Nargi v Cocucci
2020 NY Slip Op 34654(U)
August 4, 2020
Supreme Court, Westchester County
Docket Number: Index No. 50076/2018
Judge: Charles D. Wood
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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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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LUIGI NARGI,

Plaintiff,

-against-

DECISION & ORDER
Index No. 50076/2018
Sequence No. 1

DANIELA V. COCUCCI, HUGO J. COCUCCI, IAN T. DEVINE and PHILIP C. DEVINE,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Document Numbers 25-47, were read in connection with plaintiff's motion for partial summary judgment on liability only, as against defendants, and dismissing affirmative defenses of comparative negligence.

Plaintiff brought his action for alleged injuries suffered in two separate motor vehicle accidents. In the first, at 12:30 pm, on February 26, 2016, defendant Daniela V. Cocucci backed out of a driveway on to Columbus Avenue in Tuckahoe, and struck plaintiff's vehicle, which was proceeding along the street.("the Cocucci Accident"). The second accident, occurred on July 5, 2017, while plaintiff was driving east on Lincoln Avenue in Tuckahoe, defendant Ian T. Devine ran a stop sign, and struck plaintiff's vehicle, which was not subject to a stop sign or other traffic control device.

Upon the foregoing papers, the motion is decided as follows:

A proponent of a summary judgment motion must make a "prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the

absence of any material issues of fact" (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]; Orange County-Poughkeepsie Ltd. Partnership v Bonte, 37 AD3d 684, 686-687 [2d Dept 2007]; Rea v Gallagher, 31 AD3d 731 [2d Dept 2007]). Failure to make such a prima facie showing requires a denial of the motion, regardless of the sufficiency of the motion papers (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1986]; Jakabovics v Rosenberg, 49 AD3d 695 [2d Dept 2008]; Menzel v Plotkin, 202 AD2d 558, 558-559 [2d Dept 1994]). Once the movant has met this threshold burden, the opposing party must present the existence of triable issues of fact (Zuckerman v New York, 49 NY2d 557, 562 [1980]; Khan v Nelson, 68 AD3d 1062 [2d Dept 2009]). In deciding a motion for summary judgment, the court is "required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and the proof submitted by the parties in favor of the opponent to the motion" (Yelder v Walters, 64 AD3d 762, 767 [2d Dept 2009]; Nicklas v Tedlen Realty Corp., 305 AD2d 385, 386 [2d Dept 2003]). Summary judgment is a drastic remedy, not be granted where there is any doubt as to existence of a triable issue (Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]).

Vehicle and Traffic Law §1129(a) imposes a duty on all drivers to drive at a safe speed and maintain a safe distance between vehicles, always compensating for any known adverse road conditions (Ortega v City of New York, 721 NYS2d 790 [2d Dept 2000]).

Significantly, the law in New York no longer requires to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability" (Perez v Persad, 183 AD.3d 771 [2d Dept 2020]). The Court of Appeals has also clarified that "a plaintiff's comparative negligence is no longer a complete defense to be pleaded and proven by the plaintiff, but rather is only relevant to the mitigation of

plaintiff's damages and should be pleaded and proven by the defendant"burden (Rodriguez v City of New York, 31 NY3d 312, 315 [2018]). "To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (Rodriguez v City of New York, *supra*). Thus, to be entitled to summary judgment on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case to the extent that the opposing party is negligent and a proximate cause of the incident (Edgerton v City of New York, 160 AD3d 809 [2d Dept 2018]).

Turning to the Cocucci Accident, Cocucci testified that: she was before backing up in her car out of a driveway, she waited for traffic to clear, and she turned and looked over her shoulder. She claimed that, before entering the roadway, she had looked backwards and checked her mirror and checked her backup camera, but she did not see plaintiff's vehicle before the impact (Cocucci EBT, pgs 24, 30- 32, NYSCEF Doc No. 35,). Specifically, Cocucci testified that:

Q. So during the times that you looked over your right shoulder, checked your rearview mirror and your rearview camera, you never saw this other vehicle?
A I did not.
Q Can you approximate the speed of this other vehicle immediately prior to the impact?
A Not exactly, no. The speed limit on Columbus Avenue is 25 miles per hour though.
Q But you don't know how fast this other vehicle was traveling?
A Not exactly, no.
Q. Immediately before the impact, did you hear any horns honking, tires screeching, anything to warn you that there was about to be a collision?
A. I heard the sensor in my backup camera beep that there was an approaching object.
Q. How much time passed between when you heard the sensor and the actual impact?
A It was almost immediate. A few seconds. I don't remember exactly.
Q. When you heard that sensor, where were you looking at the time you heard the sensor?
A. I don't remember.
Q. Do you know if you were looking over your right shoulder?
A. I don't recall.
Q. What did you do with respect to the operation of your vehicle when you heard this sensor on the backup camera? ...

