendant did not stop at the stop sign yet continued across the intersection and did not attempt to avoid the accident by turning away from the defendant's vehicle. Counsel states that the defendant's vehicle was in the intersection when it was struck then plaintiff was under a duty to yield the right of way to the defendant's vehicle and failed to do so in violation of VTL §1142(a). Counsel contends there are issues as to whether the

plaintiff was speeding, whether plaintiff used reasonable care to avoid the accident, whether she properly swerved her vehicle in the proper direction to avoid the accident, and whether or not the defendant stopped at the stop sign before proceeding into the intersection.

In addition, the defendant contends that the plaintiff's deposition is unsigned in violation of CPLR 3116 and is therefore inadmissible.

Upon review of the defendant's motion, the plaintiff's opposition and the defendant's reply thereto this court finds as follows:

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

This Court finds that the plaintiff's affidavit and deposition testimony established, prima facie, her entitlement to judgment as a matter of law by demonstrating that the defendant Lisa Frazier, who was faced with a stop sign at an intersection, negligently drove her vehicle into the intersection in which the plaintiff was traveling in her vehicle, without yielding the right-of-way to the plaintiff and that this was the sole proximate cause of the accident (see Vehicle and Traffic Law § 1142[a]; Duran v Simon, 83 AD3d 654 [2d Dept. 2011]). Plaintiff was entitled to anticipate that other motorists will obey the traffic laws and yield the right-of-way (see Sirot v Troiano, 66 AD3d 763 [2d Dept. 2009]), and she also demonstrated that she was driving within the speed limit and attempted to take evasive action immediately prior to the collision (see Bonilla v Gutierrez, 81 AD3d 581 [2d Dept. 2011]; Sirot v Troiano, 66 AD3d 763[2d Dept. 2009]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]). In this regard the courts have held that a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection (see Sirot v Troiano, 66 AD3d 763 [2d Dept.

2009]; Thus, "under the doctrine of comparative negligence, a driver who lawfully enters an intersection . . . may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection" (see Romano v 202 Corp., 305 AD2d 576 [2d Dept. 2003][that (defendant) allegedly "ran" the stop sign would not preclude a finding, as a matter of law, that negligent conduct by (plaintiff) contributed to the accident]).

Here, the defendant's deposition testimony conflicts with the factual allegations contained in the plaintiff's deposition testimony.. Ms. Frazier testified that she came to a complete stop at the stop sign and proceeded when the plaintiff's vehicle was a block away. She stated that her vehicle was in the middle of the intersection when the plaintiff's vehicle sped up and struck the rear of her vehicle with the front of plaintiff's vehicle. Therefore, this Court finds that there are questions of fact as to whether the defendant stopped at the stop sign before proceeding into the intersection; which vehicle entered the intersection first; where each parties' vehicle was positioned prior to the impact; when plaintiff first observed defendant's vehicle in the intersection; and whether plaintiff had adequate time to observe defendant's vehicle in the intersection and take appropriate evasive action to stop her vehicle or to otherwise avoid the accident (see Steiner v Dincesen, 943 NYS2d 585 [2d Dept. 2012]; Bonilla v Gutierrez, 81 AD3d 581 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]).

Lastly, the plaintiff's deposition testimony is admissible as it was certified and is also admissible under CPLR 3116(a) since that transcript was submitted by the party deponent himself and therefore was adopted as accurate by the deponent (see Rodriguez v Ryder Truck, Inc., 91 AD3d 935 [2d Dept. 2012]; Ashif v Won Ok Lee, 57 AD3d 700 [2d Dept. 2008]).

Accordingly, as triable questions exist as to whether plaintiff exercised due care as she entered the intersection and, if not, whether such lack of care was a proximate cause of the accident (see Gorham v Methun, 57 AD3d 480 [2d Dept. 2008]), it is hereby,

ORDERED, that the plaintiff's motion for partial summary judgment on the issue of liability is denied.

Dated: July 9, 2012  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.