

Kankani v Christopher
2018 NY Slip Op 31292(U)
February 23, 2018
Supreme Court, Bronx County
Docket Number: 300352/2016
Judge: Jr., Kenneth L. Thompson
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Dismissed

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

USAMAT KANKANI,

Index No: 300352/2016

Plaintiff,

-against-

DECISION AND ORDER

SANDRA E. CHRISTOPHER, JEFFREY O. BOURNE
and NILT, INC.,

Present:
HON. KENNETH L. THOMPSON, JR.

Defendants.

X

The following papers numbered 1 to 3 read on this motion to dismiss

No	On Calendar of March 29, 208	PAPERS NUMBER
	Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	1
	Answering Affidavit and Exhibits-----	2
	Replying Affidavit and Exhibits-----	3
	Affidavit-----	
	Pleadings -- Exhibit-----	
	Memorandum of Law-----	
	Stipulation -- Referee's Report --Minutes-----	
	Filed papers-----	

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendants move pursuant to CPLR 3212 to dismiss the complaint. This action arose as a result of personal injuries sustained by decedent, Usamat Kankani, (Kankani), in a motor vehicle collision in an intersection. Kankani's vehicle's approach to the intersection was controlled by a stop sign. The vehicle operated by defendant, Jeffrey O. Bourne, (Bourne), entered the intersection from a road that was not controlled by a traffic device.

The accident giving rise to plaintiff's claim involved an intersection collision between plaintiff's vehicle, which was traveling on a highway that was not regulated by any traffic control device, and defendants' vehicle, which had come to a stop at a stop sign and then entered the intersection. Since plaintiff had the right-of-way (Vehicle and Traffic Law § 1142), he was "entitled to anticipate that other vehicles would obey the traffic laws that require them to yield" (*Namisnak v Martin*, 244 AD2d 258, 260 [1st Dept 1997]; see *Jordan v City of New York*, 12 AD3d 326 [1st Dept 2004]). A "presumption

of negligence” arises from the failure of a driver at a stop sign “to yield the right of way” to the vehicle on the highway (*Murchison v Incognoli*, 5 AD3d 271, 271 [1st Dept 2004]).

Martinez v. Cofer, 128 A.D.3d 421, 421–22 [1st Dept 2015]).

Co-defendant, Nilt, Inc. is alleged to be the title holder of the vehicle operated by Bourne, and is entitled to dismissal on the grounds that the claims against Nilt are merely derivative of the claims against Bourne. CPLR 3212(b).

Accordingly, the motion is granted and the complaint is hereby dismissed in its entirety.

The foregoing constitutes the decision and order of the Court.

Dated: 5/11/2018



KENNETH L. THOMPSON JR. J.S.C.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX**

-----X

ALHAJI BABA KANKANI, as Administrator of the
Estate of USAMAT KANKANI,

Plaintiff

- against -

Index No. 300352/2016

SANDRA E. CHRISTOPHER, JEFFREY O.
BOURNE and NILT, INC.,

Defendants

-----X

**MEMORANDUM OF LAW
OF THE DEFENDANTS
SANDRA CHRISTOPHER AND JEFFREY O. BOURNE**

Law Office of Dennis C. Bartling
ATTORNEYS FOR DEFENDANTS
Sandra Christopher and Jeffrey O. Bourne
875 Merrick Avenue
Westbury, NY 11590
516 229 4429

THE DEFENDANTS, JEFFREY O. BOURNE AND SANDRA E. CHRISTOPHER, WERE NOT NEGLIGENT AS A MATTER OF LAW AND SUMMARY JUDGMENT SHOULD BE GRANTED.

The CPLR provides that a summary judgment “motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party” (CPLR 3212 (b)). A Court may grant summary judgment in a proceeding when it has been established that no triable issue of fact exists. Summary judgment is designed to expedite all civil cases by eliminating from the trial calendar claims which can be properly resolved as a matter of law. *Andre v. Pomeroy*, 35 N.Y.2d 361 (1974).

THE DEFENDANTS, JEFFREY O. BOURNE and SANDRA E. CHRISTOPHER, DID NOT BREACH ANY DUTY OWED TO THE PLAINTIFF

It is well-established law in New York State, that there are three elements which must be present for a plaintiff to recover from a defendant in tort. These elements are: (1) the existence of a legal duty from the defendant to the plaintiff; (2) a breach of that duty; and (3) the injury which was proximately caused by the breach of the duty. See *Brandy B. v. Eden Cent. School Dist.*, 15 N.Y.3d 297 (2010); *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325 (1981); *Pulka v. Edelman*, 40 N.Y.2d 781 (1976).

