Greger v Fowler
2015 NY Slip Op 32256(U)
November 20, 2015
Supreme Court, Suffolk County
Docket Number: 5932/2015
Judge: Paul J. Baisley

SHORT FORM ORDER

INDEX NO. 05932/2015

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

LAURA GREGER AND WILLIAM DOLAN,

Plaintiffs,

-against-

BRYAN FOWLER, LORYN MCCLEAN AND RONALD MCCLEAN,

Defendants.

ORIG. RETURN DATE: July 28, 2015 (#001)
ORIG. RETURN DATE: August 28, 2015 (#002)
FINAL RETURN DATE: September 11, 2015
MOT. SEQ. #: 001- MG
002- MG; CASEDISP

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Upon the following papers numbered 1 to 38 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-8 ; 17-26 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 9-12; 27-29; 30-32; 33-34 ; Replying Affidavits and supporting papers 13-16; 35-36; 37-38; Other ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by the defendants Loryn McClean and Ronald McClean and the motion (#002) by the defendant Bryan Fowler hereby are consolidated for the purposes of this determination; and it is

ORDERED that the motion by the defendants Loryn McClean and Ronald McClean seeking summary judgment dismissing the complaint and all cross claims against them is granted; and

ORDERED that the motion by the defendant Bryan Fowler seeking summary judgment dismissing the complaint is granted.

The plaintiffs Laura Greger and William Dolan commenced this action to recover damages for injuries they allegedly sustained as a result of a motor vehicle accident that occurred at the intersection of Old Town Road and Arrowhead Lane in the Town of Brookhaven on March 20, 2015. It is alleged that the accident occurred when the vehicle owned and operated by the plaintiff Laura Greger crossed over the double yellow line into the southbound lane of travel of Old Town Road, striking the vehicle owned by the defendant Ronald McClean and operated by the defendant Loryn McClean. As a result of

the impact between the McClean and Greger vehicles, the Greger vehicle was caused to spin around and cross back over into the northbound lane of travel, facing in a southbound direction. After crossing over into the northbound lane of travel, the front driver's side of the Greger vehicle was struck by the vehicle owned and operated by the defendant Bryan Fowler. At the time of the accident's occurrence, the plaintiff William Dolan was riding as a front seat passenger in the Greger vehicle.

The defendants Loryn McClean and Ronald McClean now move for summary judgment on the basis that Loryn McClean was faced with an unexpected emergency situation not of her making when the Greger vehicle crossed over into her lane of travel. In support of the motion, the McClean defendants submit copies of the pleadings, a certified copy of the police accident report, and the affidavit of Loryn McClean. The plaintiffs oppose the motion on the ground that the vehicle operated by Loryn McClean crossed over into her lane of travel in violation of Vehicle and Traffic Law § 1126, striking her vehicle while she was stopped in the left turning lane of Old Town Road. In opposition to the motion, the plaintiff submits her own affidavit.

It is axiomatic that on a motion for summary judgment the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The court's task on a motion for summary judgment is issue finding rather than issue determination (*see Sillman v Twentieth Century Fox Film Corp.*, *supra*), and it must view the evidence in the light most favorable to the party opposing the motion (*see Boyce v Vazquez*, 249 AD2d 724, 671 NYS2d 815 [3d Dept 1998]). Thus, to obtain summary judgment, the moving party must establish his or her claim or defense by tendering sufficient evidentiary proof, in admissible form, to warrant the court to direct judgment in the movant's favor (*see Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such showing has been made, the burden shifts to the nonmoving party to demonstrate the existence of material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

A driver is not required to anticipate that a motor vehicle traveling in the opposite direction will cross over into oncoming traffic (*see Barbaruolo v DiFede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]; *DiSena v Giammarino*, 72 AD3d 873, 898 NYS2d 664 [2d Dept 2010]; *Koch v Levenson*, 225 AD2d 592, 638 NYS2d 785 [2d Dept 1996]). Crossing a double yellow line into the opposing lane of traffic is a violation of Vehicle and Traffic Law § 1126(a) and constitutes negligence as a matter of law, unless there is a justified emergency situation not of the driver's own making (*see Sullivan v Mandato*, 58 AD3d 714, 873 NYS2d 96 [2d Dept 2009]; *Hazelton v D.A. Lajeunesse Bldg. & Remodeling, Inc.*, 38 AD3d 1071, 832 NYS2d 114 [2d Dept 2007]; *Kock v Levenson*, *supra*).

Here, the McClean defendants established their prima facie entitlement to judgment as a matter of law on the issue of negligence (*see Pearson v Northstar Limousine, Inc.*, 123 AD3d 991, 999 NYS2d 478 [2d Dept 2014]; *Jamal v Scarsdale Auto Clinic, Inc.*, 73 AD3d 861, 899 NYS2d 886 [2d Dept

2010]; *DiSiena v Giammarino*, 72 AD3d 873, 898 NYS2d 664 [2d Dept 2010]). The evidence submitted by the McClean defendants shows that the sole proximate cause of the subject accident was the Greger vehicle's crossing over into oncoming traffic in violation of § 1126(a) of the Vehicle and Traffic Law, and striking the McClean vehicle (*see Barbaruolo v DiFede*, 73 AD3d 957, 900 NYS2d 671 [2d Dept 2010]; *Campbell v County of Suffolk*, 57 AD3d 821, 871 NYS2d 222 [2d Dept 2008]; *Scott v Kass*, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]). This violation of the Vehicle and Traffic Law constitutes negligence per se (*see Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; *Marsicano v Dealer Stor. Corp.*, 8 AD3d 451, 779 NYS2d 102 [2d Dept 2004]; *Gadon v Oliva*, 294 AD2d 397, 742 NYS2d 122 [2d Dept 2002]). In her affidavit, Loryn McClean avers that she was traveling, approximately 20 miles per hour, southbound on Old Town Road, that the light was green for traffic traveling southbound, that it was snowing, and that, without warning, the Greger vehicle, which had no headlights on, crossed over the double yellow line into her lane of travel, striking her vehicle head on. Loryn McClean, as the driver with the right of way, was not required to anticipate that an automobile traveling in the opposite direction would cross over into oncoming traffic (*see e.g. Ferebee v Amaya*, 83 AD3d 997, 922 NYS2d 472 [2d Dept 2011]; *Snemyr v Morales-Aparicio*, 47 AD3d 702, 850 NYS2d 489 [2d Dept 2008]; *Eichnwald v Chaudry*, 17 AD3d 403, 794 NYS2d 391 [2d Dept 2005]). Indeed, such a situation presents an emergency situation and the actions of a driver presented with such a situation must be judged in that context (*see Thomas v New York City Tr. Auth.*, 37 AD3d 821, 829 NYS2d 921 [2d Dept 2007]; *Bentley v Moore*, 251 AD2d 612, 675 NYS2d 108 [2d Dept 1998]). Based upon the submitted evidence, Loryn McClean did not act negligently under the emergency circumstances presented (*see Mandel v Benn*, 67 AD3d 746, 889 NYS2d 81 [2d Dept 2009]; *Marsch v Catanzaro*, 40 AD3d 941, 837 NYS2d 195 [2d Dept 2007]; *Huggins v Figueroa*, 205 AD2d 460, 762 NYS2d 404 [2d Dept [2003]).

