

Wenderoth v Irvis

2020 NY Slip Op 34632(U)

November 18, 2020

Supreme Court, Ulster County

Docket Number: Index No. EF2018-4388

Judge: Christopher E. Cahill

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**STATE OF NEW YORK
SUPREME COURT**
SARAH WENDEROTH,

ULSTER COUNTY

Plaintiff,

-against-

Decision & Order
Index No.: EF2018-4388

BARRY W. IRVIS,

Defendant.

Supreme Court, Ulster County
Motion Return Date: August 17, 2020
RJI No. 55-19-00411

Present: Christopher E. Cahill, JSC

Appearances: BASCH & KEEGAN, LLP
Attorneys for Plaintiff
307 Clinton Avenue
PO Box 4235
Kingston, New York 12402
By: Derek J. Spada, Esq.

O'CONNOR & FIRST, P.C.
Attorneys for Defendant
20 Corporate Woods Blvd., 4th Floor
Albany, New York 12211
By: Elizabeth B. Yoquinto, Esq.

Cahill, J.:

This personal injury action arose from a two-vehicle collision which took place on October 19, 2018 in Kingston, New York. Both vehicles were entering what is

commonly referred to as the “Thruway Traffic Circle” from I-587 Westbound (Chandler Drive). Defendant was traveling in the “inner” left-hand lane and plaintiff was traveling in the “outer” right-hand lane. The vehicles passed the first exit off the traffic circle which leads to the Thruway entrance. They continued traveling on the circle, the plaintiff heading for the Washington Avenue exit, which is the third exit off the circle, and the defendant heading to the State Route 28 Westbound exit which is the second exit off the circle. The accident occurred when the parties’ vehicles collided as the defendant was exiting from the left lane onto Route 28, and plaintiff was continuing in the “outer” right-hand lane towards the Washington Avenue exit. Plaintiff contends that defendant essentially hit her vehicle on its driver’s side. Plaintiff suffered personal injuries as a result of the collision.

The defendant moves pursuant to CPLR § 3212 for summary judgment dismissing the complaint as he alleges that he had no responsibility for the accident as plaintiff was improperly traveling in the right-hand lane to reach the Washington Avenue exit. The plaintiff opposes the motion, arguing that it was the defendant’s vehicle that hit her, that the pavement markings on which defendant in part relies were changed subsequent to the accident, and that defendant could not see her vehicle in his sideview mirror because his vehicle had a “lift kit”.

After reviewing the parties’ submissions, the court concludes as follows. First, based on the content of defendant’s expert’s supporting and supplemental affidavits, there

is absolutely no foundation for plaintiff's claim that the pavement markings were changed after the accident. Indeed, defendant's expert's submissions, including the photographic exhibits, show that at the time of the accident, and well before then, both the regulatory sign at the intersection of I-587 and the traffic circle, and the pavement markings on the traffic circle, all indicate that traffic heading to the Washington Avenue exit must travel in the left (inner) lane of the traffic circle, and they also show that the defendant was properly traveling in his lane as he was intending to exit onto Route 28. The photos attached to plaintiff's attorney's affirmation in opposition do not contradict the expert's assertions, and the expert's findings clearly contradict the police report which states, vaguely, that the "markings on the roadway allow both lanes to exit or continue around the traffic circle." Nevertheless, plaintiff's assertion that defendant could not see her vehicle in his side view mirror because of the "lift kit" feature of his vehicle raises a question of fact, however slight, as to whether defendant shares any responsibility for the collision, despite the fact that he did have the right-of-way. As the Second Department stated in Pei v Ru Guo v Efkarpidis, (No. 2019-01448, 2020 WL 4197035, at 2 [2nd Dept 2020]), a driver with the right-of-way "has a duty to exercise reasonable care to avoid a collision, to see what there is to be seen through the proper use of his or her senses . . ."

Accordingly, the motion is denied.

This shall constitute the Decision and Order of the court. The original Decision and Order and all other papers are being delivered to the Supreme Court Clerk for transmission to the Ulster County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR § 2220. Counsel is not relieved from the applicable provisions of that rule regarding notice of entry.

SO ORDERED.

Dated: Kingston, New York
November 18, 2020

ENTER,



CHRISTOPHER E. CAHILL, JSC

Papers considered:

Notice of Motion of Elizabeth B. Yoquinto, Esq. dated July 15, 2020 with Exhibits A-F, Affirmation and Memorandum of Law in Support dated July 15, 2020; Affidavit of Dominick J. Gabriel, P.E. in Support of Defendant's Motion dated July 7, 2020, Supplemental Affidavit of Dominick J. Gabriel, P.E. in Support of Defendant's Motion dated August 31, 2020;

Affirmation in Opposition of Derek J. Spada, dated August 10, 2020 with Exhibits A-D; Affidavit in Opposition of Sarah Wenderoth dated August 10, 2020;

Reply Affirmation in Further Support of Defendant's Motion of Elizabeth B. Yoquinto, Esq. dated August 31, 2020