If one of these elements is not present, there can be no recovery by the plaintiff against the defendant. *Stukas v. Streiter*, 83 A.D.3d 18 (2nd Dept. 2011);

Green v. State, 222 A.D.2d 553 (2nd Dept. 1995); *Gaeta v. City*, 213 A.D.2d 509 (2nd Dept. 1995).

The scope of one party's duty owed to another is a question of law to be determined by the Court. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 (2002); *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579 (1994); *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 76 N.Y.2d 220 (1990)

While questions of proximate cause can be factual jury questions, the Court of Appeals has held that the plaintiff must establish prima facie that the alleged negligence was a substantial cause of the events that resulted in his injuries. *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308 (1980). Where the defendant's vehicle merely furnishes the occasion for the accident, any negligence that could be attributed to the defendant is not a proximate cause of the plaintiff's injuries. *Ely v. Pierce*, 302 A.D.2d 489 (2nd Dept 2003).

Drivers are under a duty to maintain a reasonable speed, control and care of their cars to avoid an accident. *Oberman v. Alexanders Rent-A-Car, et al.*, 56 A.D.2d 814 (1st Dept. 1977).

**THE PLAINTIFF, KANKANI, SHOULD HAVE STOPPED AND YEILDED
THE RIGHT OF WAY TO THE DEFENDANT, BOURNE .**

The legal duty and obligation of the operator of a motor vehicle which is approaching an intersection controlled by a stop sign is twofold. The initial obligation upon the operator is to stop for the sign. If the operator does not stop and the inquiry ends, then operator of the vehicle is found to be legally negligent.

If the operator of the vehicle does stop, then he is required to yield the right of way to vehicles in the intersection. A component of yielding the right of way is the obligation of the operator to see what there is to be seen by the proper use of the ordinary senses.

The KANKANI vehicle was negligent per se because he violated Vehicle and Traffic Law § 1142 (a) and 1172 (a). Violation of a state statute is negligence per se. The unexcused failure to observe the statutory standard of care is negligence. *Martin v. Herzog*, 228 N.Y. 164 (1920); *Dalal v. City of New York*, 262 A.D.2d 596 (2nd Dept. 1999); *Miller v. Hine*, 281 A.D. 387 (3rd Dept. 1953).

Vehicle and Traffic Law § 1142 (a) provides:

“Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.”

Vehicle and Traffic Law § 1172 (a) provides:

“Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is not crosswalk, at the point nearest the intersecting roadway where the driver has a view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.”

This test is detailed in section 2:80 of the New York Pattern Jury Instructions: Motor Vehicle Accidents-Collision at Intersection Controlled by Stop or Yield Sign:

In applying this provision of the statute, you must first decide whether the (defendant) actually stopped as required. If you decide that (he, she) failed to stop as required, (plaintiff, defendant) was negligent. Section 1172 of the Vehicle and Traffic Law provides:

It is a well-established principle of law that a vehicle which fails to stop or stops and then fails to yield the right-of-way is negligent as a matter of law. See *Bongiovanni v. Marino*, 255 A.D.2d 540, 680 N.Y.S.2d 865 (2nd Dept. 1998); *Nunziata v. Birchell*, 238 A.D.2d 555, 656 N.Y.S.2d 383 (2nd Dept. 1997).

THE DEFENDANT, BOURNE, HAD A RIGHT TO ASSUME THAT THE PLAINTIFF KANKANI, WOULD OBEY THE VEHICLE AND TRAFFIC LAW AND YIELD THE RIGHT OF WAY.

The operator of the vehicle with the right of way still has a legal duty to observe. That duty is that he must not act recklessly. Essentially this means that the operator will be free from negligence in almost any circumstance. The general exception is the situation where the driver with the right of way enters the intersection aware that the other vehicle will not stop. Otherwise, the operator may rely on the statute and is solely under duty to anticipate that the other vehicle will yield the right of way. *Gravina v. Wakschal*, 255 A.D.2d 291, 679 N.Y.S.2d 420 (2nd Dept. 1998); *Maxwell v. Land-Saunders*, 233 A.D.2d 303, 649 N.Y.S.2d 809 (2nd Dept. 1966)

THE PLAINTIFF, KANKANI, AS THE OPERATOR OF A MOTOR VEHICLE WHICH FAILED TO OBEY A STOP SIGN IS NEGLIGENT AS A MATTER OF LAW.

