

Hoyt v Fishbane

2014 NY Slip Op 33808(U)

September 29, 2014

Supreme Court, Nassau County

Docket Number: 12075/12

Judge: Karen V. Murphy

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Part Form Order

**SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 11 NASSAU COUNTY**

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

_____ X

NICOLE HOYT,

Plaintiff(s),

Index No. 12075/12

-against-

**Motion Submitted: 8/13/14
Motion Sequence: 004**

**STEVEN N. FISHBANE, ROBERT H. HORD and
WANDA E. HORD,**

Defendant(s).

_____ X

The following papers read on this motion:

- Notice of Motion/Order to Show Cause.....X
- Answering Papers.....XX
- Reply.....XXX
- Briefs: Plaintiff's/Petitioner's.....
- Defendant's/Respondent's.....

Defendants Robert H. and Wanda E. Hord move this Court for an Order granting summary judgment in their favor, and dismissing the complaint against them. Plaintiff and co-defendant Fishbane oppose the requested relief.

This three-car motor vehicle accident occurred on December 21, 2010, at approximately 9:25 p.m., on the eastbound Northern State Parkway, in Nassau County, New York.

It is well recognized that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v Pomeroy*, 35 NY2d 361 [1974]). 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 (*Cauthers v Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence

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must be viewed in the light most favorable to the non-moving party, herein the plaintiff (*Makaj v Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

“There can be more than one proximate cause [for a collision] and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law” (*Pollack v Margolin*, 84 AD3d 1341, 1342 [2d Dept 2011]; see also *Amador v City of New York*, 2014 NY Slip Op 05758 [2d Dept 2014]).

In this case, the Hord defendants maintain that, as a matter of law, the deposition testimony of the parties establishes that they are not the proximate cause of the accident that injured plaintiff.

The Hord defendants submit, *inter alia*, the deposition testimony of all parties to this action, and the certified police accident report.

The accident report does not contain any admissions against interest from any of the parties, and it is undisputed that the officer who prepared the report did not witness the accident. Furthermore, the source(s) of the information contained in the accident description section is/are not identified; thus, the Court will not consider the accident description contained in the police report (see *King v King*, 99 AD3d 672 [2d Dept 2012]; *Noakes v Rosa*, 54AD3d 317 [2d Dept 2008]; *Battista v Rizzi*, 228 AD2d 533 [2d Dept 1996]). The Court does note, however, that no tickets or violations were issued to any of the three operators involved in this accident.

The conflicting deposition testimony regarding the actions of Wanda Hord as she drove in the right-hand lane of the parkway fail to establish a *prima facie* case for judgment as a matter of law; instead, the testimony raises triable issues of fact as to whether Wanda Hord contributed to the happening of the accident.

Wanda Hord testified that, immediately prior to the happening of the accident, as she was passing an entrance ramp, she was driving at approximately forty-five (45) miles per hour (mph) in the right lane of the parkway. There were no vehicles in front of her as far as she could see. Mrs. Hord saw, first through her windshield and then through her passenger window, a Toyota (Fishbane’s vehicle) on the entrance ramp. Mrs. Hord did not recall if Fishbane’s vehicle was moving or stopped on the entrance ramp, and she did not keep her eye on it. Seconds later, plaintiff’s vehicle, a Lincoln Navigator, struck Mrs. Hord’s vehicle in the rear. Plaintiff’s vehicle was traveling behind Mrs. Hord, in the same right-hand lane. According to Mrs. Hord, her car was traveling at approximately 45 mph at the time it was impacted by plaintiff’s vehicle.

Steven Fishbane testified that he was completely stopped in the entrance ramp lane, which is a lane to the right of the right-hand lane of the parkway. He had his left directional signal on, and he had to come to a complete stop because "there was another car on my left that made it difficult for me to move . . . there was a woman [Wanda Hord] driving it."

