

Morris v Bennett

2019 NY Slip Op 34568(U)

July 30, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 16-620203

Judge: Sanford Neil Berland

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SHORT FORM ORDER

E-FILE

INDEX No. 16-620203
CAL. No. 19-00023MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 6 - SUFFOLK COUNTY

PRESENT:

Hon. SANFORD NEIL BERLAND
Acting Justice of the Supreme Court

MOTION DATE 3-26-19
ADJ. DATE 5-7-19
Mot. Seq. # 004 - MG

-----X
JANET MORRIS,

Plaintiff,

- against -

CARLTON BENNETT and FORTUNATA M.
MAYER,

Defendants.
-----X

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers by defendant Bennett, dated February 25, 2019; Answering Affidavits and supporting papers by plaintiff, dated April 18, 2019; Answering Affidavits and supporting papers by defendant Mayer, dated April 30, 2019; and Replying Affidavits and supporting papers by defendant Bennett, dated May 3, 2019, it is,

ORDERED that the motion by defendant Carlton Bennett for summary judgment in his favor is granted.

Plaintiff commenced this action against defendants seeking to recover damages for personal injuries she allegedly sustained in a motor vehicle accident that occurred on September 15, 2016, at approximately 4:15 p.m., on Deer Park Avenue, at its intersection with Lombard Street, in Babylon, New York. At the time of the accident, plaintiff was a front-seat passenger in the motor vehicle operated by defendant Carlton Bennett, which was proceeding northbound on Deer Park Avenue. Defendant Fortunata M. Mayer was

Morris v Bennett
Index No. 620203/2016
Page 2

operating a motor vehicle southbound on Deer Park Avenue and proceeded to make a left turn onto Lombard Street, in front of Bennett's vehicle. The two vehicles collided and Mayer's vehicle flipped over.

Defendant Bennett now moves for summary judgment dismissing the complaint and the cross-claim against him on the ground that defendant Mayer's negligence was the sole proximate cause of the accident. In support of the motion, defendant Bennett submits copies of the pleadings, a certified copy of the MV-104A Police Accident Report, and transcripts of the parties' deposition testimony. Defendant Bennett argues that he is entitled to summary judgment because defendant Mayer failed to yield the right of way when making a left turn, from southbound Deer Park Avenue onto Lombard Street, in front of his vehicle. In opposition to the motion, plaintiff and defendant Mayer argue that factual issues exist regarding whether defendant Bennett was comparatively negligent in causing the accident.

Plaintiff testified at her deposition that she was involved in a motor vehicle accident on September 15, 2016, while riding as a front-seat passenger in defendant Bennett's vehicle. They had been traveling northbound on Deer Park Avenue for approximately twenty minutes prior to reaching the area where the accident occurred. She first observed defendant Mayer's vehicle when it was turning left in front of defendant Bennett's vehicle. Plaintiff testified that defendant Mayer's vehicle was moving "quickly" and that defendant Bennett applied his brakes at the same time that the cars came into contact. Following the collision, defendant Bennett's car came to a stop and defendant Mayer's vehicle flipped over.

Defendant Bennett testified that he had been traveling northbound on Deer Park Avenue for approximately ten minutes prior to reaching the intersection where the accident occurred. Deer Park Avenue has north and southbound lanes of traffic in that area, separated by a concrete divider. There is a break in the divider at the intersection where the accident occurred. Defendant Bennett first observed Mayer's vehicle when it was traveling in the southbound lane on Deer Park Avenue, approximately two car lengths away from his vehicle. According to defendant Bennett, when he first observed Mayer's vehicle it did not have any turn signal activated. When he was approximately one car length from the Mayer vehicle, the Mayer vehicle made a left turn in front of his vehicle. He pressed on the brake but could not avoid the collision between the two vehicles. Defendant Bennett estimates that his vehicle was traveling 30 miles per hour prior to the accident and that "maybe ten seconds" passed between the time that he first observed the Mayer vehicle turn left and the accident. He testified that there is no traffic control signal at the intersection where the accident occurred.

Defendant Mayer testified that she was traveling in the left, southbound lane on Deer Park Avenue prior to the accident. The roadway in that area is straight and level. There is a traffic light at the intersection where the accident occurred, and the light was green in her direction when she reached the intersection and at the time of the accident. She activated her directional signal 200 feet prior to reaching the intersection, which she estimated to be about four car lengths. At the time of the accident, she was making a left turn, and her vehicle was moving in the northbound lane of Deer Park Avenue, traveling approximately ten miles per hour. She testified that she made a complete stop on the southbound side of Deer Park Avenue for ten seconds before making the left turn and that she did not see defendant Bennett's vehicle at any time prior to the accident. She was looking straight ahead at the time of the accident and first became aware of the accident when she felt the impact to her vehicle. She estimates that approximately ten seconds passed between the time that she began to make the left turn and the impact to her vehicle.