Violation of the Vehicle and Traffic Law § 1172(a) constitutes negligence per se. Therefore, the party who fails to obey a stop sign will be negligent as a matter of law and therefore responsible for the incident.

In addition to being negligent as a matter of law, the offending driver is negligent in breaching his duty regarding the safe operation of his vehicle. Namely, the offending driver violated his duty to enter an intersection in such a safe manner as to not constitute an immediate hazard to traffic which is moving across or within an intersection. Conversely, the operator of the vehicle with the right of way, is not under any duty or legal obligation to watch for vehicles which may enter an intersection without obeying traffic signs. See *Namisnak v. Martin*, 244 A.D.2d 258, 664 N.Y.S.2d 435 (1st Dept. 1997).

Motorist who collided with a van after its driver ran a stop sign was not negligent, regardless of whether she failed to look before entering the intersection; van driver was negligent as a matter of law for failing to stop at the stop sign, the motorist did not see the van prior to impact and had no time to take evasive action, motorist's uncontradicted testimony indicated that she was traveling at a normal speed, and motorist had the right of way and had no duty to watch for and avoid a driver who might fail to stop at the stop sign. *Jenkins v. Alexander*, 9 A.D.3d 286, 780 N.Y.S.2d 133 (1st Dept. 2004). Car driver's negligence in either failing to stop at stop sign or failure to yield right of way was sole proximate cause of collision with tractor trailer truck, even if truck was

speeding, where car hit right side of truck which had nearly passed all the way through intersection. *Namisnak v. Martin*, 244 A.D.2d 258, 664 N.Y.S.2d 435 (1st Dept. 1997)

A party's failure to act reasonably under the circumstances and failure to see that which she should have seen through the proper use of her senses also constitutes negligence. *Wilson v. Rosedom*, 82 A.D.3d 970 (2nd Dept. 2011); *Laino v. Lucchese*, 35 A.D.3d 672 (2nd Dept. 2006); *Berner v. Koegel*, 31 A.D.3d 591 (2nd Dept. 2006); *Bongiovi v. Hoffman*, 18 A.D.3d 686 (2nd Dept. 2005); *Bolta v. Lohan*, 242 A.D.2d 356 (2nd Dept. 1997); *Mohammed v. Frische*, 233 A.D.2d 628 (1st Dept. 1996)).

The operator of a motor vehicle who has the right of way, is entitled to anticipate that other vehicles will obey the traffic laws which require them to yield to the vehicle with the right of way. *Gabler v. Marty Bldg. Supply Corp.*, 27 A.D.3d 519 (2nd Dept. 2006) [internal citations omitted]


In *Batal v. Associated Universities, Inc.*, 293 A.D.2d 558 (2nd Dept. 2002), the plaintiff proceeded with the right of way northbound, and the defendant, who first stopped at a stop sign but did not observe the plaintiff's vehicle, entered the intersection westbound, and the plaintiff struck the defendant's vehicle. The Court held that the defendant was negligent per se. The only reason the Court did not hold that the plaintiff was entitled to judgment as a matter of law was because, in that case, there was evidence that the plaintiff contributed to the accident by driving at an excessive rate of speed.

The driver of a motor vehicle with the right of way is entitled to anticipate that the driver of an oncoming vehicle would obey the traffic laws that require the oncoming driver to yield the right of way. *Jordan v. City of New York*, 12 A.D.3d 326 (1st Dept. 2004)

Under the circumstances of this case, the defendant, BOURNE, did not breach any duty owed to the plaintiff. The collision involved two vehicles at the intersection of 211th Street and Paulding Avenue. The intersection is controlled by a stop sign for vehicles traveling on 211th Street only. The intersection does not have traffic control devices for vehicles traveling on Paulding Avenue. The accident happened as the BOURNE vehicle was driving through the intersection, with no traffic control devices in his direction, when the KANKANI vehicle failed to yield the right of way to the defendant, BOURNE, thus, causing an accident.

It is respectfully requested that this Court dismiss the complaint and any and all cross-complaints against the defendants, SANDRA E. CHRISTOPHER, JEFFREY O. BOURNE, and for any other relief that this Court deems just and proper.

Dated: Westbury, New York
February 23, 2018


Theresa Mariano