

Polidoro v Wheeler
2019 NY Slip Op 34430(U)
November 1, 2019
Supreme Court, Westchester County
Docket Number: Index No. 63998/2018
Judge: Charles D. Wood
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This opinion is uncorrected and not selected for official publication.

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**

-----X
MARGIE POLIDORO and DOMINICK POLIDORO,

Plaintiffs,

-against-

**DECISION & ORDER
Index No. 63998/2018
Sequence No. 1**

**BROOKE LEXI WHEELER and CHRISTOPHER
WHEELER,**

Defendants.

-----X
**BROOKE LEXI WHEELER and CHRISTOPHER
WHEELER,**

Third Party Plaintiffs,

-against-

PAUL D. POLIDORO,

Third-Party Defendant.

-----X
WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 22-37 were read in connection with Third Party Defendant Paul D. Polidoro's motion for summary judgment to dismiss the Third Party Complaint.

This is an action for serious personal injuries arising out of an automobile accident that occurred on April 20, 2017, at approximately 8:05 P.M. According to the complaint, Third Party Defendant was driving, plaintiffs were passengers, and was proceeding with the right of way on Eastbound Route 202 in Westchester County, when defendants' vehicle driven by 16

year old Brooke Lexi Wheeler (“defendant”), while attempting to make a left turn, failed to yield to a stop sign, and struck Third Party Defendants’ vehicle.

A third party complaint was brought by defendants for contribution and indemnification against Third Party Defendant/driver.

Upon the foregoing papers, the motion is decided as follows:

A 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 demonstrate the absence of any material issues of fact” (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is “required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion” (Yelder v. Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy and should not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed

and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v City of New York, 721 NYS2d 790 [2d Dept 2000]). Also, pursuant to VTL §1141, “the operator of a vehicle intending to turn left within an intersection must yield the right-of-way to any oncoming vehicle which is within the intersection or so close to it as to constitute an immediate hazard. The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law. Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision...a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision” (Attl v Spetler, 137 AD3d 1176 [2d Dept 2016]).

Here, Third Party Defendant established his prima facie entitlement to judgment as a matter of law, that the proximate cause of the accident was defendant’s violation of Vehicle and Traffic Law §1141, in making a left turn when it was not reasonably safe to do so, directly into the path of Third Party Defendant’s oncoming vehicle (Attl v Spetler, 137 AD3d 1176, 1176–77 [2d Dept 2016]).

Further, Third Party Defendant established that defendant's vehicle entered an intersection controlled by a stop sign without yielding the right-of-way to his approaching vehicle, regardless of whether defendant initially stopped at the stop sign (*see* VTL§ 1142[a]; Mohammad v Ning, 72 AD3d 913, 914–15 [2d Dept 2010]). Also, Third Party Defendant’s testimony that he could not maneuver his car forward or any where, due to the incremental slow traffic to avoid the accident, thus having insufficient time to react to defendant’s failure to yield, established that he is not comparatively negligent for failing to avoid the collision.

In opposition, defendants failed to raise a triable issue of fact. Brooke Wheeler’s

testimony that she did not see Third Party Defendants' vehicle prior to the accident, even though the area was well-lit, because plaintiffs' vehicle failed to have its headlights on, was purely speculative, as she had no true recollection, which does not preclude summary judgment.

NOW, therefore for the above stated reasons, it is hereby

ORDERED, that Third Party Defendant's motion for summary judgment is granted, the Third Party Complaint is dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the caption shall be amended to remove the Third Party Action, and shall now read:

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

-----X
MARGIE POLIDORO and DOMINICK POLIDORO,

Plaintiffs,

-against-

Index No. 63998/2018

**BROOKE LEXI WHEELER and CHRISTOPHER
WHEELER,**

Defendants.

-----X
; and it is further

ORDERED, that the parties are directed to appear in the Settlement Conference Part on **December 10**, 2019 at 9:15 A.M. in Courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

All matters not herein decided are denied. This constitutes the Decision and Order of

the court.

Dated: November 1, 2019
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties by NYSCEF