

O'Neill v Favaloro

2021 NY Slip Op 33570(U)

July 12, 2021

Supreme Court, Cortland County

Docket Number: Index No. EF19-923

Judge: Mark G. Masler

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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Cortland County Courthouse, in the City of Cortland, New York on May 21, 2021.

PRESENT: HON. MARK G. MASLER
Justice Presiding.

STATE OF NEW YORK
SUPREME COURT: COUNTY OF CORTLAND

DENNIS O'NEILL and LINDA O'NEILL,

Plaintiffs,

DECISION AND ORDER

v

Index No. EF19-923
RJI No. 2021-0052-J


MICHAEL A. FAVALORO,

Defendant.

APPEARANCES:

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	Elizabeth Larkin, County Clerk

MARK G. MASLER, J. S. C.

Plaintiffs commenced this action to recover for injuries sustained by Dennis O'Neill (herein plaintiff; his wife sues derivatively) in a motor vehicle collision which occurred at approximately 6:16 p.m. on July 13, 2017. Prior to the collision, defendant was operating his pickup truck in a southerly direction on Carter Slocum Road in the Town of Freetown. As defendant turned left into the driveway of his farm property, his vehicle was struck by a motorcycle operated by plaintiff, who was traveling in a northerly direction.

Plaintiffs move for partial summary judgment on the issue of liability, contending that defendant violated Vehicle and Traffic Law § 1141, which requires that a driver who intends to turn left into a driveway yield the right-of-way to “any vehicle approaching from the opposite direction which is . . . so close as to constitute an immediate hazard.” Plaintiffs made a prima facie showing of entitlement to summary judgment based on submissions demonstrating that defendant failed to yield the right-of-way to plaintiff when making his left turn (see Brodney v Picinic, 172 AD3d 673, 674 [2019]). In support of their motion, plaintiffs submitted defendant's deposition testimony and the deposition testimony of Randy Hopkins, the driver of a vehicle which was traveling northerly ahead of plaintiff prior to the collision.¹ Hopkins testified that plaintiff had followed him in the northbound lane of Carter Slocum Road for approximately three miles prior to the collision (see NY St Cts Elec Filing [NYSCEF] Doc No. 23, Addonizio aff, exhibit G [Hopkins deposition tr] at 9, lines 16-25). Hopkins further testified that plaintiff maintained a consistent distance of “about a telephone pole to telephone pole” behind him at a

¹ Plaintiff's injuries assertedly left him with no memory of the incident (see NYSCEF Doc No. 23, Addonizio aff, exhibit D [Dennis O'Neill deposition tr] at 17, lines 17-25).

speed between 45 and 50 miles per hour (Hopkins deposition tr at 10, lines 5-25; at 11, lines 2-3; at 13, lines 16-23). Hopkins stated that the headlamp of plaintiff's motorcycle was illuminated, and that without the headlamp he would not have seen the motorcycle (see Hopkins deposition tr at 13, lines 24-25; at 14, lines 2-4; at 21, lines 20-25; at 22, lines 2-21). Hopkins did not witness the collision (see Hopkins deposition tr at 17, lines 4-6). Defendant testified that, as he approached his driveway, he signaled his intention to turn and waited for the Hopkins vehicle to pass before turning, and that he did not see plaintiff's motorcycle before turning (see NYSCEF Doc No. 22, Addonizio aff, exhibit F [Favaloro deposition tr] at 38-40).

However, in opposition to plaintiffs' motion, defendant submitted evidence sufficient to raise a factual issue as to whether, when defendant initiated his left turn, plaintiff's vehicle was "so close as to constitute an immediate hazard" (Brodney v Picinic, 172 AD3d at 674 [quoting Vehicle and Traffic Law § 1141, citations omitted]; see Luck v Tellier, 222 AD2d 783, 785 [1995]). This evidence included testimony from the depositions of William Conklin and Paula Shippey, each of whom resides on Carter Slocum Road less than one half mile south of the collision site, and an affidavit from William Fischer, who has experience in the investigation and reconstruction of motor vehicle accidents. Conklin testified that, as he was repairing a vehicle in his driveway, he saw plaintiff's "motorcycle speeding up the road" (NYSCEF Doc No. 24, Addonizio aff, exhibit H [Conklin deposition tr] at 9, lines 21-25). He heard the motorcycle progressively shift into higher gears as it approached (see Conklin deposition tr at 16, lines 11-22). He did not observe another vehicle in front of the motorcycle (see Conklin deposition tr at 19, lines 2-6). After he observed the motorcycle pass, he heard it shift once more into a higher gear (see Conklin deposition tr at 12, lines 14-24; at 48, lines 12-25; at 49, lines 2-3). Although

