Francois v Happes
2015 NY Slip Op 31414(U)
July 16, 2015
Supreme Court, Suffolk County
Docket Number: 13-14230
Judge: Joseph Farneti
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SHORT FORM ORDER

INDEX No. 13-14230

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 9-25-14 (#001)
MOTION DATE 10-2-14 (#002)
ADJ. DATE 10-30-14
Mot. Seq. # 001 - MD
002 - MG

KENCHISE JEAN FRANCOIS,

Plaintiff,

- against -

BARBARA HAPPES,

Defendant.

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Upon the following papers numbered 1 to 16 read on these motions to dismiss and for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 5; 11 - 13 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 6 - 8; 14 - 16 ; Replying Affidavits and supporting papers 9 - 10 ; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant to dismiss the complaint, and alternatively to compel plaintiff Kenchise Jean Francois to provide authorizations to obtain her cellular phone records is denied; and it is further

ORDERED that the motion by plaintiff Kenchise Jean Francois for summary judgment on the issue of liability is granted.

Plaintiff Kenchise Jean Francois ("Francois") commenced this action to recover damages for personal injuries sustained in a motor vehicle accident on May 1, 2013, at the intersection of Rabro Drive and Simeon Woods Road in the Town of Islip. Rabro Drive is separated by a double yellow line with two lanes in each direction. However, at the subject intersection in both directions is one lane for traffic to proceed straight, a lane to turn right and a lane to turn left. The intersection is controlled by a traffic light without a directional arrow for making turns.

At the time of the accident, Francois, the owner and operator of her vehicle in which Sonese Bichotte ("Bichotte"), her mother, was a passenger. Her vehicle was traveling west on Rabro Drive. The defendant, the owner and operator of her vehicle, was traveling east on Rabro Drive when she attempted to make a left turn at the subject intersection. As defendant was turning left, the two vehicles collided in the intersection with the front passenger side of the Francois vehicle hitting the front right fender of the defendant's vehicle.

Issue has been joined and discovery is in progress. Defendant now moves to dismiss Francois' complaint for failure to provide authorizations to obtain her cellular phone records for the date of the accident. In the alternative, defendant seeks an order compelling Francois to provide the authorizations. Francois moves for summary judgment in her favor on the issue of liability.

CPLR 3101 provides that "[t]here shall be full disclosure of all matter material and necessary in the prosecution or defense of an action." "It is incumbent on the party seeking disclosure to demonstrate that the method of discovery sought will result in the disclosure of relevant evidence or is reasonably calculated to lead to the discovery of information bearing on the claims" (***Foster v Herbert Slepoy Corp.***, 74 AD3d 1139, 1140, 902 NYS2d 426 [2d Dept 2010]). The principal of full disclosure does not, however, give a party the right to uncontrolled and unfettered information, or a fishing expedition (***Foster v Herbert Slepoy Corp.***, *supra*; ***Carpio v Leahy Mechanical Corp.***, 30 AD3d 554, 816 NYS2d 762 [2d Dept 2006]). Thus, to protect a party's privacy, discovery of cellular phone records will only be directed where there is evidence that the cellular phone was being used at the time of the motor vehicle accident (***Page v Napier***, 2009 NY Slip Op 30325, 2009 WL 434607 [Sup Ct, Nassau County]). Notably, the mere fact that a driver was in possession of a cell phone at the time of an accident, without any witness testimony as to it being used at that time, would not entitle the defendant to such records (***Morano v Slattery Skanska, Inc.***, 18 Misc 3d 464, 846 NYS2d 881 [Sup Ct, NY County 2007]).

Here, the basis upon which the defendant contends she is entitled to the cellular phone records is that Francois was looking down seconds prior to the accident. Defendant supports her motion with the transcripts of the deposition testimony of Francois, Bichotte, and non-party witness John Hults ("Hults") and his written statement provided at the scene which is attached to the police accident report.

During her deposition, Francois denied that she was using her cellular phone at any time while operating her vehicle prior to the accident. Francois testified that her mother Bichotte had the cell phone on her lap and it was turned off. According to Francois, her mother always took the cell phone while she was driving. Similarly, Bichotte testified that she had her daughter's cell phone and that during the few minutes they were in the vehicle, Francois neither used nor looked at it, and the phone did not ring or make any sound prior to the accident.

Hults testified that he was stopped for a red light on Simeon Woods Road facing south for about 60 seconds prior to the accident with an unobstructed view of the vehicles traveling in front of him on Rabro Drive. Hults testified that he did not see anyone in the Francois vehicle talking on a cell phone. He also testified that he saw Francois with her head down less than a second to a second and a half before the accident occurred. In his written statement, Hults writes, in pertinent part, "[t]he lady in the

Nissan car [Francois] appeared to have her head down going through the intersection . . . and made no attempt to brake prior to the impact."

