

**Cascio v Conwood Corp.**

2019 NY Slip Op 34965(U)

November 26, 2019

Supreme Court, Queens County

Docket Number: Index No. 713223/2017

Judge: Chereé A. Buggs

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Short Form Order

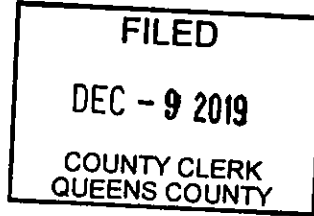
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS

Present: Hon. Chereé A. Buggs  
Justice

IAS PART 30

-----X  
GRACE CASCIO,

Plaintiff,



Index No.  
713223/2017

Motion Date:  
October 30, 2019

- against -

Motion Cal. No.: 11

CONWOOD CORP., BODGAN OLEKSZYK and  
LESLIE MCCURDY,

Motion Seq. No.: 5

Defendants.  
-----X

The following efile papers numbered 50-55, 57, 76 submitted and considered on this motion by defendant Leslie McCurdy seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting summary judgment in his favor dismissing the plaintiff's complaint, as well as any and all cross-claims and counterclaims.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits .....	EF 50-55
Affirmation in Opposition-Affidavits-Exhibits.....	EF 57
Reply Affirmation-Affidavits-Exhibits.....	EF 76

This action arises from a three-car motor vehicle accident which occurred on October 17, 2014 on Cross Bay Boulevard at or near its intersection with 156<sup>th</sup> Avenue, County of Queens, State of New York. Plaintiff Grace Cascio (hereinafter "Cascio") sued to recover against defendants Conwood Corp. (hereinafter "Conwood"), Bogdan Olekszyk (hereinafter "Olekszyk") and moving defendant Leslie McCurdy (hereinafter "McCurdy"). In her verified complaint, Cascio alleged that the Conwood vehicle driven by Olekszyk came into contact with the rear of the McCurdy vehicle, and the McCurdy vehicle came into contact with the rear of her vehicle.

Now, McCurdy makes this application, seeking an Order pursuant to CPLR 3212 in granting summary judgment in her favor dismissing the plaintiff's complaint, as well as any and all cross-claims and counterclaims. Discovery is now complete. A Note of Issue was filed on April 26, 2019. This matter is scheduled to appear for Trial in the Trial Scheduling Part on February 26, 2020. The motion for summary judgment was made timely (*see* CPLR 3212; *Brill v City of New York*, 2 NY3d 648 [2004]).

In support of the motion, in addition to the verified complaint and his answer, McCurdy annexed Cascio's deposition transcript dated October 2, 2018, Olekszyk's deposition transcript dated February 22, 2019 and his deposition transcript dated February 22, 2019. McCurdy failed to annex a copy of Conwood and Olekszyk's verified answer. Generally, the failure to annex a complete set of pleadings on a motion for summary judgment as required by CPLR 3212(b) results in the denial of the motion (*see Wider v Heller*, 24 AD3d 433 [2d Dept 2005]). However, Conwood and Olekszyk's did not argue this failure as grounds for denial of the motion in their opposition, therefore the Court shall proceed to address the merits of the motion. (*See* CPLR 2001; 3212[b]; *Mew Equity, LLC v Sutton Land Servs, LLC.*, 144 AD3d 874 [2d Dept 2016].)

#### **Deposition Testimony of Cascio**

Cascio gave sworn testimony in this matter on October 2, 2018. She testified in relevant part that on the date of the accident, she was seat belted and operating her 2001 Toyota Camry, at or near the intersection of Cross Bay Boulevard and she believed 156<sup>th</sup> Avenue on her way to shop at the local grocery store. She had a passenger in her vehicle. Immediately prior to the accident, she was traveling in the right lane. She recalled that she had traveled through a green light. At the time of the accident her vehicle was moving. She felt one impact to the rear of her car and it was propelled forward, and the vehicle did not come into contact with anything. She related that the car traveling behind her was a large SUV and there was a van traveling behind the SUV. She stated that the driver of the SUV was a male and after the accident he came over to her and kept apologizing. She also stated that both she and the male SUV driver were on the phone calling the police following the accident, and the driver of the van asked that they not call the police, that he would pay for the damage, actually reaching in his pocket and attempting to give her his credit card. She told the police when they arrived that the SUV hit her vehicle and the van hit the SUV and made it hit her vehicle. Cascio also testified that the driver of the van left the scene while the police were there, and the police left the scene to find him and that she was later told by the police that the driver of the van was intoxicated and was arrested. The majority of the remainder of her testimony related to her injuries.

**Deposition Testimony of Conwood/Olekszyk**

Conwood and Olekszyk, the driver of the Conwood vehicle, gave sworn testimony in this matter on February 22, 2019. He stated in sum and substance, that on the date of the accident, he was employed by Conwood, driving a van owned by Conwood delivering materials from warehouse. He had been arrested in 2004 for driving under the influence of alcohol. He believed he told his boss Augustyn about this driving record history. He recalled that the accident occurred on October 17, 2014, and he related that following the accident, he was arrested and pled guilty to driving while intoxicated.

He did not recall much about the occurrence. He remembered driving on Cross Bay Boulevard, but did not recall the lane he was in prior to the accident. He recalled hitting a car, he believed the car came out in front of his car and the driver quickly stepped on the brakes and he did not have time to stop. He testified that maybe the other car's taillights were not working and maybe the other car was not working well. He stated only seconds passed from the time that the car pulled out and he came into contact with it in the rear. He did not recall many details surrounding the accident. He did not recall having any conversations with the other parties in this case after the accident. He did not recall leaving the scene of the accident. He did not recall preparing an incident report for Conwood. He stated he was not responsible for the accident because the other car "came out." He said he was "only guilty of having something to drink." He did not believe that his ability to operate his car was impaired by drinking two beers on the date of the accident. He did not know if there were more than two cars involved in the accident. He recalled his vehicle came into contact with the one in front of it, and it was possible his car could have come into contact with another vehicle he did not know. He did not recall attempting to leave the scene of the accident. When he first saw the vehicle he stated that it was 20 feet ahead of him and he thought it would go through the light but the driver stepped on the brake and he could not brake. The other vehicle was in front of him and he came into contact with it in the rear when it was stopped, but he was not sure. He recalled the vehicle in front of him faced a yellow traffic light and it could have went through the light. Although he described the impact to the other vehicle as light, he also testified that the air bags in his van deployed. He did not know whether the driver of the other vehicle was male or female. He agreed the car coming out had completed its turn before the accident occurred. The car came out of the parking lot and stopped due to a yellow light.

### Deposition Testimony of McCurdy

McCurdy gave sworn testimony in this matter on February 22, 2019. He testified in sum and substance that on the date of the accident, he was driving on Cross Bay Boulevard near the intersection of 156<sup>th</sup> Avenue. He intended to make a right turn at 156<sup>th</sup> Avenue to proceed home because he lives on the street. He was traveling in the right lane and had been traveling in the right lane for about three or four blocks prior to the occurrence. He did not see the van which came into contact with his vehicle prior to the accident. He was driving a Ford SUV. He testified that a white van came into contact with his car in the rear and after the van hit his car, his vehicle was pushed forward into the car in front of him. He stated that the car in front of him proceeded through a light and he proceeded through the same light and then the car slowed down and stopped, so he stopped his vehicle also behind it. He recalled that there was a vehicle coming out of a parking lot and traffic slowed for that vehicle. The car in front of him which he described as brownish stopped and let the car exiting the parking lot proceed in front of it. He described the impact to his vehicle as heavy. After the impact, the driver of the van got out of his vehicle and asked him not to call the police because his uncle or someone he knew owned the company and would take care of everything. He recalled the police arrived at the scene of the accident. McCurdy testified that there were two impacts to his vehicle; after the first impact to the rear of his vehicle, the van backed up and hit his vehicle a second time and then left the scene. By this time his wife was at the scene, and advised the police that the van had left the scene and the police went after the van. He testified that the police came back to the scene and told him that they caught the van driver on the Belt Parkway and he was arrested for drinking while driving. McCurdy testified that he could smell alcohol on the van driver's breath. He described the traffic conditions as moderate to heavy prior. His vehicle was stopped for five to six seconds before impact.

### DISCUSSION

Summary judgment eliminates cases from the trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]). Summary judgment is a drastic remedy and should not be granted where there is doubt about the existence of any issues (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering admissible evidence to eliminate any material issues of fact from the case. (*Friends of Animals, Inc. v Assoc. Fur Mfrs.*, 46 NY2d 1065 [1979].) It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering admissible evidence to eliminate any material issues of fact from the case. (*Winegrad v New York Univeristy Medical Center*, 64 NY2d 851 [1985].) On a motion for summary judgment, the party moving for summary judgment must establish the entitlement to judgment as a matter of law by tendering evidence in

admissible form, eliminating any material triable issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) In determining a motion for summary judgment, evidence must be viewed in a light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party (see *Adams v Bruno*, 124 AD3d 566 [2d Dept 2015]). Summary judgment eliminates cases from the Court's trial calendar which can be properly resolved by the Court as a matter of law (*Andre v Pomeroy*, 35 NY2d 361 [1974]).

Olekszyk admitted that he pled guilty to driving his vehicle while intoxicated in violation of Vehicle and Traffic Law §1192, evidence of negligence per se (see generally *DiLallo v Katsan Ltd Ptrs.*, 134 AD3d 885[2d Dept 2015]; *Thoresz v Vallone*, 70 AD3d 1031 [2d Dept 2010]; *Coogan v Torrisi*, 47 AD3d 669 [2d Dept 2008]). Olekszyk's legal intoxication without a showing of causation cannot provide a basis for liability (See *Kemper v Arnow*, 18 AD3d 939 [3d Dept 2005]). Assuming that defendant's conduct constitutes negligence per se, in order for liability to attach it must also be proved that the negligence was the cause of the event which produced the harm (*Sheehan v City of New York*, 40 NY2d 496 [1976]).

It is well established that a "rear-end collision with a stopped vehicle establishes a prima facie case of liability against the [driver and owner of] the moving vehicle and imposes a duty of explanation on its driver." (See *Johnston v Spoto*, 47 AD3d 888 [2d Dept 2008]; see also VTL §1129[a]; *Sokolowska v Song*, 123 AD3d 1004 [2d Dept 2014]).

New York State Vehicle and Traffic Law §1129(a) states the following:

"Following Too Closely. The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the highway."

The Court finds that McCurdy established his prima facie entitlement to judgment as a matter of law. McCurdy established that on the date of the accident, his vehicle was stopped in traffic when it was stopped in traffic and hit in the rear by the vehicle owned by Conwood and driven by Olekszyk, and upon impact, the McCurdy vehicle was propelled into Cascio's vehicle. Now, Olekszyk and Conwood are required to come forward with evidence sufficient to raise a triable issue of fact.

In opposition, Conwood and Olekszyk argued that if McCurdy is entitled to summary judgment, a determination that they are liable, then he does not have to prove freedom from comparative negligence. However, if he is also seeking a determination that he is not liable he must still prove his freedom from comparative fault. Therefore it is requested that the motion be denied or that the case proceed to trial on the issue of whether McCurdy was negligent and if so, whether his negligence was a substantial factor in causing the accident.

In response, McCurdy argued that the accident occurred as a result of Oleksyck's vehicle striking the rear of the McCurdy vehicle, which pushed McCurdy into the rear of Cascio's vehicle. At his deposition Oleksyck admitted to driving while intoxicated at the time of the accident, that he struck McCurdy's vehicle in the rear and he did not know if his vehicle was moving or stopped at the time of the accident or whether he drove his vehicle from the scene of the accident. Both Cascio and McCurdy testified that Oleksyck fled the scene of the accident and was chased by the police, after he offered his credit card to pay for any damages.

Even assuming the facts as presented by Olekszyk, he testified that the vehicle he hit in the rear was stopped in front of him stopped at a yellow light. A yellow traffic signal is a warning to drivers to be prepared to stop. (*See* VTL §1111[b][1]; 34 RCNY 4-03[a][2][i]. Although it is also alleged that the McCurdy vehicle stopped short, however, "[v]ehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (*Le Grand v Silberstein*, 123 AD3d 773 [2d Dept 2014]; *see also Pierre v Demoura*, 148 AD3d 736 [2d Dept 2017]; *Schmertzler v Lease Plan U.S.A., Inc.*, 137 AD3d 1101 [2d Dept 2016]; *Robayo v Aghaabdul*, 109 AD3d 892 [2d Dept 2013]; *Jumandeo v Franks*, 56 AD3d 614 [2d Dept 2008]). Olekszyk's testimony demonstrated that he was driving intoxicated in violation of VTL 1192 and was following McCurdy's vehicle too closely in violation of VTL §1129(a) causing the rear end collision (*see Buchanan v Keller*, 169 AD3d 989 [2d Dept 2019]). In the case *Malone v Morillo*, (6 AD3d 324 [1<sup>st</sup> Dept 2004]) the Appellate Division First Department reversed the trial Court's denial of defendants motion for summary judgment. Plaintiff alleged he sustained serious injuries when his car rear-ended defendants' motor vehicle when it stopped abruptly in a light-controlled intersection. Defendants moved for summary judgment on the issue of liability which was denied by the Supreme Court. On appeal, the Appellate Division First Department reversed, holding that whether defendants were already stopped at a red light or stopped suddenly in the middle of the intersection while the light was yellow, the Court found no non-negligent explanation by plaintiff for striking defendants' vehicle in the rear under the circumstances. The failure to observe traffic conditions as well the failure to maintain a safe stopping distance was the sole proximate cause of the collision. The Court finds that Olekszyk, the driver of the Conwood vehicle is the sole proximate cause of this collision (*see Odetalla v Rodriguez*, 165 AD3d 826 [2018]).

Therefore, the motion of defendant Leslie McCurdy seeking an Order pursuant to Civil Practice Law and Rules (CPLR) 3212 granting summary judgment in his favor dismissing the plaintiff's complaint, as well as any and all cross-claims and counterclaims is granted.

The foregoing constitutes the decision and Order of this Court.

Date: November 26, 2019



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Hon. Chereé A. Buggs, JSC

FILED  
DEC -9 2019  
COUNTY CLERK  
QUEENS COUNTY