

Cappuccio v Manzo
2020 NY Slip Op 34690(U)
December 19, 2020
Supreme Court, Westchester County
Docket Number: Index No. 70024/2018
Judge: Sam D. Walker
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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
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
SHELLYDENE R. CAPPuccio and SEAN STERLING,
Plaintiffs,

DECISION & ORDER
Index No. 70024/2018
Seq# 1

-against-

ALEXANDRA M. MANZO and SANDRO MANZO,
Defendants.

-----X
The following papers were read and considered in deciding the present motion:

- Notice of Motion/Affirmation/Exhibits A-J
- Affirmation in Opposition/Exhibits 1-8
- Reply Affirmation

The plaintiffs, Shellydene R. Cappuccio ("Cappuccio") and Sean Sterling, commenced this action against Alexandra M. Manzo and Sandro Manzo ("Manzo"), by filing a summons and complaint on December 6, 2018, seeking money damages for alleged injuries sustained on October 4, 2016, as a result of a motor vehicle accident. The plaintiffs allege that Cappuccio was operating the vehicle at the speed limit in the left lane of the two lane roadway on Memorial Highway and as she approached the traffic circle, the vehicle, operated by Manzo, hit her vehicle's right front passenger side and fender.

The defendants, by their attorney, now file the instant motion for summary judgment¹, seeking dismissal of all the claims against them. Manzo's attorney argues that Cappuccio made an unsafe lane change from the left lane to the right lane in order to exit

¹The Court deems the defendants' motion to be timely, based upon the Administrative Orders issued due to the Covid-19 pandemic.

the traffic circle and in so doing, struck their vehicle, while they were traveling in their lane with the right of way. The attorney contends that Cappuccio admits to changing lanes in an effort to move across from the left most lane to the right most lane, in order to exit the traffic circle from the right lane. In support of the motion, the defendants proffer party depositions, a police report, administrative orders, the trial readiness order and copies of the pleadings.

In opposition, the plaintiffs, by their attorney, argue that the defendants' motion must be denied because they failed to make a prima facie showing of entitlement to judgment as a matter of law and there exists several issues of material fact, requiring a trial. Their attorney asserts that the accident was caused by Manzo's negligent driving in making improper passing and lane usage and that such was the cause of the accident. The attorney also argues that the police officer in the police accident report noted the contributing factor of the accident was the defendants' improper passing or lane usage.

In reply, the defendants' attorney argues that there are no material questions of fact and that Cappuccio admits that she had her right blinker on, intending to go into the right lane, when her vehicle came into contact with the defendants' vehicle, which was already in the right lane and which she admits, she did not see. Their attorney asserts that Cappuccio's affidavit, stating that the accident occurred because the defendants' vehicle veered left from the right turn only lane into her vehicle, is pure speculation because she testified that she did not see the defendants' vehicle prior to the impact to her vehicle. The attorney argues that Cappuccio has no knowledge of how the accident occurred, since she testified that she did not see anything, but just felt an impact to her car and closed her eyes after the impact.

The attorney further asserts that the police officer has no personal knowledge of the events upon which the description in the report is based, but simply notes the statements from each driver and Cappuccio's statement contradicts her affidavit now being submitted in opposition to the motion and her sworn testimony at her deposition. The attorney further argues that the report diagram box reflects that Cappuccio was making a right turn at the time of the accident and Manzo was proceeding straight.

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]; (*see 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).

New York Vehicle and Traffic Law § 1128, states in pertinent part that:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety (NY VTL § 1128[a]).

A driver is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the other driver's violation

of the vehicle traffic law (see *Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]). However, there may be more than one proximate cause of an accident and the proponent of a summary judgment motion bears the burden of establishing freedom from comparative negligence as a matter of law (*Id*), since a driver with a right-of-way also has a duty to use reasonable care to avoid a collision (see *Attl v Spetler*, 137 AD3d 1176, 1176 [2d Dept 2016]). Nevertheless, “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” (*Id*); see also *Smith v. Omanes*, 123 AD3d 691, 691 [2d Dept 2014]).

In this case, the defendants relied upon, *inter alia*, the Cappuccio’s own deposition testimony, which even when viewed in the light most favorable to the plaintiffs’ established, *prima facie*, that Cappuccio’s actions were the sole proximate cause of the collision, since she failed to see the defendants’ vehicle, which was in the right lane, as she intended to exit the rotary (traffic circle) to her right. Cappuccio testified that had put on her right blinker, she did not see Manzo’s vehicle in the right lane and also did not see the vehicle when contact was made. The evidence submitted by the defendants establishes entitlement to summary judgment as a matter of law, thereby shifting the burden to Simone to demonstrate the existence of a factual issue requiring a trial (see *Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]).

In opposition, Cappuccio failed to raise a triable issue of fact (*Peluso v Martinez*, 138 AD3d 769 [2d Dept 2016]). Cappuccio’s statement in her affidavit that the accident occurred because Manzo’s vehicle veered left from the right turn only lane into her vehicle and that is the only way the accident could have occurred, is without value, since she also

admits in the affidavit that she did not see the defendant's vehicle before the impact. Since she was the one intending to turn right into the right lane where Manzo's vehicle was traveling, Manzo was the one with the right of way. The plaintiffs' assertion that the defendants' vehicle veered left from the right lane into her vehicle is based on pure speculation and is insufficient upon which to base her claim and cannot survive the defendants' summary judgment motion.

With regard to the police report, such is not probative because the officer did not observe the accident and it is not certified. Further, the parties' statements do not contradict the defendants' evidence.

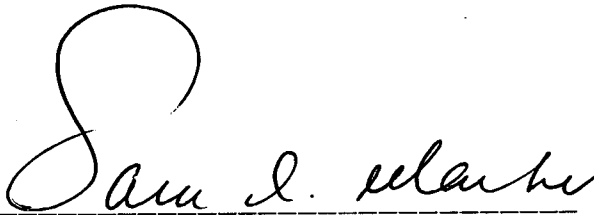
Accordingly, upon the foregoing, it is

ORDERED that the motion is granted; and it is further

ORDERED that the plaintiffs' complaint is dismissed.

The following constitutes the Decision and Order of this Court.

Dated: White Plains, New York
December 19, 2020


HON. SAM D. WALKER