

**Diggs v Barrett**

2014 NY Slip Op 30420(U)

February 5, 2014

Supreme Court, Queens County

Docket Number: 700431/2011

Judge: Robert J. McDonald

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oncoming lane of traffic striking the plaintiffs vehicle in the middle of the drivers' side. Plaintiff claims that as a result of the accident she and her father, Kelvin Diggs lost \$19,505.68 due to the total loss of their vehicle.

Philip J. Dinhofer, Esq. counsel for plaintiffs, now moves prior to depositions, for an order pursuant to CPLR 3212(b), granting summary judgment in favor of plaintiffs on the issue of liability and awarding damages to the plaintiffs in the amount of \$19,505.68 as well as counsel fees for services rendered in the prosecution of this action. In support of the motion, the plaintiffs submit an affirmation from counsel; an affidavit from plaintiff Denae Diggs with regard to the facts of the accident; an affidavit from plaintiff, Kelvin Diggs, with respect to amount his daughter paid to purchase the vehicle and the amount he paid to satisfy the balance due on the note; a copy of the pleadings; photographs depicting the street where the accident occurred; and various documents related to the claim for damages.

In her affidavit dated November 23, 2013, plaintiff, Denae Diggs, states that on April 24, 2010 she was the driver of a 2010 Honda Accord two door sedan. At approximately 2:00 a.m. she was traveling northbound on Guy R. Brewer Blvd. intending to make a left turn onto 112<sup>th</sup> Road. She states that as she was making the left turn her vehicle was struck in the middle of the driver's side by a 1997 Ford SUV operated by the defendant, Travis Barrett and owned by defendant, Tanya Barrett. She states that the defendant's vehicle, which was also traveling northbound on Guy R. Brewer, came from behind her, and struck her vehicle broadside while she was in the middle of making the left turn. She states that the defendants' vehicle crossed over the double yellow line prior to striking her vehicle. She states that the force of the impact was so hard that it propelled her vehicle out of the intersection and onto the northwest corner of the intersection. She states that as a result of the accident, her vehicle was declared a total loss. She states that her insurance did not cover the property damage to the vehicle and the defendants' insurance company declined coverage of the entire claim.

Plaintiff's counsel argues that the plaintiff is entitled to summary judgment on the theory that the subject accident was analogous to a rear-end collision. Counsel contends that since the defendant's vehicle came from behind the plaintiff's vehicle while she was making a left turn onto 112<sup>th</sup> Street, that pursuant to VTL § 1129 the defendant was negligent for following too closely, failing to maintain a reasonably safe rate of speed,

failing to maintain control of his vehicle and failing to use reasonable care to avoid striking the other vehicle. Thus, counsel argues that this rear-end collision creates a prima facie case of negligence with respect to the defendant's vehicle thereby requiring the operator if the vehicle approaching from the rear to provide a non-negligent explanation. Further, counsel argues that as the plaintiff testified that the defendant crossed over the double yellow line prior to striking her vehicle, the defendant was negligent pursuant to VTL § 1126(a) which prohibits the operator of a vehicle from crossing over a double yellow line into the opposing lane of traffic.

Therefore, the plaintiff contends that defendant was negligent in coming from behind the plaintiff, crossing over a double yellow line to overtake the plaintiff's vehicle and in the process, striking the plaintiff's vehicle on the driver's side while she was lawfully making a left turn from Guy R. Brewer onto 112<sup>th</sup> Street. Counsel alleges that defendant was negligent in that he failed to maintain a safe speed, failed to maintain a safe distance between his car and the car in front of him in violation of VTL § 1129(a) and failed to avoid striking the plaintiff's vehicle. Counsel argues that the plaintiff is entitled to summary judgment on the issue of liability because the evidence demonstrates that the defendant was inattentive, following too closely, and traveling at an excessive rate of speed. Plaintiff submits that the actions of the defendant were the sole proximate cause of the accident and from the evidence submitted it can not be inferred that plaintiff's actions were negligent or a proximate cause of the accident.