The defendant's motion is denied. There is no evidence that Francois was using a cell phone prior to, or at the time of the accident (*see* ***Carpio v Leahy Mechanical Corp.***, *supra*; ***D'Alessandro v Nassau Healthcare Corp.***, 44 Misc 3d 1210[A], 997 NYS2d 668 [Sup Ct, Nassau County 2014]). Plaintiff's conclusory assertions that Francois was distracted because, according to Hults she appeared to be looking down, is completely speculative and not supported by any evidence that she may have been using a cell phone (***D'Alessandro v Nassau Healthcare Corp.***, *supra*; *see* ***Carpio v Leahy Mechanical Corp.***, *supra*). The mere fact that Francois had a cell phone at the time of the accident, without any witness testimony as to it being used at that time, is insufficient to demonstrate the defendant's entitlement to such records, and amounts to nothing more than a fishing expedition (***D'Alessandro v Nassau Healthcare Corp.***, *supra*; *see* ***Auerbach v Klein***, 30 AD3d 451, 816 NYS2d 376 [2d Dept 2006]; ***Morano v Slattery Skanska, Inc.***, 18 Misc 3d 464, 846 NYS2d 881 [Sup Ct, NY County 2007]; *cf* ***Detraglia v Grant***, 68 AD3d 1307, 890 NYS2d 696 [3d Dept 2009]). Moreover, contrary to the defendant's contention, there is no inconsistency in the testimony of Francois and Bichotte. They both clearly testified that Francois was not using her cell phone at any time while operating her vehicle. Therefore, discovery of the cellular phone records will not be directed as there is no evidence that plaintiff's cell phone was being used at the time of the motor vehicle accident.

Francois' motion for summary judgment on the issue of liability is granted. Francois testified that she left home at about 5:15 p.m. for the 15-minute drive to take her mother to work for her 6:00 p.m. shift. Francois testified that she was traveling at approximately 10 to 15 miles per hour in the middle lane of Rabro Drive looking straight ahead at the road and the traffic light. It is not disputed that the light was green for both drivers on Rabro Drive. She observed the defendant's vehicle coming from the opposite direction in the middle lane when it was about 50 to 100 feet away. Francois testified she did not see the defendant's vehicle change lanes, but suddenly saw it making a left turn directly in front of her. Both Francois and Bichotte testified that the left turn directional signal was not illuminated on the defendant's vehicle. Francois testified that she had less than two seconds to react to the defendant's vehicle suddenly turning in front of her and attempted to steer her vehicle to the right to no avail. She could not avoid the collision.

The defendant testified that she was traveling at approximately 40 miles per hour on Rabro Drive, but as she approached the subject intersection slowed down to 12 miles per hour to make a left turn onto Simeon Woods Road. Although defendant testified that her view was not obstructed, she conceded and could not explain why she did not see the Francois vehicle prior to the accident.

The deposition testimony of the parties establishes that the defendant in violation of Vehicle and Traffic Law ("VTL") § 1141 attempted to make a left turn without yielding the right of way to Francois' vehicle, and thus, was negligent as a matter of law (*see* ***Anzel v Pistorino***, 105 AD3d 784, 962 NYS2d 700 [2d Dept 2013]; ***Medina v Rodriguez***, 92 AD3d 850, 939 NYS2d 514 [2d Dept 2012]). Pursuant to VTL § 1141, the driver of a vehicle intending to turn left "shall yield the right of way to any vehicle approaching from the opposite direction which is . . . so close as to constitute an immediate hazard"

(***Reyes v Marchese***, 96 AD3d 926, 946 NYS2d 500 [2d Dept 2012]). Here, since Francois had the right of way, she was entitled to assume that the defendant would yield.

Indeed, under the circumstances here, it is well-settled that a driver is negligent where an accident occurs because she has failed to see that which through the proper use of her senses should have been seen (***Bongiovi v Hoffman***, 18 AD3d 686, 795 NYS2d 354 [2d Dept 2005]; ***Bolta v Lohan***, 242 AD2d 356, 661 NYS2d 286 2d Dept 1997]). Here, defendant should have seen and yielded the right of way to the Francois vehicle which was clearly present and visible. Defendant's admission that she did not see the Francois vehicle establishes her negligence as a matter of law (*see* ***Krajniak v Jin Y Trading, Inc.***, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; ***Bolta v Lohan***, *supra*).

