

Cox v Mello
2015 NY Slip Op 31313(U)
March 9, 2015
Supreme Court, Queens County
Docket Number: 8990/2014
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

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SAMANTHA COX and ROY OCASIO, Index No.: 8990/2014
Plaintiffs, Motion Date: 02/03/15
- against - Motion No.: 27
JOSEPH MELLO, Motion Seq.: 1
Defendant.

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The following papers numbered 1 to 12 were read on this motion by plaintiff on the counterclaim, SAMANTHA COX, for an order pursuant to CPLR 3212 granting plaintiff summary judgment on the issue of liability and dismissing the counterclaim of the defendant, Joseph Mello:

Papers Numbered

Notice of Motion-Affidavits-Exhibits.....1 - 6
Affirmation in Opposition-Affidavits-Exhibits.....7 - 10
Reply Affirmation.....11 - 12

This is a personal injury action in which plaintiffs, Samantha Cox and Roy Ocasio, seek to recover damages for injuries they each sustained as a result of a motor vehicle accident that occurred on July 9, 2013, at the intersection of Broadway and 21st Street, Queens County, New York.

Plaintiff Cox claims that at the time of the accident, she was proceeding eastbound on Broadway with the green light in her favor when defendant, Joseph Mello, made a sudden left turn from westbound Broadway into the southbound lane of traffic on 21st Street directly in front of his vehicle. The plaintiff's passenger, Roy Ocasio, was also allegedly injured as a result of the collision.

Plaintiffs commenced this action by the filing of a summons and complaint on June 10, 2014. Issue was joined by service of defendant Joseph Mello's verified answer with counterclaim dated August 15, 2014. Plaintiff on the counterclaim, Samantha Cox, appeared in the action by service of a Notice of Appearance and verified reply to counterclaim dated September 3, 2014.

Jacqueline Doody, Esq., counsel for plaintiff on the counterclaim, now moves, prior to depositions, for an order pursuant to CPLR 3212(b), granting summary judgment dismissing the defendant's counterclaim. In support of the motion, the plaintiff submits an affirmation from counsel; a copy of the pleadings; a copy of the police accident report; and an affidavit of merit from the plaintiff on the counterclaim, Samantha Cox.

In her affidavit, dated October 20, 2014, Ms. Cox, age 29, states that she was the operator of a 2004 Ford. She states that the accident occurred as the Mello vehicle was traveling westbound on Broadway and attempted to make a left turn into the southbound lane of traffic on 21st Avenue. She states that the Mello vehicle turned into her vehicle as she proceeded eastbound on Broadway with the green light in her favor. She states that Mello's left turn into her vehicle was sudden and she had no time to react or make any evasive maneuvers to avoid contact. She states that she was already in the intersection and had the right of way and she was proceeding straight when the collision occurred. She states that Mello made a left turn immediately after an emergency vehicle had been allowed to pass through the intersection.

The description portion of the police report prepared by the responding officer states as follows:

"At t/p/o driver #1 (defendant), states he was traveling westbound on Broadway making a left turn in southbound direction on 21st with green light when he turned into veh #2 (plaintiff) after allowing ambulance to pass through intersection. Driver # 2 (plaintiff), states she was traveling eastbound on Broadway with green light and proceeded forward with the right of way after allowing emergency vehicle to pass when vehicle #1 turned into her.

Plaintiff on the counterclaim's counsel, argues in support of the motion for summary judgment, that the defendant driver violated VTL § 1141 by failing to yield the right of way to the plaintiff's vehicle approaching the intersection and turning at the intersection without waiting until the turn could be made with reasonable safety. Counsel contends that the defendant was

negligent based upon his failure to observe and yield to the plaintiff's vehicle which was traveling straight ahead on Broadway with the right of way. Plaintiff claims that defendant was negligent in making his left turn and colliding with plaintiff's vehicle. Counsel contends that because the defendant made a left turn directly into the path of the plaintiff's vehicle that he violated VTL §§ 1141, 1163(a) and 1140(a)(b) and is negligent as a matter of law. Counsel asserts that based upon the affidavit of the plaintiff, when the accident occurred, plaintiff had already entered the intersection and was traveling through the intersection while defendant was still in the process of entering the intersection. Counsel states that it was because of the defendant's negligent actions that the plaintiff collided with the side of the defendant's vehicle with the front of his vehicle. Counsel asserts that in accordance with the evidence, the plaintiff on the counterclaim is entitled to summary judgment on the issue of liability and dismissing the defendant's counterclaim as defendant's actions were negligent as a matter of law and there is no evidence demonstrating that the plaintiff was comparatively negligent.

