O'Brien v Couch
2013 NY Slip Op 33827(U)
June 27, 2013
Supreme Court, Saratoga County
Docket Number: 2010-2598
Judge: Robert J. Chauvin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SARATOGA

JANET O'BRIEN,

Plaintiff,

-against-

JESSICA COUCH,

Defendant.

DECISION AND ORDER

Index No: 2010-2598
RJI No: 45-1-2011-0120

ORIGINAL

Appearances:

For Plaintiff: Brendan F. Baynes, Esq.
The Baynes Law Firm, PLLC
130 Main Street
Ravena, NY 12143

For Defendant: Louise E. Dunn, Esq.
Law Offices of Karen L. Lawrence
500 New Karner Road, 3rd Floor
Albany, New York 12205-3853

Before: Hon. Robert J. Chauvin

By notice of motion, dated February 13, 2013, the defendant moves, pursuant to CPLR § 3212, for an order of summary judgment in favor of the defendant and dismissing the plaintiff's complaint. In support of such motion the defendant submitted the affirmation of Louise E. Dunn, Esq., dated February 13, 2013, along with annexed exhibits "A" through "J", including copies of the note of issue; pleadings; demand for and verified bill of particulars; accident report; deposition of plaintiff taken November 18, 2011; deposition of the defendant taken November 18, 2011; the affidavit of Douglas Close, dated November 19, 2012; the affidavit of Douglas J. Rowland, P.E., dated February 6, 2013, along with the resume and report of said witness.

In opposition the plaintiff submitted the affirmation of Brendan F. Baynes, dated March 12, 2013, along with annexed exhibits "A" through "E", including copies of various medical records, records from defendant's cell phone and deposition of the defendant taken November 6, 2012. Plaintiff also submitted the affidavit of Gregory L. Witte, along with annexed exhibits "A" through "D" including the resume and report of said witness and various photographs.

In reply the defendant submitted the further affirmation of Louise E. Dunn, Esq., dated April 12, 2013, with annexed exhibits "A" and "B", including a further affidavit of Douglas J. Rowland, P.E., dated April 12, 2013, and a copy of the deposition of the defendant taken November 6, 2012.

The motion was initially returnable on March 19, 2013. Upon consent of all parties the motion was adjourned until April 16, 2013. It is also noted by the court that the matter is presently adjourned without date due to the military deployment of the defendant outside of the country.

UNDERLYING ACTION

The underlying action herein concerns a motor vehicle accident which occurred in the morning hours of June 15, 2010 on Route 9 in the Town of Halfmoon, Saratoga County. At that time the plaintiff was pulling out of a service station located on the east side of Route 9, a four lane highway running north and south, directly across from Sitterly Road. She intended to turn left and proceed southbound on Route 9. At that time the defendant was proceeding northbound on Route 9 and collided with the plaintiff's vehicle.

In accordance with all of the direct, eyewitness testimony submitted herein at that time the intersection was controlled by a traffic light, which was green in regard to northbound traffic on Route 9 and was flashing red for traffic leaving the service station. Further all of the direct evidence herein establishes that there were no aberrant weather or road conditions, that the defendant was traveling at or about the speed limit in that area, 40 mph, and that the defendant applied her brakes upon seeing the plaintiff pull out. Moreover it is uncontested that the defendant was no more than three car lengths away, when the plaintiff was beginning to pull into the intersection.

Such is supported by the testimony of the defendant, as well as, another driver who was also proceeding northbound on Route 9. Such witness clearly indicates that the defendant had a green light, was traveling at or about the speed limit and that the plaintiff pulled out in front of the defendant, thereby causing the accident. The witness also indicates that the defendant applied her brakes upon the plaintiff pulling out into oncoming traffic.

In addition the observation of such witness and the testimony of the defendant, that the defendant was proceeding at or about the posted speed limit prior to the accident, is buttressed by

the submitted opinion of a licensed physical engineer.

It must also be noted that based upon the only direct evidence herein, the testimony of the defendant, she was not in use of her cell phone at the time of the accident. The defendant has expressly denied the use of her cell phone at the time of the accident. Further she has expressly indicated that at the time of the accident she had a hands free cell phone speaker hanging in the area of her neck and that such may have been activated upon deployment of her air bag.

