

Morgan v Castronovo
2012 NY Slip Op 32438(U)
January 6, 2012
Supreme Court, Suffolk County
Docket Number: 20494/2010
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK**I.A.S. PART 7 - SUFFOLK COUNTY****PRESENT:****WILLIAM B. REBOLINI**
Justice_____
Scott Morgan and Colleen Morgan,Index No.: 20494/2010

Plaintiffs,

Motion Sequence No.: 003; MGMotion Date: 5/22/12Submitted: 6/19/12

-against-

Michael Castronovo, Jr. and April Castronovo,

Motion Sequence No.: 004; XMGMotion Date: 5/22/12Submitted: 6/19/12

Defendants.

Attorney for Defendants on Counterclaim:Gordon & Silber, P.C.
355 Lexington Avenue, 7th Floor
New York, NY 10017Attorney for Plaintiffs:Tinari, O'Connell,
Osborn & Kaufman, LLP
320 Carleton Avenue, Suite 6800
Central Islip, NY 11722Clerk of the CourtAttorney for Defendants:Richard T. Lau & Associates
300 Jericho Quadrangle, P.O. Box 9040
Jericho, NY 11753

Upon the following papers numbered 1 to 30 read upon these motions for Summary Judgment: Notice of Motion and supporting papers, 1 - 11; Notice of Cross Motion and supporting papers, 12 - 20; Answering Affidavits and supporting papers, 21 - 28; Replying Affidavits and supporting papers, 29 - 30; it is

ORDERED that the motion by plaintiff on the counterclaim, Colleen Morgan, for an order pursuant to CPLR 3212 granting summary judgment in her favor dismissing defendants' counterclaim is granted; and, it is further

ORDERED that the motion by plaintiffs for an order pursuant to CPLR 3212 granting summary judgment in their favor and against defendants on the issue of liability is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff passenger, Scott Morgan, as well as a derivative action for loss of services on behalf of his wife, plaintiff driver Colleen Morgan, as a result of a motor vehicle accident with an automobile driven by defendant Michael Castronovo, Jr. and owned by defendant April Castronovo. After issue was joined and leave to serve an amended answer was granted, defendants interposed a counterclaim for indemnification against plaintiff Colleen Morgan, who replied claiming, in part, that she was confronted with an emergency situation.

The accident occurred on October 24, 2009 at approximately 8:00 p.m. on Smithtown Boulevard at or near its intersection with Rosevale Avenue in the Town of Smithtown, New York. It is uncontroverted that plaintiff Colleen Morgan, the owner and operator of a 2009 Honda Accord vehicle, was proceeding straight in an easterly direction along Smithtown Boulevard, a roadway with one lane and a left turn lane in each direction in the vicinity of the Rosevale Avenue intersection, when the front driver's side of her vehicle was hit by the front of the vehicle operated by defendant Michael Castronovo, Jr. At the time of the collision, defendants' vehicle was traveling in the westbound direction on Smithtown Avenue and had been in the left turning lane.

Plaintiff on the counterclaim now moves for summary judgment dismissing the counterclaim against her on the ground that she bears no liability for the subject accident inasmuch as the movement into her lane or the left hand turn by defendants' vehicle into the path of her oncoming vehicle, which had the right-of-way, was in violation of Vehicle and Traffic Law §§ 1141 and 1163 (a) and thus, was the sole proximate cause of the subject accident. Plaintiffs cross move for summary judgment in their favor on the issue of liability on the same grounds.

The deposition testimony of the parties submitted in support of the motion reveals that at the time of the subject accident it was raining, it was dark outside, and the roads were lit by overhead street lights. Additionally, the parties contend that the subject intersection was controlled by a traffic light which was green for east west traffic, but that no green turn arrow was illuminated for either driver.

Defendant Michael Castronovo, Jr. testified at his examination before trial that he was making a left turn, and that his turn signal, headlights, and windshield wipers were all on at the time of the accident. He stated that he had stopped his car in the left turning lane, observed two vehicles pass as he contemplated making a left turn, and that his vehicle was traveling at approximately 20 miles per hour at the time of the collision with plaintiffs' vehicle. Defendant Michael Castronovo, Jr. first saw plaintiffs' headlights approximately a half a second before the accident and he did not sound the horn or apply the brakes prior to the impact. Although he posits that plaintiffs' vehicle was traveling at approximately 40 to 45 miles per hour at the time

of the collision, he testified in response to at least three separate questions that he did not see the other vehicle before the accident. He stated that he did not know or recall the information upon which he based the approximate speed of plaintiffs' vehicle.

Plaintiff Colleen Morgan testified at her deposition that just prior to the subject accident she was traveling in an easterly direction along Smithtown Avenue and that her vehicle was traveling between 30 and 35 miles per hours at the time of the collision with defendants' vehicle. She maintains that she saw the headlights from defendants' automobile approximately 3 seconds before the collision and that she did not observe the vehicle making a turn, but that "all of a sudden, it was in front of us...[in] our lane." Plaintiff Colleen Morgan stated that she had no opportunity to apply the brakes, make an evasive maneuver, or sound the horn. She testified that prior to the 8 p.m. collision, she had one martini at about 5 p.m., ate dinner and left a restaurant at about 6:30 p.m., returned to her home, and then proceeded out shortly before the collision. Plaintiff Scott Morgan testified at his examination before trial that at the time of the collision he was a passenger in the vehicle owned and operated by his wife, plaintiff Colleen Morgan. He indicated that he first observed the defendants' vehicle about a "split second" before the accident and that the vehicle in which he was a passenger was 90% through the intersection when it was struck by defendants' automobile. He postulates that defendants' car appeared to swerve and was hydroplaning immediately prior to the collision. Plaintiff Scott Morgan states that defendant Michael Castronovo, Jr. said "I'm sorry, sorry. I'm so sorry. We slid into your lane" immediately after the accident.

