

Ward v Dagostino

2020 NY Slip Op 34740(U)

April 14, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 619795/2018

Judge: Joseph A. Santorelli

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SHORT FORM ORDER

INDEX No. 619795/2018
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 2-16-2020
SUBMIT DATE 3-26-2020
Mot. Seq. # 02 - MG

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LOUIS WARD,

Plaintiff,

THE ODIERNO LAW FIRM, P.C.
Attorneys for Plaintiff
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-against-

SHANNON N. DAGOSTINO, JOHN J.
DAGOSTINO, ROBERT RILEY, and FAITH
M. GRAPPONE,

Defendants.

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Upon the following papers numbered 1 to 30 read on this motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 14; ~~Notice of Cross Motion and supporting papers~~; Answering Affidavits and supporting papers 15 - 26; Repeating Affidavits and supporting papers 27 - 30; ~~Other~~ (and after hearing counsel in support and opposed to the motion) it is,

Defendant, Robert Riley, moves for an order granting summary judgment and dismissing the complaint of the plaintiff against him. The plaintiff did not oppose this motion. Defendants, Shannon N. Dagostino and John J. Dagostino oppose the motion in all respects.

This is an action to recover damages for injuries allegedly sustained by plaintiff Louis Ward as a result of a motor vehicle accident on July 27, 2017 at 12:59 pm, on Ocean Avenue at or near the intersection with Johnson Avenue, Ronkonkoma, Town of Islip, Suffolk County, New York. The accident allegedly occurred when a vehicle owned by defendant John J. Dagostino and operated by defendant Shannon N. Dagostino, hereinafter referred to as the "Dagostino vehicle", attempted to make a left turn from northbound Ocean Avenue onto Johnson Avenue and struck the vehicle being operated by plaintiff Louis Ward on the driver's side. As a result of the initial impact, the vehicle operated by plaintiff Louis Ward was propelled into the vehicle operated by defendant Robert Riley.

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After the initial impact between the Dagostino vehicle and the Ward vehicle, the Dagostino vehicle ricocheted back across the roadway and struck the vehicle being operated by defendant Faith M. Grappone. Defendant Grappone previously moved for an order dismissing the plaintiff's complaint. That motion was granted by Order dated August 7, 2019, (Baisley, J.).

Defendant, Robert Riley, now moves for an order dismissing the complaint arguing that the prior decision held that defendant Shannon N. Dagostino's negligence was the sole legal and proximate cause of the accident. In support of the application, defendant Riley submits, among other things, copies of the pleadings, a copy of the decision dated August 7, 2019, (Baisley, J.), and a copy of the transcript for the examination before trial of plaintiff Louis Ward. In opposition, the Dagostino defendants submit an attorney affirmation and the affidavit of Taylor Dagostino, the front seat passenger in the Dagostino vehicle, which states in relevant part, "When Shannon moved forward, the light was still green...Shannon then began her turn and as she was passing the stopped white car and as she was entering the right-hand lane of southbound Johnson Avenue, I saw a black Audi enter the intersection and the front of the Audi struck the passenger side fender of Shannon's car." ... "After the impact the air bags inflated and I did not see any of the other cars involved in the accident. I submit this affidavit as my sister Shannon has no recall of the accident and it is my belief that the southbound cars in this accident may have sped up to beat a yellow light." The plaintiff has not submitted any papers in opposition to the motion.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident (*see Estate of Cook v Gomez*, 138 AD3d 675, 30 NYS3d 148 [2d Dept 2016]; *Boulos v Lerner-Harrington*, 124 AD3d 709, 709, 2 NYS3d 526 [2d Dept 2015]; *Rungoo v Leary*, 110 AD3d 781, 782, 972 NYS2d 672 [2d Dept 2013]). While there can be more than one proximate cause of an accident and it is generally for the trier of fact to determine, the issue of proximate cause may be decided as a matter of law where only one conclusion may be drawn from the established facts (*see Estate of Cook v Gomez*, *supra*; *Jones v Vialva-Duke*, 106 AD3d 1052, 966 NYS2d 187 [2d Dept 2013]; *Kalland v Hungry Harbor Assoc., LLC*, 84 AD3d 889, 922 NYS2d 550 [2d Dept 2011]).

