

Strebel v Rapid Recovery Towing Ltd.
2024 NY Slip Op 35473(U)
May 15, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 608877/2020
Judge: C. Stephen Hackeling
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX No. 608877/2020
 CAL. No. 202300903MV

SUPREME COURT - STATE OF NEW YORK
 I.A.S. PART 12 - SUFFOLK COUNTY

P R E S E N T :

Hon. C. STEPHEN HACKELING
 Justice of the Supreme Court

MOTION DATE 9/27/23 (001)
 MOTION DATE 11/1/23 (002)
 ADJ. DATE 12/20/23
 Mot. Seq. # 001 MD
 Mot. Seq. # 002 MG

-----X
 MAUREEN STREBEL,

Plaintiff,

- against -

RAPID RECOVERY TOWING LTD., KENNY
 RODRIGUEZ, GERALD E. HOWELL and
 LARA NICOLE HOWELL,

Defendants.
 -----X

SIBEN & SIBEN, LLP
 Attorney for Plaintiff
 90 East Main Street
 Bay Shore, New York 11706

MILBER MAKRIS PLOUSADIS &
 SEIDEN, LLP
 Attorney for Defendants Rapid Recovery
 Towing Ltd. and Kenny Rodriguez
 1000 Woodbury Road, Suite 402
 Woodbury, New York 11797

MARTYN, MARTYN, SMITH &
 MURRAY
 Attorney for Defendants Howell
 330 Old Country Road, Suite 211
 Mineola, New York 11501

Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion and supporting papers on Mot. Seq. # 001 by defendants Gerald Howell and Lara Howell, filed August 28, 2023; Notice of Motion and supporting papers on Mot. Seq. # 002 by defendants Rapid Recovery Towing Ltd. and Kenny Rodriguez, filed October 16, 2023; Answering Affidavits and supporting papers on Mot. Seq. #001 and #002 by plaintiff, filed November 28, 2023; Answering Affidavits and supporting papers on Mot. Seq. #002 by defendants Gerald Howell and Lara Howell, filed November 30, 2023; Replying Affidavits and supporting papers on Mot. Seq. # 001 by defendants Gerald Howell and Lara Howell, filed December 5, 2023; Replying Affidavits and supporting papers on Mot. Seq. # 002 by defendants Rapid Recovery Towing Ltd. and Kenny Rodriguez, filed December 19, 2023; it is

Strebel v Rapid Recovery Towing
Index No. 608877/2020
Page 2

ORDERED that the motion (001) by defendants Gerald E. Howell and Lara Nicole Howell, and the motion (002) by defendants Rapid Recovery Towing Ltd. and Kenny Rodriguez, are hereby consolidated for the purposes of this determination; and it is further

ORDERED that the motion by defendants Gerald E. Howell and Lara Nicole Howell for summary judgment dismissing the complaint and all cross-claims against them is denied; and it is further

ORDERED that the motion by defendants Rapid Recovery Towing Ltd. and Kenny Rodriguez for summary judgment dismissing the complaint and all cross-claims against it is granted.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Maureen Strebel as a result of a motor vehicle accident that occurred on Montauk Highway, near its intersection with Eastport-Manor Road, in Brookhaven, New York, on July 22, 2019. The accident allegedly occurred when the vehicle owned by defendant Gerald E. Howell and operated by defendant Lara Nicole Howell (hereinafter the Howell defendants) struck plaintiff's vehicle, after plaintiff allegedly was waived on to proceed by a vehicle owned by defendant Rapid Recovery Towing Ltd. and operated by Kenny Rodriguez (hereinafter the Rodriguez defendants). The Howell defendants and the Rodriguez defendants asserted cross-claims against each other.

The Howell defendants now move for summary judgment dismissing the complaint against them, arguing that plaintiff's negligence was the sole proximate cause of the accident, in that she entered defendant's lane of travel when it was not safe to do so. In support of the motion, the Howell defendants submit, among other things, the pleadings and the parties' deposition transcripts. Plaintiff argues in opposition that Lara Howell was negligent, because she was speeding, and that triable issues of fact exist as to how the accident occurred.

Defendants Rapid Recovery Towing Ltd. and Kenny Rodriguez now move for summary judgment, arguing that plaintiff relied on her own senses and not upon the alleged gestures by Kenny Rodriguez when she proceeded into the roadway, and that she failed to see that which she should have seen. In support of the motion, the Rodriguez defendants submit, among other things, the pleadings, the parties' deposition transcripts, and an uncertified copy of the police accident report. Plaintiff argues in opposition that there are questions of fact as to the cause of the accident, because Kenny Rodriguez honked his horn and waived plaintiff on.

