

Tosado v Grieco

2019 NY Slip Op 34361(U)

June 3, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 619956/2018

Judge: Jr., Paul J. Baisley

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SHORT FORM ORDER

INDEX NO. 619956/2018

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr., J.S.C.

TRACEY L. TOSADO,

Plaintiff,

-against-

VIRGINIA GRIECO and RACHEL GRIECO,

Defendants.

VIRGINIA GRIECO and RACHEL GRIECO

Third-Party Plaintiffs,

-against-

HECTOR AVILA,

Third-Party Defendant.

ORIG. RETURN DATE: February 19, 2019

FINAL RETURN DATE: March 19, 2019

MOT. SEQ. # 001 MG

MOT. SEQ. # 002 MD

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Upon the following papers e-filed and read on these motions for summary judgment : Notice of Motion and supporting papers by plaintiff, dated January 30, 2019 ; by third-party defendant Hector Avila, dated February 6, 2019; Answering Affidavits and supporting papers by defendants, dated March 7, 2019 ; Replying Affidavits and supporting papers by plaintiff, dated March 14, 2019 ; by third-party defendant Avila, dated March 18, 2019; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that plaintiff's motion for an order pursuant to CPLR 3212 (e) granting partial summary judgment in her favor on the issue of liability is granted; and it is further

ORDERED that the motion by third-party defendant Hector Avila for summary judgment dismissing the third-party complaint as against him is denied; and it is further

ORDERED that the parties to this action shall appear for a preliminary conference on July 2, 2019 at 10:00 a.m. at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident which occurred on August 28, 2018. The accident allegedly happened when a vehicle owned by defendant Virginia Grieco, and driven by defendant Rachel Grieco collided with the vehicle in which plaintiff was a passenger, when it attempted to make a left turn in an

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intersection without yielding the right-of-way to plaintiff's vehicle in violation of Vehicle and Traffic Law §1141. Third-party defendant Hector Avila was the owner and operator of the vehicle that plaintiff was a passenger in when the collision occurred.

Plaintiff now moves for an order granting partial summary judgment in her favor on the issue of negligence, arguing that defendant Rachel Grieco improperly made a left turn, failed to yield the right of way to plaintiff's vehicle and was the sole proximate cause of her injuries. In support of his motion, plaintiff submits her own affidavit, copies of the pleadings, pictures of the subject vehicles, and a certified police accident report.

Plaintiff submits her own affidavit which was made in Florida and contains a certificate of acknowledgment. In her affidavit, plaintiff states that on the date of the accident, at approximately 8:10 p.m., she was a front-seat passenger in a vehicle owned and operated by her husband, Hector Alvia. She states that their vehicle was proceeding northbound on Main Street near its intersection with Furrows Road in the Town of Islip, New York, and that there is one lane of travel in each direction and a turning lane at the intersection. She states that there is a traffic light at the intersection, that it was illuminated green for the direction they were traveling, and that it was illuminated red for traffic traveling on Furrows Road.

Tosado states that her vehicle was traveling at a rate of 30 mph, and that it was approximately two to three car lengths from the vehicle directly in front of it which had passed through the intersection before her vehicle entered it. She states that when her vehicle was one to two feet into the intersection, she observed defendants' vehicle making a left turn directly in front of her vehicle, and that within a second her vehicle was struck by defendant's vehicle with a heavy impact. She states that Avila steered his vehicle to the right to avoid the collision, but he was unable to avoid it.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*Ming-Fai Jon v Wager*, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; *Katikireddy v Espinal*, 137 AD3d 866, 26 NYS3d 77 [2d Dept 2016]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Vehicle and Traffic Law §1141 provides "[t]he driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." The operator of the right-of-way vehicle is entitled to assume that the oncoming vehicle will obey the traffic laws and yield the right of way (*Gobin v Delgado*, 142 AD3d 1134, 38 NYS3d 63 [2d Dept 2016]; *Kassim v*

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Uddin, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]). However, every driver must operate his or her vehicle in a reasonable manner, and even a right-of-way driver has an obligation to use his or her senses to avoid colliding with other vehicles (*Frey v Richmond Hill Lbr. & Supply*, 132 AD3d 803, 18 NYS3d 407 [2d Dept 2015]).

Here, plaintiff established her prima facie entitlement to summary judgment by demonstrating that the Grieco vehicle failed to yield the-right-of way to plaintiff's vehicle by making a left turn into the path of oncoming traffic when it was not reasonably safe to do so in violation of Vehicle and Traffic Law § 1141 (*Shashaty v Gavitt*, 158 AD3d 830, 71 NYS3d 560 [2d Dept 2018]). Plaintiff also established her prima facie entitlement to summary judgment by demonstrating that she was a nonculpable passenger in the vehicle that was struck by defendants' vehicle (*see Gallo v Jairath*, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]). The burden, therefore, shifted to defendants to proffer evidence in admissible form raising a triable issue of fact (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595).

