Lallemand v Held
2018 NY Slip Op 34256(U)
October 12, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 605899/2018
Judge: Paul J. Baisley, Jr.
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SHORT FORM ORDER **INDEX NO. 605899/2018**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

JEAN LALLEMAND,

Plaintiff,

-against-

KIERSTEN T. HELD and KEVIN C. HELD,

Defendants.

ORIG. RETURN DATE: September 7, 2018
FINAL RETURN DATE: September 7, 2018
MOT. SEQ. #: 001 MG

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated August 7, 2018, and supporting papers; (2) Affirmation in Opposition by the defendants, dated August 30, 2018, and supporting papers; (3) Reply Affirmation by the plaintiff, dated September 7, 2018; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendants' liability is granted; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8 (f) on November 8, 2018 at the Supreme Court, DCM Part, One Court Street, Riverhead, New York at 10:00 a.m.

The plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred at approximately 6:35 p.m. on July 4, 2016, at the intersection of Wireless Road and Hawkins Road, in the Town of Brookhaven. The accident allegedly happened when the vehicle operated by the defendant Kiersten T. Held (Held) and owned by the defendant Kevin C. Held made a left turn into the lane of travel occupied by the plaintiff's vehicle while it was proceeding through the intersection.

It is undisputed that the plaintiff's vehicle was traveling northbound on Wireless Road, and that Held was traveling southbound on Wirelesss Road immediately prior to this accident. It is also undisputed that the subject intersection is controlled by a traffic light, and that Held attempted to make a left hand turn heading eastbound on Hawkins Road.

The plaintiff now moves for summary judgment on the issue of the defendants' liability. In support of the motion, the plaintiff submits, among other things, the pleadings, his affidavit, and an

unauthenticated copy of a photograph of the intersection. In his affidavit, the plaintiff swears that, prior to this incident, he was traveling north in the right lane on Wireless Road at approximately thirty miles per hour, that his intention was to proceed through the intersection and continue northbound on Wireless Road, and that the traffic light for his direction of travel was green as he approached the intersection. He states that Wireless Road, at its intersection with Hawkins Road, is a two-way roadway with two northbound and two southbound lanes of travel separated by a double yellow line, that the right northbound lane on Wireless Road only permits traffic to continue straight, and that the left northbound lane on Wireless Road allows traffic to either continue straight or to turn left. He indicates that northbound traffic on Wireless Road also has use of two dedicated right turn lanes to proceed east onto Hawkins Road.

The plaintiff further swears that the left southbound lane on Wireless Road permits traffic to proceed straight or to make a left turn onto eastbound Hawkins Road, that he first observed the defendants' vehicle as it was proceeding southbound in the left lane of travel on Wireless Road, and that he kept the defendants' vehicle under his constant observation until the two vehicles came into contact with each other. He indicates that the traffic light was green at all relevant times and did not change color before the collision of the two vehicles, that his vehicle "had no directional signals activated neither as I entered the intersection nor within 5 seconds prior to that," and that the defendants' vehicle did not signal for a left turn at anytime before the impact between the two vehicles. He states that he observed the defendants' vehicle enter the intersection and continue straight through the intersection; that, after he had entered the intersection, the defendants' vehicle suddenly and without warning attempted to make a left turn and to proceed east on Hawkins Road; and that he applied his brakes and attempted to swerve out of the defendants' vehicle's pathway in an attempt to avoid the collision, but was unable to avoid the impact because he only had a "moment to react."

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 eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]).

A driver intending to turn left within an intersection is required by law to yield the right of way to the vehicle proceeding straight or approaching from the opposite direction which is in the intersection or is so close as to constitute an immediate hazard (*see* Vehicle and Traffic Law § 1141; *Bogorad v Fitzpatrick*, 31 NY2d 984, 341 NYS2d 314 [1973]; *Jones v Castro-Tinco*, 62 AD3d 957, 880 NYS2d 308 [2d Dept 2009]; *Casaregola v Farkouh*, 1 AD3d 306, 767 NYS2d 57 [2d Dept 2003]; *Mathewson v Bender*, 259 AD2d 673, 686 NYS2d 832 [2d Dept 1999]). A driver with the right of way is entitled to anticipate that another driver will obey the traffic laws that require her to yield the right of way

(*Mohammad v Ning*, 72 AD3d 913, 899 NYS2d 356 [2d Dept 2010]; *Bongiovi v Hoffman*, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]). The evidence submitted by the plaintiff establishes his prima facie entitlement to summary judgment by establishing that the defendant driver violated Vehicle and Traffic Law § 1141 when she made a left turn directly into the path of the plaintiff's oncoming vehicle as he lawfully proceeded through the intersection with the right of way (*see Loch v Garber*, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]; *Almonte v Tobias*, 36 AD3d 636, 829 NYS2d 153 [2d Dept 2007]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]).

