

Mann v Schoon

2017 NY Slip Op 32635(U)

November 6, 2017

Supreme Court, Bronx County

Docket Number: 300957/14

Judge: Alison Y. Tuitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX – PART 5

SABRINA MANN,

Plaintiff,

Index No. 300957/14

- against -

DECISION/ ORDER

EBONY SCHOON AS ADMINISTRATOR OF THE
ESTATE OF VICTORIA L. COHENS, SCO
FAMILY OF SERVICES AND ZACHERY STIVALA,
Defendants.

Hon. Alison Y. Tuitt

Upon the foregoing papers, defendant Zachery Stivala (“Stivala”) seeks summary judgment, pursuant to CPLR 3212, dismissing all claims and cross-claims against him, on the issue of liability.

This action arises from a motor vehicle and motorcycle collision that occurred on January 6, 2013, at approximately 2:00 P.M., on Boston Post Road, in the Bronx. On the date of the accident, plaintiff Sabrina Mann was the front seat passenger in a 2010 Dodge minivan (“minivan”) owned by SCO Family of Service and operated by decedent Victoria L. Cohens (“Cohens”). Stivala was operating his 2005 Suzuki motorcycle, traveling in the opposite direction on Boston Post Road. The collision occurred in the middle of the intersection as Cohens was attempting to make a left hand turn into the Post Road Plaza parking lot. Stivala’s motorcycle struck the right side, passenger door of the minivan, causing the side airbags to deploy.

PARTIES’ CONTENTIONS

Plaintiff commenced this action on or about February 7, 2014, alleging that Cohens and Stivala were negligent in the operation their vehicles. On or about May 7, 2014, Stivala served a

verified answer asserting a cross-claim against Cohens and SCO Family of Services based upon the alleged negligence of Cohens in causing the accident. In support of summary judgment, Stivala submits the pleadings, an uncertified New York State Department of Motor Vehicles Police Accident Report (MV-104A) (6/04) ("accident report"),¹ and the deposition testimony of plaintiff, Cohens and Stivala.

Stivala testified that he was traveling on Boston Post Road, a two-way roadway, with three lanes of traffic in either direction.² Stivala observed the minivan, approximately one minute before the collision, while stopped in the leftmost, turning lane on the opposite direction on Boston Post Road. Stivala was, at that point, the first vehicle stopped at a red traffic light at the intersection prior to the intersection where the accident occurred. He approximates that the prior intersection was 75 yards away from where the collision occurred. Stivala was in the leftmost lane. He contends that he was familiar with the roadway and that the minivan was in a left turning, lane which was controlled by a left turn arrow. Stivala maintains that the traffic light, at both his intersection and the minivan's intersection, turned green simultaneously and he began to proceed. He estimates that it took him approximately 10 seconds, traveling 15 - 17 mph, to reach the intersection where the accident occurred. Stivala maintains that he kept the minivan in his peripheral vision and observed it begin

¹ As the police officer who authored the accident report was not an eyewitness to the accident, the accident report is hearsay and cannot establish the ultimate issue of liability (*see Silva v Lakins*, 118 AD3d 556, 557 [1st Dept 2014]; *Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526[1st Dept 2010]; *Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]; *Quinones v New England Motor Frgt. Inc.*, 80 AD3d 514, 515 [1st Dept 2011]; *Coleman v Maclas*, 61 AD3d 569, 569 [1st Dept 2009]; *Figueroa v Luna*, 281 AD2d 204, 205 [1st Dept 2001]; *see also Uribe v Amboy Bus Co.*, 24 Misc 3d 1217[A], 1217A, 2009 NY Slip Op 51481[U], *8 [Sup Ct, NY County 2009]). Notably, Stivala testified that, contrary to the statements on the accident report, he did not provide a statement to a police officer as to how the accident occurred.

² He was traveling in a group with two other motorcycles, which he believed were behind him.

to make a left hand turn ½ second to 1 ½ seconds before the collision occurred. Stivala contends that the van was traveling approximately 4 mph and traveled 15 feet before the collision. He was approximately 5 feet from the beginning of the intersection when he first observed the minivan begin to move. He contends that he tried to avoid the collision by braking hard, but he was unable to avoid striking the minivan's passenger door and his upper body went through the minivan's window. He testified that his arm was shattered and that his motorcycle was totaled.

Cohens testified, at her examination before trial on May 19, 2014, that she was traveling on Boston Post Road, stopped at a red traffic light for approximately 1-2 minutes, in the leftmost turning lane. She intended to make a left turn to the shopping plaza's parking lot. Cohens testified that the intersection was controlled by a traffic light, but she could not recall whether there was a turning arrow. Cohens avers that while she was stopped at the red light, she observed two vehicles, that were traveling in the opposite direction, stopped at the intersection. The first vehicle was a motorcycle in the far right lane, closest to the shopping plaza, and the second vehicle was a car in the middle lane. Cohens maintains that when her light turned green the motorcycle and car "remained stopped." She did not observe any traffic in the left most lane, which was the lane closest to her. Cohens testified that a couple of seconds into her left turn she "started hearing a motorcycle gun. But, yet, the motorcycle that [she] saw to the far, closest to the mall, was not moving. And the car in the middle was not moving." She did not know where the noise, which she describes as a motor racing, was coming from. She saw no vehicles in the opposite direction, in the lane closest to the middle of the roadway. She did not see Stivala's motorcycle until it collided with the passenger door. Cohens describes the impact as hard and stated that it caused the side-curtain airbags to deploy.

Plaintiff testified, at her examination before trial on July 23, 2014, that she could not recollect any details of the events leading up to the accident because she was not paying attention. In addition, immediately before the accident, the child seated directly behind her started to bang on the window, and plaintiff was focused on calming the child down.

In opposition, Cohens and SCO Family of Services (collectively “defendants”) submit an attorney affirmation, four photographs of a blue motorcycle³ and four photographs of a gold minivan. Defendants argue, relying upon the deposition transcripts submitted with Stivala’s motion, that Stivala has failed to meet his prima facie burden in that he does not establish that Cohens was the sole proximate cause of the accident and does not eliminate any issues as to Stivala’s negligence. More specifically, defendants assert that triable issues of fact exist as to which vehicle had the right of way and whether Stivala failed to exercise reasonable care to avoid the collision. Moreover, with regard to Stivala’s negligence, defendants point out that Cohens’ vehicle had entered the intersection prior to Stivala’s motorcycle. Defendants contend that the photographs demonstrate the point of impact and the severe nature of the damage to the minivan. Defendants argue that the “crunch/impact” to the sliding door, made by a motorcycle, suggests that Stivala was traveling at a speed greater than 15 mph. Defendants further note Stivala’s testimony that his body went through the minivan glass.

In reply, Stivala contends that he should have the benefit of the emergency doctrine, as he was confronted with a sudden and unexpected circumstance which left little or no time for thought, deliberation, or consideration, that he acted reasonable and, thus, should be relieved of any liability for the accident. Stivala also avers that Cohens’ arrest, at the accident scene, due to her operation of

³ The license plate visible in one photograph and attached to the blue motorcycle matches the license plate number for Stivala’s motorcycle reflected in the accident report.

a vehicle with a suspended license, demonstrates that her actions were the sole proximate cause of the accident.⁴ Finally, Stivala argues that he had the right of way and was entitled to anticipate that Cohens would obeyed the traffic law requiring her to yield when making a left hand turn in the path of oncoming traffic.⁵

DISCUSSION

Summary judgment is a drastic remedy, and should be granted only when it is clear that no triable issues of fact exist (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that the movant is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*see Giuffrida v Citibank*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hospital*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). A failure to make that showing requires the denial of the motion, regardless of the adequacy of the opposing papers (*see Ayotte v Gervasio*, 81 NY2d 1062 [1993]; *Winegrad v NY Univ. Med. Ctr.*, 64 NY2d at 853). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*see Alvarez v Prospect Hospital*, 68 NY2d at 324).

