

Rozowski v Pride Floor Covering, Inc.

2019 NY Slip Op 34741(U)

May 6, 2019

Supreme Court, Orange County

Docket Number: Index No. EF007032-2016

Judge: Catherine M. Bartlett

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This opinion is uncorrected and not selected for official publication.

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

MEGHAN ROZOWSKI,

Plaintiff,

-against-

PRIDE FLOOR COVERING, INC. and
ERIC BORSCHEL,

Defendants.

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. EF007032-2016

DECISION AND ORDER

The following papers numbered 1 to 4 were read on Plaintiff's motion in limine to
preclude Defendants from adducing evidence at trial that the responding police officer did not
issue a traffic ticket to defendant Eric Borschel:

Notice of Motion in Limine - Affirmation / Exhibits 1-2
Affirmation in Opposition 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 injury arising out of a motor vehicle accident that occurred
on October 16, 2015 in New Windsor, New York. Plaintiff's vehicle was traveling northbound,
and Defendants' vehicle southbound, on Quassaick Avenue. The police report, authored by
Officer John Martin, states in pertinent part: "Vehicle #1 and Vehicle #2 sideswiped causing

damage to both vehicles. The driver of Vehicle #1 [*i.e.*, defendant Eric Borschel] stated that an uninvolved vehicle pulled out in front of him which caused him to move over into the northbound lane and he could not get back into the southbound lane prior to striking Vehicle #2.” The police report contains no “accident diagram.”

Plaintiff contends that defendant Borschel was negligent *inter alia* in failing to keep right and crossing over the center line in violation of Vehicle and Traffic Law (“VTL”) §1126(a), which provides:

When official markings are in place indicating those portions of any highway where overtaking and passing or driving to the left of such markings would be especially hazardous, no driver of a vehicle proceeding along such highway shall at any time drive on the left side of such markings.

An unexcused violation of the statute constitutes negligence. *See, Aranzullo v. Seidell*, 96 AD2d 1048, 1049 (2d Dept. 1983) (citing *Martin v. Herzog*, 228 NY 164 [1920]); *Petosa v. City of New York*, 52 AD2d 919, 921 (2d Dept. 1976). A violation of VTL §1126(a) may be excused if the driver exercised reasonable care in an effort to comply. *See, Brown v. State of New York*, 31 NY3d 514 (2018); *Arricale v. Leo*, 295 AD2d 920, 921 (4th Dept. 2002); *Aranzullo v. Seidell*, *supra*. Noncompliance may be justified by emergency or other unusual circumstances. *See, Arricale v. Leo*, *supra*; *Petosa v. City of New York*, *supra*. *See generally*, 1A NY PJI3d 2:26A at 320-321 (2019); 1A NY PJI3d 2:27 at 322-323.

Defendants contend:

As a result of the actions of an unidentified motorist, who abruptly and unexpectedly came out into the roadway on [Borschel’s] right-hand side while he was operating his vehicle within the speed limit and fully within his lane of travel, [Borschel] attempted to swerve to the left to avoid collision causing a portion of the left-hand side of [his] pickup truck and trailer to cross over the double yellow line. This emergency action was a response to an unexpected occurrence not of the defendant’s making...

It is further the contention of the defendants that they cannot be held responsible for reacting to an emergency situation under the conditions then and there existing – an emergency not of their own making – and they should not be found responsible for the actions of an unidentifiable motorist.

To assist in establishing the existence of an emergency situation, Defendants seek to introduce evidence that Officer Martin did not issue a traffic citation to defendant Borschel.

Defendants theorize that such evidence is admissible because:

...the fact that the officer on the scene chose not to issue a ticket to Borschel, even though Borschel's vehicle clearly may have violated Vehicle and Traffic Law §1126(a), indicated that the officer determined there was an emergency situation such that a court would not find Borschel violated [the] Vehicle and Traffic Law.

Plaintiff moves *in limine* to preclude evidence of the non-issuance of a traffic citation as inadmissible.

Preliminarily, a responding police officer's non-issuance of a traffic citation is inadmissible to demonstrate the absence of negligence on the part of a driver involved in an accident. *See, LaPenta v. Loca-Bik Ltee Transport*, 238 AD2d 913, 914 (4th Dept. 1997). *See also, Franco v. Zingarelli*, 72 AD2d 211, 216 (1st Dept. 1980) ("the absence of arrest may not serve as the basis for an inference of no negligence").

Furthermore, assuming *arguendo* that Officer Martin's non-issuance of a traffic citation was based on a determination that Mr. Borschel was faced with an emergency situation – a highly debatable proposition – the Officer's purported opinion in that regard would be inadmissible because it is without adequate foundation.

A police officer's determinations regarding the factual circumstances of an accident may be admissible in evidence provided they are properly based upon personal observations made upon arrival at the scene. *See, e.g., Scott v. Kass*, 48 AD3d 785, 786-786 (2d Dept. 2008);

Exantus v. Town of Ossining, 266 AD2d 502 (2d Dept. 1999). However, the officer's opinions and conclusions regarding ultimate issues of fact – such as negligence, justification, causation, etc. – are inadmissible in the absence of a sufficient foundation. See, *Burich v. Pomerantz*, 41 AD3d 632 (2d Dept. 2007); *Silverman v. Sciartelli*, 26 AD3d 761, 762 (4th Dept. 2006); *Arricale v. Leo*, *supra*.

Officer Martin had only Mr. Borschel's statement that an "uninvolved vehicle pulled out in front of him which caused him to move over into the north-bound lane..." However, as even Defendants correctly recognize, determination of the existence *vel non* of an emergency situation is dependent on a far more complex set of circumstances which were not known to Officer Martin. Quoting defense counsel once again:

As a result of the actions of an unidentified motorist, who abruptly and unexpectedly came out into the roadway on [Borschel's] right-hand side while he was operating his vehicle within the speed limit and fully within his lane of travel, [Borschel] attempted to swerve to the left to avoid collision causing a portion of the left-hand side of [his] pickup truck and trailer to cross over the double yellow line. This emergency action was a response to an unexpected occurrence not of the defendant's making....

Whether the uninvolved vehicle acted "abruptly and unexpectedly", whether Borschel himself was "operating...within the speed limit" and "fully within his lane of travel," whether Borschel had to cross the center line to "avoid collision" with the uninvolved vehicle – all of these circumstances are relevant to a determination whether the defendant was confronted with an emergency situation, *i.e.*, an "unexpected occurrence not of the defendant's making." Inasmuch as those circumstances were entirely unknown to Officer Martin, the Officer's purported determination that defendant Borschel was faced with an emergency situation would be inadmissible for lack of sufficient foundation.

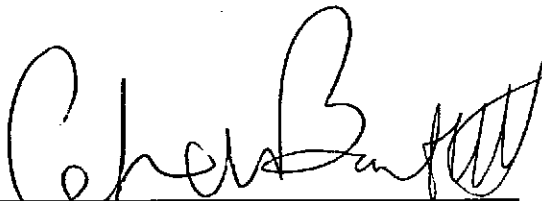
Perforce, evidence that Officer Martin did not issue a traffic ticket to defendant Borschel is inadmissible at the trial of this action. In the absence of a proper foundation therefor, such evidence would impermissibly intrude upon the role of the Court in interpreting and applying the Vehicle and Traffic Law, and upon the role of the jury as the ultimate finder of fact.

It is therefore

ORDERED, that Plaintiff's motion *in limine* to preclude the Defendants from adducing evidence that Officer John Martin did not issue a traffic ticket to defendant Eric Borschel is granted.

The foregoing constitutes the decision and order of the Court.

Dated: May 6, 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