Index No: 32949/2010

SHORT FORM ORDER

Supreme Court - State of New York
IAS PART 6 - SUFFOLK COUNTY

MOTION DATE: 07-18-2012
ADJ. DATE: 09-06-2012
MOT. SEQ: 002 MD

PRESENT:

Hon. RALPH T. GAZZILLO
A.J.S.C.

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Linda Young,

Plaintiff(s),

- against -

Melissa Wagner, Dorothy Konchar, Michael Milo and Stephen Milo,

Defendant(s).

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Upon the following papers numbered 1 to 29 read on this motion pursuant to CPLR §3212; Notice of Motion and supporting papers numbered 1-17; Affirmation in Opposition and supporting papers numbered 18-20; Affirmation in Opposition and supporting papers numbered 21-23; Affirmation in Opposition and supporting papers numbered 24-26; Replying Affidavits and supporting papers numbered 27-29; it is,

ORDERED that the motion (seq 002) by plaintiff for partial summary judgment on the issue of liability is denied with respect to all defendants Konchar and Wagner; and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry upon counsel for all other parties, pursuant to CPLR §§2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court.

Plaintiff, Linda Young, commenced this action to recover damages for personal injuries arising from three separate motor vehicle accidents that she was involved in during 2010. Chronologically speaking, the first accident involved plaintiff and defendant Michael Milo on January 10, 2010 when Milo (driving a vehicle owned by defendant Stephen Milo) hit plaintiff in a parking lot of an Amoco gasoline station as he was exiting the gasoline pump area at 2 West Montauk Highway in Babylon. The second accident took place on May 24, 2010 when defendant Melissa Wagner allegedly rear-ended plaintiff while heading westbound on Montauk Highway in West Babylon. The last accident, involving plaintiff and defendant Dorothy Konchar, took place on August 13, 2010 at the intersection of Eighth Street and Montauk Highway in Babylon after defendant Konchar allegedly ran a stop sign at the intersection.

Plaintiff now moves for summary judgment in her favor on the issue of liability against all three defendants essentially alleging that the defendants have no non-negligent explanation for striking her vehicle in each of the aforementioned accidents.

With respect to the January 10, 2010 accident, plaintiff testified at her deposition that she was operating her in the parking lot of the Amoco gas station headed straight towards the convenience store when she was struck in the driver's side door by defendant Michael Milo. Plaintiff further asserts that defendant Michael Milo testified that at the time of the accident, he was not looking forward and did not see plaintiff's vehicle prior to the impact.

Defendant Michael Milo opposes the motion asserting that because of plaintiff's failure to take an evasive action raises triable issues of fact as to the plaintiff's negligence. Specifically, defendant Milo points to plaintiff's deposition testimony wherein she testified that "[a]s I was going straight, he hit me". In addition, plaintiff testified that she observed defendant Milo's vehicle while proceeding into the parking lot, but did not see the vehicle Defendant Milo asserts that this statement shows that the plaintiff failed to act reasonably to avoid the collision.

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 (*see*, ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Center***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 925 [1980]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see*, ***Alvarez v Prospect Hosp.***, *supra*; ***Winegrad v New York Univ. Med. Center***, *supra*). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see,* ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, *supra*).

Here, the conflicting deposition testimony of the parties as to the happening of the accident raises issues of credibility which may not be resolved on a summary judgment motion (*see* ***Gordan v Honig,*** 40 AD3d 925, 837 NYS2d 197 [2007]; ***Ahr v Karolewski,*** 48 AD3d 719, 853 NYS2d 172 [2008]; ***Kolivas v Kirchoff***, 14 AD3d 493, 787 NYS2d 392 [2005]). Moreover, there are several triable issues of fact as to where the impact actually occurred and whether plaintiff failed to act reasonably under the circumstances. Therefore, plaintiff has failed to sustain the initial burden of establishing a prima facie entitlement to judgment as a matter of law. Accordingly, the portion of motion by plaintiff which is directed at defendant Milo for summary judgment is denied.