In opposition, defense counsel argues that the affidavit submitted by Tostado is inadmissible, as it is not accompanied by a certificate of conformity pursuant to CPLR 2309 (c). The affidavit was made in Florida, it was notarized by Vanessa Sanchez, a notary public in Florida, and it contains a Uniform Certificate of Acknowledgment with the requisite language demonstrating that it complies with New York statutes (*see* Real Property Law §§ 299 (3), 311 (5) and 309-b). Under these circumstances, a certificate of conformity is not necessary (*see Meikle v Fremont Inv. & Loan Corp.*, 125 AD3d 616, 3 NYS3d 393 [2d Dept 2015]). In any event, the absence of a certificate of conformity is not a fatal defect (*Midfirst Bank v Agho*, 121 AD3d 343, 991 NYS2d 623 [2d Dept 2014]).

Defendants submit the affidavit of Rachel Grieco. In her affidavit, Grieco states that she entered the subject intersection to turn left on to Furrows Road, and that she stopped momentarily to look for traffic in the opposite direction. She states that she did not see any cars coming in the opposite direction, so she began to turn and was three quarters of the way through her turn when she observed plaintiff's vehicle approaching northbound towards the intersection moving at an excessive rate of speed. She states that she applied the brakes and stopped her vehicle, but plaintiffs' vehicle continued through the intersection and sideswiped her vehicle.

Grieco's affidavit in opposition to plaintiff's motion is insufficient to raise a triable issue of fact, as plaintiff was an innocent passenger, whose right to summary judgment on the issue of liability is not restricted by possible issues of comparative negligence between the drivers of the vehicles involved in the accident (*Gallo v Jairath*, 122 AD3d 795, 996 NYS2d 682).

Defendants also oppose the motion on the grounds that it is premature as they have not conducted discovery. However, defendants fail to demonstrate that additional discovery may lead to relevant evidence or that facts essential to oppose the motion are exclusively within the knowledge and control of plaintiff (*see* CPLR 3212 [f]; *Skura v Wojtowski*, 165 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]; *Richards v Burch*, 132 AD3d 752, 18 NYS3d 87 [2d Dept 2015]; *Suero-Sosa v Cardona*, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process" is an

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insufficient basis for denying the motion (*Gasis v City of New York*, 35 AD3d 533, 534-535, 828 NYS2d 407, 409 [2d Dept 2006]; see also *Dyer Trust 2012-1 v Global World Realty, Inc.*, 140 AD3d 827, 33 NYS3d 14 [2d Dept 2016]; *Savage v Quinn*, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]). Accordingly, plaintiff's motion for an order pursuant to CPLR 3212 (e) granting partial summary judgment in her favor on the issue of liability is granted.

The motion by third-party defendant Hector Avila for summary judgment dismissing the third-party complaint against him is denied. In support of his motion, Avila relies on the documents submitted in support of plaintiff's motion for summary judgment. He claims that the certified police accident report establishes his prima facie entitlement to summary judgment. The police accident report contains a statement by Avila, which is inadmissible hearsay, and a statement by Rachel Grieco which is an admission and is admissible. However, Rachel Grieco's statement that "she thought the lane was clear when turning" does not establish that Grieco was the sole proximate cause of the accident. Absent an affidavit by Avila, a prima facie case for summary judgment in his favor cannot be established, as no proof has been submitted to prove that he was not at fault in the happening of the accident and that defendants were the sole proximate cause of the accident (see *Giannone v Urdahl*, 165 AD3d 106, 286 NYS3d 562 [2d Dept 2018]; *Shashaty v Gavitt*, 158 AD3d 830, 71 NYS3d 560 [2d Dept 2018]; *Hartsuff v Michaels*, 139 AD3d 1005, 33 NYS3d 333 [2d Dept 2016]).

Every driver must operate his or her vehicle in a reasonable manner, and even a right-of-way driver has an obligation to use of his or her senses to avoid colliding with other vehicles (*Frey v Richmond Hill Lbr. & Supply*, 132 AD3d 803, 18 NYS3d 407 [2d Dept 2015]). Having failed to submit competent proof to eliminate triable issues of fact regarding Avila's conduct and the reasonableness of his actions, the motion for summary judgment by third-party defendant Avila is denied.

Dated: 6/3/19



HON. PAUL J. BAISLEY, JR., J.S.C.