Plaintiff testified at her deposition that just before the accident, she was attempting to exit a King Kullen supermarket parking lot by making a right-hand turn onto Montauk Highway. She testified that she brought her vehicle to a stop before entering the roadway. She testified that there was a tow truck stopped for a red light, and that the driver of the truck waved her out, indicating that she could drive into the space in front of his truck. She testified that she looked to her right and left multiple times before she began turning onto Montauk Highway, that she did not see any vehicles approaching on her left, that she believed it was safe to proceed, and that she relied on her own senses to decide whether it was safe to enter the roadway. Plaintiff also testified that she was able to see "[a]bout 15 to 20 car lengths" down

Strebel v Rapid Recovery Towing
Index No. 608877/2020
Page 3

on her left and that nothing was obstructing her vision. She stated that the vehicle that struck her “came out of nowhere,” and that she did not hear any honking or skidding sounds prior to the impact.

Kenny Rodriguez testified that just before the accident, he was traveling westbound on Montauk Highway and was stopped at a red light. He testified that once the light turned green, plaintiff waved at him and then turned out, and that he then heard a horn sounding and observed a car speeding, “flying down the shoulder into the turning lane and hitting [plaintiff].” He denied ever waving or honking his horn to plaintiff, but testified that he made eye contact with plaintiff and that she waved at him before beginning to exit the parking lot.

Lara Howell testified that just before the accident, she was traveling westbound on Montauk Highway and driving within the speed limit. She testified that there is a right turn lane on Montauk Highway that begins before the entrance and exit of the supermarket parking lot, that she entered the turning lane “as soon as it began,” with the intention of turning onto Eastport Manor Road, and that she had a green turn signal in her favor. Lara Howell further testified that she noticed plaintiff’s vehicle stopped in the exit of the parking lot, and that just as she began to pass plaintiff’s vehicle, plaintiff accelerated and struck the side of her vehicle. She stated that she was traveling 15 to 20 mph at the time of impact.

Initially, the court notes that the uncertified police accident report submitted by the Rodriguez defendants is not in admissible form, and, therefore, was not considered in the determination of this motion (*see* CPLR § 4518; *Zeldin v Larose*, 223 AD3d 858, 203 NYS3d 707 [2d Dept 2024]; *Yassin v Blackman*, 188 AD3d 62, 131 NYS3d 53 [2d Dept 2020]).

Vehicle and Traffic Law § 388 (1) provides that the owner of a motor vehicle is liable for damages resulting from the negligence of one who uses or operates that vehicle with the permission, express or implied, of such owner (*see Rodriguez v Morales*, 217 AD3d 695, 190 NYS3d 452 [2d Dept 2023]; *Kelly v Starr*, 181 AD3d 799, 120 NYS3d 373 [2d Dept 2020]). By their pleadings and deposition testimony, the Howell defendants admit that Gerald E. Howell is the owner of the subject vehicle and that Lara Nicole Howell was operating the vehicle with Gerald E. Howell’s permission and consent at the time of the accident. Additionally, by their pleadings and deposition testimony, the Rodriguez defendants admit that Rapid Recovery Towing, Ltd. is the owner of the tow truck and that Kenny Rodriguez was operating it with the owner’s permission and consent at the time of the accident.

To establish *prima facie* entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 48 NYS2d 316 [1985]). If such a showing is made, the burden shifts to the party opposing the motion for summary judgment, who must proffer evidence in admissible form sufficient to establish the existence of any material issue of fact which requires a trial (*Alvarez v*