In opposition to the motion, the plaintiffs have failed to present sufficient evidence to raise a triable issue of fact as to whether Loryn McClean operated the McClean vehicle in a negligent manner or was a proximate cause of the subject accident's occurrence (*see O'Connor v Lopane*, 24 AD3d 426, 805 NYS2d 125 [2d Dept 2005]; *Wasson v Szafarski*, 6 AD3d 1182, 776 NYS2d 423 [2d Dept 2004]). In an attempt to provide some proof of which negligence could reasonably be inferred to the actions of Loryn McClean, the plaintiffs have presented Laura Greger's sworn affidavit to the Court. The Court does note that the plaintiffs have not submitted an affidavit from the plaintiff William Dolan in opposition to the motion. Yet, in an apparent attempt to raise an question of fact, Laura Greger's affidavit appears to be the verbatim equivalent of Loryn McClean's affidavit with only a few minor changes. However, the small changes that were incorporated into Laura Greger's affidavit, such as her vehicle "standing still with its headlights on, waiting to make a left turn in the turning lane of the northbound Old Town Road when Loryn McClean's vehicle crossed over the double yellow line into her lane of travel," are in direct conflict with the evidence that has been submitted in this matter, including the certified police report, which indicates that the vehicle operated by Laura Greger crossed over the double yellow line into Loryn McClean's lane of travel and struck the McClean vehicle head on. Thus, in opposition to the McClean defendants' motion, the plaintiffs have presented the Court with mere speculation and conjecture, which calls into question the authenticity and integrity of the evidence put forth to the Court, in order to feign an issue of fact. Accordingly, the McClean defendants' motion for summary judgment dismissing the complaint and all cross claims against them is granted.

In addition, the defendant Fowler moves for summary judgment on the issue of negligence, arguing that he was confronted with an emergency not of his own making when he struck the Greger vehicle, and, therefore, is not liable under the circumstances. In support of the motion, the defendant Fowler submits copies of the pleadings, a certified copy of the police accident report, and his own affidavit. The plaintiffs oppose the motion on the grounds that there are triable issues of fact as to whether the defendant Fowler was speeding at the time of the accident in violation of Vehicle and Traffic Law § 1180, and whether he was following too closely behind the Greger vehicle in violation of Vehicle and Traffic Law §1129(a) prior to the accident's occurrence. In opposition to the motion, the plaintiffs submit the affidavit of Laura Greger. The McClean defendants also oppose the motion on the ground that there are material questions of fact as to whether the defendant Fowler's actions were reasonable under the circumstances.

When one is confronted with a sudden and unexpected event or combination of events that leave little or no time for reflection or deliberate judgment, such circumstance should enter into the determination as to whether the person acted reasonably in the situation (*Ferrer v Harris*, 55 NY2d 285, 292, 449 NYS2d 162 [1982]; *see Caristo v Sanzone*, 96 NY2d 172, 726 NYS2d 334 [2001]). Thus, the emergency doctrine recognizes that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Jablonski v Jakaitis*, 85 AD3d 969, 970, 926 NYS2d 137 [2d Dept 2011] *quoting Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327, 567 NYS2d 629 [1991]; *see Evans v Bosl*, 75 AD3d 491, 905 NYS2d 254 [2d Dept 2010]; *Palma v Garcia*, 52 AD3d 795, 861 NYS2d 113 [2d Dept 2008]; *Gajjar v Smith*, 31 AD3d 377, 817 NYS2d 653 [2d Dept 2006]). However, an emergency does not automatically absolve one from liability for his or her conduct, and a defendant may still be found negligent if, notwithstanding the emergency, the choice of action pursued is found to be unreasonable (*see Bello v Transit Auth. of N. Y. City*, 12 AD3d 58, 783 NYS2d 648 [2d Dept 2004]; *Pawlukiewicz v Boisson*, 275 AD2d 446, 712 NYS2d 634 [2d Dept 2000]; *Raposo v Raposo*, 250 AD2d 420, 673 NYS2d 92 [1st Dept 1992]). Further, a defendant will not be insulated from liability if it was his or her prior conduct that brought about the emergency situation, even though he or she acted reasonably during the emergency (*see Stewart v Ellison*, 28 AD2d 252, 813 NYS2d 397 [1st Dept 2006]; *Foster v Sanchez*, 17 AD3d 312, 792 NYS2d 579 [2d Dept 2005]; *Mead v Marino*, 205 AD2d 669, 613 NYS2d 650 [2d Dept 1994]). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact, those issues may, in appropriate circumstances, be determined as a matter of law (*see Lonergan v Almo*, 74 AD3d 902, 904 NYS2d 86 [2d Dept 2010]; *Vitale v Levine*, 44 AD3d 935, 844 NYS2d 105 [2d Dept 2007]).

