

<b>Verboys v Weingrad</b>
2019 NY Slip Op 34634(U)
October 10, 2019
Supreme Court, Westchester County
Docket Number: Index No. 56719/2018
Judge: Terry Jane Ruderman
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To commence the statutory time 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

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ANDREW T. VERBOYS,

Plaintiff,

DECISION and ORDER

-against-

Sequence Nos. 1 and 2  
Index No. 56719/2018

SOPHIE R. WEINGRAD, HOWARD R. WEINGRAD,  
ANDREA J. MARKOWITZ and ALAN N. MARKOWITZ,

Defendants.

-----X  
RUDERMAN, J.

The following papers were considered in connection with the motion of defendants Andrea J. Markowitz and Alan N. Markowitz pursuant to CPLR 3212 for summary judgment in their favor, dismissing plaintiff's complaint and all cross-claims against them (sequence 1), and plaintiff's motion for summary judgment against all defendants on the issue of liability (sequence 2):

<u>Papers - Sequence 1</u>	<u>Numbered</u>
Markowitz Notice of Motion, Affirmation, Exhibits A - E	1
Plaintiff's Affirmation in Opposition to Markowitz Motion, Exhibits A - G	2
Markowitz Reply Affirmation	3
Weingrad Affirmation in Opposition to Markowitz Motion, Exhibits A - B	4
Markowitz Reply Affirmation to Weingrad Opposition	5
Plaintiff's Notice of Motion, Affirmation, Exhibits A - F	6
Markowitz Affirmation in Partial Opposition to Plaintiff's Motion	7
Weingrad Affirmation in Opposition to Plaintiff's Motion, Exhibits A - B	8

This is an action for personal injuries allegedly sustained by plaintiff Andrew Verboys on September 4, 2017 at approximately 12:39 p.m. as a result of a three-vehicle collision at the

intersection of Post Road and Wayside Lane in Scarsdale, New York. Defendant Sophie Weingrad was operating a vehicle owned by her father, defendant Howard Weingrad, in the left northbound lane of Post Road, attempting to turn left onto Wayside Lane. A vehicle operated by defendant Andrea Markowitz and owned by defendant Alan Markowitz was traveling south on Post Road, and it is undisputed that the Markowitz vehicle had the right of way. Weingrad<sup>1</sup> turned left toward Wayside Lane, in front of the Markowitz vehicle, and the front of the Markowitz vehicle collided with the passenger side of the Weingrad vehicle. The force of the impact pushed the Weingrad vehicle into the front of plaintiff's vehicle, which was stopped at the stop sign on Wayside Lane.

In moving for summary judgment, the Markowitzes argue that Weingrad was solely responsible for causing the accident, based on her failure to yield the right of way to Markowitz<sup>2</sup> (*see* Vehicle and Traffic Law § 1411), and that Markowitz may not be held liable because she was entitled to anticipate that Weingrad would obey the traffic law that required her to yield the right of way to Markowitz (*see Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]). Plaintiff's motion for partial summary judgment argues that Weingrad is liable based on the violation of Vehicle and Traffic Law § 1141, for failure to yield the right of way to the approaching vehicle, while Markowitz is liable based on the failure to see what was there to be seen and for violating the speed limit.

In plaintiff's deposition testimony, he asserted that he was stopped at a stop sign, with his foot on the brake, when his vehicle was struck by the Weingrad vehicle. Weingrad testified that

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<sup>1</sup> References to "Weingrad" in the singular will be intended to refer to defendant Sophie Weingrad alone.

<sup>2</sup> References to "Markowitz" in the singular will be intended to refer to defendant Andrea Markowitz alone.

when she was stopped on Post Road northbound, with her left turn signal on, waiting to make the left turn onto Wayside, and that she saw the Markowitz vehicle approaching from a distance of approximately seven or eight car lengths, at a speed she estimated as “in the 40s” – on a road where the speed limit is 30 mph – at which time she, Weingrad, began to make the left turn. Her vehicle was then struck on the passenger side by the front of the oncoming Markowitz vehicle. Weingrad said that prior to impact she did not hear any horns or screeching tires. She told the police that she had misjudged the speed of the other car.

Andrea Markowitz testified that she was operating her vehicle at a speed of 25 to 30 miles per hour when she first observed the Weingrad vehicle about a half-block away; she could not establish the speed of the Weingrad vehicle, but she stated that the Weingrad vehicle did not stop and did not use a directional signal before making the left turn at Wayside, in front of Markowitz’s vehicle.