Based upon such direct evidence as well as the supporting expert opinion, the defendant has moved for summary judgment dismissing the one cause of action set forth in the plaintiff's complaint.

The only contested underlying factual circumstances at issue upon this motion are the speed of the defendant's vehicle prior to the application of her brakes and whether she was utilizing her cell phone at the time of the accident. In both respects the plaintiff opposes the motion for summary judgment upon the submission of circumstantial evidence, consisting of an expert opinion and cell phone records.

First the plaintiff has submitted the affidavit of an accident reconstructionist, who, despite having previously found that at the time of the accident the defendant's vehicle was going below the posted speed limit, now through some form of extrapolation has opined that before applying her brakes the defendant was going at least nine miles per hour over the posted speed limit. Such is premised upon examination of the air bag data, certain formulas and the examination of the vehicles following the accident.

Above and beyond any other foundation issues concerning such opinion, it must also be noted that in a report prepared by such witness in October, 2010 the witness calculated that at the time of impact the defendant's vehicle was traveling at a speed of 34.85 miles per hour, and not until a second report prepared in March, 2013, following the submission of the motion herein, did the witness further calculate that prior to the application of her brakes the defendant's vehicle was traveling at 49.45 miles per hour.

Second the plaintiff also submits that the defendant's cell phone records establish the placing of a phone call from her cell phone two minutes before the time that the accident was reported to police. Based upon such the plaintiff submits that there is a factual foundation to establish an issue as to whether, at the time of the accident, the defendant was utilizing her cell

phone and thereby distracted. Upon both areas of circumstantial evidence the plaintiff submits that the defendant's motion for summary judgment must be denied.

UNDERLYING MOTION

As set forth above, the defendant has moved herein for summary judgment, pursuant to CPLR § 3212, dismissing the plaintiff's action. Again, such is premised upon the fact that the sole proximate cause of the accident herein was the negligent actions of the plaintiff. Simply put, the plaintiff pulled out in front of the defendant.

To begin, the court notes that it is well settled that in order to be entitled to summary judgment, movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment as a matter of law *(Winegrad v New York Univ. Medical Center*, 64 NY2d 851, 853 [1985]; *Crowley's Milk Co. v Klein*, 24 AD2d 920 [3d Dept 1965]; *Moskowitz v Garlock* , 23 AD2d 943, 944 [3d Dept 1965]).

On the other hand, once such is presented, the party opposing the motion, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. In this regard, "mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" for this purpose. (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988], citing *Zuckerman v City of New York*, 49 NY2d 557 [1980].)

More specifically to the instant matter, it has clearly been held that in personal injury actions premised upon motor vehicle accidents, where it is established that the sole proximate cause of the accident was the negligent actions of the plaintiff, specifically in failing to yield the right of way, that the defendant is entitled to summary judgment. Such is based upon the underlying holding that an operator of a motor vehicle is entitled to anticipate that other vehicles will obey the traffic laws that require them to yield the right of way. (*Lescenski v Williams,* 90 AD3d 1705 [4th Dept 2011], *lv. denied* 18 NY2d 811 [2012]; *Alston v American Tr., Inc.*, 82 AD3d 546, 546-547 [1st Dept 2011]; *Miglionico v Leroy Holdings Co.*, 78 AD3d 1306, 1307 [3d Dept 2010]; *Palomo v Pozzi,* 57 AD3d 498 [2d Dept 2008]; *Spivak v Erickson*, 40 AD3d 962, 962-963[2d Dept 2007]; *Aristizabal v Aristizabal*, 37 AD3d 503, 503-504 [2d Dept 2007], *lv. denied* 9 NY3d 808 [2007]; *Jacino v Sugarman*, 10 AD3d 593, 595 [2d Dept 2004]; *Mosch v Hansen,* 295 AD2d 717, 717-718 [3d Dept 2002]; *Matt v Tricill*, 260 AD2d 811 [3d Dept 1999];

Hazelton v Brown, 248 AD2d 871, 873 [3d Dept 1998].)

