

**Nunziato v Conway**

2018 NY Slip Op 34300(U)

May 11, 2018

Supreme Court, Orange County

Docket Number: Index No. EF008252-2016

Judge: Catherine M. Bartlett

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

FRANK NUNZIATO,

Plaintiff,

-against-

JOHN F. CONWAY, CINDY L. VALICENTI &
ANTHONY J. VALICENTI,

Defendants.

To commence the statutory time
period for appeals as of right
(CPLR 5513 [a]), you are
advised to serve a copy of this
order, with notice of entry,
upon all parties.

Index No. EF008252-2016
Motion Date: March 28, 2018

The following papers numbered 1 to 4 were read on the Valicenti Defendants' motion for
summary judgment:

Notice of Motion - Affirmation / Exhibits . . . . . 1-2
Affirmation in Opposition . . . . . 3
Reply Affirmation . . . . . 4

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is an action for personal injuries arising out of a motor vehicle accident that occurred
on October 26, 2015 in New Windsor, New York. Plaintiff Frank Nunziato was attempting to
turn left from a gas station across two lanes of traffic on Union Avenue. He passed in front of
truck (owned and operated by defendant John F. Conway) stopped in the right lane, and struck
an automobile (owned by defendant Anthony J. Valicenti and operated by defendant Cindy L.
Valicenti) moving in the left lane. The Valicenti Defendants move for summary judgment.

### The Evidence

Plaintiff Frank Nunziato testified that at the time of the accident he was attempting to turn left out of a Speedway gas station on Union Avenue in New Windsor across two lanes of traffic. Traffic in the right lane was stopped for a red light, but there was a gap in front of defendant John F. Conway's truck (the "Conway truck"). As Plaintiff proceeded slowly forward, his vehicle was struck in the rear by the Conway truck. Within a second later the front of Plaintiff's vehicle impacted the automobile operated by defendant Cindy L. Valicenti (the "Valicenti vehicle"), and the airbag from the steering wheel deployed. Plaintiff never saw the Valicenti vehicle before the accident occurred.

Defendant John F. Conway testified that he stopped in the right lane on Union Avenue for the red light, but left an opening in front of his truck for the gas station. Plaintiff nodded at him, he looked in his mirror and saw nothing in the left lane, and then motioned for Plaintiff to go. Plaintiff proceeded forward slowly, but stopped in front of his truck and was blocking the right lane when the light turned green. Plaintiff was stopped for Mr. Conway estimated to be 15 or 20 seconds, but because of the way his vehicle was angled he could not see around the Conway truck. Plaintiff "gunned it" (i.e., he "stepped on the gas and the car goes real quick"), and Mr. Conway went to go around Plaintiff's vehicle. He was looking forward and did not see the impact when Plaintiff's vehicle collided with the Valicenti vehicle.

Defendant Cindy L. Valicenti testified that she was in the left lane on Union Avenue and slowing down for the red light when she was struck hard by Plaintiff's vehicle. She never saw Plaintiff's vehicle until he struck her vehicle. Photographs of the accident scene confirm that Plaintiff struck the Valicenti vehicle on the right side and pushed it across the double yellow line.

### Legal Analysis

Vehicle and Traffic Law (“VTL”) §1143 provides:

The driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.

*Desio v. Cerebral Palsy Transport*, 121 AD3d 1033 (2d Dept. 2014), is akin to the case at bar. In *Desio*, the plaintiff was injured, much like Plaintiff here, when she attempted to make a left turn from a shopping plaza parking lot, in front of a stopped bus, across two lanes of traffic and collided with a vehicle traveling on the roadway with the right of way. On these facts, the Second Department observed:

Vehicle and Traffic Law §1143 provides that “[t]he driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed.” “The driver with the right-of-way is entitled to anticipate that the other motorist will obey traffic laws which require him to yield” [cit.om.]. A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law [cit.om.].

*Desio v. Cerebral Palsy Transport*, *supra*, 121 AD3d at 1034. The Court held that the plaintiff had violated VTL §1143 and was negligent as a matter of law. Recognizing that the driver with the right-of-way must nevertheless establish freedom from comparative negligence to obtain summary judgment, the Court continued:

“[A] driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision” [cit.om.].

