

**Rivera v Fazio**

2016 NY Slip Op 33170(U)

September 19, 2016

Supreme Court, Westchester County

Docket Number: Index No. 55116/15

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under 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 WESTCHESTER

-----X  
JORGE L. RIVERA and FRANCESCA A. ADELFIGIO,

Plaintiff,

-against-

JOANN A. FAZIO,

Defendant.

-----X  
EVERETT, J.

Index No. 55116/15  
Motion Sequence No. 001  
Decision and Order

The following papers were read on the motion:  
Notice of Motion/Affirmation in Supp/Affidavit in Supp/Exhibits A-K/Aff of Service

Upon the forgoing papers, the motion is granted.

Plaintiffs Jorge L. Rivera (Rivera) and Francesca A. Adelfio (Adelfio) move for an order, pursuant to CPLR 3212, granting summary judgment against defendant Joann A. Fazio (Fazio) on the issue of liability and for a dismissal of her first, fifth, sixth and seventh affirmative defenses. The motion is unopposed.

The following facts are taken from the parties' pleadings, motion papers, affidavits and documentary evidence and the record, and are undisputed unless otherwise indicated.

The complaint, as amplified in the bill of particulars, alleges that, on July 19, 2014, Rivera, with the knowledge and consent of his wife, Adelfio, the registered owner of a 2011 Kia motor vehicle bearing New York State license plate number FPL4439, was driving the Kia on Park Avenue in Harrison, New York, when a vehicle owned and operated by Fazio struck the

driver's side of the Kia. More specifically, it is claimed that, Rivera had been stopped at a traffic light at the intersection of Park and Harrison Avenues. When the light turned green, Rivera proceeded into the intersection. Fazio, who was traveling on Harrison Avenue, passed through the subject traffic light, which was red in her direction, and the front of her vehicle struck the driver's side of Rivera's vehicle. When Rivera exited his vehicle and went over to Fazio to see if she was all right, he noticed that she was intoxicated; and when he inquired, she stated that she had been drinking.

When the police arrived at the scene, Fazio was arrested and charged with driving while intoxicated under Vehicle and Traffic Law § 1192. On or about October 20, 2015, Fazio was found guilty of driving while intoxicated.

Plaintiffs commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on April 1, 2015, to recover damages for injuries they allegedly sustained as a result of the accident occurring on July 19, 2014. The complaint contains two causes of action. The first sounds in negligence, and the second is derivative in nature.

Issue was joined by service of Fazio's answer with boilerplate denials and seven affirmative defenses on or about April 17, 2015. As relevant here, the first affirmative defense alleges contributory negligence. The fifth affirmative defense alleges assumption of risk. The sixth affirmative defense alleges that plaintiffs' injuries were caused, or aggravated by, Rivera's failure to wear a seat belt or other safety restraining device, and the seventh affirmative defense alleges that plaintiffs' injuries were not caused by any acts or omissions of Fazio.

The parties pursued discovery pursuant to a preliminary conference order and several compliance conference orders, after which plaintiffs filed a note of issue and certificate of

readiness, and then served the instant motion for summary judgment. The gravamen of the motion is that plaintiffs are entitled to summary judgment on the issue of liability and to a dismissal of the four related affirmative defenses, because Fazio's negligence was the sole proximate cause of the accident, and because, other than Fazio's conjecture, there is no basis for alleging that Rivera was not wearing his seatbelt.

As the proponents of the motion for summary judgment, plaintiffs must tender evidentiary proof in admissible form sufficient to warrant the court to direct judgment in their favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

To this end, plaintiffs submit, among other things, copies of: the requisite pleadings; Rivera's sworn affidavit attesting to the underlying facts, including the fact that he was wearing a seatbelt at the time of the accident; the deposition transcripts of Rivera and Adelfio in which they testify to the underlying facts, including Rivera's sworn statement that he was wearing a seatbelt at the time of the accident (Rivera tr. at 35); the deposition transcript of Fazio in which she admits to drinking alcohol prior to driving that evening, and to intending to make a turn at the subject traffic light when "[i]n a flash, I was on the side of the road, that I realized I was in an accident" (Fazio tr. at 20, 22, 27, 29); uncertified copies of the police accident report, medical records, insurance claim documents; and a certificate of disposition from Harrison Town Court attesting to Fazio's conviction on the charge of driving while intoxicated brought against him stemming from this incident.

By this evidence, plaintiffs have satisfied their prima facie burden of establishing negligence (liability) on the part of Fazio as a matter of law, shifting the burden to Fazio to come

forward with a nonnegligent explanation supported by evidentiary proof in admissible form sufficient to require a trial on one or more issues of fact (*Zuckerman v City of New York*, 49 NY2d at 562; *Robayo v Aghaabdul*, 109 AD3d 892, 893 [2d Dept 2013]). However, by defaulting on the motion, Fazio has waived her opportunity to raise a triable issue of fact sufficient to forestall summary judgment.

Accordingly, it appearing to the Court that plaintiffs are entitled to judgment as to liability, and to a dismissal of the affirmative defenses which relate to that issue, it is

ORDERED that the motion for summary judgment is granted as to liability; and it is further

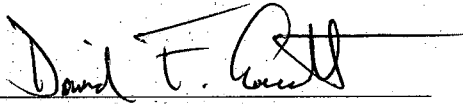
ORDERED that the first, fifth, sixth and seventh affirmative defenses are dismissed; and it is further

ORDERED that the parties are directed to appear with counsel in the Hon. Richard J. Daronco Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, at the Settlement Conference Part, Courtroom 1600, on Tuesday, October 11, 2016, at 9:15 a.m.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
September 19, 2016

ENTER:

  
HON. DAVID F. EVERETT, A.J.S.C.

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