Francois, having established her *prima facie* entitlement to summary judgment on the issue of liability, the burden shifts to the defendant to submit evidentiary proof in admissible form to raise a triable issue of material fact (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In opposition, defendant attempts to raise an issue of fact as to Francois' comparative negligence, suggesting that she was inattentive as she did not see the defendant's vehicle enter the intersection and did not reduce her speed as she approached the intersection.

As there can be more than one proximate cause of an accident, a driver who lawfully enters an intersection, could still be found partially at fault for failing to use reasonable care to avoid a collision with another vehicle in the intersection (***Adobea v Junel***, ***Adobea v Junel***, 114 AD3d 818, 980 NYS2d 564 [2d Dept 2014]; ***Simmons v Canady***, 95 AD3d 1201, 945 NYS2d 138 [2d Dept 2012]; ***Cox v Weil***, 66 AD3d 634, 634–635, 887 NYS2d 170 [2d Dept 2009]). Here, Francois established her freedom from comparative fault through her testimony that when she observed the defendant making the left turn, she attempted to move her vehicle to the right. Seconds later the impact occurred, as she was unable to avoid the collision. "[A] driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision" (***Ducie v Ippolito***, 95 AD3d 1067, 1067-1068, 944 NYS2d 275 [2d Dept 2012]; ***Yelder v Walters***, 64 AD3d 762, 764, 883 NYS2d 290 [2d Dept 2009]; *see also* ***Adobea v Junel***, *supra*). Given the brevity of the period in which Francois had to respond, she acted reasonably in attempting to take evasive action (*see* ***Yelder v Walters***, *supra*). Moreover, vehicles traveling on a through street have a preferential right of way (Vehicle and Traffic Law § 149). Thus, contrary to the argument in opposition, a driver, such as Francois, with the right of way has no duty to watch for and avoid a driver who might fail to yield or otherwise obey the traffic laws (*see* ***Barbato v Maloney***, 94 AD3d 1028, 943 NYS2d 204 [2d Dept 2012]; ***Jenkins v Alexander***, 9 AD3d 286, 780 NYS2d 133 [1st Dept 2004]).

Also unavailing is the defendant's argument that Francois failed to reduce her speed. Defendant grounds this contention on Hults' observation that Francois did not slow down as she approached the intersection. Although not cited by the defendant, she is relying on VTL § 1180 (e) which provides that "[t]he driver of every vehicle shall . . . drive at an appropriate reduced speed when approaching and crossing an intersection." It well-settled that this statute "does not mandate that a driver reduce his or her speed at every intersection, but only when warranted by the conditions presented" (***Chietan v Persaud***, 57 AD3d 471, 472, 869 NYS2d 177 [2d Dept 2008]; *see* ***Bagnato v Romano***, 179 AD2d 713, 578 NYS2d 613 [2d Dept 1992], *lv denied* 81 NY2d 701, 594 NYS2d 715 [1992]). Here, it was a clear

day, the roads were dry and traffic was light. Francois' view was unobstructed, and she was driving under the speed limit with a green light in her favor. Thus, there is no evidence that a condition existed requiring Francois to reduce her speed as she approached the intersection or that she had an opportunity to avoid the collision (*see* ***Bagnato v Romano***, *supra*; ***Matt v Tricil [NY], Inc.***, 260 AD2d 811, 687 NYS2d 828 [3d Dept 1999]; ***Wilke v Price***, 221 AD2d 846, 633 NYS2d 686 [3d Dept 1995]; ***Carmody v Sass***, 3 Misc.3d 1110[A], 787 NYS2d 676 [Sup Ct, Ulster & Orange County 2004]; *cf.* ***Delgado v Martinez Family Auto***, 113 AD3d 426, 979 NYS2d 277 [1st Dept 2014] [defendant negligent as a matter of law for violating VTL § 1180 by traveling 50 mph in a 30 mph zone]; ***Cooley v Urban***, 1 AD3d 900, 767 NYS2d 546 [4th Dept 2003] [question of fact as to comparative negligence where defendant failed to reduce his speed although admittedly observed the plaintiff's vehicle exit its lane of travel and traverse a median before turning left in an attempt to cross defendant's lane of travel]; ***Boston v Dunham*** 274 AD2d 708, 711 NYS2d 54 [3d Dept 2000] [plaintiff entered intersection without reducing her speed when her view was admittedly obstructed by another vehicle raising an issue of fact as to comparative negligence]). Thus, defendant has failed to raise an issue of fact.

Accordingly, the motion by defendant is denied and the motion for plaintiff Francois is granted.

Dated: July 16, 2015

Hon. Joseph Farneti
Acting Justice Supreme Court

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION