

Arnold v Shepitka
2023 NY Slip Op 35328(U)
July 6, 2023
Supreme Court, Orange County
Docket Number: Index No. EF002816-2022
Judge: Sandra B. Sciortino
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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 ORANGE

-----X
JOSHUA ARNOLD, JR.,
Plaintiff,

-against-

JOHN F. SHEPITKA,
Defendant.
-----X

DECISION AND ORDER
MOTION NO.: 1
MOTION DATE: 4/28/2023
INDEX NO.: EF002816-2022

SCIORTINO, J.

The following papers numbered 1-12 were considered in connection with plaintiff's motion for summary judgment on the issue of liability pursuant to CPLR 3212 and to strike the defendant's sixth affirmative defense:

PAPERS

NUMBERED

Notice of Motion/Affirmation/Statement of Material Facts	
Exhibits A-D	1-7
Counter-Statement of Material Facts/Affirmation in Opposition	
Exhibit A	8-10
Affirmation in Reply	11

PROCEDURAL HISTORY

This matter arises from a motor vehicle accident. On January 10, 2022, both parties were driving southbound on Lake Street in Newburgh New York. Lake Street consists of two lanes of traffic in each direction. Two southbound lanes are separated from two northbound lanes by a solid double yellow line. The accident occurred in the left southbound lane when the defendant attempted to perform a U-Turn.

Plaintiff filed the Summons and Verified Complaint on May 13, 2022 (Exhibit A). Issue was joined on July 14, 2022. In his answer, defendant denies the allegations of the complaint and sets forth nine affirmative defenses. The Sixth Affirmative Defense alleges plaintiff's injuries were caused by plaintiff's own negligence. (NYSCEF Doc. #3).

Plaintiff's Deposition Testimony:

Plaintiff was deposed on December 15, 2022 (Exhibit A). He was traveling southbound on Lake Street in the left lane (p.30, 31). He did not change lanes before the accident occurred (p.32). Defendant was driving in the right lane next to plaintiff for approximately twenty to twenty-five seconds (p.33). Plaintiff was driving at approximately 25 miles per hour prior to the accident (p.34). The speed limit on Lake Street was 30 miles per hour (p.32). Plaintiff was not eating, smoking, or using a cell phone while he was driving (p.35, 36). He applied his brakes approximately one second before impact (p.36). At the moment of impact, plaintiff was moving approximately 10 miles per hour (p.37). The "front, side passenger" portion of plaintiff's vehicle came in contact with the "left side of the driver's side." of defendant's vehicle. (p.38) The impact was described as heavy. (*id.*) The impact was caused when the defendant "basically swerved into [the plaintiff's] vehicle." (p.39). The defendant's vehicle was still to the plaintiff's right and no part was ahead of him (p.39).

Defendant's Deposition Testimony:

Defendant was deposed on December 15, 2022 (Exhibit C). He testified the weather conditions were clear with no rain and it was daylight (p.14). The accident occurred on Lake Street. Defendant was unfamiliar with the area and looked up the directions on his cell phone before he left his home (p.10). He did not believe he was using his headlights (p.14). Defendant was in the right lane when he turned onto Lake Street; he immediately wanted to get into the left lane (p. 14). Before moving into the left lane, the defendant did "what you normally do going from the right to

the left lane. You check your mirror and make sure there's nobody coming" (p. 15). Defendant moved into the left hand lane and he then proceeded to make a U-turn. And as [he] made [his] U-turn and crossed over the yellow line to go to the northbound lanes, [he] got hit (p.16)." Defendant testified that he was in the northbound lane when hit (*id.*) He attempted to make a U-Turn because he was lost(p.18). He had just begun making his turn and was "still basically southbound" when the collision occurred (p.19). Defendant had been in the left lane for approximately five to ten seconds before the impact occurred (p.17). Defendant did not see plaintiff before the impact (p.16). He did not check his side-view mirrors before starting the U-Turn (p.21).

Defendant states that he did not speak to a police officer at the scene of the accident except to be asked if he was okay or needed an ambulance and then to move his car (p.22).

Motion for Summary Judgment (Seq. #1)

By Notice of Motion, plaintiff seeks summary judgment on the issue of liability. Plaintiff argues he has proven his *prima facie* entitlement to summary judgment on the issue of liability. He argues he is free from all liability, and defendant is fully at fault for the subject accident. The collision did not occur at or near an intersection. Instead, it occurred due to defendant's attempt to perform a U-Turn midway through Lake Street. Despite plaintiff's attempts at evasive maneuvers and his use of his brakes, he was unable to avoid the accident.