Morris v Bennett
Index No. 620203/2016
Page 3

Initially, the Court notes that the description of the accident contained in the certified MV-104A Police Accident Report submitted in support of the motion constitutes hearsay and is inadmissible (*see Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, __ NYS3d __ [2d Dept 2019]; *Ardanuy v RB Juice, LLC*, 164 AD3d 1296, 83 NYS3d 634 [2d Dept 2018]; *Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Coller*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]). However, the unsigned transcript of plaintiff is certified and its accuracy has not been challenged by any party. Thus, it qualifies as admissible evidence for the purposes of this motion (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 937 NYS2d 602 [2d Dept 2012]). In addition, the unsigned but certified deposition transcript of defendant Bennett may be used in support of his motion (*id.*)

Defendant Bennett's application for summary judgment is granted. A party seeking summary judgment must make a prima facie showing that he or she is entitled to judgment as a matter of law by presenting sufficient admissible evidence showing that there is no triable issue of material fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 598 [1980]). If the moving party fails to meet this burden, summary judgment must be denied, regardless of the sufficiency of the opposing party's papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). If the moving party does establish entitlement to summary judgment, the burden shifts to the opposing party to present admissible, factual evidence showing that a genuine issue of material fact exists to defeat the motion (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

The Vehicle and Traffic Law provides the standard of care that motorists must follow, and an unexcused violation of any section constitutes negligence per se (*Ming-Fai Jon v Wager*, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; *Lebron v Mensah*, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]; *Katikireddy v Espinal*, 137 AD3d 866, 36 NYS3d 775 [2d Dept 2016]). Vehicle and Traffic Law § 1141 provides that when making a left turn at an intersection, drivers "shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." Vehicle and Traffic Law § 1163 similarly states that drivers must not turn "upon a roadway unless and until such movement can be made with reasonable safety." The driver with the right of way is entitled to anticipate that turning drivers will obey these traffic laws and yield to oncoming traffic (*Lebron v Mensah*, *supra*; *Shashaty v Gavitt*, 158 AD3d 830, 71 NYS3d 560 [2d Dept 2018]; *Foley v Santucci*, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; *Berner v Koegel*, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]). Every driver also has a common law duty to see what should be seen and to use reasonable care to avoid collisions, but 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 (*see Foley v Santucci*, *supra*; *Simeone v Cianciolo*, 118 AD3d 864, 988 NYS2d 257 [2d Dept 2014]; *Ducie v Ippolito*, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]).

Here, defendant Bennett established a prima facie case of entitlement to summary judgment by tendering evidence that the accident was proximately caused by defendant Mayer's making a left turn in the path of Bennett's oncoming vehicle in violation of Vehicle and Traffic Law §§ 1141 and 1163 (*see Berner v Koegel*, *supra*). Defendant Bennett's vehicle, which was proceeding straight through the intersection, had the right of way. Bennett testified at his deposition that the Mayer vehicle turned left in front of his vehicle

Morris v Bennett
Index No. 620203/2016
Page 4

when it was only one car length away and that he had only seconds to react. As the driver with the right of way, defendant Bennett was entitled to anticipate that defendant Mayer would obey the traffic laws and yield to oncoming traffic (*see Shashaty v Gavitt, supra; Foley v Santucci, supra; Berner v Koegel, supra*).

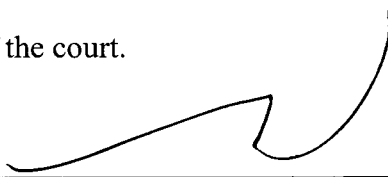
In opposition to the instant motion, plaintiff and defendant Mayer rely upon the affirmations of their attorneys, which fail to raise any triable issue of fact. Plaintiff asserts that defendant Bennett’s testimony, at his deposition, that he observed defendant Mayer making a left turn in front of his vehicle ten seconds before the impact and “tapped” his brakes raises issues of fact regarding whether defendant Bennett could have avoided the accident. Like plaintiff, defendant Mayer argues that questions of fact are present regarding defendant Bennett’s negligence because Bennett testified that he observed defendant Mayer making a left turn ten seconds before the impact and tapped his brakes, without taking any evasive action to avoid the accident. Defendant Mayer further posits that her testimony that she activated her directional and came to a complete stop prior to turning left at the intersection and that she was traveling no more than ten miles per hour and flipped over after the impact establishes that defendant Bennett was traveling at an excessive rate of speed and that her vehicle was in the intersection when he reached it.

Defendant Bennett’s testimony that he observed defendant Mayer’s vehicle turning left in front of his vehicle “maybe ten seconds” before the impact between the vehicles fails to create an issue of fact regarding whether he could have avoided the accident, given his further testified that defendant Mayer’s vehicle was only one car length away from his vehicle when it turned in front of him. Similarly, defendant Mayer’s deposition testimony fails to create an issue of fact regarding whether defendant Bennett’s vehicle was speeding or whether he could have avoided the accident, as defendant Mayer admitted that she did not observe defendant Bennett’s vehicle at any time prior to the accident (*see Ducie v Ippolito, supra; Yelder v Walters, supra; Gabler v Marly Bldg. Supply Corp., 27 AD3d 519, 813 NYS2d 120 [2d Dept 2006]; Maloney v Niewender, 27 AD3d 426, 812 NYS2d 585 [2d Dept 2006]*). The deposition testimony of defendant Bennett establishes that he was traveling approximately 30 miles per hour prior to the accident, and that he applied his brake when he observed defendant Mayer’s vehicle turning in front of him, testimony that was not contradicted by the deposition testimony of the plaintiff or defendant Mayer. Defendant Bennett had the right of way and was entitled to anticipate that defendant Mayer would obey the traffic rules requiring her to yield to oncoming vehicles (*Ming-Fai Jon v Wager, supra; Shashaty v Gavitt, supra; Foley v Santucci, supra; Berner v Koegel, supra*).

Accordingly, the motion by defendant Bennett for summary judgment dismissing the complaint and the cross-claim against him is granted.

The foregoing constitutes the decision and order of the court.

Dated: 7/30/2019
Riverhead, New York



HON. SANFORD NEIL BERLAND, A.J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION