Gervasi v Goldson
2016 NY Slip Op 33151(U)
October 26, 2016
Supreme Court, Westchester County
Docket Number: Index No. 52706/15
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (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
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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CARL GERVASI and ZORAIDA GERVASI,

Plaintiffs, **MOTION DATE: 10/21/16**
INDEX NO.: 52706/15

-against-

ROHAN GOLDSON and POWER DOOR PRODUCTS, INC.,

Defendants.
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The following papers numbered 1 to 7 were read on this motion by plaintiffs for partial summary judgment on the issue of liability, etc.[1]

Papers Numbered

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[1]This Part's published Rules require that working copies of motion papers be submitted "no later than 3:00 p.m. within three (3) business days following the electronic filing BUT in no event later than 9:30 a.m. on the calendar return date. (Emphasis supplied)." (Emphasis supplied)."

Defendants have failed to comply with the foregoing. The Part Rules are designed so that this Part reasonably can control and manage its calendar through the electronic system filing. It is not incumbent upon this Part's Clerk to advise counsel as to this requirement, but the Clerk nevertheless had advised counsel of his omission by email, dated September 15, 2016. As of the date of this Order, no response to the Clerk's email has been received and no copy of defendants' motion papers has been submitted to Chambers.

Notice of Motion - Affirmation (Gokberk) - Exhs. (A-I)[2] 1-3
Answering Affirmation (Owens) - Exhs. (A-B) 4-5
Replying Affirmation (Gokberk) - Exhs. (A-B) 6-7

Upon the foregoing papers, it is Ordered and adjudged that this motion by plaintiffs for partial summary judgment on the issue of liability is granted.

This is an action wherein plaintiffs seek to recover for alleged serious injuries sustained by Carl Gervasi, on January 7, 2015, at approximately 9:30 a.m., at which time he had been operating his motor vehicle and traveling south on Route 22, in Brewster, New York. Route 22 at this location has one lane of traffic in each direction, separated by a double yellow line. According to plaintiff's deposition testimony, there had been "no traffic" and he had been traveling on Route 22 for approximately 6 or 7 miles. Plaintiff describes Route 22 at the crash site as being "very straight and level," with a post speed limit of 55 miles per hour. According to plaintiff, at approximately 100 feet away from the driveway that leads to a deli and defendant Power Door Products, Inc.'s business, plaintiff had been driving approximately 45 to 50 miles per hour and he first had observed defendant's vehicle "sitting" in the northbound lane of Route 22. According to plaintiff, defendant's left turn signal had not been activated. Plaintiff maintains that he had taken his foot off of the gas pedal and had kept his sight on defendant's vehicle, thinking it was "possible" that defendant had been planning to turn into the deli's driveway. Within 2 to 3 seconds, as plaintiff's vehicle had approached within a distance of fifteen to twenty feet from where defendant's vehicle had been standing still, and while plaintiff still had been keeping his eyes on defendant, plaintiff claims that defendant suddenly "came at [plaintiff]," having

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[2]In accordance with this Part's published Rules, deposition transcripts shall be submitted on a single side of paper.

turned left in front of plaintiff's vehicle. Plaintiff had testified that he had applied his brakes and had turned his vehicle to the right in an attempt to avoid the impact, but that defendant's vehicle had impacted plaintiff's vehicle's "hard" within the southbound lane of Route 22, striking plaintiff's left front fender and door, and causing plaintiff's vehicle to then strike a stationary pole.

Defendant Goldson, who at the time had been employed by defendant Power Door Products, Inc. as a sales engineer, had testified that he had been driving north on Route 22, immediately prior to the subject crash; he usually would get to his office between 9:00 a.m. and 9:30 a.m. Defendant Power Door Products, Inc. had owned the vehicle that defendant had been driving while involved in the subject crash. Defendant describes Route 22 at the deli driveway location as starting a "gradual incline." Traffic conditions had been "fairly light" the morning of the crash. As defendant's vehicle had approached within a couple of hundred feet from the shared driveway of the deli and Power Door Products, Inc., defendant had not observed any vehicles coming out of the deli driveway. From a distance at or near the deli driveway, defendant had testified that he could see north approximately 800 to 1,000 feet. Defendant had testified that he had brought his vehicle to a stop on Route 22, intending to make a left hand turn into the shared deli driveway; his left turn signal had been activated. He had been stopped for approximately 2-3 seconds, looking straight ahead, and, not seeing any oncoming vehicles, nor any vehicles in the driveway, he had proceeded at a "roll[]" and turn left into the driveway, his attention then being focused on the driveway. Defendant had testified that nothing had obstructed his vision as he had turned left into the driveway. According to defendant, his vehicle suddenly had been struck "hard" by plaintiff's vehicle on his vehicle's nose, causing his vehicle to

spin around. Defendant had not honked his horn because he never had observed plaintiff's vehicle. Defendant did not know how fast plaintiff's vehicle had been traveling.