According to Mr. Fishbane, "[Hord] had decelerated sharply," but Fishbane did not observe anything that caused her to decelerate sharply. When asked how he first saw Hord's vehicle, Mr. Fishbane described that he "was looking in [his] side view mirror to look for an opportunity to enter [the parkway], and [he] saw the car. [He] knew [he] wasn't going to have a chance to enter before that car, but then [he] noticed the car slow down very - abruptly is maybe not the right word, but slow down next to [his] car, so [he] saw her out of [his] window." Fishbane looked "directly through" his window and saw that it was a woman driver, now known to be Wanda Hord. He estimated that the Hord vehicle was "going at its slowest point next to [him], . . . maybe ten miles an hour." Furthermore, Fishbane testified that, prior to the accident, he was side by side with the Hord vehicle, describing it as having "slowed significantly," and that at the time the Hord vehicle was struck by plaintiff's vehicle, it "was moving slowly."

After Steven Fishbane notice the Hord vehicle, he then looked again in his side view mirror, and saw the headlights of plaintiff's car in the right lane of the parkway. Fishbane "felt like [plaintiff's car] was going very fast, but [he] couldn't estimate the speed." Fishbane also described plaintiff's vehicle as "flying up at our cars." A second or two later, plaintiff's vehicle struck Fishbane's vehicle in the rear, while Fishbane remained in the entrance ramp lane, not in the right-hand lane of the parkway. When asked if "either one of those vehicles move[d] out of the lane or location it was in when he first described seeing the Navigator up until the time of the accident," Fishbane replied, "Yeah, there was another car next to me [referring to the Hord vehicle], so either [plaintiff] was trying to avoid that car or she - but [plaintiff] hit me from behind. I was on the . . . ramp." Fishbane was not certain if plaintiff was first involved in an impact with Hord or with himself; "[i]t happened very quickly."

Plaintiff provides yet another version of this accident. Prior to the accident, she was traveling approximately four to five car lengths behind Wanda Hord's vehicle in the right-hand lane of the parkway, at approximately 45 mph. Plaintiff estimated that Hord was also traveling at approximately 45 mph, but plaintiff did not remember if she saw the brake lights on Hord's vehicle illuminate before the impact. From the time plaintiff entered the parkway that night, until the happening of the accident, plaintiff had reached a maximum speed of 50 mph, and did not have to stop for traffic.

Plaintiff testified that Fishbane entered the parkway from the entrance ramp without

stopping, and that Fishbane impacted the passenger and back side of her vehicle with a heavy impact; yet, she identified a photograph of the Fishbane's Toyota showing rear-end damage. Plaintiff testified that she did not know if her vehicle came into contact with the rear of Fishbane's vehicle. According to plaintiff, the impact from Fishbane's vehicle pushed plaintiff's vehicle into the rear of Hord's vehicle. Later in her deposition, plaintiff stated that she was not sure if she was pushed into the Hord vehicle, and she did not know if the Hord vehicle did anything to cause the accident.

Inasmuch as there is conflicting testimony regarding the facts surrounding this accident, and specifically the speed at which Wanda Hord was traveling immediately prior to the collision, the Hord defendants have failed to establish their freedom from comparative negligence. If the trier of fact were to find that Wanda Hord slowed her vehicle on the parkway, without first having given an appropriate signal, the trier of fact could reasonably conclude that Wanda Hord created the danger of a collision (*see Vehicle and Traffic Law § 1163 [c]; Chepel v Meyers*, 306 AD2d 235 [2d Dept 2003]; *Niemiec v Jones*, 237 AD2d 267 [2d Dept 1997]; *Lipp v Laks*, 129 Ad2d 681 [2d Dept 1987]); however such a determination is properly left to the trier of fact, who can also resolve the issues of credibility present in this case (*Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3212:6*, at 14; *Donato v ELRAC, Inc.*, 18 AD3d 696 [2d Dept 2005]; *Frame v Markowitz*, 125 AD2d 442 [2d Dept 1986]).

Accordingly, the Hord defendants have failed to establish their *prima facie* entitlement to summary judgment as a matter of law.

In view of the foregoing determination, it is unnecessary to determine whether the papers submitted in opposition are sufficient to raise a triable issue of fact (*See Levin v Khan*, 73 AD3d 991 [2d Dept 2010]; *Kjono v Fenning*, 69 AD3d 581 [2d Dept 2010]).

The Hords' motion for summary judgment is denied.

The foregoing constitutes the Order of this Court.

Dated: September 29, 2014
Mineola, N.Y.


J. S. C.

ENTERED

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