

Fernandez v Robinson
2014 NY Slip Op 33852(U)
January 30, 2014
Supreme Court, Westchester County
Docket Number: 51271/12
Judge: Mary H. Smith
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DECISION AND ORDER

FILED & ENTERED

113014

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY**

**Present: HON. MARY H. SMITH
Supreme Court Justice**

-----X

LUIS FERNANDEZ,

Plaintiff,

**MOTION DATE: 1/24/14
INDEX NO.: 51271/12**

-against-

BRIANA ROBINSON and CAROL ROBINSON,

Defendants.

-----X

BRIANA ROBINSON and CAROL ROBINSON,

Third-Party Plaintiffs,

-against-

JUAN HERNANDEZ,

Third-Party Defendant.

-----X

The following papers numbered 1 to 10 were read on this re-newed motion by plaintiff for partial summary judgment on the issue of liability, etc., and on this cross-motion¹ (sic) by third party defendant for summary judgment dismissing the third-party

¹The improperly designated cross-motion is deemed a notice of motion. See CPLR 2215; Volpe v. Canfield, 237 A.D.2d 282, 283 (2nd Dept. 1997), lv. to app. den.

complaint.

Papers Numbered

Notice of Motion - Affirmation (Fragale) - Exhs. (A-M) - Memorandum of Law	1-4
Answering Affirmation (Eckert) - Exhs. (A-H)	5-6
Notice of Cross-Motion - Affirmation (Sohng)	7-8
Replying Memorandum of Law	9
replying Affirmation (Sohng)	10

Upon the foregoing papers, it is Ordered and adjudged that this motion and cross-motion are disposed of as follows:

Plaintiff Luis Fernandez seeks to recover for personal injuries he allegedly had sustained, on August 25, 2011, at approximately 4:30 p.m., as a result of a two-vehicle crash, which had occurred on Mamaroneck Avenue, a multi-lane roadway with lanes in each direction.² At the time, plaintiff had been a front seat passenger in his own vehicle which was being driven by third-party defendant Juan Hernandez. The prevailing weather conditions had been sunny and dry. According to plaintiff, his vehicle had been traveling 30 to 35 miles per hour, north on Mamaroneck Avenue, in the right-most lane, with the favor of a green light as it had approached the Heatherbloom Road intersection. After plaintiff's vehicle had entered into the Heatherbloom Road intersection, it struck the vehicle owned by defendant Carol Robinson and driven by defendant Briana Robinson ("defendant"), which had been turning left directly in front of plaintiff's vehicle. Plaintiff had testified that he did not know whether any vehicles had been stopped in the

90 N.Y.2d 802 (1997); Mango v. Long Island Jewish Hillside Medical Center, 123 A.D.2d 843, 844 (2nd Dept. 1986).

²Plaintiff had testified that Mamaroneck Avenue is a four-lane roadway, and defendant had testified that it is a six-lane roadway.

northbound intersection left turn lane and that nothing had obscured his view of the intersection; however, he had not observed defendants' vehicle prior to impact.

By Decision and Order, dated March 28, 2013, this Court had denied as premature plaintiff's original motion for summary judgment, the Court having found on the record then presenting that there existed triable issues of fact as to how this left-turn crash occurred and the comparative negligence, if any, of the involved drivers. Discovery now is complete and plaintiff presently is renewing his motion for summary judgment on the issue of liability, as well as seeking summary judgment on the issue of his having sustained a serious injury.

The Court notes that third-party defendant Hernandez has failed to appear for his deposition and that plaintiff previously had moved for an Order precluding Hernandez from testifying at trial and striking his answer. In opposition thereto, Hernandez's counsel had represented to the Court that Hernandez could not be located, despite diligent efforts having been made to locate him. Plaintiff's motion had been granted to the limited extent that Hernandez was precluded from testifying at trial but that, in the event that he appeared for his deposition prior to trial, he could move to have the preclusion Order vacated. (Lefkowitz, J.).

According to defendant's testimony, she had been driving southbound on Mamaroneck Avenue and, at the Heatherbloom Road intersection, she had moved into the left turn lane. After stopping her vehicle at the green light, defendant had observed "steady" oncoming northbound traffic. Defendant had admitted that her vision of the northbound traffic had been obstructed by a "large SUV" truck that had been stopped in the left turn northbound lane of Mamaroneck Avenue, and that she had been able to see the middle northbound lane for the distance of approximately four vehicles. With the

green light still in her favor,³ defendant had inched forward, making a second stop because her view of the oncoming northbound traffic still was obstructed. Defendant eventually had proceeded to make her left turn at a time at a time when she had been able to see the oncoming traffic for a distance of approximately 3 ½ to 4 car lengths; she believed that she had a "clear way." As she was in the "middle" of her turn, with her foot on the gas pedal, crossing over northbound lanes of Mamaroneck Avenue, her vehicle was struck "hard" by plaintiff's vehicle. Defendant had testified that she had been stopped, waiting to turn, for approximately thirty seconds and that she had not observed plaintiff's vehicle until "right before impact." She did not hear screeching brakes or a horn sound prior to impact.

Plaintiff presently is renewing his motion for partial summary judgment on the issue of liability, arguing that defendant is liable as a matter of law because she, in violation of section 1141 of the Vehicle and Traffic Law, had failed to yield the right of way to his vehicle which had the legal right of way. In support thereof, plaintiff submits his affidavit and a portion of his deposition testimony, defendant's affidavit and a portion of her deposition testimony, the deposition of the responding police officer and the MV-104A Police Accident report that had been prepared.

Defendants oppose plaintiff's motion, arguing firstly that, while plaintiff had been a passenger in the car, he also had been the owner of said vehicle, and thus is statutorily liable for the actions of Hernandez who had been driving plaintiff's car, with plaintiff's permission, without a driver's license. Further, defendants argue that issues of comparative negligence properly are left for the jury. Defendants argue that Hernandez

³Defendant did not have a green left turn arrow in her favor.

* 5
has a duty to use reasonable care to avoid the crash and, further, that there is evidence at bar that plaintiff had been speeding at the time of impact and contributorily negligent, including defendant's testimony that plaintiff's vehicle "came out of nowhere" and had struck defendants' vehicle hard, totaling it, as well as plaintiff's testimony that his vehicle had not slowed down as it had approached and entered the Heatherbloom Road.

Initially, the Court grants plaintiff's motion for summary judgment on the issue of serious injury based upon plaintiff's having sustained a fracture and defendants' withdrawing of their affirmative defense that plaintiff had not sustained a threshold injury. See Insurance Law § 5102, subdivision (d).

Addressing next plaintiff's motion for partial summary judgment on the issue of liability, and third-party defendant's summary judgment motion seeking dismissal of the third-party complaint, same are also hereby granted.

It is well settled that a plaintiff is entitled to liability judgment where a defendant's vehicle violates Vehicle and Traffic Law section 1141 by making an unsafe left turn without yielding the legal right of way to the plaintiff's vehicle and the failure to have yielded the right of way is the sole proximate cause of the ensuing crash. See Kutkiewicz v. Horton, 83 A.D.3d 904 (2nd Dept. 2011); Dimou v. Latauro, 72 A.D.3d 732 (2nd Dept. 2010); Fenster v. Ellis, 71 A.D.3d 1079, 1081 (2nd Dept. 2010); Palomo v. Pozzi, 57 A.D.3d 498 (2nd Dept. 2008). Plaintiff and third-party defendant prima facie have demonstrated their entitlement to judgment.

In opposition, defendants have failed to raise any triable issue of fact as to whether Hernandez, who had the right of way and was entitled to anticipate that defendant would obey traffic laws requiring her to yield, had been comparatively negligent in the happening

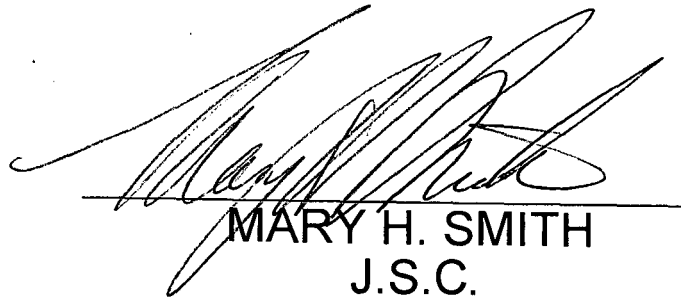
of the crash. This Court rejects defendants' unsupported, speculative argument that there exists an issue as to whether plaintiff's vehicle's excessive speed had played any factor in the collision. See Stanford v. Dushey, 71 A.D.3d 988 (2nd Dept. 2010); Yelder v. Walters, 64 A.D.3d 762, 764 (2nd Dept. 2009); Rahaman v. Abodeledhman, 64 A.D.3d 552 (2nd Dept. 2009); Kann v. Maggie's Paratransit Corp., 63 A.D.3d 792 (2nd Dept. 2009); Batts v. Page, 51 A.D.3d 833 (2nd Dept. 2008); Meretskaya v. Logozzo, 2 A.D.3d 599 (2nd Dept. 2003). Plaintiff expressly had testified that the vehicle had been traveling within the speed limit at 30 to 35 miles per hour, and defendant herself had been unable to state what was Hernandez's speed at the time of impact. That defendant had testified that plaintiff's vehicle had come out of nowhere is explainable merely by defendant's admission that she had been unable to see more than approximately 3 ½ car lengths of the northbound traffic due to the presence of the stopped SUV. The indisputable facts are that defendant had admitted to having her vision of the northbound traffic significantly obscured by the stopped SUV and, although she patently could not make her left turn with reasonable safety, she nevertheless had proceeded to turn. Since plaintiff's vehicle had the clear legal right of way and the right to assume that defendants' turning vehicle would obey the traffic law requiring it to yield the right of way to plaintiff's vehicle, it cannot be found on this record that Hernandez had not acted reasonably and/or should have reduced his speed or taken some other evasive measure.

Plaintiff's motion for partial summary judgment on the issue of liability and third-party defendant's motion for summary judgment dismissing the third-party complaint are both granted.

The parties shall appear in the Settlement Conference Part, Room 1600, at 9:30

[*7]
a.m., on March 3, 2014.

Dated: January 30, 2014
White Plains, New York



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