In opposition to the motion, defendant's counsel, James J. Nally, Esq., asserts that plaintiff on the counterclaim, has not established a prima facie case demonstrating that the defendant was liable for the accident. Defendant, Joseph Mello, submits an affidavit dated December 5, 2014, stating that immediately before the accident he was waiting to make a left turn at a green light when he observed an emergency vehicle approach from the opposite direction. He allowed the emergency vehicle to pass through the intersection of Broadway and 21st Street and then he checked for approaching vehicles. He states that after making sure the way was clear he began to make the left turn. He states that suddenly and without warning while he was in the middle of making his turn he observed a vehicle approaching at an excessive speed in the eastbound lane of Broadway. He states that the plaintiffs' vehicle was approaching at such a high rate of speed that he could not prevent the accident.

Based upon the defendant's affidavit alleging that he plaintiff was proceeding at an excessive rate of speed, counsel asserts that material issues of fact have been raised with regard to the comparative negligence of the plaintiff.

Upon review of the plaintiff on the counterclaim's motion, the defendant's 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 [2d 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]). 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 (see Cauthers v Brite Ideas, LLC, 41 AD3d 755 [2d Dept. 2007]).

Vehicle and Traffic Law § 1141 requires that "the driver of a vehicle intending to turn to the left within an intersection... yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." A driver with the right of way is entitled to anticipate that the other driver will obey traffic laws that require him to yield (see Kann v Maggies Paratransit Corp., 63 AD3d 792 [2d Dept. 2009]; Palomo v Pozzi, 57 AD3d 498 [2d Dept. 2009]; Berner v Koegel, 31 AD3d 591[2d Dept. 2006]; Gabler v Marley Bldg. Supply Corp., 27 AD3d 519[2d Dept. 2006]). Further, a driver is negligent when an accident occurs because the driver failed to see that which through proper use of the driver's senses he or she should have seen (see Laino v Lucchese, 35 AD3d 672 [2d Dept. 2006]; Berner v Koegel, 31 AD3d at 592 [2d Dept. 2006]; Bongiovi v Hoffman, 18 AD3d 686 [2d Dept. 2005]).

Here, the plaintiffs established their prima facie entitlement to judgment as a matter of law by demonstrating that the defendant driver violated Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of the Cox vehicle (see Choi v Schwabenbauer, 124 AD3d 574 [2d Dept. 2015]; Simeone v Cianciolo, 118 AD3d 864 [2d Dept. 2014]; Mazzullo v Loots, 116 AD3d 677 [2d Dept. 2014]; Ahern v Lanaia, 85 AD3d 696 [2d Dept. 2011]), and that this violation was the sole proximate cause of the accident.

However, it is well established that there may be more than one proximate cause of an accident (see O'Brien v Couch, 124 AD3d 975 [3rd Dept. 2015]; Lopez v Reyes-Flores, 52 AD3d 785[2d Dept. 2008] because each driver has a duty to exercise reasonable care under the circumstances to avoid an accident (see Adobea v Junel, 114 AD3d 818 [2d Dept. 2014]).

In opposition, the defendant raised a triable issue of fact as to Cox's comparative fault in the happening of the accident. The plaintiff failed to provide a statement as to her speed, and the defendant's averment that he actually observed the plaintiff's vehicle approaching at an excessive speed just before the collision, raises a triable issue of fact as to whether, in the exercise of reasonable care, the plaintiff could have avoided the accident (see Choi v Schwabenbauer, 124 AD3d 574 [2d Dept. 2015]; Rodriguez v Klein, 116 AD3d 939 [2d Dept. 2014]; Antaki v. Mateo, 100 AD3d 579 [2d Dept. 2012]; Veras v Vezza, 69 AD3d 611 [2d Dept. 2010]). Further, there is a question of fact as to which vehicle entered the intersection first after the emergency vehicle was permitted to pass through the intersection (see Arciszewski v T-D Mgt. Corp., 123 AD3d 856 [2d Dept. 2014]; Calderon-Scotti v Rosenstein, 119 AD3d 722 [2d Dept. 2014]; Lee v Hossain, 111 AD3d 799 [2d Dept. 2013]; Koeppel-Vulpis v Lucente, 110 AD3d 851 [2d Dept. 2013]; Gause v Martinez, 91 AD3d 595 [2d Dept. 2012]).

Accordingly, based upon the foregoing it is hereby,

ORDERED, that the motion by the plaintiff on the counterclaim, Samantha Cox, for an order dismissing the counterclaim contained in the answer of defendant, Joseph Mello, is denied.

Dated: March 9, 2015
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.