A. I didn't -- it was so immediate, so I don't recall exactly what I did.
Q. Do you recall if you slammed on your brakes? If you turned the steering wheel?
A. I wasn't moving, so my foot was already applied to the brake.
Q. So at the time you heard the sensor, your car was stopped?
A. My car was stopped. (NYSCEF Doc No.35 at pg. 33)

Plaintiff testified regarding the happening of the accident as follows:

Q. When you first saw the other car, was your vehicle still just proceeding on Columbus Avenue?
A. Yes.
Q. What speed was your vehicle traveling at the time that you first observed the other car?
A. 25 miles an hour.
Q. Where was the other vehicle when you first observed it in relation to your vehicle?
A. Coming out of the driveway.
Q. How far away was the other vehicle when you first observed it?
A. About 5 feet.
Q. Was the car -- was the other vehicle moving or stopped when you first observed it?
A. Moving.
Q. How was it moving?
A. Pretty fast.
Q. Was it moving forwards, backwards
A. Backward.
A. Yes.
Q. What did you do, if anything, with respect to the operation of your motor vehicle when you first saw the other motor vehicle backing out of the driveway?
A. I beeped the horn. I step on brake, and I turn to the left, my steering wheel to try to turn, but she was coming out too fast and she struck me.
Q. You just said the other vehicle was moving backwards. Where was it moving backwards from and where was it moving backwards to, if you understand that question?
A. From the driveway into the street.
Q. Was the driveway on your left side or your right side?
A. My right side. (Plaintiff EBT, at pgs,22,24 NYSCEF Doc No. 34)

It is well-settled that a defendant driver, who is backing into the lanes of traffic, is obligated to follow Vehicle and Traffic Law §1211 (a) which states that "[t]he driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic." (VTL §1211).

Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, it has been recognized that 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" (Ricciardi v Nelson, 142 AD3d 492, 493 [2d Dept 2016]). A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (Desio v Cerebral Palsy Transp., Inc., 121 AD3d 1033, 1034 [2d Dept 2014]).

Under these circumstances, plaintiff's vehicle had the right of way traveling in his lane of traffic, and through his deposition testimony has demonstrated prima facie entitlement to summary judgment. Plaintiff had no reason to anticipate that a motor vehicle would back out of a driveway across his lane of traffic without yielding the right-of-way.

In opposition, although there appears to be a discrepancy in the testimony of whether Cocucci's car was moving at the time of impact, this fails to preclude summary judgment, and fails to raise a triable issue of fact. Cocucci's testimony does not raise a nonnegligent explanation for her actions of backing up in the driveway into the street striking plaintiff's car that was traveling in a proper lane of traffic.

Under the circumstances of this case, the question of whether plaintiff could have taken evasive action involves pure speculation insufficient to defeat his motion for summary judgment (Pena v Santana, 5 AD3d 649, 650 [2d Dept 2004]).

Turning next to the Devine accident, the record shows that defendant Ian T. Devine was driving north on Oakland Avenue. Traffic in Devine's direction of travel is controlled by a stop sign (photograph, NYSCEF Doc No. 37), and that plaintiff's is not. As Devine approached the intersection with Lincoln Avenue, he ran the stop sign, continuing forward past the stop sign and entered the intersection. Devine testified that before entering the intersection, he looked to his right (seeing no traffic there), but he did not look to his left (Devine EBT, NYSCEF Doc No. 36, p. 31). Devine testified as follows:

A. When I saw the stop sign I slowed down.

Q. Okay. So you saw a stop sign controlling your vehicle at the intersection where this incident occurred?

A. Right.

Q. Approximately, how far away were you from the intersection when you first saw the stop sign?

A. Approximately, four car lengths away -- car lengths.

Q. And approximately, how fast were you driving when you first saw the stop sign?

A. Thirty.

Q. What did you do with respect to the operation of the vehicle when you first saw the stop sign?

A. I started to apply pressure on the brakes.

Q. And at some point did you bring your car to a complete stop?

A. After I -- after the collision I stopped.

Q. So at any time before the collision did you bring your car to a complete stop?

A. No.

(Devine EBT, at pgs 28-29 NYSCEF Doc No. 36).

