

**Castiglione v Kruse**

2014 NY Slip Op 33722(U)

July 11, 2014

Supreme Court, Suffolk County

Docket Number: 12-356

Judge: Peter H. Mayer

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

COPY

INDEX No. 12-356  
CAL No. 13-01544MV

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 17 - SUFFOLK COUNTY

**P R E S E N T :**

Hon. PETER H. MAYER  
Justice of the Supreme Court

MOTION DATE 1-22-14  
ADJ. DATE 2-26-14  
Mot. Seq. # 001 - MD  
# 002 - XMD

-----X

MARIE CASTIGLIONE and FRANK  
CASTIGLIONE,

Plaintiffs,

- against -

ROBERT KRUSE and KAREN KRUSE,

Defendants.

-----X

MICHAEL S. LANGELLA, P.C.  
Attorney for Plaintiffs  
888 Veterans Memorial Highway, Suite 410  
Hauppauge, New York 11788

PICCIANO & SCAHILL, P.C.  
Attorney for Defendants  
900 Merchants Concourse, Suite 310  
Westbury, New York 11590

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion/Order to Show Cause by the plaintiffs, dated Dec. 18, 2013, and supporting papers (including Memorandum of Law dated Dec. 18, 2013); (2) Notice of Cross Motion by the defendants, dated Jan. 13, 2014, and supporting papers; (3) Affirmation in Opposition by the defendants, dated Jan. 13, 2014, and supporting papers; (4) Reply Affirmation and Affirmation in Opposition by the plaintiffs, dated Jan. 21, 2014, and supporting papers (including Memorandum of Law dated Jan. 21, 2014; (5) Other      (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); and now

UPON DUE DELIBERATION AND CONSIDERATION BY THE COURT of the foregoing papers, the motion is decided as follows: it is

**ORDERED** that the motion by plaintiffs for partial summary judgment on the issue of liability is denied; and it is further

**ORDERED** that the cross motion by defendants for summary judgment dismissing the complaint is denied.

Plaintiffs Marie Castiglione, and her husband derivatively, commenced this action seeking to recover damages for personal injuries she sustained as a pedestrian in a motor vehicle accident. On October 19,

2011, at approximately 6:40 AM, Marie Castiglione (hereinafter referred to as “plaintiff” or “M. Castiglione”) was walking across Montauk Highway at its intersection with Keith Lane in West Islip when she was struck by the defendants’ vehicle operated by Karen Kruse (hereinafter referred to as “defendant”). Montauk Highway runs east and west, and at the subject intersection has one lane of travel for each direction with a turning lane on the westbound side. Keith Lane runs north and south. The intersection is controlled by a traffic signal. At the time of the accident, it was dark and raining and the street lights on Montauk Highway were illuminated.

Issue has been joined and discovery completed. Plaintiffs now move for summary judgment on the issue of liability. Defendants cross-move for summary judgment dismissing the complaint.

In support of their motion, plaintiffs argue that the defendant was negligent and breached her duty by violating Vehicle and Traffic Law (the “VTL”) §§ 1111(a)(3) and 1146 in failing to see M. Castiglione, to sound the horn, and to exercise due care to avoid striking her as she crossed Montauk Highway in the unmarked crosswalk. In opposition and in support of their cross motion, defendants argue that plaintiff failed to use due care while crossing Montauk Highway, attempted to cross the road outside of the crosswalk, and failed to yield the right of way to moving vehicles, thus, they should be absolved, as a matter of law, from any liability for the accident. Both sides rely upon, *inter alia*, the deposition testimony of plaintiff and that of defendant to make out their prima facie case for summary judgment.

During her deposition, plaintiff testified and also asserts in her affidavit in support of the motion, that she parked her car on Keith Lane and walked to Montauk Highway, as she did everyday to get to her job at Good Samaritan Hospital. Traffic was heavy on Montauk Highway, but she did not see any cars on Keith Lane. She waited for the signal to turn red for the vehicles traveling on Montauk Highway, looked to her right and left, saw that the vehicles had stopped on Montauk Highway, did not see any cars moving from Keith Lane, and proceeded to walk within the unmarked crosswalk. Plaintiff testified she walked at a moderate pace looking forward, crossed the westbound lane on Montauk Highway without incident, but as she was approximately halfway into the eastbound lane, she felt the front driver’s side tire of a car roll over her right foot and the side mirror hit under the her arm, breast and shoulder. Plaintiff asserts that she did not hear a horn blow or brakes screeching, and did not see the car prior to impact.

