

<b>Kitchen v Carioto Produce Inc.</b>
2016 NY Slip Op 32989(U)
August 12, 2016
Supreme Court, Albany County
Docket Number: A00106/2014
Judge: Gerald William Connolly
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STATE OF NEW YORK  
SUPREME COURT

COUNTY OF ALBANY

TERRY KITCHEN and CARY L. KITCHEN,

**DECISION AND ORDER**

Plaintiffs,

Index No.: A00106/2014

RJI No.: 01-14-114172

-against-

CARIOTO PRODUCE INC., CARIOTO FRUIT  
DISTRIBUTORS, INC., FRESHCO MANAGEMENT  
LLC, LEROY HOLDING CO. INC, VITO TRICARICO,  
BLAIR B. PRAY, RANDY PRAY, REGAN PRAY,  
DECRY PRAY, PRAY'S FARMERS MARKET, and  
John Does 1-100, a fictitious name meant to represent the  
names of any individuals or corporations who own, operate,  
or control PRAY'S FARMERS MARKET.

Defendants.

ELRAC, LLC D/B/A  
Enterprise Rent-A-Car,

Index No.: A00763/2014

RJI No.: 01-14-115574

Plaintiffs,

-against-

PRAY'S FARMERS MARKET, BLAIR B. PRAY,  
LEROY HOLDING CO., INC., VITO TRICARICO,  
and CARIOTO PRODUCE, INC.,

Defendants.

(Supreme Court, Albany County, All Purpose Term)

APPEARANCES:

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Connolly, J.:

Plaintiff, Cary L. Kitchen, seeks an order dismissing the counterclaims of defendants Carioto Produce Inc., Carioto Fruit Distributors Inc., Freshco Management, LLC, Leroy Holding Co. Inc. and Vito Tricarico (the “Carioto Defendants”) as well as defendants Blair B. Pray, Randy Pray, Regan Pray, Darcy Pray, and Pray’s Farmer’s Market (the “Pray Defendants”). The Carioto Defendants oppose the motion. The Pray Defendants do not oppose such motion.

On February 24, 2014, plaintiffs Cary L. and Terry Kitchen commenced this action against the Carioto and Pray Defendants for personal injuries sustained as a result of a motor vehicle accident that occurred on September 26, 2012. The Pray Defendants and the Carioto Defendants each interposed a counterclaim against plaintiff Cary Kitchen alleging contributory negligence and seeking contribution and/or indemnification in the event plaintiffs recover damages.

#### Facts

Plaintiffs allege that on September 26, 2012 at 12:50 pm, defendant Blair Pray, during the course of his employment with defendant Pray’s Farmers Market, was operating a certain tractor-truck combination, plaintiff Cary L. Kitchen was operating a motor vehicle in which plaintiff Terry Kitchen was a lawful passenger, and Defendant Vito Tricarico was operating a 2009 “Hino” truck. Plaintiff alleges that she was eastbound on State Route 8 in the Town of Chester, County of Warren, State of New York, when the motor vehicles operated by defendants Pray and Tricarico collided causing contact with the motor vehicle operated by plaintiff causing injuries to both plaintiffs. Plaintiffs allege that such accident occurred without any negligence on the part of the Ms. Kitchen.

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Summary Judgment

The Court is mindful that summary judgment is a drastic remedy which should only be granted when there clearly are no triable issues of fact (*see Andre v. Pomeroy*, 35 NY2d 361, 364 [1974]). It is well-settled that “the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If such right to judgment is established, the burden shifts to the opponent of the motion to establish by admissible proof, the existence of genuine issues of fact (*see Zuckerman v. City of New York*, 49 NY2d 557 [1980]). It is well established that on a motion for summary judgment, the court's function is issue finding, not issue determination (*see Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]), and all evidence must be viewed in the light most favorable to the opponent to the motion (*see Crosland v. New York City Transit Auth.*, 68 NY2d 165 [1986]).

In support of plaintiffs’ motion seeking dismissal of the Carioto Defendants and the Pray Defendants’ respective counterclaims, plaintiffs have submitted, *inter alia*, transcripts of their deposition testimony along with transcripts of the deposition testimony of defendant driver Blair Pray and his passenger son Jonathan Pray and of defendant driver Vito Tricarico.