Vehicle and Traffic Law § 388 provides that the owner of a vehicle is vicariously liable to third parties for injuries resulting from the "use and operation" of such vehicle by any person using it with permission. The statute creates a strong presumption of permissive use which can be rebutted only with substantial evidence showing that the driver of the vehicle was not operating it with the owner's express or implied permission (*see Murdza v Zimmerman*, 99 NY2d 375, 756 NYS2d 505 [2003]; *Amex Assur. Co. v Kulka*, 67 AD3d 614, 888 NYS2d 577 [2d Dept 2009]; *Talat v Thompson*, 47 AD3d 705, 850 NYS2d 486 [2d Dept 2008]). The presumption can be rebutted by evidence that the driver exceeded restrictions placed on his or her use of the vehicle by the owner (*Murdza v Zimmerman*, *supra*; *Ellis v Witsell*, 114 AD3d 636, 979 NYS2d 826 [2d Dept 2014]; *Aetna Casualty & Surety Co. v Brice*, 72 AD2d 927, 422 NYS2d 203 [4th Dept 1979] *affd* 50 NY2d 958, 431 NYS2d 528 [1980]; *Rachon v Cheuvant*, 37 AD2d 911, 325 NYS2d 452 [4th Dept 1971]), thereby exonerating the owner from vicarious liability under the statute. Here, the defendant owner does not seriously dispute that his daughter had permission to operate his motor vehicle. Thus, the plaintiff has established that the defendant owner is also liable herein.

In opposition to the plaintiff's prima facie showing of entitlement to summary judgment on the issue of liability, the defendants submit the affirmation of their attorney, Held's affidavit, and an uncertified and unauthenticated copy of police accident report, Form MV-104A, regarding this incident. The police accident report record relied on by the defendant is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378 [1984]; *Cheul Soo Kang v Violante*, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]).

In her affidavit, the plaintiff swears that, as she proceeded southbound on Wireless Road on the date of this accident, she stopped for a red light at the intersection, and that her left turn signal was activated as she intended to turn left onto Hawkins Road. She states that her vehicle was stopped first in line at the intersection, that she waited approximately 10 to15 seconds for the traffic light to change color, and that, when the traffic light turned green, she proceeded into the middle of the intersection and brought her vehicle to a stop to wait for northbound traffic to pass. She indicates that, once she observed the northbound traffic "to be free and clear," she proceeded to make a left turn onto Hawkins Road. Held further swears that her vehicle was impacted by the plaintiff's vehicle after she had already crossed into the northbound lane of Wireless Road, and that she did not have time to avoid the accident. She indicates that she did not hear any car horns or screeching tires prior to the impact, and that she believes that the plaintiff had been traveling at an excessive speed.

In her affidavit, Held does not establish when she first saw the plaintiff's vehicle, where it was in relation to the intersection as she made the decision to make her left turn, and what portion of the plaintiff's vehicle came into contact with her vehicle. Held also does not indicate what portion of her vehicle was impacted. A driver is charged with the common-law duty of seeing that which he or she should have seen, under the circumstances, through the proper use of his or her senses (*see Aponte v Vani*, 155 AD3d 929 64 NYS3d 123 [2d Dept 2017]; *Guzman v Bowen*, 38 AD3d 837, 833 NYS2d 548 [2d Dept 2007]). "[A] driver is negligent where an accident occurs because [he or she] has failed to see that which through the proper use of [his or her] senses [he or she] should have seen" (*Breslin v Rudden*, 291 AD2d 471, 471-472, 738 NYS2d 674 [2d Dept 2002]; *see also Heath v Liberato*, 82 AD3d 841, 918 NYS2d 353 [2d Dept 2011]). A driver also has "a duty to see what should have been seen and to exercise reasonable care under the circumstances to avoid an accident" (*Cajas-Romero v Ward*, 106 AD3d 850, 851, 965 NYS2d 559 [2d Dept 2013]; *Filippazo v Sanhago*, 277 AD2d 419, 716 NYS2d 710 [2nd Dept 2000]).

In her affirmation, counsel for the defendants argues that there are triable issues concerning the conduct of the respective drivers, which vehicle entered the intersection first, and which driver had the right of way to proceed thorough the intersection. Counsel further contends that there is an issue of fact whether the plaintiff had his right turn signal activated prior to the accident, which would give Held the right to assume that she could safely proceed with her left turn. Said affirmation does not address the issue of the defendant owner's vicarious liability herein.

Even if one were to assume that the plaintiff had his right turn signal activated prior to this accident, Held does not indicate why she did not see the plaintiff continue in the left northbound lane of Wireless Road without taking the dedicated right turn lanes at the intersection. In any event, Held's statement that she had proceeded into the northbound lane of Wireless Road, and her speculative statement that the plaintiff was speeding, as well as counsel's allegation that the plaintiff had his right turn signal activated are questions of comparative fault relevant only to damages (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). A plaintiff is not required to show freedom from comparative fault in establishing his or her entitlement to summary judgment on the issue of liability (*see Rodriguez v City of New York, id.*; *Edgerton v City of New York*, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]).

Accordingly, the plaintiff's motion for summary judgment on the issue of the defendants' liability is granted.

Dated: 10/12/18

HON. PAUL J. BAISLEY, JR., J.S.C.