With respect to the May 24, 2010 accident, plaintiff alleges that defendant Wagner rear-ended her vehicle while both vehicles were heading westbound on Montauk Highway. Plaintiff testified that the reason she stopped her vehicle was due to a family of geese crossing the roadway. Defendant Wagner testified that the plaintiff came to a sudden stop twice just after traffic had

stopped for a red light. Thereafter, defendant Wagner testified that her vehicle slid into the plaintiff's vehicle.

"A rear-end collision with a stopped "or stopping" vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (citations omitted). One of several nonnegligent explanations for a rear-end collision is a sudden stop of the lead vehicle" (Chepel v Meyers, 306 A.D.2d 23, 237).

Although the rear driver is bound to maintain a reasonably safe rate of speed and control over his vehicle to avoid colliding with a vehicle in front of his (see ***Power v Hupart,*** 260 AD2d 458; VTL §1129[a]), drivers are also duty bound not to stop suddenly or to slow down without proper signaling in order to avoid a collision from the rear (*see* ***Chepel v Meyers,*** 306 AD2d 235; Purcell v Axelsen, 286 AD2d 379; Colonna v Suarez, 278 AD2d 355). A situation in which the forward driver stopped suddenly or slowed down quickly without proper signaling qualifies as a non-negligent explanation for a rear-end collision (see ***Chepel v Meyers,*** 306 AD2d 235; ***Filippazzo v Santiago,*** 277 AD2d 419; ***Power v Hupart***, 260 AD2d 458). Moreover, the issue of whether debris (in this case geese) in roadway caused an emergency situation (resulting in the front car stopping short) is usually a question for the trier of fact (***Haider v. Zadrozny,*** 61 AD3d 1077; ***Schlanger v. Doe,*** 53 AD3d 827). On the record before the court on this motion, there are contradictory versions of how this accident occurred. Consequently, there are material issues of fact requiring a trial (*see* ***Zuckerman v City of New York,*** 49 NY2d 557).

With regard to the August 13, 2010 accident, plaintiff alleges that defendant Konchar ran a stop sign at the intersection of Eighth Street and Montauk Highway and therefore was the sole cause of the collision with the plaintiff entitling plaintiff to summary judgment on the issue of liability with respect to defendant Konchar.

Defendant's counsel does not dispute that defendant Konchar was partially responsible for the collision, but argues that plaintiff's failure to exercise reasonable care to avoid a collision may require her to be held to be partially at fault for the accident. In support of Konchar's position, counsel submits the sworn deposition testimony of plaintiff wherein the plaintiff acknowledges first seeing defendant Konchar's vehicle when approaching the intersection of 6th Street with Montauk Highway. Plaintiff testified that she was in the left lane of Montauk Highway and remained in that lane traveling at a speed of 40 mph and did not slow down, change lanes or taking another evasive action to avoid the impact with Ms. Konchar's vehicle. Furthermore, Konchar claims that the fact that plaintiff's vehicle flipped over following the impact, makes it likely that plaintiff was traveling at an excessive rate of speed. Accordingly, defendant argues that these issues preclude the Court from granting partial summary judgment to plaintiff.

Although defendant Konchar has acknowledged partial liability with respect to the collision,

it appears that there is a question of fact with regard to whether plaintiff's failure to take any evasive action contributed to the accident. Plaintiff's testimony reveals that she did not turn, brake or slow down despite the fact that she observed defendant Konchar's vehicle for a period of time prior to the collision (see, ***King v Washburn***, 273 A.D.2d 725; Greco v Boyce, 262 A.D.2d 734).

On the record before the court on this motion, there are contradictory versions of how this accident occurred. Consequently, there are material issues of fact requiring a trial (*see* ***Zuckerman v City of New York,*** 49 NY2d 557).

Accordingly, the motion is decided as set forth herein.

Dated: 12/3/12
RIVERHEAD, NY

Ralph T. Gazzillo
A.J.S.C.

NON-FINAL DISPOSITION

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