“It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the

⁴ Cohens testified that her driver’s license was suspended due to the non-payment of car insurance. She also testified that she was not aware of her suspended license until the time of her arrest.

⁵ Vehicle and Traffic Law § 1141 requires “[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.”

lack thereof)” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505 [2012], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see *Sanchez v Finke*, 288 AD2d 122, 123 [1st Dept 2001]).

Here, Stivala does not establish his entitlement to summary judgment as a matter of law. Each defendant driver, via his or her respective deposition testimony, provided conflicting evidence of which driver had the right of way to proceed (see *Buffa v Carr*, 148 AD3d 606, 606 [1st Dept 2017]; *Espinal v Volunteers of Am.-Greater NY, Inc.*, 121 AD3d 558 [1st Dept 2014]). Stivala testified that he observed the traffic lights at both his intersection and the minivan’s intersection turn green, simultaneously. He also testified, however, that the light at which the minivan was stopped was controlled by a left turning arrow. Cohens testified, conversely, that when she proceed to turn left, the vehicles intending to proceed in the opposite direction were all stopped and that she had the right of way to proceed (see *Buffa v Carr*, 148 AD3d at 606; *Espinal v Volunteers of Am.-Greater NY, Inc.*, 121 AD3d 558; see also *Villaverde v Santiago-Aponte*, 84 AD3d 506, 506 [1st Dept 2011]; *Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d 295, 297 [1st Dept 2008]).

Moreover, Cohens testimony that she looked for on-coming traffic and did not see Stivala’s motorcycle in the left lane when she began to turn, raises triable issues of fact as to whether Stivala’s motorcycle was so close as to constitute a hazard when Cohens proceeded to turn and whether Stivala used reasonable care not to hit the turning minivan if such could be avoided (see *Thomas v Holzberg*, 300 AD2d 10, 11 [1st Dept 2002]; *Bogorad v Fitzpatrick*, 38 AD2d 923, 923-924 [1st Dept 1972], affirmed 31 NY2d 984 [1973]). A driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection (*Nevarez v S.R.M. Mgt. Corp.*, 58 AD3d at 297-298). In this

regard, “a motorist always has a duty to operate his or her vehicle with reasonable care (PJI 2:77)” (*Ohlhausen v City of NY*, 73 AD3d 89, 92 [1st Dept 2010]; see *Soto-Bay v Prunty*, 115 AD3d 586 [1st Dept 2014]; *O’Farrell v Inzeo*, 74 AD2d 806, 807 [1st Dept 1980]).

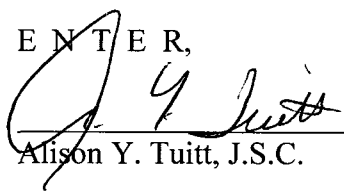
Finally, a question of fact exists as to whether Stivala’s rate of speed contributed to the accident. The photographs of the severe damage to the minivan’s door, and the testimony that the curtain air-bags deployed and that Stivala’s body was propelled through the minivan’s passenger window, may permit a jury to infer, without speculation, that Stivala was traveling at a speed greater than 15 - 17 mph as he approached and entered the intersection and that he failed to use reasonable care to avoid hitting the minivan, which may have already been in the process of turning (see *Bogorad v Fitzpatrick*, 38 AD2d at 923-924; *Saldana v Sarlo*, ___AD3d___, 797 NYS2d 689, 2005 NY Slip Op 25142, *9 [App Term, 1st Dept 2005]).

Similarly, these issues of fact preclude any determinations as to the applicability of the emergency doctrine (*Powers v Kyong Kwan Min*, 147 AD3d 401, 402 [1st Dept 2017][an actor faced with a sudden and unexpected circumstance may not be negligent if the actions taken are reasonable and prudent in the emergency context and the actor had not created the emergency]).

Accordingly, it is hereby ordered that the motion is denied.

This constitutes the decision and order of the Court.

Dated: ~~August~~ ^{November 6} _____, 2017

ENTER,


Alison Y. Tuitt, J.S.C.