

Smith v Zeilingold

2013 NY Slip Op 31008(U)

May 8, 2013

Supreme Court, Queens County

Docket Number: 9651/2013

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

HENRY SMITH, Index No.: 9651/2011
Plaintiff, Motion Date: 04/30/2013
- against - Motion No.: 177

YAKOV MOSHE ZEILINGOLD and YOCHANAN
ZEILINGOLD, Motion Seq.: 3
Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by plaintiff, HENRY SMITH, for an order pursuant to CPLR 3212 granting plaintiff partial summary judgment on the issue of liability and setting the matter down for trial on damages only:

Papers Numbered

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

This is a personal injury action in which plaintiff, Henry Smith seeks to recover damages for injuries he sustained as a result of a motor vehicle accident that occurred on January 13, 2011, at the intersection of Eastern Parkway and Howard Avenue, in Kings County, New York.

Plaintiff claims that at the time of the accident, he was proceeding eastbound on Eastern Parkway with the green light in his favor when defendant-driver, Yakov Moshe Zeilingold, made a sudden left turn from westbound Eastern Parkway onto Howard Avenue directly in front of his vehicle. Plaintiff states that as a result of the collision he sustained severe physical injuries including a meniscal tear of the right knee which required surgical repair and cervical spine disc herniations at C3-4, C4-5 and C5-6.

Huy (Tom) Le, Esq., counsel for plaintiff, now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment in favor of plaintiff on the issue of liability and setting the matter down for a trial on damages. In support of the motion, the plaintiff submits an affirmation from counsel; a copy of the pleadings; a copy of plaintiff's bill of particulars and amended bill of particulars; and copies of the transcripts of the examinations before trial of the plaintiff and the defendant, Yakov Moshe Zeilingold.

Plaintiff, age 71, testified at an examination before trial held on July 30, 2012 that on the date of the accident, January 13, 2011, he was operating a 1997 Ford Econoline 250. He was proceeding to his home after dropping a friend off at Rockaway Parkway. He was proceeding eastbound in the center lane of Eastern Parkway which is three lanes in each direction. Plaintiff testified that as he approached the intersection with Howard Avenue the traffic signal was green in his direction. He observed defendants' vehicle heading in a westbound direction. He testified that when he first saw defendant's vehicle he was already in the intersection and the defendant's vehicle turned left "right in front of me." The plaintiff turned his vehicle to the left to try to avoid the collision but he struck the defendant's vehicle on its side. Plaintiff testified that after the impact the defendant got out of his vehicle and stated that he was sorry that he cut the plaintiff off.

Defendant, Yakov Moshe Zeilingold, age 26, was deposed on October 3, 2012. He stated that on the date of the accident he was operating a 2004 Buick LeSabre which was owned by his father Yochanan Zeilingold. He stated that he was coming from an amusement park in New Rochelle and traveling to the Flatbush area of Brooklyn utilizing a GPS that was mounted on the windshield of his vehicle. He testified that he was driving westbound on Eastern Parkway in the right lane. He stated that a half a block before he reached the intersection with Howard Avenue he moved into the left lane in accordance with the directions of the GPS device. He engaged his left turn signal as he intended to make a left turn onto Howard Avenue. He stated that the traffic signal at the intersection was green in his direction. When he reached the intersection he slowed down and looked to his right towards the oncoming lanes of travel on Eastern Parkway. He observed a large white van in the left lane coming towards his vehicle as he began to make his turn into the intersection. When he first observe the van it was two car lengths away and he accelerated as he began to turn left. He stated, "I figured that at the rate he was going and the distance he was, I would have enough time to

get past him without there being any contact and preferred that versus to stay in my lane to continue as there would be contact." He stated that the front of plaintiff's vehicle collided with the right passenger side of his vehicle. He stated that he was not injured as a result of the collision. He stated that after the impact he approached the operator of the other vehicle and apologized.

Plaintiff's counsel, argues in support of the motion for summary judgment, that the defendant driver violated VTL §§ 1141 by failing to yield the right of way to the plaintiff's vehicle approaching the intersection and turning at the intersection without waiting until the turn could be made with reasonable safety. Counsel contends that the defendant was negligent based upon his failure to observe and yield to the plaintiff's vehicle who was traveling straight ahead on Eastern Parkway with the right of way. Plaintiff claims that defendant was negligent in making his left turn and colliding with plaintiff's vehicle. Counsel contends that because the defendant made a left turn directly into the path of the plaintiff's vehicle that he violated VTL § 1141 and is negligent as a matter of law. He states that based upon the testimony of the parties, that when the accident occurred, plaintiff had already entered the intersection and was traveling through the intersection while defendant was still in the process of entering the intersection. Counsel states that because of the defendant's negligent actions the plaintiff collided with the side of the defendant's vehicle with the front of his vehicle. Counsel asserts that in accordance with the evidence and testimony, the plaintiff is entitled to partial summary judgment on the issue of liability as defendant's actions were negligent as a matter of law and there is no evidence demonstrating that the plaintiff was comparatively negligent.

