

Richards v Joy

2016 NY Slip Op 32913(U)

June 6, 2016

Supreme Court, Westchester County

Docket Number: 51006/16

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under 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
COUNTY OF WESTCHESTER

-----X
CORY RICHARDS,

Plaintiff,

-against-

TONY JOSEPH JOY,

Defendant.

-----X
EVERETT, J.

Index No. 51006/16
Motion Sequence No. 001
Decision and Order

The following papers were read on the motion:
Notice of Motion/Aff in Supp/Exhibits 1-5
Aff in Opp/Exhibits A-C
Reply Aff

Upon the forgoing papers, the motion is denied.

In this personal injury action, plaintiff Cory Richards (Richards) moves for an order, pursuant to CPLR 3212, granting summary judgment against defendant Tony Joseph Joy (Joy) on the issue of liability, and striking his first, second, fifth and sixth affirmative defenses. Joy opposes the motion.

The following facts are taken from the parties' pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Richards commenced this action by filing a summons and complaint in the Office of the Westchester County Clerk on or about January 27, 2016. In his complaint, plaintiff alleges that, on March 22, 2015, he was a pedestrian walking at or near the intersection of Saw Mill River Parkway North and Yonkers Avenue, in Yonkers, New York, when a motor vehicle owned and

operated by Joy struck him, causing him to sustain serious physical injuries. Issue was joined by service of Joy's answer with six affirmative defenses on or about February 2, 2016. On March 8, 2016, the parties entered into a so-ordered preliminary conference stipulated order outlining the discovery to be exchanged. The preliminary conference order includes, among other things, a schedule for party depositions and an independent medical examination with respect to plaintiff's claimed injuries to his "neck, back, wrist, torn ligaments in finger w/ surgery" (aff in opp, exhibit A). Two days later, on March 10, 2016, plaintiff filed the instant motion.

Richard supports his motion with a sworn affidavit in which he states, in relevant part, that on March 22, 2015:

"4. It was a clear day with no precipitation. Prior to entering the crosswalk, as there was no pedestrian crossing signal present at that location, I looked to my left and my right to look for oncoming vehicles. I saw that the crosswalk was clear and there were no vehicles approaching the crosswalk and I entered the crosswalk.

5. I proceeded at a normal pace, along Yonkers Avenue that crossed the entrance and exit ramps for the Saw Mill Parkway and within the confines of the aforementioned crosswalk. When I was only partially through the intersection, and still in the crosswalk, I was violently struck by the vehicle operated by Defendant Joy. There was no warning, of any kind, of the impending impact"

(notice of motion, exhibit 1). Richards also submits a copy of the police report prepared by the officer who arrived at the scene (notice of motion, exhibit 2). According to the police report, an accident involving a vehicle driven by Joy (identified as veh 1), and a pedestrian, Richards, occurred 3:49 a.m., at the intersection of the Saw Mill River Parkway North and Yonkers Avenue (*id.*). The officer's accident description provides:

"Motorist of veh # 1 related that he made a left turn from Yonkers Ave towards entrance to Saw Mill Pkwy N/B, when Ped started yelling and hitting rear driver side of veh # 1 complaining of pain to right foot. Pedestrian related that he was

walking E/B on Yonkers Ave when veh # 1 made left turn and ran over right foot with rear driver side tire. Ped transported to St. Joseph's Hosp.”

(*id.*).

Richards asserts that, pursuant to Vehicle and Traffic Law § 1151, a pedestrian, such as himself, has the right of way to finish crossing, and any approaching vehicles are required to yield. Vehicle and Traffic Law § 1151 states, at subsection (a):

“[w]hen traffic-control signals are not in place or not in operation the driver of a vehicle shall yield the right of way, slowing down or stopping if need be to so yield, to a pedestrian crossing the roadway within a crosswalk on the roadway upon which the vehicle is traveling, except that any pedestrian crossing a roadway at a point where a pedestrian tunnel or overpass has been provided shall yield the right of way to all vehicles.”

Despite the fact that the accident occurred in Yonkers, Westchester County, plaintiff also relies on the section of the Traffic Rules and Regulations of the City of New York that pertains to traffic signals for the proposition that, even where there is a green light in a vehicle's favor, such vehicle must yield the right of way of pedestrians lawfully within an intersection or crosswalk (34 RCNY § 4-03).

Given his sworn statement that he looked both ways before he started to cross, and that he was within the crosswalk when he was struck by Joy's vehicle, it is Richards' position that Joy's failure to allow him to exit the crosswalk before proceeding across it with his vehicle amounted to a violation of statutory law, and constitutes negligence per se.

Next, plaintiff cites to a series of cases in which various courts granted liability-based summary judgment motions submitted by plaintiffs who had been struck by moving vehicles. These include: *Hoey v City of New York*, 28 AD3d 717 [2d Dept 2006]; *Razzaque v Krakow Taxi*, 238 AD2d 161 [1st Dept 1997]); *DeProssino v Noorzad*, 225 AD2d 581 [2d Dept 1996]);

Zabusky v Cochran, 234 AD2d 542 [2d Dept 1996]); *Jacobs v Schleicher*, 124 AD2d 785 [2d Dept 1986]); and *Bolte v City of New York*, 28 AD2d 232 [1st Dept 1967], *revd on other grounds* 22 NY2d 817 [1968]). Claiming that he is entitled to judgment as a matter of law on the issue of liability, Richards seeks a concomitant dismissal of the Joy's related first (personal jurisdiction), second (assumption of risk, culpable conduct), fifth (emergency doctrine) and sixth (Workers' Compensation Law §§ 11, 29) affirmative defenses.

In opposition to the motion, Joy: (1) points out that there has been no discovery in this matter, as plaintiff filed the motion just two days after entering into the preliminary conference order; (2) denies committing a violation of the Vehicle and Traffic Law, as confirmed by the police report which contains no indication that Joy was given a citation; (3) insists that questions of fact exist as to how the accident occurred; and (4) that there are issues of comparative negligence, which do not lend themselves to resolution by summary judgment, especially at this juncture. In support of his opposition, Joy submits a copy of the preliminary conference order (aff in opp, exhibit A), a Google map photograph of the subject intersection (*id.* exhibit B), and his own sworn affidavit attesting to his version of the events leading up to, and including, the accident (*id.* exhibit C). The preliminary conference order contemplates, among other things, the exchange of authorizations, and names and addresses of all witnesses by April 5, 2016, the completion of both plaintiff and defendant's depositions by May 19, 2016, and an independent medical examination of plaintiff within 45 days of his deposition (*id.* exhibit A). Joy's sworn affidavit states, in relevant part:

"2. On March 22, 2015, at approximately 3:00 a.m., I was operating my 2008 Honda Sedan on eastbound Yonkers Avenue, when I was involved in a motor vehicle accident.

3. I am accustomed to driving late at night and I was fully alert.
4. The motor vehicle accident occurred at the intersection of Yonkers Avenue and Saw Mill River Parkway, an intersection I am familiar with.
5. . . . The intersection is well-lit.
6. Prior to the accident occurring, I . . . brought my vehicle to a stop at the subject intersection for a red traffic control light.
* * *
9. When the green left turn arrow, with a regular green signal appeared, I checked the intersection and looked to my left (the direction I was intending to proceed) and I did not see any pedestrians at the intersection.
10. After checking the intersection for pedestrians, I slowly proceeded to turn left through the intersection.
11. Immediately after I had completed my turn and was through the intersection, I heard a 'thump' sound coming from the back of my car.
* * *
13. I then noticed the plaintiff sitting down near the intersection, so I stopped my car about 25 feet passed [sic] the intersection, exited my vehicle, and approached the plaintiff.
14. The plaintiff was moving around the area, alternating between sitting and then lying down.
15. I informed the plaintiff that I was going to go back to the car to get my cell phone so that I could call the police. When I walked back to my car, the plaintiff stood up and chased me back to my car.
16. At that point, I noticed that there was a police vehicle behind the plaintiff. . . I walked over to the police vehicle and told them what had happened.
17. The officer approached the plaintiff. The plaintiff stood as he spoke with the police officer.
18. I overheard the plaintiff tell the police officer that he had hit his head on the back of my car. The police officer then inspected the back of my vehicle and did not find any dents.
19. At that point, I then heard the plaintiff change his story, telling the police officer that my vehicle had run over his foot"

(id. Exhibit C).

For the following reasons, the motion is denied as premature.