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see, Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Further, the credibility of the parties is not an appropriate consideration for the Court (*S.J. Capelin Assocs., Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478 [1974]), and all competent evidence must be viewed in a light most favorable to the party opposing summary judgment (*Benincasa v Garrubbo*, 141 AD2d 636, 637, 529 NYS2d 797, 799 [2d Dept 1988]). Once this showing by the movant has been established, the burden shifts to the party opposing the summary judgment motion to produce evidence sufficient to establish the existence of a material issue of fact (*see Alvarez v Prospect Hosp.*, *supra*).

Vehicle and Traffic Law §1141 provides that "[t]he 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." Here, plaintiff on the counterclaim and plaintiffs demonstrated their *prima facie* entitlement to judgment as a matter of law by demonstrating that

defendant violated Vehicle and Traffic Law § 1141 by making a left turn directly into the path of their vehicle when it was not reasonably safe to do so, as their vehicle was legally proceeding along Smithtown Boulevard with the right-of-way (*see, Ahern v Lanaia*, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; *Heath v Liberato*, 82 AD3d 841, 918 NYS2d 353 [2d Dept 2011]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]). In addition, inasmuch as plaintiff Colleen Morgan had the right-of-way, she was entitled to anticipate that defendant Michael Castronovo, Jr. would obey those traffic laws which required him to yield to the plaintiffs' vehicle (*see Ahern v Lanaia, supra*).

In opposition to the motion, defendants contend that issues of fact exist as to whether plaintiff Colleen Morgan exercised reasonable care to avoid the collision with the left-turning defendants' vehicle. However, there is no deposition testimony that plaintiff Colleen Morgan actually observed the defendants' vehicle prior to the accident so as to be able to avoid colliding with it (*compare Sirot v Troiano*, 66 AD3d 763, 886 NYS2d 504 [2d Dept 2009]; *Gorham v Methun*, 57 AD3d 480, 869 NYS2d 182 [2d Dept 2008]). Defendants assert that plaintiff Colleen Morgan was driving at an excessive rate of speed at the time of the collision and include a witness statement from Richard Meehan, a front seat passenger in defendants' vehicle. His statement that plaintiffs' vehicle "appeared to be proceeding at 40 to 45 miles per hour" prior to the accident contained no information as to the time and duration he observed the plaintiffs' vehicle. Meehan also stated that "it appeared that there was sufficient time and space for [defendant] Castronovo to complete his left turn onto Rosevale Avenue"-which was obviously not the case. Finally, defendants imply that plaintiff Colleen Morgan was at fault because of her having consumed a martini prior to the accident. This claim is illusory, at best, since the fact that plaintiff Colleen Morgan admitted to having had one drink 2 and ½ hours prior to the accident, without any other evidence of intoxication or impairment, does not change the finding that the sole proximate cause of the subject accident was defendants' failure to yield the right-of-way as required by Vehicle & Traffic Law § 1141 (*see, Ahern v Lanaia, supra; Agati v Wandel*, 49 AD3d 572, 854 NYS2d 445 [2d Dept 2008]). Therefore, defendants failed to raise a triable issue of fact as to whether plaintiff Colleen Morgan was comparatively negligent in the operation of her vehicle (*see, Ahern v Lanaia, Heath v Liberato, Berner v Koegel, supra*).

In addition, inasmuch as defendant Michael Castronovo, Jr. admitted that prior to commencing his left turn he did not see the vehicle that plaintiff was operating, defendant was negligent as a matter of law in failing to see that which, through the proper use of his senses, he should have seen (*see, Berner v Koegel, supra; Gabler v Marly Bldg. Supply Corp.*, 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]). In opposition to the motion, defendants contends that there is an issue of fact as to plaintiffs' comparative negligence in the operation of her vehicle, specifically, whether plaintiff failed to avoid the collision when she failed to see defendants' vehicle, which she should have seen with the proper use of her senses. Here, defendants failed to raise a triable issue of fact inasmuch as plaintiff Colleen Morgan had the right of way and was entitled to anticipate that defendant Michael Castronovo, Jr. would obey the traffic laws which required him to yield (*see, Palomo v Pozzi*, 57 AD3d 498, 869 NYS2d 153 [2d Dept 2008]; *Berner v Koegel, supra*).

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Accordingly, as the evidence shows defendants failed to yield the right of way to the approaching plaintiffs' vehicle, the motion for summary judgment by plaintiff on the counterclaim is granted and the counterclaim is dismissed and partial summary judgment on the issue of liability is granted to plaintiffs.

Dated: 7/6/2012

William B. Rebolini
HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION