CV-10-101-00

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

DELIA BOZOLASCO

Plaintiff

- and -

RAFAEL ESTACIO and JUAN BOZOLASCO

Defendants

ENDORSEMENT RELEASED JUNE 12, 2014

For defendant Rafael Estacio: Mester, N.

For defendant Juan Bozolasco: Sproule, W.

For plaintiff: E. Shlomovitz

The Defendant, Juan Bozolasco (J.B.) seeks summary judgment dismissing the claim against him. The plaintiff consents. The defendant, Rafael Estacio (R.E.) opposes. The issue is whether there is a genuine issue requiring trial with respect to the allegations of negligence against J.B.

The action arises from a motor vehicle accident on Aug. 21, 2008. The plaintiff was a passenger in the vehicle driven by J.B., who was traveling NB at an intersection in Mississauga. The defendant, R.E., was travelling SB and attempting a left hand turn to go eastbound when his vehicle struck the driver's side of J.B.'s vehicle. RE later pleaded guilty to making an improper left turn.

There are 4 witnesses whose evidence supports the conclusion that R.E. was negligent in making the left hand turn. The substance of their evidence, as a whole, also leads to the conclusion that J.B.'s vehicle was proceeding lawfully through the intersection and could not have avoided the accident that occurred as a result of R.E.'s left turn.

There is no dispute that R.E.'s guilty plea *per se* is not dispositive of the entire issue of negligence in this action. What the defendant R.E. argues in opposing this motion is that there is evidence that J.B. did not exercise reasonable care to avoid the accident, or at least minimize the damages, and that, had he done so, he would have avoided , or at least minimized the impact despite R.E.'s unsafe left turn. He submits that this is an issue requiring a trial to apportion liability.

Counsel for R.E. points to inconsistencies in the evidence supporting J.B.'s account of the accident. He submits, for example, that one independent witness asserts that J.B.'s vehicle was stopped at the intersection at one point, which contradicts J.B.'s own and the other witness' versions of the events. The same witness says that J.B.'s vehicle was travelling somewhere between 30 -45 km/hr, yet describes the vehicle as travelling 2 lanes in 1 - 2 seconds, which counsel submits would not be possible. Counsel takes the position that some independent witness' testimony is also unreliable because he gave the wrong colour for the car, and said he was more concerned about the welfare [erratum] and safety of the occupants than the car – evidence counsel submits would support the conclusion he did not really see how the accident occurred. The defendant R.E. also argues that the evidence of J.B. having taken a Percocet tablet that morning and the uncertainty about whether he took another one that afternoon before the accident, supports the conclusion that J.B. was not focussed on his driving and thus failed to react and exercise reasonable care to avoid or minimize the impact.

The Defendant R.E. raises other similar challenges based on minor aspects of each of the defendant J.B.'s witness;es [erratum] testimony.

Based on these challenges it would appear there may be a triable issue raised the defendant R.E.. However, as directed by the Supreme Court in <u>Hryniak</u> v. <u>Mauldin</u> – 2014 SCC 7, that is not the end of the matter to be considered on this motion.

As stated in paragraph 66 of <u>Hryniak</u>, "If there appears to be a genuine issue requiring a trial, [the motions judge] should then determine if the need for a trial can be avoided by using the new powers under Rules 20.04(2.1) and (2.2). She may, at her discretion, use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if they will lead to a fair and just result and will serve the goals of timeliness, affordability and proportionality in light of the litigation as a whole." The Court goes on to state in para. 67

that “these powers are presumptively available, rather than exceptional, in line with the goal of proportionate, cost-effective and timely dispute resolution.”

The powers granted by the Rule are: weighing the evidence; evaluating the credibility of a deponent and drawing any reasonable inference from the evidence.

In the case at bar there are two independent witnesses who have been deposed about what they observed at the accident scene. Having regard to all the evidence before me, there is no question that the defendant R.E.’s vehicle struck the side of J.B.’s vehicle when it was in the intersection proceeding lawfully through the intersection. Although the defendant R.E. disputes, or does not admit, the authenticity of the police report and the vehicle damage estimate details, there is no evidence to refute the conclusion about the circumstances of the accident. When the court assesses the evidence of each witness, and also the evidence as a whole, there is no basis upon which the court, on a balance of probabilities, would conclude that J.B. did not exercise reasonable care to avoid the impact of R.E.’s vehicle, which impact occurred due to R.E.’s negligence in making an unsafe left turn when the intersection was not clear.

The evidence of R.E. provides nothing more than speculation about J.B.’s lack of reasonable care. J.B.’s evidence that he does not take Percocet if he is going to be driving in the afternoon accords with common sense. Moreover there is no evidence of any negative effect such a tablet could have on a driver’s attention. Although each witness struggles with providing an exact measure of the driver’s speeds, overall the evidence supports the conclusion that J.B. was proceeding under the speed limit through the intersection, whereas R.E. was going at an unsafe speed and under unsafe circumstances into the intersection when he hit J.B.’s vehicle. Both independent eye witnesses to the accident say R.E.’s vehicle was going too fast when it entered the intersection and unfortunately struck J.B.’s vehicle. Both observed J.B.’s vehicle was already in the intersection travelling at a safe speed when R.E.’s vehicle hit it. There is no cogent evidence to support a finding of any negligence on the part of J.B., and R.E.’s bald claim in his examination that the “hit” was not his fault does not change that conclusion.

I find, therefore, that there is no issue as against the defendant J.B. that requires a trial. In the interests of timeliness, affordability and proportionality in light of the litigation as a whole, summary judgment shall issue dismissing the plaintiff’s claim against the defendant, Juan Bozolasco.

As the defendant J.B. has been wholly successful on this motion and action he is entitled to costs. If the parties are unable to agree on the disposition of costs counsel shall deliver brief written submissions on costs: for the defendant J.B. by June 26, 2014; for R.E. by July 10, 2014; and for the plaintiff by July 17, 2014. Reply submissions, if any, by July 26, 2014.

Order accordingly

“Seppi, J.”