Defendant testified that she was driving on Keith Lane headed south, and intended to make a left turn at its intersection with Montauk Highway to proceed east. She testified that Keith Lane has two lanes of travel, one for each direction and ends at Montauk Highway, but slightly to the east is the driveway for Good Samaritan Hospital. Defendant testified that as she approached the subject intersection, the traffic light was red, she stopped her vehicle and waited with her left turn signal on. As she waited, she did not see any pedestrians. When the light turned green in her favor, there were vehicles stopped to her left and to her right on Montauk Highway, and a car exiting the driveway of Good Samaritan Hospital which turned left in front of her car and proceeded west. Defendant testified she then proceeded to turn onto Montauk Highway, traveling about 5-6 miles per hour when she felt a severe impact to her car. She did not see what caused the impact, and did not realize that a pedestrian was involved until after she pulled over. Although there was nothing obstructing her view, defendant testified she did not see plaintiff walking across Montauk Highway. Defendant testified that when the police arrived, she reported that a pedestrian had hit her car. However, in the certified police report submitted by the plaintiffs, defendant provided the following written statement

at the scene of the accident:

I was at the intersection of Keith Lane and Montauk Highway waiting at a red light. The light changed to green and I had to wait before making a left turn because I was blinded by bright lights of a car making a left from the Good Sam driveway. After the car passed I started to make my left turn and felt an impact. A pedestrian, wearing dark colors had been hit. Conditions were dark, rainy.

An eyewitness to the accident, David Cabrera, testified pursuant to a subpoena and voluntarily provided a sworn statement dated January 26, 2012. Cabrera states that he was the first car stopped at the red light in the westbound lane of Montauk Highway. He observed a pedestrian at the corner and saw her look in all directions before she crossed the street. Cabrera testified that when the light was green in the pedestrian's favor, she crossed directly in front of his vehicle, they made eye contact, and he saw her pause to ensure the car in the next lane had stopped. Cabrera states that as the pedestrian was crossing the eastbound lane of Montauk Highway, walking at a good pace, he saw an SUV driving south on Keith Lane, turn east onto Montauk Highway and hit the pedestrian. According to Cabrera, the SUV was making the left turn at about 20-22 miles per hour, and after it hit the pedestrian causing her to fall to the pavement, the SUV kept going and rolled over the pedestrian's leg before pulling over to the side of the road. Cabrera states he parked his car and ran over to the pedestrian while yelling at the female driver of the SUV. At the time he provided the statement, Cabrera writes that he recalls yelling at the female driver, "what, you didn't see her" and also "you made the turn too damn fast." Cabrera writes that the female driver replied "I didn't see her, I didn't see her." Questioning of Cabrera during his deposition elicited the same testimony. Since he had to go to work Cabrera provided the pedestrian with his contact information, and left before the police arrived. The pedestrian, he later found out, was M. Castiglione.

Pursuant to VTL § 1146(a), "every driver of a vehicle shall exercise due care to avoid colliding with any ... pedestrian ... upon any roadway and shall give warning by sounding the horn when necessary." Defendant also has the "common-law duty to see that which [s]he should have seen [as a driver] through the proper use of h[er] senses" (*Barbieri v Vokoun*, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept 2010]). VTL § 1111(a)(3) provides, in pertinent part, that "pedestrians facing any steady green signal...may proceed across the roadway within any marked or unmarked crosswalk." VTL § 110 "recognizes that a crosswalk at an intersection need not be delineated by lines or other markings on the road's surface" (*Kochloffel v Giordano*, 99 AD2d 798, 472 NYS2d 132 [2d Dept 1984]).

Based on the deposition testimony submitted, plaintiffs established their prima facie entitlement to summary judgment on the issue of liability. Plaintiff's testimony demonstrates that she entered the unmarked crosswalk after waiting for the green light in her favor, and exercised reasonable care while walking across Montauk Highway. Defendant had a statutory duty to use due care to avoid colliding with plaintiff, as well as a common-law duty to see that which she should have seen through the proper uses of her senses (see VTL § 1146), as well as a common-law duty to see that which she should have seen through the proper use of her senses (*Barbieri v Vokoun*, 72 AD3d 853, 856, 900 NYS2d 315 [2d Dept 2010], citing see *Domanova v State of New York*, 41 AD3d 633, 634 [2007]; *Larsen v Spano*, 35 AD3d 820, 822 [2006]). Defendant breached this duty as she admittedly did not see plaintiff walking across Montauk

Castiglione v Kruse  
Index No. 12-356  
Page 4

Highway. In addition, Cabrera's statement and testimony, together with the defendant's written statement are sufficient to demonstrate, prima facie, defendant's violation of VTL § 1146(a) ["every driver of a vehicle shall exercise due care to avoid colliding with any...pedestrian...upon any roadway and shall give warning by sounding the horn when necessary"].

In opposition, it is argued that based upon the testimony of the parties, plaintiff was the sole proximate cause of the accident because she failed to use the care of an ordinary prudent person when crossing Montauk Highway, a heavily trafficked road, in an unmarked crosswalk. The argument that plaintiff was the sole proximate cause is belied by the above-mentioned testimony and written eyewitness statement. Nevertheless, "[t]he question of whether a person was within an unmarked crosswalk at the time of an accident is a factual matter for jury resolution" (*Olson v Dougherty*, 128 AD2d 920, 921, 512 NYS2d 730 [3d Dept 1987]). Therefore, both motions are denied.

Accordingly, the motion by the plaintiffs for summary judgment in their favor on the issue of liability is denied, and the cross motion by defendants for summary judgment dismissing the complaint is denied.

Dated: \_\_\_\_\_

7-11-14

  
\_\_\_\_\_  
PETER H. MAYER, J.S.C.