

Walsh (Estate of Stengl) v Safeguard Gas Heat Inc.
2018 NY Slip Op 34132(U)
October 18, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 611448/2017
Judge: John H. Rouse
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INDEX NO. 611448/2017

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 12 - SUFFOLK COUNTY

PRESENT:

Hon. John H. Rouse
Acting Supreme Court Justice

MOTION DATE: 07/18/2018
ADJ. DATE: 09/12/2018
Mot. Seq. 002- **MG**
e-filed full participation

Joan Walsh, Lorelle J Pyan, Richard F Stengl EXECUTORS OF
THE ESTATE OF FRANK A STENGL, DECEASED,

Plaintiffs

DECISION & ORDER

-against-

Safeguard Gas Heat Inc., Jesse T. Lombardi, John M Graziano,
Thomas J Maloney,

Defendants

TO:

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Defendant Thomas J. Maloney for an order pursuant to CPLR §3212 granting partial summary judgment to defendant Thomas J. Maloney on his cross-claims against defendants Safeguard Gas Heat Inc., and Jesse T. Lombardi, and dismissing defendants Safeguard's and Lombardi's second (*seat belt defense*), third (*comparative fault of Maloney*) and sixth (*barred by Worker's Compensation Law*) affirmative defenses contained in their Answer pursuant to CPLR §3211(a) and for such other and further relief as this Court may deem just and proper; (2) all e-filed documents numbered 16-31; it is:

ORDERED that the motion (Seq. #002) by Thomas J. Maloney for partial summary judgment on the issue of liability on his cross claims against Defendants Safeguard Gas Heat Inc. and Jesse T. Lombardi is granted; and further his motion for summary judgment on the cross claims by Defendants Safeguard Gas Heat Inc., Jesse T. Lombardi as against him is granted; and it is further

ORDERED that pursuant to CPLR § 3212(b) all Plaintiffs shall have partial summary judgment against Defendants Safeguard Gas Heat Inc. and Jesse T. Lombardi on the issue of liability; and Defendant John M. Graziano, as owner of the vehicle operated by Thomas J. Maloney, shall have summary judgement on the cross claims against him by Defendants Safeguard Gas Heat Inc. and Jesse T. Lombardi.

ORDERED that Defendant Thomas Maloney is directed to serve upon all other parties who have appeared in this action with a copy of this decision and order with notice of entry as soon as practicable *See Protocol for Electronic Filing in Suffolk County Supreme Court at II (M) page 6 for rules on serving notice of entry.* <https://www.nycourts.gov/courts/10jd/suffolk/EFiling/>

DECISION

This action arises out of a serious collision between a van driven by Jesse T. Lombardi and Nissan Altima driven by Thomas Maloney. Plaintiffs Walsh, Pian and Frank Stengl were passengers in the vehicle driven by Maloney.

In this consolidated action (*decision and order dated March 23, 2018 consolidating the case brought by Thomas Maloney against Safeguard Gas, Inc. and Jesse T. Lombardi with that brought by Plaintiffs: Joan Walsh, Lorelle J. Pyan, Richard F. Stengl, Executors of the Estate of Frank A. Stengl, Deceased*) Thomas J. Maloney moves for summary judgment on his cross claims against Defendants Safeguard Gas, Inc. and Jesse T. Lombardi (*such claims previously being his claims as Plaintiff in the unconsolidated action*) and upon the cross claims made by these Defendants for contribution based upon the alleged comparative fault of Maloney.

Thomas J. Maloney's Allegations of Fact

In support of his motion for summary judgment Thomas Maloney submits an affidavit with the following allegations. Maloney is 62 years old. On May 28, 2017, at approximately 5:00 PM, he was involved in a motor vehicle accident in which the vehicle that he was driving was struck by a vehicle owned by defendant Safeguard and driven at the time by its employee Lombardi. The accident occurred at the intersection of the Long Island Expressway North Service Road with Commack Road, in Commack, New York. At the time of the accident Maloney was driving a Nissan Altima owned by my neighbor John Graziano. Just prior to being struck by defendant Safeguard/Lombardi's vehicle, Maloney had stopped on the North Service Road at the light at the intersection with Commack Road. At the point where I stopped my vehicle, the roadway of the North Service Road consisted of four lanes. The lane farthest to the left was marked "Left Turn Only" on the pavement. The second-most lane from the left was marked "Left Turn