Defendant had been issued two summonses at the scene; one for not having an insurance card, which summons eventually had been dismissed, and the other for failing to yield the right of way. Defendant had succeeded in getting that summons reduced to a parking ticket.

Presently, plaintiffs are moving for partial summary judgment on the issue of liability and seek an Order directing the scheduling of an assessment of damages.

It is well settled that a plaintiff is entitled to liability judgment where a defendant's vehicle violates Vehicle and Traffic Law section 1141 by making an unsafe left turn without yielding the legal right of way to the plaintiff's vehicle and the failure to have yielded the right of way is the sole proximate cause of the ensuing crash. See Kutkiewicz v. Horton, 83 A.D.3d 904 (2nd Dept. 2011); Dimou v. Latauro, 72 A.D.3d 732 (2nd Dept. 2010); Fenster v. Ellis, 71 A.D.3d 1079, 1081 (2nd Dept. 2010); Palomo v. Pozzi, 57 A.D.3d 498 (2nd Dept. 2008). Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, it is equally well settled is that 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. See Ducie v. Ippolito, 95 A.D.3d 1067, 1068 (2nd Dept. 2012); Socci v. Levy, 90 A.D.3d 1020, 1021 (2nd Dept. 2011). Plaintiffs, through the submission of the parties' deposition testimony, prima facie have demonstrated their entitlement to summary judgment on the issue of liability by establishing that defendant's actions had been the sole proximate cause of this collision.

In this Court's view, defendants have failed to raise any genuine triable issue of fact

with respect to plaintiff's comparative negligence in the happening of the crash. Plaintiff had the legal right of way and he had been entitled to anticipate that defendant would obey traffic laws requiring him to yield. There is no evidence that plaintiff's speed had played any role in the occurrence, especially since defendant had testified that he had failed to observe plaintiff's vehicle at any time within the approximate 800 to 1,000 sight visibility he had testified he had while at a stop.

The mere factual discrepancy between the parties' testimony regarding whether defendant's left turn signal had been activated is of no moment given plaintiff's testimony that he had observed defendant's stopped vehicle and he had considered that defendant possibly might be turning left into the deli driveway even though the signal had not been activated.

Nor does this Court find that the testimonial discrepancy between the parties' physical descriptions of Route 22 at and near the crash site constitute a triable issue of fact. Notwithstanding that plaintiff had testified that the roadway had been level and that he had visibility of approximately 100 feet ahead whereas defendant had testified that the roadway had started a gradual incline at the crash site and that he could see 800 to 1,000 feet ahead, said discrepancy is irrelevant given the incontrovertible fact that defendant clearly had testified that his view of the roadway north had not been obscured but that he nevertheless had not observed plaintiff's vehicle at any time prior to impact.

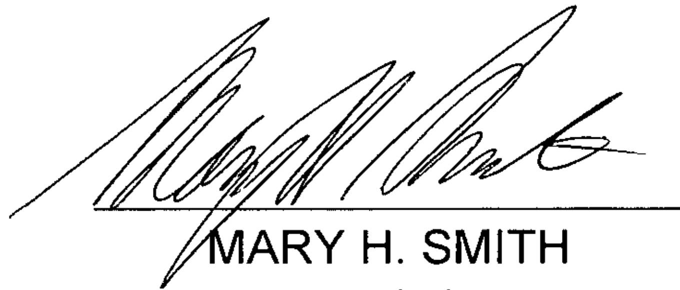
Nor does this Court find that any triable issue of fact is raised by the submission of evidence showing that plaintiff had been talking on his cell phone for approximately 90 seconds at or near the time of the crash. Firstly, there is no evidence establishing precisely when the impact had occurred, and/or whether plaintiff had been engaged in a

cell phone conversation at the time of or immediately prior to impact. Plaintiff had testified that he did not recall whether he had been talking on his cell phone at any time preceding the crash. In any event, plaintiff had testified that his vehicle had been blue tooth equipped which had enabled plaintiff's hands free talking. Secondly, again, this is not a situation of a distracted driver where a plaintiff testifies that he had failed to observe the defendant's stopped vehicle. Rather, plaintiff's unrefuted testimony is that he had observed defendant's vehicle at a distance of approximately 100 feet away, that he had kept his eyes on defendant's vehicle the entire time that he had been driving south approaching the location where defendant's vehicle had been stopped, that he had observed defendant's vehicle for an approximate three second period of time, that plaintiff had appreciated the fact that defendant possibly might be turning into the driveway, that he had been driving under the posted speed limit and had taken his foot off of the gas pedal as he had approached defendant's vehicle and that he had observed defendant suddenly turn left into his traffic lane.

Upon the unrefuted record at bar, the sole proximate cause of the crash had been defendant's failure to have yielded the way to plaintiff.

The parties shall appear in the Settlement Conference Part, room 1600, at 9:15 a.m., on December 6, 2016, for the scheduling of an assessment on damages.

Dated: October 26, 2016
White Plains, New York



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