

**Iervolino v Klein**

2019 NY Slip Op 34435(U)

October 29, 2019

Supreme Court, Putnam County

Docket Number: Index No. 501186/2018

Judge: Victor G. Grossman

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.

To commence the 30 day 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 PUTNAM**

-----X  
GEORGE IERVOLINO,

Plaintiff,

-against -

MONICA KLEIN,

Defendant.

-----X

**GROSSMAN, J.S.C.**

**DECISION & ORDER**

Index No.501186/2018  
Sequence No. 2  
Motion Date: 9/11/19

The following papers, numbered 1 to 16, were considered in connection with Plaintiff's Notice of Motion, dated August 14, 2019, seeking, inter alia, summary judgment on the issue of liability.

| <b>PAPERS</b>  | <b>NUMBERED</b> |
|--|-----------------|
| Notice of Motion/Affirmation in Support/Exhs. 1-6/Prior Motion Papers and Exhibits | 1-9             |
| Affirmation in Opposition/Exhs. A-E  | 10-15           |
| Reply Affirmation  | 16              |

This is an action to recover damages for personal injuries, stemming from a 2-car accident on Route 6, Mahopac, New York on May 24, 2018. At the time of the accident, Plaintiff George Iervolino was driving in the westbound lane proceeding down a small hill when Defendant Monica Klein exited the driveway of a local business and began to make a left-turn across Plaintiff's lane of traffic. Plaintiff swerved left in an attempt to avoid a collision, but the cars collided, causing Plaintiff to be injured.

Plaintiff commenced this action on September 21, 2018. Defendant interposed her Answer on November 21, 2018.

On November 26, 2018, Plaintiff moved for partial summary judgment on the issue of liability. In support of his motion, Plaintiff submitted, inter alia, his affidavit, photographs of the location of the accident, the police report, the Summons and Verified Complaint, and Defendant's Verified Answer. In opposition, Defendant proffered Ms. Klein's affidavit.

On February 15, 2019, this Court denied Plaintiff's motion, stating that there were issues of fact, warranting a denial of the summary judgment motion. The Court also denied the motion because there had been no opportunity to engage in any discovery due to the immediate filing of Plaintiff's motion.

Having completed discovery, Plaintiff filed the Note of Issue on July 3, 2019. The Court notes that Plaintiff has demanded a non-jury trial, while Defendant has demanded a jury trial.

Plaintiff has moved for the following relief:

1. Leave to renew in accordance with CPLR §2221(e);
2. Upon renewal, awarding Plaintiff partial summary judgment on the question of liability in accordance with CPLR §3212(a);
3. Dismissing Defendant's first, second, and third affirmative defenses in accordance with CPLR §3211(b);
4. Determining that Plaintiff sustained a serious injury within the meaning of Insurance Law §5102(d) as a result of the collision giving rise to this lawsuit;
5. Directing that the trial be limited to the issue of Plaintiff's damages; and
6. Together with such other, further or different relief, which this Court deems just and proper.

Plaintiff argues that renewal of his summary judgment motion is warranted now that discovery is complete, and that having completed discovery, it is apparent that there are no triable issue of fact as to liability. Plaintiff argues that Defendant “materially contradicted her earlier affidavit and offered testimony that unequivocally demonstrates that she was solely responsible for the accident,” while Plaintiff’s “deposition testimony explicitly rebuts the gaps that Defendant purported to find in his earlier affidavit” (Affirmation in Support at ¶6). Plaintiff also seeks summary judgment on the issue of “serious injury,” in light of his “uncontradicted medical records” (Affirmation in Support at ¶6). Finally, Plaintiff is seeking dismissal of Defendant’s First, Second, and Third Affirmative Defenses.

Defendant opposes the motion, except to the extent she consents to the dismissal of her Third Affirmative Defense (seatbelt). Defendant argues that there are questions of fact with respect to liability and serious physical injury.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. v Briarcliff Farms*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, “the proponent... 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 issue of fact.” However, once a movant makes a sufficient showing, “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]). Where the moving papers are insufficient, the court need not consider the sufficiency of

the opposing papers (*Id.*; see also *Fabbricatore v Lindenhurst Union Free School Dist.*, 259 A.D.2d 659 [2d Dept. 1999]).