*Id.*, 121 AD3d at 1034-35. The Court held that (i) the defendant established *prima facie* entitlement to judgment as a matter of law by testifying that he first observed the plaintiff’s vehicle moving into traffic from in front of the stopped bus less than a second prior to impact; and (ii) plaintiff’s testimony that seconds had passed from the time she first observed the

defendants' vehicle to impact was insufficient to raise a triable issue of fact. *Id.*, at 1035. *See also, Nesbitt v. Gallant*, 149 AD3d 763 (2d Dept. 2017); *Ricciardi v. Nelson*, 142 AD3d 492 (2d Dept. 2016); *Cook v. Gomez*, 138 AD3d 675 (2d Dept. 2016); *Riccuiti v. Porcu*, 124 AD3d 616 (2d Dept. 2015); *Marcel v. Sanders*, 123 AD3d 1097 (2d Dept. 2014); *Strocchia v. City of New York*, 70 AD3d 926 (2d Dept. 2010); *Rose v. Leberth*, 128 AD3d 1492 (4<sup>th</sup> Dept. 2015); *Rak v. Kossakowski*, 24 AD3d 1191 (4<sup>th</sup> Dept. 2005).

Inasmuch as Plaintiff herein was entering or crossing Union Avenue from a “place other than another roadway” – to wit, a gas station – he was obliged to comply with VTL §1143 and “yield the right of way to all vehicles approaching on” Union Avenue. *See, Nesbitt v. Gallant, supra*, 149 AD3d at 763 (plaintiff turning left onto roadway from gas station violated VTL §1143). In proceeding out of the gas station in front of the Conway truck and striking the Valicenti vehicle, Plaintiff failed to yield the right-of-way in violation of VTL §1143 and was negligent as a matter of law. *See, Desio v. Cerebral Palsy Transport, supra*. Plaintiff's intrusion into defendant Valicenti's lane of travel from in front of the Conway truck happened very suddenly – either because Plaintiff “gunned it” (per defendant Conway) or because he was struck in the rear and propelled in that direction (per Plaintiff himself). *See, Victor v. Daley*, 150 AD3d 1307 (2d Dept. 2017).<sup>1</sup> In consequence, defendant Valicenti was left with no time to react and take measures to avoid the collision; Valicenti did not see Plaintiff, and Plaintiff did not see Valicenti, before the collision occurred.

---

<sup>1</sup>In *Victor v. Daley, supra*, the plaintiff collided with defendant Bernstein's vehicle and was propelled into defendant Daley's vehicle. The Second Department held that Daley, who was traveling with the right-of-way, was not negligent for failing to avoid the collision and that his actions were not a proximate cause of the collision. *Id.*, 150 AD3d at 1307-08.

Furthermore, there is no evidence that defendant Valicenti was speeding or otherwise negligent in the operation of her vehicle. She testified that she was simply slowing down as she approached the red light when Plaintiff's vehicle suddenly struck her vehicle. Neither Plaintiff nor defendant Conway observed the Valicenti vehicle before the collision, and nothing in their testimony gives rise to a triable issue whether any negligence on her part contributed to the occurrence of the accident

Thus, the Valicenti Defendants established *prima facie* entitlement to judgment as a matter of law. Plaintiff failed in opposition to demonstrate the existence of any triable issue of fact precluding summary judgment, and defendant Conway did not oppose the Valicentis' motion at all. Consequently, the Valicenti Defendants are entitled to summary judgment dismissing all claims against them. *See, Desio v. Cerebral Palsy Transport, supra; Nesbitt v. Gallant, supra; Strocchia v. City of New York, supra; Rose v. Leberth, supra; Rak v. Kossakowski, supra.*

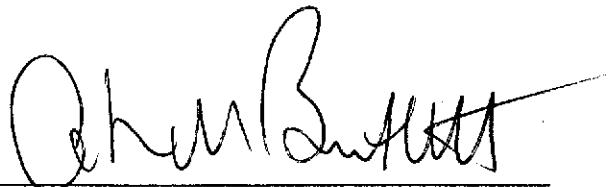
It is therefore

ORDERED, that the motion of defendants Cindy L. Valicenti and Anthony J. Valicenti for summary judgment is granted, and it is further

ORDERED, that all claims against the Valicenti Defendants, including the Plaintiff's complaint and co-defendant John F. Conway's cross claim, are hereby dismissed.

The foregoing constitutes the decision and order of the court.

Dated: May 11, 2018      ENTER  
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

5

HON. C. M. BARTLETT  
JUDGE NY STATE COURT OF CLAIMS  
ACTING SUPREME COURT JUSTICE