Clearly such rulings are premised upon the express provisions of Vehicle and Traffic Law §§ 1141, 1142, 1143 and/or 1110.

In the present case the defendant has presented direct, uncontested evidence that the sole proximate cause of the accident was the plaintiff's failure to both yield the right of way and obey a traffic control device.

Further the plaintiff has not presented a sufficient factual circumstance or evidence to put such in issue. First the opinion of speed relied upon by the plaintiff, does not rebut the plain and simple fact that the negligent actions of the plaintiff in failing to yield the right of way and/or obey a traffic control device, were the cause of the accident. Second the court finds such opinion speculative, at best. The contention that the defendant was exceeding the speed limit before she applied her brakes is based upon an inspection of the vehicles following the accident and some form of extrapolated theory which was not calculated until the filing of the motion herein and which calculates the speed of her vehicle at less than ten miles per hour over the posted speed limit. In addition, as noted above, such expert initially only calculated the speed of the defendant's vehicle at the time of impact and that such speed was five miles below the posted speed limit. Clearly the defendant and the nonparty eyewitness testified that defendant was traveling within the speed limit and had no opportunity to avoid the accident.

Furthermore, not only does the court find such evidence to be speculative, at best, but there has not been a sufficient foundation set forth, by way of the scientific acceptance and/or reliability of the methodology employed, to establish the admissability of such opinion. Moreover there has not been a sufficient foundation set forth, by way of the qualifications of the witness to express such opinion, to establish the admissability of such opinion.

Likewise the court does not find the cell phone records to be sufficient to establish an issue of fact herein. Again, at best, the use of a cell phone by the defendant at the time of the accident, even if true, is secondary to the sole proximate cause of the accident as established by all of the direct evidence herein. Furthermore the contention that cell phone records showing that a call was made from the defendant's cell phone two minutes before the time that the accident was reported, as reflected upon the police accident report, establishes a factual basis from which to infer that the defendant was distracted at the time of the accident is contrary to the proof, and,

speculative, at best.

In both respects the court does not find such circumstantial and speculative evidence and/or submissions to be sufficient to rebut the clear and direct evidence submitted by the defendant, and/or to establish any factual issue herein. (*Lecenski*, 90 AD3d 1705; *Alston*, 82 AD3d 546; *Mosch*, 295 AD2d 717; *Matt*, 260 AD2d 811; *Morrison v Flintosh*, 163 AD2d 464, 467-468 [3d Dept 1990].)

As such the defendant's motion for summary judgment is in all respects granted.

This memorandum shall constitute the decision and order of the court. The original decision and order and the underlying papers are being delivered directly to the Saratoga County Clerk for filing. The signing of this decision and order and the delivery of this decision and order to the Saratoga County Clerk shall not constitute notice of entry under CPLR § 2220, and the parties are not relieved from the applicable provisions of that rule regarding service of notice of entry.

DATED: June 27, 2013
Ballston Spa, NY

HON. ROBERT J. CHAUVIN
SUPREME COURT JUSTICE

SARATOGA COUNTY CLERK'S OFFICE BALLSTON SPA, NY
2013 JUL -3 PM 2:38
FILED

The following papers were read and considered:

1. Notice of Motion dated February 13, 2013;
2. Affirmation in Support of Louise E. Dunn, Esq. dated February 13, 2013 with attached exhibits "A" through "J";
3. Affidavit of Douglas Close dated November 19, 2012;
4. Affidavit of Douglas J. Rowland, P.E. dated February 6, 2013 with attachments;
5. Attorney Affidavit in opposition of Brendan F. Baynes, Esq dated March 12, 2013 with attached exhibits "A" through "E";
6. Affidavit of Gregory L. Witte dated March 12, 2013 with attached exhibits "A" through "D";
7. Reply Affirmation of Louise E. Dunn, Esq. dated April 12, 2013 with attached exhibits "A" and "B"; and
8. Affidavit of Douglas J. Rowland, P.E. dated April 12, 2013 with attachment.

ENTERED
Peter R. Martin
Saratoga County Clerk