Smith v Grenier
2019 NY Slip Op 34438(U)
May 15, 2019
Supreme Court, Orange County
Docket Number: Index No. EF007341-2018
Judge: Catherine M. Bartlett
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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

HOPETON SMITH,

Plaintiff,

-against-

JAMES H. GRENIER,

Defendant.

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. EF007341-2018
Motion Date: April 26, 2019

The following papers numbered 1 to 4 were read on Defendant's motion for summary judgment dismissing the complaint:

Notice of Motion - Affirmation / Exhibits 1-2

Affirmation in Opposition / Exhibits 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 allegedly sustained by Plaintiff Hopeton Smith in a motor vehicle accident that occurred on April 15, 2016. Plaintiff's vehicle was parked on Jerome Avenue, Bronx, New York. When Plaintiff opened the driver's door to exit the vehicle, there was contact between the door and defendant James Grenier's passing vehicle. Defendant moves for summary judgment dismissing the complaint on the ground that Plaintiff was negligent in opening the door in violation of Vehicle and Traffic Law §1214, and that Plaintiff's negligence in

that regard was the sole proximate cause of the accident. Plaintiff contends that there are triable issues of fact whether Defendant was operating his vehicle at an excessive rate of speed and failed to keep a proper lookout.

Plaintiff's Deposition Testimony

Plaintiff, parked at the curb on the right side of Jerome Avenue, testified that he looked in his rear-view mirror and saw nothing coming, looked in his side mirror for a "split second" and saw nothing, then opened the driver's side door. He heard a bang, felt an impact and fell back into his car. It appeared from the damage to Defendant's car that its front corner struck the door, and that the door then scraped along the side of Defendant's vehicle. Afterward, Plaintiff was able to force his door closed and drive home.

Defendant's Deposition Testimony

Defendant testified that he was traveling about 25 miles per hour in the left lane of Jerome Avenue before slowing down and moving to the right lane in anticipation of making a right hand turn. He further slowed to squeeze past a vehicle that was illegally parked by a column of the overhead subway train. Within a second after clearing the column, Defendant felt a jolt, his car lurched slightly left and he heard scraping. The blade of Plaintiff's car door creased Defendant's right front fender, and scraped along the side of his car to the middle of the back door, at which point he was able to bring his car to a stop. Defendant was traveling between 5 and 10 miles per hour at the time of the accident, and did not see Plaintiff's door open.

Legal Analysis

Williams v. Persaud, 19 AD3d 686 (2d Dept. 2005) is squarely on point. In that case, the Second Department wrote:

> The plaintiff testified that she "parked the car and got out," and that "a second" elapsed from the time she allegedly looked in the side view mirror, saw nothing, opened the door, and heard the impact. This is consistent with the defendant's testimony that he was traveling in the right lane of traffic immediately to the left of the parking lane at 10 to 15 miles per hour when he heard a bang as he was passing the plaintiff's vehicle.
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> On these facts, the defendant established prima facie entitlement to judgment as a matter of law. In opposition, the plaintiff failed to raise a triable issue of fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320...). There is nothing in the record to demonstrate that the defendant breached any duty owed to the plaintiff or, assuming such a breach, that any conduct on the part of the defendant was a proximate cause of the accident [cit.om.]. To the contrary, the evidence established that plaintiff violated Vehicle and Traffic Law §1214[1] by opening her door on the side adjacent to moving traffic when it was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of her senses, she should have seen (*see Levy v. Town Bus Corp.*, 293 AD2d 452...).

Id. See also, Persaud v. Hub Truck Rental Corp., 170 AD3d 907, 907-909 (2d Dept. 2019); *Montesinos v. Cote*, 46 AD3d 774 (2d Dept. 2007); *Tavarez v. Herrasme*, 140 AD3d 453, 453-454 (1st Dept. 2016).

Here, the evidence affirmatively shows that Defendant was traveling at a moderate rate of speed and had no opportunity to see Plaintiff's door opening and take evasive action before impact. Defendant testified that he was traveling at just 5 to 10 miles per hour when the accident occurred, and was able to bring his vehicle to complete stop within just a few feet from the point of impact (i.e., from time Plaintiff's door impacted his right front fender to the time it reached the middle of his rear door). Plaintiff never saw Defendant's vehicle before the accident, and hence

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[1]Vehicle and Traffic Law §1214 provides in pertinent part: "No person shall open the door of a motor vehicle on the side available to moving traffic unless and until it is reasonably safe to do so, and can be done without interfering with the movement of other traffic..."

any testimony on his part to Defendant's speed is inadmissible speculation. Furthermore, as Plaintiff himself admits, the accident occurred almost instantaneously when he opened the door, and Defendant confirms that he never saw the door being opened before he felt the impact. Plaintiff's reliance on the police report is unavailing: as the reporting officer neither witnessed the accident nor undertook an accident reconstruction, his notation that the accident was due to inattentiveness by both parties is inadmissible hearsay.

In sum, there is no admissible evidence to demonstrate that Defendant was traveling at an excessive rate of speed, that he failed to keep a proper lookout, or indeed that he breached any duty of care owed to Plaintiff. On the evidence of record, Defendant established *prima facie* entitlement to summary judgment, and Plaintiff, in opposition, failed to demonstrate the existence of any triable issue of fact. Accordingly, Defendant's motion for summary judgment is granted.

It is therefore

ORDERED, that Defendant's motion for summary judgment is granted, and Plaintiff's Complaint is hereby dismissed.

The foregoing constitutes the decision and order of this Court.

Dated: May 15, 2019 ENTER
Goshen, New York

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

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