

Conklin v Horn

2019 NY Slip Op 34667(U)

September 30, 2019

Supreme Court, Westchester County

Docket Number: Index No. 69636/2017

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

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
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
GINA CONKLIN,

Plaintiff,

DECISION & ORDER
Index No. 69636/2017
Seq. # 2

-against-

TIFFANY AMBER HORN, ANDREW CONKLIN and
RANDY CONKLIN

Defendant(s).

-----X
ANDREW S. CONKLIN,

Third-Party Plaintiff,

-against-

TIFFANY AMBER HORN,

Third-Party Defendant.

-----X
The following papers were read on the defendant's motion for summary judgment dismissing the complaint and any cross claims against her:

Notice of Motion/Affirmation in Support/Exhibits a-e	1-7
Affirmation in Opposition/Exhibits 1-10	8-18
Affirmation in Opposition/Exhibits A-B	19-21

Factual and Procedural Background

The plaintiff, Gina Conklin, commenced this action on November 29, 2017, to recover damages for injuries she allegedly sustained in a motor vehicle accident that occurred on, March 2, 2016, when a vehicle operated by Andrew S. Conklin, and owned

by Randy Conklin, in which Gina Conklin was a passenger, collided with a vehicle operated by Tiffany Amber Horn ("Horn").

Andrew Conklin also commenced another action on February 23, 2018 against Tiffany Amber Horn. By Decision and Order of this Court, dated March 20, 2019, that action was consolidated with this action and the caption amended.

Horn now files the instant motion for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and any and all cross claims against her on the basis that she was not negligent, is not liable, and did not breach any duty owed. Horn argues that it is clear from the testimony of all parties, that there is no negligence on her part. Both Gina Conklin and Andrew Conklin filed opposition to the motion arguing that there are issues of fact as to how the accident occurred, precluding summary judgment.

Discussion

A party moving for summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (*see McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Once the moving party has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party to submit evidentiary proof in admissible form to establish material

issues of fact (see *Alvarez*, 68 NY2d at 324; *Winegrad*, 64 NY2d at 853).

Opposing counsel assert that Horn's motion should be dismissed because her attorney failed to include a copy of the pleadings with her motion. However, "[n]otwithstanding that CPLR 3212(b) requires that motions for summary judgment be supported by a copy of the pleadings, CPLR 2001 permits a court, at any stage of an action, to "disregard a party's mistake, omission, defect, or irregularity if a substantial right of a party is not prejudiced" (see *Wade v Knight Transp., Inc.*, 151 AD3d 1107, 1109 [2d Dept 2017]). Here, the record is sufficiently complete and the other parties have not been prejudiced by the failure to include the pleadings. Furthermore, since this action and motion was filed electronically, the Court has access to all documents in the file and the opposing counsel included a copy of the pleadings with their opposition, therefore, the record is sufficiently complete (see *Long Is. Pine Barrens Socy., Inc. v County of Suffolk*, 122 AD3d 688 [2d Dept 2014]).

With regard to the merits of the case, the evidence demonstrates the plaintiff's prima facie entitlement to judgment as a matter of law by establishing that Gina Conklin and Andrew Conklin's vehicle proceeded into an intersection controlled by a stop sign without yielding the right of way to the approaching vehicle (see Vehicle and Traffic Law §§ 1142[a] 1172[a]), thereby shifting the burden to the defendant to demonstrate the existence of a factual issue requiring a trial (see *Goemans v County of Suffolk*, 57 AD3d 478, 479 [2d Dept 2008] ["the County established its prima facie entitlement to judgment as a matter of law by evidence that Sellers failed to yield the right-of-way upon

entering the subject intersection in violation of Vehicle and Traffic Law § 1142(a) and thus was negligent as a matter of law.”]; *Thompson v Schmitt*, 902 NYS.2d 606, 607 [2d Dept 2010] [Plaintiff established prima facie entitlement to judgment as a matter of law on the issue of liability by demonstrating “that the defendant driver, who was faced with a stop sign at the intersection ...negligently entered the intersection without yielding the right of way to his approaching vehicle and that this was the sole proximate cause of the accident”])

The fact that Andrew Conklin was required to stop his vehicle at a stop sign, while Horn’s route of travel was not encumbered by a requirement to stop, established that Andrew Conklin failed to yield the right of way to Horn (*Id.*; see also, *Szczotka v Adler*, 291 AD2d 444 [2d Dept 2002])¹. “A driver who fails to yield the right-of-way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law” (see *Gergis v Miccio*, 39 AD3d 468, 468 [2d Dept 2007]; see also *Maliza v Puerto-Rican Transp. Corp.*, 50 AD3d 650 [2d Dept 2008]).

Furthermore, Andrew Conklin was obligated to see that which by the proper use of his senses he should have seen, and Horn, as the driver with the right-of-way, was entitled to anticipate that Conklin would obey traffic laws which required him to yield

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In *Szczotka v Adler*, the plaintiff moved for summary judgment on the issue of liability asserting that the defendant failed to stop at the stop sign. In opposition, the defendant asserted that he did stop at the stop sign and that the plaintiff must have been speeding. The Second Department held that “[r]egardless of whether the defendant stopped at the stop sign, the plaintiff established that the defendant violated Vehicle and Traffic Law § 1142(a) by failing to yield the right of way to her” (*Szczotka v Adler*, 291 AD2d 444 [2d Dept 2002]).

(see *Moussouros v Liter*, 22 AD3d 469, 470 [2d Dept 2005]).

Here, the Conklins assert in opposition that Horn's vehicle was still stopped at the stop line when Horn's vehicle swerved and hit their vehicle. They argue that there are triable issues of fact as to how the accident occurred, including if they had entered the intersection as Horn approached, whether Horn's vehicle swerved off of the road she was traveling on and hit their vehicle and the speed at which Horn's vehicle was traveling. The Court finds that the Conklins have raised issues of material fact to rebut the plaintiff's prima facie showing of entitlement to judgment as a matter of law.

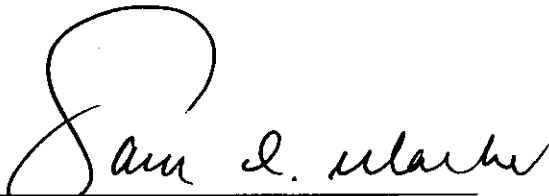
Accordingly, it is

ORDERED that Tiffany Amber Horn's motion for summary judgment to dismiss the complaint and any and all cross claims against her, is DENIED.

The parties are directed to appear in the Settlement Conference Part in courtroom 1600 on November 19, 2019 at 9:15 a.m.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
September 30, 2019


HON. SAM D. WALKER, J.S.C.