Based upon the adduced evidence, the defendant Fowler has established a prima facie case that he was faced with an emergency situation not of his own making at the time of the subject accident's occurrence (*see Ryan v Town of Riverhead*, 117 AD3d 707, 985 NYS2d 584 [2d Dept 2014]; *Harris v Linares*, 106 AD3d 873, 964 NYS2d 657 [2d Dept 20]; *Lee v Ratz*, 19 AD3d 552, 798 NYS2d 80 [2d Dept 2005]). The defendant Fowler states in his affidavit that he was traveling northbound on Old Town Road, that he had his headlights on because it was snowing, and that he observed the stopped Greger vehicle facing south in the northbound lane of travel. The defendant Fowler further avers that as a result

of observing the stopped Greger vehicle, he applied his brakes and turned his steering wheel to the right in an attempt to avoid colliding with the Greger vehicle, but was unable to do so, causing the front driver's side of his vehicle to strike the front driver's side door of the Greger vehicle. Additionally, the certified police accident report submitted in support of the motion indicates that the Greger vehicle, which was facing in a southbound direction in the northbound lane of travel on Old Town Road, was struck by the Fowler vehicle, which was traveling northbound on Old Town Road after trying to slow down, because he observed the stopped Greger vehicle in his lane of travel following the collision between the McClean and Greger vehicles. Since the accident between the Greger and Fowler vehicle occurred within seconds of the defendant Fowler observing the stopped Greger vehicle, facing the wrong way in traffic after having crashed with the McClean vehicle, the emergency doctrine applies, and any alleged failure by the defendant Fowler to exercise his best judgment is insufficient to constitute negligence (*see Wemyss v Ruszczyk*, 126 AD3d 888, 5 NYS3d 506 [2d Dept 2015]; *Quinones v Altman*, 116 AD3d 686, 983 NYS2d 84 [2d Dept 2014]; *Parastatidis v Holbrook Rental Ctr., Inc.*, 95 AD3d 975, 943 NYS2d 625 [2d Dept 2012]).

In opposition to the motion, neither the plaintiffs nor the McClean defendants raised a triable issue of fact as to whether the defendant Fowler acted unreasonably under the circumstances (*see Garcia v Stewart*, 120 AD3d 1298, 993 NYS2d 90 [2d Dept 2014]; *Kennery v County of Nassau*, 93 AD3d 694, 940 NYS2d 130 [2d Dept 2012]). Mere speculation that the defendant Fowler could have taken some evasive action to avoid the collision or that he somehow contributed to the subject accident's occurrence by following too closely to the Greger vehicle or was speeding prior to its occurrence is insufficient to overcome the defendant Fowler's prima facie showing. Moreover, neither the plaintiffs nor the McClean defendants proffered any evidence to contradict the defendant Fowler's account of the accident between his vehicle and the Greger vehicle (*see e.g. Vainier v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; *cf. Tringali v Sieber*, 115 AD3d 934, 982 NYS2d 398 [2d Dept 2014]). In fact, the affidavit of Laura Greger, which was submitted by the plaintiffs, does not even mention the collision that occurred between Greger vehicle and the Fowler vehicle and, therefore, is insufficient to raise a triable issue of fact. Accordingly, the defendant Fowler's motion for summary judgment seeking to dismiss the complaint is granted.

Dated: 11/20/15

HON. PAUL J. BAISLEY, JR

HON. PAUL J. BAISLEY, JR., J.S.C.