Here, the immediate result of Richards' submission of his summary judgment motion was an automatic stay of discovery, effectively preventing Joy from deposing Richards to test the accuracy and veracity of his recollection about the accident. It has also forestalled Richards from establishing, in the setting of a deposition, the facts and circumstances surrounding the accident. Moreover, Richards' self-serving affidavit, containing carefully selected information about the events of March 22, 2015,¹ is contradicted by Joy's equally self-serving affidavit, and is unsupported by other, nonsubjective evidence sufficient "to eliminate any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Inasmuch as the police report is fact-neutral, Richards reliance on his own nonobjective affidavit, discovery, including depositions of all witnesses to the event, is necessary either to establish Richards' claim of negligence, or to establish Joy's defense (*see Busby v Ticonderoga Cent. School Dist.*, 222 AD2d 882, 882 [3d Dept 1995]).

There is also little merit to Richards' assertion that Joy, in opposing the motion, "has concocted feigned issues of fact in hope of defeating plaintiff's motion," as it is he, who by prematurely serving the instant motion, seeks to preclude any inquiry into the cause or events leading up to the accident (liability) (reply aff, at 5).

Furthermore, in actions such as this, which involve a pedestrian who is (allegedly) struck by a motor vehicle while lawfully present in a crosswalk, it is well settled that "a failure to yield the right of way does not ipso facto settle the question of whether the other party was [him]self

¹ Richards inexplicably describes the accident as having occurred on a "clear day," despite the fact that the police officer reported the accident having occurred at approximately 3:49 a.m. (notice of motion, exhibit 2)

guilty of negligence” (*Thoma v Ronai*, 189 AD2d 635, 636 [1st Dept 1993], citing *Schmidt v Flickinger Co.*, 88 AD2d 1068 [3d Dept 1982], *appeal withdrawn* 58 NY2d 655 [1982]; *Pecora v Marique*, 273 AD 705 [1st Dept 1948]). While Vehicle and Traffic Law § 1151 subsection (a) places an obligation on a driver to yield the right of way to a pedestrian crossing within (or without) the confines of a crosswalk, subsection (b) places an obligation on a pedestrian to look for approaching vehicles before crossing. Vehicle and Traffic Law § 1151 (b) states: “[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.” Accordingly, in exercising his right of way, Richards:

“was required to use due care in light of all of the circumstances and heed any danger that confronted [him]. The right of way is not a right to self-inflicted mayhem for which the defendant can be held liable, and one cannot, to the exclusion of everyone and everything around him, rely solely upon his right of way”

(*Schmidt v Flickinger Co.*, 88 AD2d at 1068-1069; Vehicle and Traffic Law § 1151 [b]).

Contrary to plaintiff’s assertions, this is not an instance where the occurrence of the accident constitutes a prima facie case of negligence against the operator of the offending vehicle, as it does in rear-end collisions (*Volpe v Limoncelli*, 74 Ad3d 795, 795-796 [2d Dept 2010]). It is also not an instance of negligence per se, as there remains a question of fact as to whether Joy violated any provision of the Vehicle and Traffic Law, and, based on their different recollections of the incident, there exists questions of fact as to the proximate cause of the accident, and/or whether, and/or to what extent, each was responsible for causing the accident. Stated another way, questions remain as to whether Joy failed to adequately look before turning and then failed to yield to Richards, and questions remain as to whether Richards failed to look before crossing and was free from comparative fault, precluding summary judgment.

The failure to make a prima facie showing of entitlement to judgment on the issue of liability “requires a denial of the motion,” including the related demand for a dismissal of Joy’s affirmative defenses, “regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853).

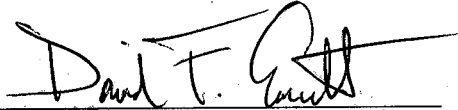
Accordingly, it is

ORDERED that plaintiff’s motion is denied in its entirety; and it is further

ORDERED that counsel appear in the Compliance Conference Part in courtroom 800, on June 24, 2016, at 9:30 a.m., to make the necessary scheduling adjustments to the preliminary conference order.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
June 6, 2016



HON. DAVID F. EVERETT, A.J.S.C.

To:

Lefkowitz & Gottfried, LLP
40 Broad Street - 4th Floor
New York, New York 10004

Picciano & Scahill, P.C.
900 Merchants Concourse - Suite 310
Westbury, New York 11590