#### Discussion

As both plaintiff and the Markowitz defendants contend, the evidence establishes beyond dispute that Weingrad violated Vehicle and Traffic Law § 1411 by turning left in front of the oncoming Markowitz vehicle instead of yielding the right of way, thereby contributing to causing the accident that resulted in the collision with plaintiff’s vehicle.

However, “[t]here can be more than one proximate cause of an accident” (*Cox v Nunez*, 23 AD3d 427, 427 [2d Dept 2005]). “[A] driver who has the right of way has a duty to exercise reasonable care to avoid a collision with another vehicle already in the intersection” (*Rodriguez v Klein*, 116 AD3d 939, 939 [2d Dept 2014], citing *Demant v Rochevet*, 43 AD3d 981, 842 NYS2d 74 [2d Dept 2007]). Plaintiff and the Weingrads suggest that Markowitz contributed to causing the accident by traveling at an excessive rate of speed and failing to exercise reasonable

care (*see Shashaty v Gavitt*, 158 AD3d 830, 832 [2d Dept 2018]). The Markowitzes protest that the submitted evidence is insufficient to create an issue of fact as to any negligence on the part of Markowitz, or that any such negligence contributed to causing the accident.

The evidence that Markowitz was speeding is Weingrad's testimony that when she saw the Markowitz vehicle approaching from a distance of approximately seven or eight car lengths, it was traveling at a speed she thought was "in the 40s." The Markowitzes first argue that Weingrad's estimate does not constitute competent evidence, since she was only 16 years old at the time of the accident, with just one month of driving experience, and admitted that she did not actually know Markowitz's rate of speed. The Markowitzes further rely on case law holding that "[a]lthough 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" (*Rohn v Aly*, 167 AD3d 1054, 1056 [2d Dept 2018], citing *Ducie v Ippolito*, 95 AD3d 1067, 1067-1068 [2d Dept 2012], quoting *Yelder v Walters*, 64 AD3d 762, 764 [2009] [internal quotation marks omitted]).

In *Rohn v Aly*, it was established that the defendant driver was proceeding straight along the roadway and had the right of way, and that the plaintiff's vehicle turned left in front of it without yielding (*id.*). Although the plaintiffs in *Rohn* testified that the defendant driver had been speeding, the Court concluded that such testimony was "inconsequential inasmuch as the [plaintiffs] did not raise a triable issue as to whether [Aly] could have avoided the accident even if she had been traveling at or below the posted speed limit" (167 AD3d at 1056). Notably, in *Rohn*, there was also video surveillance footage of the accident supporting the court's determination.

Here, Sophie Weingrad's estimate of Andrea Markowitz's speed may not be rejected out

of hand, as the Markowitzes suggest. Nor, conversely, must Sophie Weingrad's estimate of her distance from the Markowitz vehicle when she began her left turn be relied on as fact. Rather, Weingrad's and Markowitz's competing testimony on the issues of the speed at which Markowitz was driving, the distance between the two vehicles when Weingrad began her left turn, and whether Weingrad used her left turn signal, all present issues of fact. Unlike *Rohn* and the cases it cites, the question of whether the accident could have been avoided if Andrea Markowitz had been driving at the posted speed limit and had taken note of Weingrad at an earlier point in time, also presents an issue of fact. The calculation proffered by the Markowitzes, in an effort to establish that Markowitz had less than two seconds to attempt to avoid the collision, relies on disputed estimates by the participants regarding their distances and rates of speed, rather than on established facts.

The Markowitzes' motion for summary judgment must therefore be denied; they have not established an absence of any possibility of liability as a matter of law.

Since an issue of fact is presented regarding the Markowitzes' liability, plaintiff's motion for summary judgment on the issue of liability must be denied insofar as that relief is sought as against the Markowitz defendants.

However, plaintiff is entitled to a striking of the affirmative defense of comparative negligence (*see Poon v Nisanov*, 162 AD3d 804 [2nd Dept 2018]).

Based upon the foregoing, it is hereby,

ORDERED that the motion by defendants Andrea J. Markowitz and Alan N. Markowitz pursuant to CPLR 3212 for summary judgment in their favor, dismissing plaintiff's complaint and all cross-claims against them (sequence 1), is denied; and it is further

ORDERED that plaintiff's motion for summary judgment against defendants on the issue

of liability (sequence 2) is granted only to the extent that summary judgment on the issue of liability is granted as against defendants Sophie Weingrad and Howard R. Weingrad, and the affirmative defense of comparative negligence on plaintiff's part is stricken; and it is further

ORDERED that the parties shall appear on Tuesday, November 26, 2019 at 9:15 a.m. in the Settlement Conference Part of the Westchester Supreme Court in the Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
October 10, 2019

  
HON. TERRY JANE RUDERMAN, J.S.C.