he did not visually observe the collision, Conklin heard a loud noise, which he characterized as a “boom,” shortly after the motorcycle passed from view (see Conklin deposition tr at 12, lines 19-23; at 20, lines 7-8). Based on his experience as a truck driver and motorcycle rider, and his previous observations of other motor vehicles traveling past his house, Conklin estimated that the motorcycle was going between 65 and 70 miles per hour as it passed his house, and that it was probably traveling “a little over 70 miles an hour” at the time of impact (Conklin deposition tr at 14, lines 16-20; at 15, lines 22-25; at 16, lines 2-25; at 17, lines 2-16; at 24, lines 2-4; at 36, line 25; at 37, lines 2-25; at 38, lines 2-24; at 44, lines 15-21; at 51, lines 11-25; at 52, lines 2-4; at 54, lines 22-25; at 55, line 2). Conklin’s deposition testimony regarding the speed of the motorcycle is generally consistent with the supporting deposition he gave to the Cortland County Sheriff’s Department shortly after the collision, in which Conklin stated that it appeared that plaintiff “was trying to get the motorcycle to go as fast as he could” (NYSCEF Doc. No. 26, Addonizio aff, exhibit J at 22).

Shippey testified that, prior to the collision, she was sitting in her living room, from where she could see Carter Slocum Road, when she “heard an engine rev up going really fast – sounding really fast going by” (NYSCEF Doc No. 25, Addonizio aff, exhibit I [Shippey deposition tr] at 12, lines 5-13; at 15, lines 2-25; at 16, line 2). She saw the “blur of a motorcycle go by” (Shippey deposition tr at 12, lines 14-15). Based on her experience with motorcycles and previous observations of vehicles traveling past her house at known speeds, Shippey estimated the speed of the motorcycle to be greater than 80 miles per hour (see Shippey deposition tr at 14, lines 10-22). She did not recall seeing another vehicle pass her house prior to the motorcycle (see Shippey deposition tr at 17, lines 7-10; at 19, lines 20-22).

Fischer opined that the headlamp on plaintiff's motorcycle was not illuminated prior to the collision (see NYSCEF Doc No. 32, Fischer aff ¶ 9). He opined that plaintiff's motorcycle would have been camouflaged from, and therefore inconspicuous to, defendant due to the lack of contrast between the road and the appearance of plaintiff – who was dressed in a dark helmet and clothing and operating an unlighted dark motorcycle (see Fischer aff ¶¶ 10-13, 16-17). Notably, Fischer's conclusion that plaintiff's motorcycle was not readily visible to other drivers is consistent with the testimony of Hopkins, who stated that “the only way I knew the motorcycle was back there [was] due to [the headlamp's] color” (Hopkins deposition tr at 22, lines 15-21). Fischer further opined that the motorcycle, if operated at the speed estimated by Conklin, would have been beyond a driver's normal visual search pattern (see Fischer aff ¶ 16).

Plaintiffs correctly contend that they are not required to establish the absence of plaintiff's own comparative negligence in order to establish entitlement to summary judgment on the issue of liability (see Rodriguez v City of New York, 31 NY3d 312, 315 [2018]; Brodney v Picinic, 172 AD3d at 674; Schleede v State of New York, 170 AD3d 1400, 1402 [2019]). However, the evidence submitted by defendant regarding the speed at which plaintiff was traveling is sufficient to raise a triable issue of fact as to whether, when defendant initiated his left turn, plaintiff's vehicle was “so close as to constitute an immediate hazard” (Vehicle and Traffic Law § 1141) and, therefore, whether defendant acted negligently in the first instance (see Brodney v Picinic, 172 AD3d at 674; cf. Nasadoski v Shaut, 115 AD3d 1026, 1027 [2014] [summary judgment on the issue of liability was properly granted to a plaintiff motorcycle operator who was injured when another driver turned left into his path of travel where the defendant driver failed to submit any evidence controverting plaintiff's evidence that he was

traveling at or below the speed limit of 40 miles per hour]; Peschieri v Estate of Ballweber, 285 AD2d 921, 922-923 [2001] [summary judgment was granted in favor of motorcycle operator on the issue of liability where it was undisputed that he was traveling at the speed limit of 45 miles per hour]).

Based on the foregoing, plaintiff's motion is denied.

This decision constitutes the order of the court. The filing of this decision and order or transmittal of copies hereof, by the court shall not constitute notice of entry (see CPLR 5513).

Dated: July 12, 2021
Cortland, New York

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Hon. Mark G. Masler
Supreme Court Justice