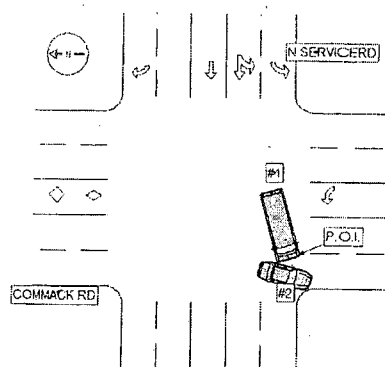
/Straight" on the pavement. The lane to the right of that was marked "Straight" only and the lane farthest to the right was marked "Right Turn Only." When Maloney stopped at the intersection with Commack Road his vehicle was in the second lane from the left, the lane that was marked "Left Turn/Straight." There was one vehicle ahead of Maloney. When the light turned green Mr. Maloney moved his vehicle ahead and began to turn left onto Commack Road. As Mr. Maloney entered the intersection, his vehicle was violently struck in the driver's side door by a white van being operated by defendant Lombardi. The initial impact by Lombardi's van with Mr. Maloney's vehicle was in the intersection itself, and Lombardi's van then pushed Mr. Maloney's vehicle across the intersection and off the roadway.

Mr. Maloney alleges he was seriously injured by the collision, suffering a fractured shoulder. The front-seat passenger in Mr. Maloney's vehicle, Frank Stengl, was killed by the force of the impact. In operating his vehicle on May 28, 2017, Mr. Maloney alleges he obeyed all traffic rules and regulations. At all times his vehicle was entirely within its permitted lane of travel. Mr. Maloney alleges he appropriately stopped his vehicle at the traffic light when it was red, and he moved forward appropriately when the light turned green. The lane in which Mr. Maloney's vehicle was traveling just prior to the collision was marked for a left turn or to go straight, and his intention was to make a permitted left turn onto Commack Road South.

Based upon the deposition of Defendant Jesse T. Lombardi he had exited the Long Island Expressway and was traveling in the far left lane as alleged by the movant. He testified that he was traveling at speed of forty miles per hour and the light was green as he approached the Maloney his vehicle was in a left turn only lane that was to the left (south) of the Maloney vehicle. Lombardi testified that he began to change lanes to move towards the right so that he could get gas at a service station on the far side of the intersection with Commack Road on the north side of the service road.

Based upon the deposition of an independent witness, Jaal Thalib, who was in his vehicle the northbound lane of Commack Road sitting at the red traffic light he testified at an examination before trial that he observed the collision as the van struck driven by Jesse T. Lombardi struck the driver's side of the vehicle driven by Thomas Maloney. Plaintiff, upon the facts alleged has made a *prima facie* case that Defendant Lombardi was the sole proximate cause of this collision.¹

¹The movant has submitted a letter dated August 2, 2018 submitted with Findings and Disposition from a Department of Motor Vehicles Hearing dated July 23, 2018. The court has not considered this determination in considering the present motion. See e-filed document 31.



*diagram, not to scale, from certified police accident report included for roadway markings
not for any purpose of reconstruction or the determination of the point of impact.*

In opposition Co-Defendant Jesse T. Lombardi has failed to raise a triable issue of fact. The inescapable conclusion is that Lombardi driving a van westbound in the far left lane attempted to move his vehicle to the right to go, as he testified, to a gas station on the far side of the intersection on the north side of the road and struck the driver side of the vehicle driven by Thomas Maloney that was legally turning left to proceed southbound on Commack Road. Accordingly, Thomas Maloney's motion for partial summary judgment on the issue of liability on his cross claims against Jesse T. Lombardi and Safeguard Gas Heat Inc. is granted and his motion for summary judgment on the cross claims against him by Jesse T. Lombardi and Safeguard Gas Heat Inc. is granted.

The Court further determines that Plaintiffs Joan Walsh, Lorelle J Pyan, Richard F Stengl Executors of the Estate of Frank A. Stengl, Deceased, shall also have summary judgment against Defendants Jesse T. Lombardi and Safeguard Gas Heat Inc. on the issue of liability in accordance with CPLR § 3212(b). *See Pagan v Jordan*, 163 A.D.3d 978 (2nd Dept. 2018).

The foregoing shall constitute the decision and order of the court.

Dated: October 18, 2018

JOHN H. ROUSE, Acting J.S.C.

NON-FINAL DISPOSITION