Ms. Kitchen testified that she was operating a 2013 Dodge Avenger rental vehicle which was operating in good condition and her husband was a passenger. She testified that prior to the collision, she had pulled onto Route 8 behind the Pray tractor trailer after leaving a Stewart’s store

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traveling in an eastbound direction. She testified that Route 8 in that area is a two lane road, with one lane for each direction. As she pulled into the lane, the Pray tractor-trailer was approximately two cars ahead of her but that the rear end of such trailer was over the double-yellow line. She testified that the "road goes around and he wasn't all the way in the eastbound lane" (CK Aff., pg 75), that she was always approximately two car lengths behind the tractor trailer and that while the speed limit was 55 miles per hour, as she had just pulled out of the Stewart's, she was not traveling at the speed limit but was going approximately 35 - 40 miles an hour. She estimated that one to three inches of the tip of the back end of the tractor trailer operated by Mr. Pray was traveling over the double-yellow line. She testified that she saw a collision between the left back end of the tractor trailer operated by Mr. Pray and a box truck coming in the opposite (westbound) direction. She asserts that prior to that collision she did not see the box truck and that she was in the middle of her lane proceeding around a right-hand turn. She indicated that when she saw the collision, she grabbed the steering wheel and went right trying to "get out of that" (CK Aff., pg. 88). She testified that as a result of the collision, the box truck came straight at her car, the front of the box truck hit the driver's side door of the vehicle she was driving and that it was only a matter of seconds between when she made the observation that the tractor-trailer was traveling over the yellow lines and when the collision occurred between the two trucks. She testified that her car ended up in a ditch and that she was behind the tractor-trailer a short distance before the collision occurred between the two trucks (CK Aff., pgs. 87 and 98).

Mr. Terry Kitchen testified at deposition that as they were exiting the Stewart's parking lot to travel onto Route 8 going east, the Pray tractor-trailer passed by their vehicle. He testified that

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his wife pulled the vehicle into the east bound lane behind the Pray tractor-trailer. He testified that the accident occurred within approximately 100 yards of plaintiffs pulling into the easterly bound lane. He testified that he was navigating using his cell-phone so he was looking up and down during such 100 yards. He testified that Ms. Cary Kitchen maintained a distance of 2-3 car lengths between the car she was driving and the Pray tractor-trailer. He testified that approximately ten seconds elapsed between Cary Kitchen pulling out of the Stewart's parking lot and the accident occurring. Mr. Kitchen testified that he did not have a good recollection as to a recorded interview he had previously given concerning the accident.

Jonathan Pray, the front-seat passenger in the Pray tractor trailer, testified at deposition that the tractor-trailer was traveling at a "relatively slow speed" "well below the speed limit (J. Pray Aff., pg. 21). He testified he believed the first impact between the box truck and tractor trailer was their mirrors. Just prior to the impact he stated that he was looking in front of the tractor trailer and saw the box truck approaching the double yellow line. He testified that he did not notice the plaintiff's vehicle until the after plaintiff's vehicle was struck.

The driver of the Carioto box truck, defendant Vito Tricarico, testified at deposition that he did not notice the plaintiff's vehicle in his lane of travel prior to the accident. He testified that the Pray tractor trailer was "over the lines" at the time of the collision.

The driver of the Pray tractor-trailer, defendant Blair Pray, testified at deposition that the Carioto box truck "drifted away from the fog line, drifting in our direction" and that the Carioto truck's "mirror clipped our mirror" and continued into the Pray tractor-trailer's path and lane striking the rear of the tractor trailer and ultimately hitting the car behind it (B. Pray Aff., pg. 28). He

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testified that at no point in time was the tractor-trailer he was driving over the double yellow line and that his tractor trailer did not make any contact with the plaintiff's vehicle. He testified at deposition that the Carioto box truck was solely responsible for the accident.

Plaintiffs argue that the counterclaims should be dismissed as none of the defendants or defendants' witnesses have any knowledge or information regarding plaintiff Cary Kitchen's use and operation of the vehicle she was driving at the time of the accident. Accordingly, plaintiffs assert that such counterclaims, which allege that she contributed to the accident should be dismissed. Plaintiffs further contend that this is not a case where a vehicle rear-ended another vehicle and, in fact, there is no contention nor evidence that the plaintiffs' vehicle contacted the tractor-trailer.

"A driver is not obligated to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic. Such an event constitutes a classic emergency situation, thus implicating the 'emergency doctrine'" (*Gajjar v Shah*, 31 AD3d 377 [2<sup>nd</sup> Dept 2006]). "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, and, thus, cannot be expected to adhere to the same accuracy of judgment as someone who has had the full opportunity to reflect. Courts have consistently determined that an individual who did not create, or did nothing to contribute to, an emergency situation cannot be held liable for the repercussions therefrom. Significantly, a driver who is in his proper lane is not required to anticipate that an automobile going in the opposite direction will cross

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over into oncoming traffic since a cross-over scenario ... presents an emergency situation” (*Caban v Vega*, 226 AD2d 109 [1<sup>st</sup> Dept 1996][internal citations and quotations omitted]). Plaintiff Cary Kitchen’s reaction - steering to the right upon seeing the Carioto box truck coming towards her and ultimately colliding into the vehicle she was driving - was reasonable as a matter of law under the circumstances, which were not of her own making (*see Id.*). Accordingly, the burden shifts to the defendants to raise a triable issue of fact.

As stated above, the Pray Defendants do not oppose her application to dismiss their counterclaim against the plaintiffs. In opposition, the Carioto defendants have failed to raise a triable issue of fact sufficient to preclude the dismissal of the counterclaims against plaintiffs. While the Carioto defendants assert that material issues of fact abound as to her comparative fault, they have failed to demonstrate such contention with anything more than conclusory assertions. They assert that issues of fact exist as to whether she was negligent in operating her vehicle at either or both an unsafe distance or an unsafe speed thereby having a hand in the creation of the emergency situation she claims existed and foreclosing her ability to avoid the accident. They submit plaintiffs responses to their Notice to Admit asserting that both plaintiffs gave recorded interviews in which they both admitted that she pulled out behind the Pray tractor-trailer and noticed the tractor-trailer was over the yellow lines and “could see where maybe he jerked his wheel back to get back on his side but he was on the yellow line. The back end of his trailer was over the line” (C. Kitchen Notice to Admit, interview transcript, pg. 6). Ms. Kitchen admitted that the transcription was accurate. Though he did not have memory of this at his deposition, Mr. Terry Kitchen’s interview provided that after they pulled into the eastbound lane and had passed the gas station, he noticed the tractor-

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trailer was not driving erratically but was not staying in his lane, which he told his wife. “I said look he was crossing over the line and like he kind pulled back into his lane and that’s when I noticed it hit the truck and I said something to my wife about it” (T. Kitchen Notice, pg.5). He denied in the Notice to Admit that the transcription was completely accurate and did not have the same memory of the event at deposition, though he testified at deposition, as did Ms. Kitchen that seconds (at most ten) transpired between pulling into the lane from Stewart’s and the trucks colliding.

Such defendants acknowledge that Mr. Tricarico and his co-employee passenger testified that they did not know whether such plaintiff did anything wrong in the operation of the vehicle she was driving, but note that such testimony was provided in the context that neither saw the Kitchen automobile prior to the contact because it was obstructed by the tractor trailer. Such defendants argue, conclusorily, that while plaintiffs noted that the rear of the tractor-trailer drifted into the double-yellow lines, she did not slow down or back off from the threat allegedly created and her maintenance of only two-car lengths behind the tractor-trailer raises an issue of fact concerning her alleged comparative fault. It is pure conjecture to assume that the collision between the Carioto box truck and plaintiff could have been prevented had plaintiff noticed earlier or otherwise responded to the tractor-trailer drifting into the double-yellow lines, seconds before the collision occurred (*see generally, Davis v Pimm*, 228 AD2d 885 [3d Dept 1996]; *Hines v New York City Transit Auth.*, 139 AD3d 534 [1<sup>st</sup> Dept 2016]; *Rooney v Madison*, 134 AD3d 634 [1<sup>st</sup> Dept 2015]; *Foster v Kelly*, 119 AD3d 1250 [3d Dept 2014]; *Shetsky v Corbett*, 107 AD3d 1100 [3d Dept 2015]). There has been no testimony presented that plaintiff C. Kitchen was driving in an erratic manner or was in any way at fault with respect to the collision that occurred between the Pray tractor-trailer and the Carioto box

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truck.

Otherwise, the Court has reviewed the parties' remaining arguments and finds them either unpersuasive or unnecessary to consider given the Court's determination.


Accordingly, it is hereby

**ORDERED**, that plaintiffs' motion to dismiss the Pray Defendants' and Carioto Defendants' counterclaims against them is granted.

This Memorandum constitutes the Decision and Order of the Court. This original Decision and Order is being returned to the attorney for plaintiffs. The signing of this Decision and Order and delivery of a copy of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry of the original Decision and Order.

SO ORDERED.  
 ENTER.

Dated: August 12, 2016  
 Albany, New York

  
 Gerald W. Connolly  
 Acting Supreme Court Justice

Papers Considered:

1. Notice of Motion dated June 8, 2016; Affidavit in Support of Motion for Summary Judgment of Adam G. Giangreco, Esq. dated June 8, 2016 with accompanying exhibits A-K;
2. Affirmation in Opposition of M. R. Belkin, Esq. dated June 30, 2016 with accompanying exhibits A-B;
3. Letter from counsel for the Pray Defendants dated June 28, 2016;
4. Affidavit in Further Support of Motion for Summary Judgment of A. Giangreco, Esq. dated July 7, 2016 with accompanying exhibits A-B.