

Hasandjekic v Donovan
2020 NY Slip Op 35056(U)
April 3, 2020
Supreme Court, Westchester County
Docket Number: Index No. 50925/2019
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
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.**

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MIRSAD HASANDJEKIC,

Plaintiff,
-against-

DECISION & ORDER
Index No. 50925/2019
Seq. # 1

MEGHAN PATRICIA DONAVAN and SUSAN MARIE
DONAVAN,
Defendant(s).

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The following papers were read on Plaintiff's motion for summary judgment on the issue of liability:

Notice of Motion/Affirmation in Support/Exhibits 1-9	1-11
Affirmation in Opposition/Exhibits A-B	12-14
Reply Affirmation	15

Factual and Procedural Background

The plaintiff, Mirsad Hasandjelic, commenced this action on January 15, 2019 seeking damages for alleged injuries he sustained in an accident which occurred on September 15, 2018, on Midland Avenue at the intersection of McGeory Avenue in the City of Yonkers, when the plaintiff's motorcycle collided with the motor vehicle, operated by Meghan Patricia Donovan ("Donavan") and owned by Susan Marie Donovan, when Donovan was attempting to make a left turn.

The plaintiff now files the instant motion for an order pursuant to CPLR 3212 granting summary judgment against the defendants on the issue of liability; dismissing the defendants' first and third affirmative defenses; and setting the matter down for trial on the issue of damages.

The plaintiff argues that Donovan's violation of Vehicle & Traffic Law §1141 is negligence per se and entitles the plaintiff to judgment as a matter of law on the issue of liability and that Donovan is liable for failing to see that which is there to be seen. The plaintiff further argues that the defendants' first affirmative defense should be stricken because the plaintiff bears no comparative fault for the collision, which occurred when Donovan did not see him traveling straight on Midland Avenue and turned left directly into his path of travel. The plaintiff also argues that the defendants' third affirmative defense should be stricken because there is no question that the defendants are subject to the personal jurisdiction of the Court and Vehicle and Traffic Law § 253 provides for service of a summons and complaint upon non-resident motorists such as the defendants.

In opposition, the defendants argue that the motion must be denied in all respects, since there are genuine issues of material fact that must be resolved by the trier of fact. The defendants argue that there are genuine issues of fact as to whether the plaintiff had enough time to avoid the accident and should have yielded to the defendant who had already started her turn prior to the impact. They argue that Donovan did not see the plaintiff prior to the impact, which indicates that she had started her turn before the plaintiff's motorcycle reached the vicinity and the impact to the defendant's vehicle by the

plaintiff's own admission, is the front passenger area above the wheel, which supports the notion that the defendant had already started her turn prior to the impact.

In reply, the plaintiff argues that the indisputable facts show that Donovan was negligent as a matter of law for violating VTL § 1141 and further, Donovan's failure to see what was there to be seen, renders her liable as a matter of law under common law negligence. The plaintiff states that the sole proximate cause of the accident was Donovan's failure to yield the right of way to the plaintiff and the testimony is clear that Donovan did not see the plaintiff on his motorcycle any time prior to the collision and the plaintiff testified that he did not have time to react.

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]; *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).

The plaintiff alleges that Donovan was negligent as a matter of law by making a left turn into an intersection when it was hazardous to do so in violation of New York State Vehicle and Traffic Law §1141, which states in pertinent part that:

“The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall 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.” VTL §1141.

“A plaintiff 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 defendant driver’s violation of VTL §1141 in turning left directly into the path of the plaintiff’s oncoming vehicle which was lawfully present in the intersection” (see *Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]). There may be more than one proximate cause of an accident, 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]).

The Second Department has also held that “[a] driver is negligent if he or she has failed to see that which, through the proper use of senses, should have been seen” (see *Berner v Koegel*, 31 AD3d 591, 592 [2d. Dept 2006]). “The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey the traffic laws requiring him or her to yield” (see *Gause*, 91 AD3d at 596). The courts have held 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” (see *Attl v Spetler*, 137 AD3d 1176, 1176 [2d Dept 2016], quoting *Yelder v Walters*, 64 AD3d 762, 764 [2d Dept 2009]) [citations omitted]. Even if the vehicle failed to brake or avoid the collision,

an error of judgment or wrong choice of action is not negligence when one is called upon to act quickly in the face of sudden and unexpected circumstance which leave little or no time for thought, deliberation or consideration. (14 N.Y.Prac., New York Law of Torts §7:15; *Rivera v New York City Transit Authority*, 77 NY2d 322, 327 [1991]).

In this case, the plaintiff claims that by Donovan's failing to yield the right of way to his motorcycle approaching and her failing to see his cycle which should have been seen with proper use of her senses, constituted negligence as a matter of law and was the sole proximate cause of the accident.

Since the evidence shows that Donovan did not have the right of way when making her left turn, admitted to not seeing the plaintiff's motorcycle prior to beginning to execute her turn, had an unobstructed view of traffic and proceeded into the intersection, the Court finds that the plaintiff has established a prima facie showing of entitlement to judgment as a matter of law. The burden now shifts to the defendants to set forth evidentiary proof establishing the existence of a material issue of fact.

The Court finds the defendants' arguments in opposition to be insufficient to defeat summary judgment (*see Batts v Page*, 51 A.D.3d 833, 834 [2d Dept 2008]; *McCain v Larosa*, 41 AD3d 792, 793 [2d Dept 2007]; *Meliarenne v Prisco*, 9 AD3d 353, 354 [2d Dept 2004]). Therefore, the Court finds that the defendants have not raised an issue of material fact to rebut the plaintiff's prima facie showing of entitlement to judgment as a matter of law.

In addition, the Court further grants the part of the motion seeking dismissal of the defendants' first and third affirmative defenses. The defendants were properly served

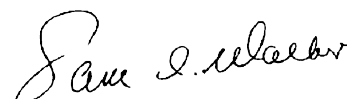
pursuant to VTL § 253 and the Court has jurisdiction over the defendants. Further, Donavan's failure to yield to the plaintiff's motorcycle, was the sole proximate cause for the accident and the plaintiff bears no contributory negligence or assumption of risk in causing the accident.

Accordingly, based on the foregoing, it is

ORDERED that the plaintiff's motion for summary judgment on liability is GRANTED; and it is further

ORDERED that the defendants' first and third affirmative defenses as to comparative negligence and lack of jurisdiction, are dismissed.

Dated: White Plains, New York
April 3, 2020



HON. SAM D. WALKER, J.S.C.