

Gonzalez v Marini
2018 NY Slip Op 34330(U)
October 10, 2018
Supreme Court, Westchester County
Docket Number: Index No. 69813/2016
Judge: William J. Giacomo
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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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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ROLANDO GONZALEZ, as Guardian for AUGUSTIN
GREGORIO GONZALEZ,
Plaintiff,

Index No. 69813/2016

– against –

DECISION & ORDER

JULIE MARINI, as Guardian Ad litem for ANTOINETTA
MARINI, and LORETO MARINI,
Defendants.

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In an action to recover damages for personal injuries, the defendant moves for summary judgment, pursuant to CPLR 3212, dismissing the complaint:

Papers Considered

1. Notice of Motion/Affirmation of Andrea E. Ferrucci, Esq./Exhibits A-J;
2. Affirmation of Keith McMillan, Esq. in Opposition/Affidavit of Donald D. Hoffman, Ph.D, DABFT/Exhibits A-G;
3. Reply Affirmation of Andrea E. Ferrucci, Esq.¹

Factual and Procedural Background

On December 8, 2016, at approximately 5:44 p.m., the plaintiff, a pedestrian, was struck by a vehicle operated by the defendant Antoinetta Marini and owned by her husband, the defendant Loreto Marini. The accident occurred on Marble Avenue in Pleasantville. The portion of Marble Avenue where the accident occurred is straight and level, divided by a double yellow line, and has a posted speed limit of 30 mph. There is one lane of traffic in each direction. Loreto Marini was in the passenger seat of the vehicle and the Marini's granddaughter was in the back seat at the time of the accident.

Defendants move for summary judgment dismissing the complaint on the grounds that the sole proximate cause of the accident was that the plaintiff was intoxicated and

¹ The improper sur-reply of Keith McMillan, Esq. has not been considered by the Court.

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improperly crossed in the middle of the street without yielding to the Marini vehicle in violation of Vehicle and Traffic Law 1152(a).

Defendants submit a certified police report demonstrating that the operator of the vehicle stated she was driving north on Marble Avenue when the pedestrian stepped out in front of her car. The pedestrian was unable to provide a statement due to his injuries. The police report also indicates that apparent contributing factors to the accident was pedestrian error or confusion.

The defendant Loreto Marini testified at an examination before trial that his wife was driving the vehicle at the time of the accident. Approximately eight to ten seconds prior, he observed the plaintiff standing in the southbound lanes of Marble Avenue with his head down. The plaintiff dropped something, then picked it up and jumped into their lane of travel. Mr. Marini testified that his wife slammed on the brakes.

Alexandra Marini testified at an examination before trial that she was sitting in the back seat of the vehicle. She observed the plaintiff at the double yellow line of the street while the vehicle was approximately a car length or less than a car length away. The plaintiff looked at the car, backed up, and then jolted forward, while her grandmother braked.

Detective Morgan Cole-Hatchard responded to the scene of the accident. Based upon her investigation, she concluded that the pedestrian was not crossing in a designated crosswalk. Detective Cole-Hatchard testified that she asked the doctors if alcohol was present in plaintiff's system and the response was that a substantial amount of alcohol was present. She testified that based upon a report from the County Police, the Marini vehicle was driving ten miles per hour over the speed limit and failed to observe the pedestrian. Det. Cole-Hatchard testified that the speed of the Marini vehicle was "a pretty normal speed to be going on Marble Avenue, ten over ... [based upon] [r]egular traffic flow". Marini was not given a traffic summons.

Defendants also submit an affirmed report of Lyle Hayes, Ph.D. DABCC, a New York State Certified Forensic Toxicologist. Dr. Hayes reviewed the medical records for plaintiff from Westchester Medical Center Emergency Department. Dr. Hayes reported that blood drawn from plaintiff at the hospital had a blood alcohol concentration level of 288 mg/dl, which is three times the legal limit for driving (80 mg/dl). According to Dr. Hayes, this BAC may be expected to have resulted from ingestion of 10-13 drinks. Dr. Hayes further states that the BAC level reported is expected to cause severe impairment, including confusion, impairment of perception and comprehension, as well as significant impairment of coordination, attention and balance, diminished visual acuity and decreased speed of response to visual stimulation. Further, sensory-motor incoordination, vertigo, staggering gait, and drowsiness or loss of consciousness are reported at this level. Mental confusion and disorientation by ethanol intoxication are to be expected with the BAC level reported.

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In opposition, plaintiff argues that issues of fact exist as to defendants' negligence. Plaintiff argues that defendants violated Vehicle and Traffic Law 1146 by failing to observe and avoid a pedestrian in the roadway. Plaintiff further argues that the emergency doctrine does not apply and that the Noseworthy doctrine does apply.

Plaintiff submits an accident reconstruction report, dated December 8, 2016, prepared by Sergeant Ezekiel Serrano of the Westchester County Department of Public Safety. Plaintiff also submits the deposition testimony of Sergeant Serrano. Sergeant Serrano accessed and imaged the Airbag Control Module/Event Data Recorder from the Marini vehicle. The pre-crash data showed that the Marini vehicle was traveling at 42.3 mph 4.8 seconds prior to the frontal impact and 39.8 mph .8 seconds prior to impact. The accelerator rate and engine rpm were steady and the brake pedal was not applied during the 4.8 seconds prior to impact. Sergeant Serrano testified that Marini's foot was on the accelerator pedal from 4.8 seconds before the impact up until the point of the impact. No airbags were deployed during the collision. Sergeant Serrano testified that the weather was clear and the roadway was dry. Upon his investigation at the scene, he did not observe any pre or post impact tire marks on the roadway.

Discussion

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Winegrad v N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

"Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; see *Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a prima facie showing of entitlement to summary judgment (see *Zuckerman v New York*, 49 NY2d at 562).

"The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Kolivas v Kirchoff*, 14 AD3d 493 [2d Dept 2005]; see *Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (see *Pearson v Dix McBride*, 63 AD3d 895 [2d Dep't 2009]; *Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]).

Vehicle and Traffic Law 1152(a) provides that "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway".

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Vehicle and Traffic Law 1146(a) provides, in pertinent part, that “every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary”.

Although defendants demonstrated prima facie entitlement to judgment as a matter of law on the issue of liability (see Veh & Tr Law 1152[a]), plaintiff raised triable issues of fact as to whether the defendants were negligent and whether such negligence was the proximate cause of the plaintiff's injuries (see Veh & Tr Law 1146[a]; *Sanclemente v MTA Bus Co.*, 116 AD3d 688, 689 [2d Dept 2014]; *Billingsy v Blagrove*, 84 AD3d 848 [2d Dept 2011]).

Accordingly, defendants' motion for summary judgment is DENIED. Counsel for all parties are directed to appear in the **Settlement Conference Part, room 1600, on November 20, 2018, at 9:15 a.m.**

Dated: White Plains, New York
October 10, 2018



HON. WILLIAM J. GIACOMO, J.S.C.

H: ALPHABETICAL MASTER LIST – WESTCHESTER/Gonzalez v. Marini