In opposition to the motion, defendant's counsel, Marcella Gerbasi Crewe, Esq., asserts that plaintiff, Henry Smith, has not established a prima facie case demonstrating that the defendant was liable for the accident. In addition counsel requests that the issue of whether the plaintiff sustained a serious injury be reserved for a future motion for summary judgment after the completion of discovery or at the time of trial.

Upon review of the plaintiff's motion, the defendants' opposition and the plaintiffs' 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. The failure to make that showing

requires the denial of the motion regardless of the sufficiency of the opposing papers (see Mastrangelo v Manning, 17 AD3d 326 [2d Dept 2005]). 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]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (see Cauthers v Brite Ideas, LLC, 41 AD3d 755 [2d Dept. 2007]).

Vehicle and Traffic Law § 1141 requires that "the driver of a vehicle intending to turn to the left within an intersection... 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." A driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require him to yield (see Kann v Maggies Paratransit Corp., 63 AD3d 792 [2d Dept. 2009]; Palomo v Pozzi, 57 AD3d 498 [2d Dept. 2009]; Berner v Koegel, 31 AD3d 591[2d Dept. 2006]; Gabler v Marley Bldg. Supply Corp., 27 AD3d 519[2d Dept. 2006]). Further, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (see Laino v Lucchese, 35 AD3d 672 [2d Dept. 2006]; Berner v Koegel, 31 AD3d at 592 [2d Dept. 2006]; Bongiovi v Hoffman, 18 AD3d 686 [2d Dept. 2005]).

It is plaintiff's contention that the defendant, Yakov Moshe Zeilingold, was negligent as a matter of law in attempting to make a left turn onto Howard Avenue in violation of VTL §1141 and that said negligence was the sole proximate cause of the accident. This Court agrees.

Here, the plaintiff established prima facie entitlement to judgment as a matter of law through the submission of the deposition testimony of each party. Plaintiff testified that he saw the defendant's vehicle on Eastern Parkway as he approached the intersection but that as he reached the middle of the intersection, the defendant proceeded into the intersection at which point the plaintiff struck the defendant's vehicle broadside. Defendant testified that he looked for traffic when he reached the intersection at Howard Avenue. He observed the plaintiff's vehicle two car lengths away and began the left turn. He states that rather than waiting for the plaintiff's vehicle to pass he accelerated across the intersection believing that he had enough time complete the left turn before the plaintiff's vehicle arrived at the intersection. Thus, the evidence established that

defendant was negligent in violating Vehicle and Traffic Law § 1141 by making a left turn when it was not reasonably safe to do so, directly into the path of plaintiff's vehicle which was lawfully present in the intersection (see Ducie v Ippolito, 95 AD3d 1067 [2d Dept. 2012]; Socci v Levy, 90 AD3d 1020 [2d Dept. 2011]; Stanford v Dushey, 71 AD3d 988 [2d Dept. 2010]).

In opposition, the defendants failed to raise a triable issue of fact as to whether the plaintiff was at fault in the happening of the accident. It has been recognized that a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision (see Yelder v Walters, 60 AD3d 734 [2d Dept. 2010]; Jaramillo v Torres, 60 AD3d at 735 [2d Dept. 2009]; DeLuca v Cerda, 60 AD3d 721 [2d Dept. 2009]). As plaintiff had the right of way he was entitled to anticipate that defendant would obey the traffic laws which required him to yield. Here, the plaintiff testified that he only had seconds to try to avoid the impact when he first realized that the defendant was proceeding into the intersection. Therefore, plaintiff established his freedom from comparative negligence as he was lawfully in the intersection when defendant entered the intersection despite seeing the plaintiff's vehicle only two car lengths away (see Bonilla v Gutierrez, 81 AD3d 581 [2d Dept. 2011]).

Accordingly, based upon the foregoing it is hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, HENRY SMITH, shall have partial summary judgment on the issue of liability as against the defendants YAKOV MOSHE ZEILINGOLD and YOCHANAN ZEILINGOLD and the Clerk of Court is authorized to enter judgment accordingly, and it is further,

ORDERED, that this action shall be placed on the trial calendar of the Court for a trial on serious injury and damages.

Dated: May 8, 2013
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.