The Court in *Gabler v. Marly Bldg. Supply Corp.*, 27 AD3d 519, 520, 813 NYS2d 120 (App Div 2d Dept 2006), held that

The defendants demonstrated their prima facie entitlement to

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judgment as a matter of law by establishing that the plaintiff violated Vehicle and Traffic Law § 1141 when he made a left turn directly into the path of the defendants' vehicle as it legally proceeded with the right of way (see *Moreback v Mesquita*, 17 AD3d 420, 793 NYS2d 148 [2005]; *Torro v Schiller*, 8 AD3d 364, 777 NYS2d 915 [2004]; *Casaregola v Farkouh*, 1 AD3d 306, 767 NYS2d 57 [2003]; *Rieman v Smith*, 302 AD2d 510, 755 NYS2d 256 [2003]; *Russo v Scibetti*, 298 AD2d 514, 748 NYS2d 871 [2002]; *Agin v Rehfeldt*, 284 AD2d 352, 726 NYS2d 131 [2001]; *Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2000]). As the defendants' vehicle had the right of way, Lam was entitled to anticipate that the plaintiff would obey the traffic laws which required him to yield to the defendants' vehicle (see *Bongiovi v Hoffman*, 18 AD3d 686, 795 NYS2d 354 [2005]; *Moreback v Mesquita*, supra; *Russo v Scibetti*, supra; *Agin v Rehfeldt*, supra; *Stiles v County of Dutchess*, supra; *Zambrano v Philhwan Seok*, 277 AD2d 312, 715 NYS2d 750 [2000]; *Cenovski v Lee*, 266 AD2d 424, 698 NYS2d 868 [1999])... he was negligent as a matter of law in failing to see that which he should have seen through the proper use of his senses (see *Bongiovi v Hoffman*, supra; *Spatola v Gelco Corp.*, 5 AD3d 469, 773 NYS2d 101 [2004]; *Breslin v Rudden*, 291 AD2d 471, 738 NYS2d 674 [2002]; *Agin v Rehfeldt*, supra; *Stiles v County of Dutchess*, supra; *Zambrano v Philhwan Seok*, supra; *Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 [1997]; see also *Weigand v United Traction Co.*, 221 NY 39, 116 NE 345 [1917]).

Here, Riley's submissions establish, prima facie, that he was not at fault for the happening of the accident, and that defendant Shannon N. Dagostino's negligence was the sole proximate cause of the accident (see *Estate of Cook v Gomez*, supra; *Boulos v Lerner-Harrington*, supra; *Jones v Vialva-Duke*, supra). The affidavit of Robert Riley demonstrates that his vehicle was struck by the plaintiff's vehicle after the initial impact with the Dagostino vehicle, providing a non-negligent explanation for the collision between the Ward and Riley vehicles (see *Chuk Hwa Shin v Correale*, supra; *Hartfield v Seenarraine*, supra; *Strickland v Tirino*, supra). There is no evidence that the Riley vehicle was at fault for the Ward vehicle being propelled into it after being struck by the Dagostino vehicle.

Thus, Riley has established prima facie entitlement to judgment as a matter of law. The Dagostino defendants and the plaintiff were then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. The Dagostino defendants have submitted

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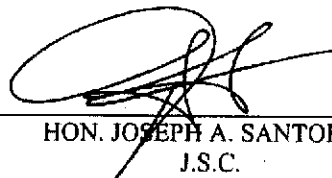
an affirmation of their attorney together with an affidavit of Taylor Dagostino. The mere speculation that the plaintiff and defendant Riley "may have sped up to beat a yellow light" is insufficient to raise a triable issue that defendant Riley was at fault for the accident.

In addition, in as much as the plaintiff has not submitted any opposition to Riley's motion, he too has failed to raise any triable issue of fact. (*see see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, supra*). As the opposing parties have not submitted admissible evidence that Riley was contributorily negligent, they have failed to rebut the moving defendant's prima facie showing that defendant Shannon N. Dagostino's negligence was the sole proximate cause of the accident (*see Estate of Cook v Gomez, supra; Boulos v Lerner-Harrington, supra; Jones v Vialva-Duke, supra*).

Accordingly, defendant Riley's motion for summary judgment is granted. Counsel for the movant shall serve a copy of this order upon counsel for the plaintiff and co-defendants and upon the Calendar Clerk of this court within thirty (30) days from the date of this order.

The foregoing constitutes the decision and Order of this Court.

Dated: April 14, 2020



HON. JOSEPH A. SANTORELLI
J.S.C.

Sent from my iPad