

Bradley-Chernis v Zalocki

2020 NY Slip Op 34828(U)

September 28, 2020

Supreme Court, Ulster County

Docket Number: Index No. EF18-4343

Judge: James P. Gilpatric

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**STATE OF NEW YORK
SUPREME COURT**

ULSTER COUNTY

KATHRYN BRADLEY-CHERNIS,

DECISION

Plaintiff,

Index No.: EF18-4343

- against -

ANTHONY J. ZALOCKI,

Defendant.

**Supreme Court, Ulster County
R.J.I. No.: 55-19-00547**

Present: James P. Gilpatric, J.S.C.

APPEARANCES:

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

LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendant
The Capitol
Albany, New York 122024
By: Douglas R. Kemp, Assistant Attorney General

Gilpatric, J.:

On August 2, 2018 plaintiff was struck head-on by the defendant’s motor vehicle on Hurley Avenue, a two lane roadway, in the Town of Ulster, County of Ulster and State of New York. The defendant moves for summary judgment, pursuant to CPLR 3212 and Vehicle and Traffic Law §1104, dismissing the plaintiff’s complaint. The plaintiff opposes the motion.

This action, which seeks compensation for plaintiff’s injuries, is based on allegations by the plaintiff that the defendant violated multiple Vehicle and Traffic Laws, including but not limited to

New York State Vehicle and Traffic Sections 1120 and 1180. At the time of the accident, the defendant, a New York State Trooper, was responding to a 911 emergency call. The defendant now moves to dismiss the action alleging that the defendant, while acting in the duties of a New York State Trooper, was engaged in an emergency operation and was unable to negotiate his vehicle through a curve on the roadway and crossed the center line into the plaintiff's lane of travel. The defendant asserts, as such, his conduct was not reckless as set forth in the exemptions for liability pursuant Vehicle and Traffic Law §1104(b). The plaintiff opposes the motion asserting that there remain questions of fact as to whether or not the defendant's actions showed a reckless disregard for the safety of all persons as set forth in Vehicle and Traffic Law §1104(b).

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (JMP Holding Corp v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). The failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851 [1985]).

Where the proponent of the motion has made a *prima facie* showing, the burden then shifts to the party opposing the motion to demonstrate, by admissible evidence, the existence of a triable issue of fact (Vermette v Kensworth Truck Co., 69 NY2d 714 [1986]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form to sufficiently establish the existence of a material issue of fact which mandates resolution by trial. If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*see* Rotuba Extruders v Ceppos, 46 NY2d 223, 231 [1978]).

Additionally, Vehicle and Traffic Law §1104 states, in part, that the operator of an emergency vehicle engaged in an emergency operation is permitted to:

1. Stop, stand or park irrespective of the provisions of this title;
2. Proceed past a steady red signal, a flashing red signal or a stop sign, but only after slowing down as may be necessary for safe operation;
3. Exceed the maximum speed limits so long as he does no endanger life or property;
4. Disregard regulations governing directions of movement or turning in specified directions.

In his summary judgment motion, the defendant claims that his conduct does not rise to the level of recklessness set forth in VTL §1104(b) and that the plaintiff's complaint against him must be dismissed. In support of his motion, the defendant submits, *inter alia*, his sworn affidavit, the affirmation of his attorney, a copy of the pleadings, a copy of his deposition testimony and a copy of the deposition testimony of the plaintiff. In the affidavit of the defendant, he averred that at the time of the accident he was acting in his duties as a New York State Trooper and was responding to a 911 call with his lights and sirens on (Zalocki Affidavit). The defendant further stated that the accident occurred when he was unable to negotiate a curve in the road and crossed the center line into the plaintiff's lane of travel (Zalocki Affidavit). The defendant stated that prior to the accident and while responding to the call, he encountered a line of three vehicles that were also traveling in his lane of travel and that only the first car that he approached pulled over to the side of the road allowing him to pass (Zalocki Affidavit). The defendant also stated that he was required to accelerate in order to pass the other two vehicles, and after passing the lead vehicle he encountered a sweeping curve to his right (Zalocki Affidavit). He also averred that he applied his brakes in an attempt to slow down enough to negotiate the curve but he was unable to slow his vehicle enough to negotiate the curve and crossed the yellow line into the oncoming lane (Zalocki Affidavit). The defendant stated that he did not see the plaintiff's vehicle until immediately before impact (Zalocki Affidavit). He further averred that he had his emergency lights and sirens on at all times and that he was not using his radio, cell phone or other communication device, nor otherwise distracted prior to the collision (Zalocki Affidavit). As such, the defendant asserts that his actions do not rise to the standard of recklessness as set forth in VTL §1104(b) and the plaintiff's complaint should be dismissed.

In opposition, the plaintiff submits, *inter alia*, her attorney's affirmation, her sworn affidavit, dated July 24, 2020, the sworn affidavit of her expert Robert L. Winans, Jr., P.E., dated July 17, 2020 and a copy of his expert report, dated July 13, 2020, the sworn affidavit of her expert Joseph J. Blaettler, dated July 23, 2020 and a copy of his expert report, dated July 20, 2020, a copy of plaintiff's deposition testimony, a copy of the defendant's deposition testimony, the non-party witness statement of Peter Politi, dated September 25, 2018, copies of various pictures depicting the scene of the accident and the roadway, copies of two video surveillance tapes moments leading up to the subject accident and, still frames from those videos to rebut the defendant's motion and his

account that his conduct did not meet the standard of recklessness pursuant to VTL §1104(b). The plaintiff avers in her affidavit that she saw the defendant's vehicle traveling at a high rate of speed with his emergency lights activated when she first observed his vehicle (Plaintiff's Affidavit). She also asserted that at no time did she hear a siren (Plaintiff's Affidavit). The plaintiff stated that as soon as she saw the defendant's vehicle, it appeared to lose control while traversing a fairly sharp curve and entered her lane (Plaintiff's Affidavit). She stated that she slammed on her brakes and steered to the right onto the shoulder of the roadway when the defendant's vehicle struck her car head-on (Plaintiff's Affidavit). The plaintiff stated that the defendant's vehicle crossed the plaintiff's entire lane and was partially on the shoulder to the right of her lane when the collision occurred (Plaintiff's Affidavit). The plaintiff also averred that there were no oncoming vehicles, other than the defendant's vehicle at the time leading up to the collision and that she did not see the defendant passing any vehicles at any point when she observed him (Plaintiff's Affidavit). She also stated that there were no vehicles in her field of view that he was passing or could have passed, but, rather the defendant was within his proper lane of travel when she first observed his vehicle (Plaintiff's Affidavit). The plaintiff also submits the video of the defendant's vehicle prior to and at the moment of the collision to support her version of the accident (Plaintiff's Exhibit "L"). Additionally, the non-party witness statement of Peter Politi was submitted by the plaintiff to rebut the defendant's account of the accident (Plaintiff's Exhibit "G"). Mr. Politi stated that on the date of the accident he was traveling in a southerly direction on Hurley Avenue when he noticed a police vehicle in his rearview mirror with its emergency lights turned on (Plaintiff's Exhibit "G"). Mr. Politi also stated that the police vehicle was traveling fast and he did not hear any siren (Plaintiff's Exhibit "G"). Mr. Politi further stated that a short time later he observed that the defendant's vehicle had crashed into another vehicle and that the defendant's vehicle was on the wrong side of the roadway (Plaintiff's Exhibit "G").

Additionally, the plaintiff submits the expert report of Robert L. Winans, Jr., that calculated the speed of the defendant's vehicle observed in the surveillance videos that were submitted of the defendant's vehicle (Plaintiff's Exhibit "B"). Mr. Winans report stated that he reviewed the two surveillance videos, the still frames from the video and that he visited the location of the collision on Hurley Avenue on July 9, 2020 in determining his results (Plaintiff's Exhibit "B"). Based upon

his research, observations and measurements, Mr. Winans concluded that the defendant was traveling at approximately 56.6 miles per hour when he first entered the first surveillance video and decelerated to approximately 45.8 miles per hour at the time he exited from view of the initial surveillance video (Plaintiff's Exhibit "B").

The plaintiff also submits the expert report of Joseph J. Blaettler to rebut the defendant's motion. Mr. Blaettler stated that his report is based on his 33 years of law enforcement and criminal justice experience, training and education in the field of investigations, supervision, procedures, and operations (Plaintiff's Exhibit "D"). Mr. Blaettler stated that he reviewed, *inter alia*, the deposition testimonies of the plaintiff, the defendant, non-party witness Peter Politi, the pleadings two videos of the accident and still photographs from the videos (Plaintiff's Exhibit "D"). Mr. Blaettler determined, based within a reasonable degree of certainty in the above mentioned fields, that the defendant was operating his vehicle in a reckless manner and his actions were a direct cause of the injuries sustained by the plaintiff (Plaintiff's Exhibit "D"). He further opined that no reasonable law enforcement officer would have engaged in the reckless conduct that the defendant engaged in and his actions were a gross deviation of recognized police policy and procedure (Plaintiff's Exhibit "D"). Mr. Blaettler concluded that, on the date and time of the collision between the defendant and the plaintiff, the defendant engaged in reckless conduct by traveling at unsafe speeds while he attempted to maneuver a sweeping curve causing him to lose control of his vehicle and striking the plaintiff head-on and the unsafe speed of the defendant was one of the main factors in the collision (Plaintiff's Exhibit "D").

After the Court's review of all of the submissions, there remains triable issues of fact regarding the defendant's actions. While VTL §1104 grants exemptions to an authorized emergency vehicle, the provisions of VTL §1104(e) states that the statute does not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons and shall not protect the driver from the consequences of his reckless disregard for the safety of others (*see* VTL§1104 [e]). Clearly, the submissions are not conclusive that the defendant did not act in a reckless disregard for the safety of others (*see* Peterkin v City of Mount Vernon, 64 Misc. 3d 1237(a) (N.Y. Sup. Ct. 2019); Saarinen v Kerr, 84 NY2d 494 [1994]). Issues of fact regarding whether the defendant's conduct was reckless and in violation of several VTL laws and whether the defendant

was, in fact, passing multiple vehicles when he lost control of his vehicle have been raised by the plaintiff's submissions.

Since the Court's function is issue finding and not issue determination (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1956]) and, reviewing all of the evidence presented in the light most favorable to the opponent of the motion (*see Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]), the Court hereby determines that the plaintiff has raised triable issues of fact in her opposition to the defendant's motion for summary judgment. As there is not sufficient evidence submitted to permit this Court to conclude that defendant, under the circumstances presented and as a matter of law, did not act without reckless disregard for the safety of all persons and were a mere lapse in judgment at the time of the collision. The Court has reviewed any remaining arguments and find them to be unpersuasive and/or unnecessary to reach. Therefore, the summary judgment motion to dismiss the complaint as against the defendant must be denied.

Accordingly, it is hereby

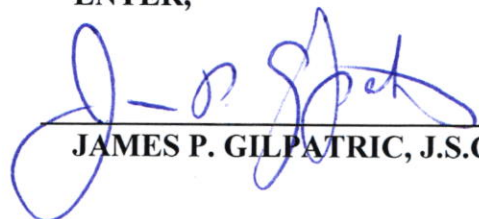
ORDERED, that the defendant's motion for Summary Judgment is denied.

This shall constitute the decision of the Court. The original decision 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 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: September 28, 2020
Kingston, New York

ENTER,



JAMES P. GILPATRIC, J.S.C.

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Papers considered:

- 1.) Notice of Motion, dated June 29, 2020;
- 2.) Defendant's Memorandum of Law by douglas R. Kemp, Esq., dated June 29, 2020;
- 3.) Affidavit of Anthony J. Zalcoki, dated June 22, 2020;
- 4.) Affirmation in Support of Douglas R. Kemp, Esq., dated June 29, 2020, with attached exhibits;
- 5.) Affirmation in Opposition of Derek J. Spada, Esq., dated August 6, 2020; ;
- 6.) Plaintiff's Affidavit, dated July 24, 2020;
- 7.) Expert Affidavit of Robert L. Winans, Jr. P.E., dated July 17, 2020, with attached exhibits;
- 8.) Expert Affidavit of Joseph J. Blaettler, dated July 23, 2020. With attached exhibits.