“Where \* \* \* a driver enters traffic without yielding and collides with another vehicle, he or she is negligent as a matter of law and his or her negligence is a proximate cause of the accident (Vehicle and Traffic Law §§1143, 1173); see *Yasinovsky v Lenio*, 28 AD3d 652, 653 [2d Dept 2006]; *Lallemand v Cook*, 23 AD3d 533 [2d Dept 2005]; *Trzepacz v Jara*, 11 AD3d 531 [2d Dept 2004]; *Bolta v Lohan*, 242 AD2d 356 [2d Dept 1997]). In addition, ‘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’ (*Bolta v Lohan, supra*; see *Stiles v County of Dutchess*, 278 AD2d 304)” (*Kuper v Bretstein*, 2016 WL 1122184 [Sup Ct (Queens) February 10, 2016]). However, “[t]here can be more than one proximate cause of an accident” (*Rabenstein v Suffolk County Dept. of Pub. Works*, 131 AD3d 1145 [2d Dept 2015]), quoting *Cox v Nunez*, 23 AD3d 427 (2d Dept 2005). Therefore, “a driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident” (*Rabenstein v Suffolk County Dept. of Pub. Works, supra* at 1146). But, “[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant’s liability and the absence of his or her own comparative fault” (*Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]).

For the same reasons that the Court found in its prior Decision and Order, where the Court had to evaluate the parties’ dueling affidavits, the Court now must evaluate the parties’ dueling depositions. Despite Plaintiff’s arguments that the depositions resolved any questions of fact with respect to liability, the Court disagrees.

In support of his motion for summary judgment, Plaintiff proffered, inter alia, his and Defendant's depositions. As he stated previously in his affidavit, Plaintiff testified that he was driving westbound along Route 6, on a decline, at "approximately 40 m.p.h." when Defendant suddenly pulled out into his lane to make a left-hand turn into the eastbound lane of traffic (Iervolino EBT at 18-19). Plaintiff had not seen Defendant's vehicle prior to the impact (Iervolino EBT at 19), but then stated he saw Defendant's car for the first time "when I came over the crest of the hill on a decline" as "[i]t was pulling out of Mower Mart on my right-hand side, attempting to make a left-hand turn into the westbound lane" (Iervolino EBT at 20). Plaintiff admitted to not seeing Defendant's turn signal, alluding that he could not based on his position to her vehicle, but then stated that she had not activated it (Iervolino EBT at 20). When Plaintiff first saw Defendant's car, "[i]t was in the westbound lane slowly moving into the eastbound lane" (Iervolino EBT at 20). Plaintiff maintained, as he did in his affidavit, that he had no choice but to swerve to the left to avoid a collision, but that he nevertheless collided with Defendant's car (Iervolino EBT at 21; Iervolino Aff. at ¶10). According to Plaintiff, the impact was "heavy" (Iervolino EBT at 22). Plaintiff did not slam on his brakes, but rather "gradually applied my brakes," as "I didn't want to hit head-on" (Iervolino EBT at 21). Plaintiff stated that he was approximately 100 feet to 2 car lengths away from Defendant's car when he first observed it (Iervolino EBT at 20-21).

On the other hand, at her deposition, Defendant denied knowing the speed at which Plaintiff was driving (Klein EBT at 29), despite stating in her affidavit that "in my estimation," Plaintiff was driving "in excess of the 40-mph posted speed limit" (Klein Aff. at ¶5). She also testified at her deposition that when she pulled up to Route 6, the westbound lane of Route 6 was

“okay,” that she did see come cars approaching, but that she believed it to be safe to make a left-hand turn (Klein EBT at 19-21, 32-34). Defendant stated that the westbound lane sloped, having “[a] slight hill” “coming on a downward” (Klein EBT at 21-22, 29). She said she stopped before turning, but could not recall for how long she waited (Klein EBT at 22-23). When Defendant first saw Plaintiff’s car prior to impact, it was a few car lengths away (Klein EBT at 26), and she tried to get out of its way (Klein EBT at 31). Defendant stated that the amount of time that elapsed from when she first saw Plaintiff’s car until the moment of impact was “[a] very short time,” but she could not state the amount of time with certainty (Klein EBT at 26, 28-29). Defendant turned left and as she was entering the eastbound lane, she saw the car coming towards her in the westbound lane, and it “seemed to be going towards the center”, ultimately colliding with her in the middle of the road (Klein EBT at 22-24, 26-27, 29). While acknowledging that she was required to yield to traffic because she was making a left turn, Defendant stated that when she turned onto Route 6, she believed she could do so safely (Klein EBT at 32). She stated that at the moment of impact, she was driving “very slow” – between 10 and 15 m.p.h. (Klein EBT at 25), and that the force of the impact was medium (Klein EBT at 29-30).