Opposition

Defendant counsel, by affirmation, argues defendant cannot be held solely liable for the accident. Plaintiff, it is argued, failed to take evasive maneuvers to avoid the accident. Additionally, plaintiff's testimony contradicts defendant's testimony. Plaintiff alleged he saw defendant's vehicle continuously proceeding next to his vehicle. In contrast, defendant stated he was already in the left lane for five to ten seconds before the impact occurred (Exhibit C, p.17). Defendant's account of the

accident was that he was executing a left turn from the left-most lane on Lake Street and was then struck from behind by plaintiff.

Second, plaintiff testified he was traveling at 10 miles per hour at the time of the accident. Defendant stated plaintiff's vehicle struck his vehicle at a high rate of speed (Exhibit C, p.16). Defendant argues that if plaintiff's statement that plaintiff was driving at 10 miles per hour were true, defendant must have also been traveling at 10 miles per hour. The photographs (Exhibit B) indicate the accident occurred at a much faster speed.

Lastly, it is argued that the contents of the police report create issues of fact. While plaintiff relies on statements allegedly made to a police officer at the scene, defendant testified that he never spoke to any officer regarding how the accident occurred.

On that basis, defendant argues there are material issues of fact, and summary judgment would be inappropriate.

Reply

Plaintiff argues that defendant's arguments are baseless and unsupported. Defendant did not provide a non-negligent explanation for the collision caused by him. Defendant's testimony does not refute the fact that, prior to the accident he was in the right southbound lane, while plaintiff was in the left southbound lane. Defendant did not take precautionary measures such as checking his mirrors before attempting to make the U-Turn. Defendant admits the accident occurred when he was making the U-Turn.

Likewise, defendant's arguments that plaintiff was comparatively negligent are unpersuasive. By his own admission, defendant never observed plaintiff's vehicle prior to the accident and thus cannot testify as to what speed it was traveling. Defendant argues plaintiff did not hear a car horn based upon his testimony (Exhibit A, p.36). However, such a response does not conflict with his

affidavit. Plaintiff was asked if he heard a horn, not whether he used his own horn. Therefore, plaintiff asserts he is entitled to summary judgment on the issue of liability.

The Court has fully considered the submissions of the parties.

DISCUSSION

CPLR 3212(b) states a motion for summary judgment shall be supported by affidavit, a copy of the pleadings, and, other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the defense has no merit. “The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [2 Dept 1986]).

“Summary judgment is a drastic remedy, to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact” (*Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503 [2012]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Ortiz v. Varsity Holdings, LLC*, 18 N.Y.3d 335, 339 [2011]). “While negligence cases do not generally lend themselves to resolution by motion for summary judgment, such a motion should be granted where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party (*O'Malley v. USA Waste of New York, Inc.*, 283 A.D.2d 409 [2d Dept 2001]).

Here, plaintiff has failed to establish a *prima facie* case. In support of his motion, plaintiff submitted his affidavit (Plaintiff Exhibit B); the defendant's deposition transcript (Plaintiff Exhibit C), and a copy of the police report (Plaintiff Exhibit D). But for the fact that it was the defendant's intent to make a U-turn, the relevant factors set forth by each are sharply contested.

The plaintiff states the defendant was in the right hand lane when he started the U-turn. The defendant states he was in the left hand lane. Plaintiff states that the accident happened fully in the left hand lane. Defendant states that it happened, at least partially in the northbound lane.

Plaintiff relies on statements allegedly made by the defendant to a police officer at the scene. A party's statement against his interest is generally admissible. (*see, Ferrara v Poranski*, 88 AD2d 904 [2d Dept 1982] (defendant's statement recorded in police report that "she must have fallen asleep and struck LILCO pole # 44" constitutes an admission against interest.)). However, in this matter, the defendant specifically testified that he never spoke to a police officer.

The function of the court on such a motion is issue finding, and not issue determination (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The court is not to resolve issues of fact or to determine credibility, but merely to determine whether such issues exist (*Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005]).

In this matter, the plaintiff has failed to show the absence of triable issues of fact. The plaintiff's motion must be denied.

The parties shall appear for an in-person conference on July 28, 2023 at 9:15AM.

This constitutes the decision and order of the Court.

Dated: July 6, 2023
Goshen, New York

ENTER:


HON. SANDRA B. SCIORTINO, J.S.C.

To: Attorneys of Record via NYSCEF