In opposition to the motion, counsel for defendant contends that the motion for summary judgment must be denied as there are questions of fact as to how the accident took place. Counsel states that this was not, as categorized by the plaintiff, analogous to a rear-end collision, rather defendant states that this was a T-bone like collision that occurred while the plaintiff was making an improper left turn. In support of the opposition, counsel submits his own affirmation as well as the affidavit of defendant Travis Barrett dated January 15, 2014 which states that on April 24, 2010 he was

"driving northbound on Guy R. Brewer Boulevard when plaintiff's vehicle made a right from Sayres Avenue onto Guy R. Brewer Boulevard in front of me. Shortly thereafter, plaintiff pulled her vehicle towards the right side of Guy R. Brewer Boulevard to let me pass her and to allow me to continue heading northbound. After the plaintiff pulled to the right, the plaintiff then suddenly proceeded to make a left turn onto 112<sup>th</sup> Road. As plaintiff proceeded into her turn, she placed her

vehicle in front of my car. While plaintiff was in the process of making her turn, both of our vehicles collided. There was contact between the right front passenger's side of my vehicle and the driver's side of the plaintiff's vehicle. Prior to the collision I did not cross over the double yellow line. If plaintiff planned to make a left turn, it was a wide left turn. Had the collision not occurred I would have continued heading northbound on Guy R. Brewer Boulevard."

Defense counsel contends that the affidavits of the parties contain differing versions of how the accident occurred and as such there are questions of fact as to which party or parties were negligent and which parties negligence was a proximate cause of the accident.

Upon review of the plaintiffs' 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 [2nd 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]).

Based upon a review of the respective affidavits of the parties this Court finds that there are material issues of fact which preclude the granting of summary judgment to the plaintiff on the issue of liability. Therefore, viewing the evidence in the light most favorable to the non-moving party (Stukas v Streiter, 83 AD3d 18 [2nd Dept. 2011]; Judice v DeAngelo, 272 AD2d 583, [2nd Dept. 2000] this court finds that there are factual issues concerning whether the plaintiff and defendant each met their respective duty to observe what should have been observed and the duty to exercise reasonable care under the circumstances (see Wilson v Rosedom, 82 AD3d 970 [2d Dept. 2011]; Cox v Weil, 66 AD3d 634 [2d Dept. 2009]; Borukhow v Cuff, 48 AD3d 726 [2d Dept. 2008]).

The plaintiff claims she was proceeding on Guy R. Brewer making a lawful left turn when the defendants' vehicle came from behind her, crossed the yellow lines, went into the opposing lane of traffic, and struck her vehicle while she was making a

legal left turn. However, defendant claims that he was proceeding northbound on Guy R. Brewer when the plaintiff vehicle came out from Sayres Street and made a right turn onto Guy R. Brewer in front of his vehicle. In contradiction to the plaintiff's version the defendant states that the plaintiff pulled to the right on Guy R. Brewer so that defendant could pass her and continue heading straight. However, according to the defendant, the plaintiff suddenly made a left turn from the right lane side of Guy R. Brewer directly in front of his vehicle. Defendant claims that this was clearly not a rear-end collision. Further, Barrett stated that he never crossed the double yellow lines and the plaintiff made a wide left turn in violation of VTL 1160(b) which requires a left turn to be made from the right half of the roadway nearest the center line. According to defendant's affidavit plaintiff did not make the turn close to the center line, but rather, maneuvered her vehicle to the right side of Guy R. Brewer prior to making the left turn.

Therefore, viewing the evidence submitted in the light most favorable to the nonmoving party, there are issues of credibility which should be determined by the trier of fact rather than on a motion for summary judgment. "A court may not weigh the credibility of witnesses on a motion for summary judgment, unless it clearly appears that the issues are not genuine, but feigned" (Conciatori v. Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]). Thus, this Court finds that as the parties have presented differing versions as to how the accident occurred, there is a triable issue of fact as to whether the defendant was negligent and whether any negligence on the plaintiff's part contributed to the accident. Accordingly, as triable questions exist as to whether both drivers exercised due care 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 plaintiffs' motion for an order granting summary judgment on the issue of liability and damages is denied.

Dated: February 5, 2014  
Long Island City, N.Y.

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ROBERT J. MCDONALD, J.S.C