Based on the above, the Court finds that there are issues of fact, warranting a denial of the summary judgment motion.

Plaintiff also moves for summary judgment on the issue of serious physical injury. However, this portion of Plaintiff’s motion is found in that section of Plaintiff’s counsel’s moving affirmation that is over the Court’s 15-page limitation for affirmations as set forth in this Court’s Part Rules (*see* Grossman, J.S.C., Part Rules, Section IV[A][3] [“Absent express permission obtained in advance from the Court, briefs/memoranda of law are limited to 20 pages

each, and affirmations and affidavits are limited to 15 pages each. Papers exceeding these limitations may not be considered, or may be rejected, by the Court”). Generally, the Court is within its authority to reject such an oversized affirmation (*see Diana G-D ex rel. Ann D. v Bedford Cent. School Dist.*, 33 Misc3d 970, 979 [Sup Ct (Westchester) 2011], citing *Macias v City of Yonkers*, 65 AD3d 1298 [2d Dept 2009]). Here, however, the Court will not. But, the parties are reminded of their obligation to comply with this Court’s Part Rules in the future.

In any event, according to Insurance Law §5102(d), “serious injury” is defined as:

“a personal injury which results in \* \* \* a permanent loss of a body member and/or permanent consequential limitation of use of a body member; or significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

“A plaintiff moving for summary judgment on the issue of serious physical injury must establish, prima facie, that he or she sustained an serious injury within the meaning of Insurance Law 5102(d), and ‘that the [serious] injury was causally related to the accident’”(*Barcadel v City of Yonkers*, 52 Misc3d 544, 550 [Sup Ct (West) 2016], quoting *Kapelereis v Riordan*, 89 AD3d 903, 904 [2d Dept 2011]).

Without reaching the issue of whether the Plaintiff’s back injury falls within the definition of Insurance Law §5102(d), the Court finds that there is a question of fact as to whether the accident caused the injury. While Plaintiff maintains the accident did, and proffered two medical affidavits in support, Defendant argues in opposition to the motion by pointing to Plaintiff’s pre-existing back injury for which he had been receiving ongoing treatment, and to the few months that had passed between the accident and the time Plaintiff began to exhibit a

physical deterioration of his back and mobility. Moreover, Dr. Jack Stern, the physician who performed the IME, did not definitively conclude that the accident aggravated/exacerbated Plaintiff's pre-existing injury, stating only that it "appear[ed]" to have (Opposition, Exh. D at 4). Therefore, the Court finds that there are issues of fact to be resolved at trial (*see generally Kellner v DeBushey Coach, Ltd.*, 138 AD2d 460, 463 [2d Dept. 1988] [issue of serious physical injury is question of fact for jury]).

In light of the above, it is hereby

ORDERED that the portion of Plaintiff's motion for leave to renew is granted; and it is further

ORDERED that upon renewal, Plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Defendant's Third Affirmative Defense is dismissed; and it is further

ORDERED that any relief not directly addressed herein is denied; and it is further

ORDERED that the parties are to appear before the undersigned on Tuesday, November 12, 2019 at 9:30 a.m. for a pre-trial conference. No per diem counsel will be permitted. No adjournments will be granted unless for good cause shown.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York  
October 29, 2019

  
HON. VICTOR G. GROSSMAN, J.S.C.

To: Michael E. Greenspan, Esq.  
Greenspan & Greenspan  
Attorneys for Plaintiff  
188 East Post Road, Suite 401  
White Plains, New York 10601

Michalina N. Shuter, Esq.  
Keane & Bernheimer, PLLC  
Attorneys for Defendant  
400 Columbus Avenue, Suite 100S  
Valhalla, New York 10595