Plaintiff testified at his deposition the following:

Q. Is Oakland a two-way street?

A. Two-way.

Q. Is it also one lane in each direction?

A. Yes.

Q. In addition to the one lane in each direction, there's a parking lane on each side?

A. Yes.

Q. When you looked to your left, did you see any vehicles approaching you on Oakland?

A. No.

Q. When you looked to the right, did you see any vehicles approaching Lincoln on Oakland?

A. No.

Q. About how far down Oakland could you see when you looked to your right? Either in feet, or car lengths, or any way you'd like to measure it.

A. There's always cars parked over there on the right side and the left side. So I -- I didn't see the car hit me. (NYSCEF Doc No. pgs 76-77).

Under Section 1142(a) of the Vehicle and Traffic Law, Devine was required to yield the right of way:

"Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection" (N.Y. Veh. & Traf. Law § 1142).

The Second Department recognized that "a driver who fails to yield the right of way after stopping at a stop sign is in violation of Vehicle and Traffic Law § 1142(a) and is negligent as a matter of law. Moreover, driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield" (Hunt v New York City Transit Auth., 166 AD3d 735, 736 [2018]).

Taking into consideration these legal principles, plaintiff demonstrates a prima facie entitlement to summary judgment, through his deposition testimony, which demonstrated that he was properly driving along the street, and had no time to make evasive moves to avoid Devine's motor vehicle hitting plaintiff's. Additionally, Devine fails to offer a non-negligent explanation for running a stop sign and striking plaintiff's vehicle (Williams v Spencer Hall, 113 AD3d 759, 760 [2d Dept 2014]).

Plaintiff further seeks summary judgment dismissing all defenses of comparative negligence against both sets of defendants for each accident.

The issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, plaintiff moved for summary judgment dismissing

defendants' affirmative defense of comparative negligence (Poon v Nisanov, 162 AD3d 804, 808 [2d Dept 2018]. In support of his motion, plaintiff submitted deposition testimony that showed that his vehicle was struck by Cocucci when she was backing up her motor vehicle from a driveway into the street striking plaintiff's motor vehicle. Regarding the Devine Accident, Devine had run a stop sign striking plaintiff's motor vehicle.

For the Devine accident, plaintiff demonstrated, prima facie, that he was not at fault. Plaintiff's deposition testimony demonstrated that he exercised due care, and defendant Devine admitted to running the stop sign.. However, in the Cocucci accident, a liability trial will be required to determine whether the plaintiff shares in the fault. For the reasons as discussed above, and of those advanced by plaintiff, he has demonstrated that defendants were negligent and a proximate cause of their respective accidents.

In opposition, each defendant Cucucci's deposition raised a triable issue of fact as to whether plaintiff was comparatively at fault in the happening of the accident (Yayoi Higashi v M & R Scarsdale Rest., LLC, 176 AD3d 788, 790 [2d Dept 2019]). Specifically, she states that she was stopped when the impact occurred. While the plaintiff has established that Cocucci was a proximate cause of the accident, a trial is required to establish whether she was the only proximate cause.

NOW, therefore for the above stated reasons, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment on the issue of liability is granted against the Cocucci defendants for the 2016 accident, and against the Devine defendants for the 2017 accident, and regarding the Devine accident, plaintiff is granted summary judgment dismissing all defenses of comparative negligence; and it is further

ORDERED, that the issue of serious injury will be tried during the damages phase of the trial, and that the granting of this summary judgment motion does not preclude further determination that plaintiff may or may not have sustained serious injury as defined by Insurance Law §5102[d]; and it is further

ORDERED, that the parties are directed to appear in the Compliance Conference Part in Room 800 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601, at a time and place so designated by that Part.

The Clerk is directed to enter judgment accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: August 4, 2020
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: All Parties' Counsel by NYSCEF