Strebel v Rapid Recovery Towing
Index No. 608877/2020
Page 4

Prospect Hosp., 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (*see Kishun v Roman*, 221 AD3d 795, 796, 198 NYS3d 209 [2d Dept 2023]; *Lopresti v Estate of Galante*, 221 AD3d 798, 198 NYS3d 205 [2d Dept 2023]). Although the operator of a vehicle with the right-of-way is entitled to assume other drivers will obey traffic laws requiring them to yield, the driver with the right-of-way also has a duty to exercise reasonable care to avoid collisions with other vehicles (*see Laureano v EAN Holdings, LLC*, ___AD3d___, 2024 NY Slip Op 01538 [2d Dept 2024]; *Hernandez-Martinez v Wang*, 221 AD3d 977, 200 NYS3d 435 [2d Dept 2023]). As there can be more than one proximate cause of an accident, a defendant driver who is seeking summary judgment must make a prima facie showing that he or she is free from comparative fault (*Laureano v EAN Holdings, LLC*, ___AD3d___, 2024 NY Slip Op 01538; *Ballentine v Perrone*, 179 AD3d 993, 114 NYS3d 696 [2d Dept 2020]; *Inesta v Florio*, 159 AD3d 682, 682, 71 NYS3d 161 [2d Dept 2018]). A defendant driver seeking summary judgment on the issue of liability must establish that he or she kept the proper lookout, or that his or her alleged negligence did not contribute to the accident (*Ballentine v Perrone*, 179 AD3d 993, 994, 114 NYS3d 696, 697-698). It is generally for the fact-finder to determine the issue of proximate cause (*see Hain v Jamison*, 28 NY3d 524, 46 NYS3d 502 [2016]; *Floracic v City of New York*, 212 AD3d 434, 183 NYS3d 7 [1st Dept 2023]). Additionally, summary judgment is not warranted where the parties submit conflicting deposition testimony that fails to eliminate triable issues of fact as to how the accident occurred (*see Schmitz v Pinto*, 220 AD3d 681, 197 NYS3d 326 [2d Dept 2023]; *Golovnya v Artemchenko*, 210 AD3d 1058, 180 NYS3d 177 [2d Dept 2022]; *Baah v HP, Inc.*, 211 AD3d 783, 181 NYS3d 124 [2d Dept 2022]).

Here, the Howell defendants' submissions are insufficient to establish that defendants were free from fault in the happening of the accident, or that plaintiff's negligence was the sole proximate cause of the accident (*see Rogers v Consolidated Edison Co. of New York, Inc.*, 223 AD3d 689, 204 NYS3d 360 [2d Dept 2024]). The parties' conflicting accounts of how the accident occurred, including whether Lara Howell was speeding, raise triable issues of fact as to whether she exercised reasonable care while driving on Montauk Highway, and whether she caused or contributed to the accident (*see Rogers v Consolidated Edison Co. of New York, Inc.*, 223 AD3d 689, 204 NYS3d 360; *Golovnya v Artemchenko*, 210 AD3d 1058, 180 NYS3d 177).

However, the Rodriguez defendants have established their prima facie entitlement to summary judgment as a matter of law. "When one driver chooses to gratuitously signal to another person, indicating that it is safe to proceed or that the signaling driver will yield the right-of-way, the signaling driver assumes a duty to do so reasonably under the circumstances; this duty is owed to pedestrians and other motorists and passengers as well as to the person who is being signaled" (*Dolce v Cucolo*, 106 AD3d 1431, 1431, 966 NYS2d 581, 582-583 [3d Dept 2013]; *see also Dyakiw v Salian*, 216 AD3d 619, 188 NYS3d 149 [2d Dept 2023]). However, whether the signaling driver is liable depends on whether the recipient of the gesture relied on it as an indication the path was safe and clear (*see Nasadoski v Shaut*, 115 AD3d 1026, 983 NYS2d 123 [3d Dept 2014]; *Dolce v Cucolo*, 106 AD3d 1431, 966 NYS2d 581; *see also Ohlhausen v City of New York*, 73 AD3d 89, 898 NYS2d 120 [1st Dept 2010]). Here,

Strebel v Rapid Recovery Towing
Index No. 608877/2020
Page 5

plaintiff testified that she was able to see 15 to 20 car lengths down to her left on Montauk Highway, that she looked both ways multiple times, and that she felt it was safe to proceed when she began pulling out of the parking lot onto Montauk Highway (*see Wright v Seidner*, 291 AD2d 555, 737 NYS2d 664 [2d Dept 2002]). Although plaintiff's testimony conflicts with Kenny Rodriguez's testimony, in that he denies waving to plaintiff, plaintiff testified that she relied on her own senses in determining that it was safe to pull out of the parking lot onto Montauk Highway. Plaintiff failed to raise a triable issue of fact in opposition.

Accordingly, the Howell defendants' motion is denied, and the Rodriguez defendants' motion for summary judgment dismissing plaintiff's complaint and all cross-claims against them is granted.

Dated: May 15, 2024



Hon. C. Stephen Hackeling, J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION