Martinez v Murphy
2020 NY Slip Op 34965(U)
May 28, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 16-620093
Judge: George M. Nolan
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SHORT FORM ORDER

INDEX No. 16-620093
CAL. No. 19-01525MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 55 - SUFFOLK COUNTY

PRESENT:

Hon. GEORGE M. NOLAN
Justice of the Supreme Court

MOTION DATE 11-6-19 (004 & 005)
MOTION DATE 1-9-20 (006 & 007)
ADJ. DATE 2-6-20
Mot. Seq. # 004 - MG
005 - MG
006 - MotD
007 - MG

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LUIS MARTINEZ, as Administrator of the Estate of GENNA MARTINEZ, deceased, and LUIS MARTINEZ, individually,

Plaintiffs,

- against -

CONNOR J. MURPHY, DONNA L. MURPHY, IRWIN L. GORSKY and ZACHARY D. HICKS,

Defendants.

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Upon the following papers read on this e-filed motion for summary judgment; Notice of Motion/Order to Show Cause (004) by defendant Zachary D. Hicks, dated October 1, 2019, and supporting papers; Notice of Motion/Order to Show Cause (005) by defendant Irwin L. Gorsky, dated October 18, 2019, and supporting papers; Notice of Motion/Order to Show Cause (006) by defendants Connor J. Murphy and Donna L. Murphy, dated November 21, 2019, and supporting papers (including a Memorandum of Law, dated November 26, 2019; Notice of Cross Motion (007) by defendant Irwin L. Gorsky, dated December 5, 2019 and

supporting papers; Affirmation in Opposition (004), (005), and (006) by plaintiff, dated January 2, 2020, and supporting papers; Affirmation in Opposition (007) by plaintiff, dated January 7, 2020, and supporting papers; Affirmation in Opposition (005) by defendants Connor J. Murphy and Donna L. Murphy, dated January 6, 2020 ,and supporting papers; Replying Affirmation (004) by defendants Connor J. Murphy and Donna L. Murphy and defendant Zachary D. Hicks, dated January7, 2020; Replying Affirmation (005) by defendant Irwin L. Gorsky, dated February 5, 2020; Replying Affirmation (006) by defendants, Connor J. Murphy and Donna L. Murphy, dated January 29, 2020; Replying Affirmation (005) and (007) by defendant Irwin L. Gorsky, dated February 5, 2020 (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); it is

ORDERED that the motion (004) by defendant Zachary D. Hicks, the motion (005) by defendant Irwin L. Gorsky, the motion (006) by defendants Connor J. Murphy and Donna L. Murphy, and the cross motion (007) by defendant Irwin L. Gorsky are consolidated herein for disposition; and it is further

ORDERED that the motion (004) by defendant Zachary Davidson Hicks s/h/a Zachary D. Hicks for an order pursuant to CPLR 3212, granting summary judgment in his favor on the issue of liability, and dismissing the complaint and any cross claims asserted against him is granted; and it is further

ORDERED that the motion (005) by defendant Irwin L. Gorsky for an order pursuant to CPLR 3212, granting summary judgment in his favor on the issue of liability, and dismissing the complaint and any cross claims asserted against him is granted; and it is further

ORDERED that the motion (006) by defendant Connor Murphy s/h/a Connor J. Murphy and Donna L. Murphy for an order pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's claim for damages related to conscious pain and suffering of the decedent is granted to the extent indicated herein; and is otherwise denied; and it is further

ORDERED that the cross motion (007) by defendant Irwin L. Gorsky, for an order pursuant to CPLR 3212, granting summary judgment dismissing plaintiff's claim for damages related to conscious pain and suffering of the decedent is denied.

Plaintiff, Luis Martinez, the administrator of the estate of Genna Martinez, commenced this wrongful death action against defendants to recover damages for, inter alia, the conscious pain and suffering Genna Martinez allegedly sustained as a result of a motor vehicle accident that occurred on Route 347, near the intersection with Sylvan Lane, in the Town of Brookhaven on December 26, 2014, at approximately 9:40 p.m. It is undisputed that there were three vehicles involved in the accident, and that Route 347 is a four-lane highway with two lanes of travel in either direction, turning lane, and a traffic control device at the intersection with Sylvan Lane. The accident allegedly occurred when a vehicle operated by Connor J. Murphy (Murphy) and owned defendant Donna Murphy made a left turn or U-turn and collided with the vehicle owned and operated by defendant Irwin L. Gorsky (Gorsky). Murphy's vehicle then entered into the left lane of travel, where it collided with a vehicle owned and operated by defendant Zachary Hicks. Plaintiff's daughter, Genna Martinez, was the front- seat passenger in the vehicle operated by Murphy. There were no witnesses to the accident.

Hicks and Gorsky now move for summary judgment dismissing the complaint and any cross claims asserted against them, arguing that they were not negligent in the happening of the accident. In support of their motions, they submit, inter alia, copies of the pleadings, the bill of particulars, and the parties' deposition testimony. In opposition to the motions, plaintiff argues that a triable issue exists as to whether Hicks and Gorsky were negligent in causing the accident.

At his deposition, Hicks testified that just prior to the accident, he was traveling westbound in the left lane on Route 347, at approximately 30 to 35 mph, near the intersection with Sylvan Lane. Hicks testified that as he proceeded into the intersection the traffic light was green, and that he observed Murphy's vehicle stopped, " perpendicular" to his vehicle, on Route 347. He testified that approximately one to two seconds later, the front end of his vehicle struck the passenger side of Murphy's vehicle. The impact caused his air bags to deploy and his vehicle to move approximately one to two car lengths away from Murphy's vehicle. Hicks testified that Gorsky's vehicle was "slightly" ahead of his vehicle in the right lane of travel on Route 347, and that he heard the noise of the impact between Gorsky and Murphy's vehicle a "second" prior to his accident. He testified that he did not observe Murphy's vehicle turn left or make a U-turn at the intersection with Sylvan Lane. Finally, Hicks testified that he did not hear the sounds of a horn or screeching brakes prior to his accident.

At his deposition, Murphy testified that on the day of the accident he and decedent were traveling eastbound on Route 347 on their way to Port Jefferson. Murphy testified that he observed a Holiday Inn prior to the intersection with Sylvan Lane, and that he did not have any memory of the accident. He testified that as a result of the accident he suffered a concussion, brain bleeding and facial fracture. According to Murphy, he recalled that after the accident, he regained consciousness, looked around his vehicle, observed broken glass, and that there were red and blue lights illuminating by police vehicles at the scene of the accident. Murphy further testified that he observed that the decedent was unconscious, not moving, and "slumped" in the front seat of the vehicle. He did not recall that he turned left or made a U-turn into the intersection with Sylvan Lane prior to the accident. Murphy testified that he again regained consciousness when he was at the hospital and did not recall speaking to anyone. He did not recall stating that he and decedent "looked" at each other as the vehicle rotated after the accident. Murphy testified that the decedent remained unconscious and that he was informed by someone that she died approximately two or three days after the accident.

At his deposition, Gorsky testified that he and nonparty Karen Wool were traveling westbound in the right lane on Route 347 at approximately 40 miles per hour in light traffic. Gorsky testified that when he proceeded into the intersection with Sylvan Lane he observed the face of Murphy from the left side view mirror of his vehicle, approximately five feet away, traveled directly into the path of his vehicle. He testified that approximately two seconds later, Murphy's vehicle struck the driver's side of his vehicle. At the time of the accident the traffic light was green for the westbound traffic on Route 347. Gorsky testified that a second later, he heard the impact between Murphy's vehicle and Hicks' vehicle prior to colliding with a utility pole but that he did not observe the collision. He testified that he did not hear any sounds of a horn or brakes screeching, and that he did not "expect" Murphy's vehicle to turn left into the intersection with Sylvan Lane prior to the accident. Finally, he testified that he did not observe the decedent in Murphy's vehicle.

At her deposition, Karen Wool testified that she was riding as a front seat passenger in the vehicle operated by Gorsky, which was traveling westbound on Route 347, when it was struck on the left driver's side by Murphy's vehicle near the intersection with Sylvan Lane. Wool testified that the impact was heavy and caused Gorsky's vehicle to strike a utility pole. She testified that she did not hear any sounds of a horn, brakes screeching, or any other impacts on the roadway prior to her accident.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such a prima facie case 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, 487 NYS2d 316 [1985]). However, upon the movant establishing a prima facie showing of entitlement to a summary judgment, the burden then shifts to the opponent to offer evidence in admissible form sufficient to establish a material issue of fact requiring a trial of the action (***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

Vehicle and Traffic Law § 1128 states that "a vehicle shall be driven as nearly as practicable entirely with 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." Further, Vehicle and Traffic Law § 1141 requires a motorist intending to make a left turn into an intersection to yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard. A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see* ***Atti v Spetler***, 137 AD3d 1176, 28 NYS3d 699 [2d Dept 2016]; ***Moreno v Gomez***, 58 AD3d 611, 872 NYS2d 143 [2d Dept 2009]; ***Spivak v Erickson***, 40 AD3d 962, 836 NYS2d 676 [2d Dept 2007]). Further, all motorists have a duty to see what they should have seen and use reasonable care to avoid a collision with another motorist (*see* ***Stiles v County of Dutchess***, 278 AD2d 304, 717 NYS2d 325 [2d Dept 2000]). A motorist with the right of way is entitled to anticipate that other motorists will obey traffic laws requiring him or her to yield (*see* ***Lock v Garber***, 69 AD3d 814, 893 NYS2d 233 [2d Dept 2010]; ***Berner v Koegel***, 31 AD3d 591, 819 NYS2d 89 [2d Dept 2006]; ***Moreback v Mesquita***, 17 AD3d 420, 793 NYS2d 148 [2d Dept 2005]). In addition, a motorist with the right of way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent in failing to avoid the collision (*see* ***Socci v Levy***, 90 AD3d 1020, 935 NYS2d 332 [2d Dept 2011]; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]; ***Berner v Koegel***, *supra*).

Here, Hicks' and Gorsky's submissions are sufficient to establish a prima facie case of entitlement to summary judgment. The testimony demonstrated that Murphy failed to yield the right of way to Hicks' and Gorsky's oncoming vehicles and turned directly into their path of travel when it was unsafe to do so, and that they were not comparatively at fault in the happening of the accident (*see* ***Rohn v Aly***, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]); ***Socci v Levy***, 90 AD3d 1020, 935 NYS2d 332 [2d Dept 2011]); ***Yelder v Walters***, *supra*; ***Moreno v Gomez***, *supra*). In opposition, plaintiff failed to raise a triable issue of fact as to whether Hicks and Gorsky were comparatively at fault in causing the accident. Inasmuch as they had the right of way, Hicks and Gorsky were entitled to anticipate that Murphy would obey the traffic laws requiring him to yield and allow their vehicle to pass prior to making a left turn or U-Turn prior to entering the intersection with Sylvan Lane. Accordingly, their motions for summary judgment dismissing the complaint against them are granted.

The Murphy defendants also move for summary judgment in their favor, dismissing the claim for conscious pain and suffering against them, arguing that there is no evidence that the decedent suffered

any conscious pain and suffering following the subject accident. In support of the motion, they submit, inter alia, the pleadings, the bill of particulars, the parties' deposition testimony, a certified copy of the Police Accident Report (MV-104), a certified copy of the Police Report for Fatal Vehicle Accident, and an expert affirmation by Stuart L. Dawson, M.D.

Gorsky also moves, separately for summary judgment dismissing the claim for conscious pain and suffering against him. In support, Gorsky's submits, inter alia, the pleadings, and an affirmation by his attorney that adopts the record submitted in the motion by Murphy. As summary judgment dismissing the complaint against him is granted, Gorsky's motion related to the claim for conscious pain and suffering is denied as moot.

In a wrongful death action, a plaintiff asserting a claim for conscious pan and suffering must establish as a threshold matter that the decedent was conscious for a period of time after the subject accident (*see* ***Cummins v County of Onondaga***, 84 NY2d 322, 324, 618 NYS2d 615 [1994]; ***Phiri v. Joseph***, 32 AD3d 922, 822 NYS2d 573 [2d Dept 2006]). However, a defendant who moves for summary judgement has the initial burden of making a prima facie showing that the decedent did not endure conscious pain and suffering and pre-impact terror (*see* ***Kevra v Vladagan***, 96 AD3d 805, 949 NYS2d 64 [2d Dept 2012]; ***Phiri v Joseph***, *supra*; ***Schild v Kinglsley***, 5 Ad 3d 103, 773 NYS2d 20 [1st Dept 2004). In order to establish a prima facie entitlement to judgment as a matter of law, it was incumbent upon the defendant to come forward with evidentiary proof, in admissible form, demonstrating the absence of any triable issues of fact.

Here, the Murphy defendants established their prima facie entitlement to summary judgment dismissing plaintiff's claim for conscious pain and suffering by submitting evidence that the decedent immediately lost consciousness and died as a result of the accident (*see* ***Cummins v County of Onondaga***, 84 NY2d 322, 618 NYS2d 615 [1994]; ***Kevra v Vladagin***, *supra*; ***Phiri v Joseph***, *supra*). Defendants submitted deposition testimony by nonparty witness Christopher Myers, a paramedic, who testified that in approximately two minutes after the collision, he observed that decedent suffered head trauma, and was unresponsive. He further testified that decedent was unconscious with a Glasgow Coma level Score of three, which indicated that she was not conscious for anytime following the accident. Additionally, the affirmation by Stuart L. Dawson, M.D., stated that based on his review, not limited to the police report, the PRC Terryville Fire department report and Stony Brook Hospital medical records, it was his opinion, to a degree of reasonable certainty, that the decedent suffered no conscious pain or suffering as a result of the accident. He avers that decedent had comminuted depressed skull fractures and brain lacerations, and that the cause of her death was anoxic encephalopathy, due to head injury. He opined that she was instantaneously rendered unconscious upon impact between the vehicles. Dawson avers that decedent never showed any neurological improvement during hospitalization and was pronounced brain dead on December 28, 2014. In opposition, plaintiff's failed to establish that the decedent was conscious for a period of time after the subject accident (*see* ***Cummins v County of Onondaga***, *supra*). Accordingly, the branch of the motion by the Murphy defendants for summary judgment dismissing the claim for conscious pain and suffering is granted.

However, the Murphy defendants' submissions failed to address whether there was any interval between the time the decedent appreciated the danger of the impending accident and the time of the

accident and if so, whether she experienced any fear or terror as a result such apprehension (*see* ***Mc Kenna v Reale***, 137 AD3d 1533 , 29 NYS3d 596 [3d Dept 2016]). Accordingly, their motion is denied insofar as it seeks dismissal of plaintiff's claim for damages related to the decedent's alleged pre-impact terror.

Dated: May 28, 2020

J.S.C.

FINAL DISPOSITION X NON-FINAL DISPOSITION