

Verno v Fahey

2018 NY Slip Op 34329(U)

April 24, 2018

Supreme Court, Westchester County

Docket Number: Index No. 68975/16

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
NANCY VERNO,

Plaintiff,

-against-

ROSE G. FAHEY,

Defendant.

-----X
EVERETT, J.

Index No. 68975/16
Motion Sequence No. 001
Decision and Order

The following papers were read on the motion:

Notice of Motion/Affirmation in Supp/Exhibits A-F/Aff of Serv (docs 25-33)

In this personal injury, plaintiff Nancy Verno (Verno) moves for orders, pursuant to CPLR 3212, granting summary judgment against defendant Rose G. Fahey (Fahey) on the questions of liability and whether she sustained a serious injury as defined under Insurance Law § 5103 (d). Verno also seeks an order striking Fahey's affirmative defenses sounding in comparative negligence, culpable conduct, lack of serious injury, and failure to use a seatbelt, and based on her contention that the accident was caused by circumstances outside of her control. Upon the foregoing papers, the unopposed motion is granted.

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

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on December 15, 2016, to recover damages for injuries she allegedly sustained as a result of a head-on automobile accident that occurred on September 21,

2016. According to Verno, the accident occurred on Lovell Street in the Town of Somers, New York, when, at approximately 12:46 p.m., Fahey's vehicle crossed the double yellow line into Verno's lane and struck the front of Verno's vehicle. Verno alleges that, as a result of Fahey's negligence, she sustained serious physical injuries, which meet the No-Fault threshold for recovery based on non economic loss for pain and suffering. Issue was joined by service of Fahey's answer with affirmative defenses on or about January 5, 2017. The parties conducted extensive discovery pursuant to the preliminary conference and follow-up compliance conference orders, and on February 9, 2018, Verno filed a note of issue and certificate of readiness.

Verno now moves for summary judgment, and Fahey does not oppose any part of the motion.

Under New York law, it is well settled that the proponent of the motion for summary judgment must tender evidentiary proof in admissible form sufficient to warrant the court to direct judgment in her favor as a matter of law on the issues of liability and severity of injuries (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). It is also well settled in New York that "[c]rossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law § 1126 (a), constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver's own making" (*Foster v Sanchez*, 17 AD3d 312, 313 [2d Dept 2005]). As indicated above, Fahey does not deny driving her vehicle across the double yellow line on Lovell Street, and into the opposing lane of traffic, where she struck Verno's vehicle.

With respect to Verno's claim of serious physical injuries, under New York's No-Fault law, as codified under Article 51 of the Insurance Law, a person who is injured in an automobile

accident can only recover for pain and suffering from the owner or driver of the offending vehicle if one or more of the injuries sustained by the person constitute a serious injury within the meaning of the Insurance Law. Insurance Law § 5102 (d) defines a serious injury as:

“a personal injury which results in death; dismemberment; significant disfigurement; a fracture; loss of a fetus; permanent loss of use of a body organ, member, function or system; permanent consequential limitation of a use of a body organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person’s usual and customary daily activities for not less than ninety days during the one hundred eighty days immediately following the occurrence of the injury or impairment.”

To make the requisite showing for summary judgment, Verno submits copies of the pleadings, a certified copy of the police report relative to the accident; her deposition transcript; and certified records of Westchester Medical Center, the facility to which she was removed for medical treatment following the accident.

In her deposition, Verno explained that, when she first observed Fahey’s vehicle, it was traveling in her (Verno’s) lane, then corrected back into Fahey’s own lane. Verno further explained that she responded to the movement of Fahey’s vehicle by slowing her own vehicle to about 10 miles per hour, and by pulling as far over to the side of the road as she could to try to avoid the oncoming vehicle, which was traveling at about 40 to 45 miles per hour (Verno tr at 41, 42, 43). Verno testified that Fahey then crossed back into her (Verno’s) lane and drove head-on into the front of her vehicle (*id.* at 32-46, generally). Verno described the impact as a “crushing” of the front of her vehicle and of her right leg, which was left dangling (*id.* at 47, 60). She recalled the police arriving at the scene and being taken by ambulance to Westchester Medical Center, where she underwent surgery for a fracture of the tibia and fibula of her right

ankle, and was treated for her other injuries, which include fractures of her right wrist, her sternum and her neck and back between C7 and T4 (*id.* at 64, 65). Verno testified that she was subsequently transferred from Westchester Medical Center to the Helen Hayes Rehabilitative Hospital where she remained until October 15, 2016.

Both the certified police report and the certified hospital records confirm Verno's testimony, and by this evidence, Verno establishes prima facie entitlement to judgment as a matter of law as to liability and the severity of her injuries (*see Zuckerman v City of New York*, 49 NY2d at 562). Having made this showing, the burden shifts to Fahey to raise a question of fact sufficient to forestall summary judgment (*id.*). Fahey, who does not submit opposition to the motion, does not challenge any of Verno's assertions, including the severity of her injuries, nor does Fahey claim that she crossed the double yellow line due to an emergency situation (*see Foster v Sanchez*, 17 AD3d at 313). By failing to oppose or contest any of Verno's factual assertions, Fahey, in effect, concedes that no questions of fact exist (*see Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *see also Admiral Ins. Co. v Marriott Intl., Inc.*, 79 AD3d 572, 577 [1st Dept 2010]).

It appearing to the Court that plaintiff is entitled to judgment as to liability and as to the severity of her claimed injuries, and that the only triable issues of fact arising on plaintiff's motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that plaintiff's motion is granted as to liability and as to the severity of her claimed injuries; and it is further

ORDERED that defendant's affirmative defenses are stricken; and it is further

ORDERED that counsel shall appear in the Settlement Conference Part in courtroom

1600, Westchester County Courthouse, 111 Dr. Martin Luther King, Jr., Blvd., White Plains,
New York, on Tuesday, May 29, 2018, at 9:15 a.m., to schedule a trial on damages.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
April 24, 2018

ENTER:



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

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