Montague v Maldonado
2020 NY Slip Op 34566(U)
May 29, 2020
Supreme Court, Queens County
Docket Number: 701207/2017
Judge: Lourdes M. Ventura

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SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

Present: HONORABLE LOURDES M. VENTURA, J.S.C. IAS Part 37

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ALAN MONTAGUE,

Plaintiff,

-against-

ELMER MALDONADO,
LIDER CONSTRUCTION CORP.,
MARK BROWN, and VICTOR RICE,

Defendants.

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Index Number: 701207/2017

Motion Date: February 10, 2020

Motion Seq. No.: 11

The following numbered papers electronic filed read on this Motion by Defendants Elmer Maldonado and Lider Construction Corp., for an Order: Pursuant to CPLR §2221(e), granting renewal of Co-Defendants' Rice and Brown prior motion for summary judgment; Pursuant to CPLR §2221(d), granting reargument of Co-Defendants' Brown and Rice prior motion for summary judgment; and for such other and further relief as this Court may deem just, proper and equitable under the circumstances.

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Upon the foregoing papers, it is Ordered that Defendants' Motion is determined as follows:

Here, Plaintiff commenced this personal injury action to recover damages for injuries allegedly sustained in a two-car collision which occurred on or about August 2, 2016 on 194th Street at or about its intersection 113th Road in the County of Queens. At the time of the collision, Plaintiff was a passenger in a vehicle owned by Defendant Victor Rice (hereinafter "Defendant Rice") and operated by Defendant Mark Brown (hereinafter "Defendant Brown"). The second vehicle was owned by Defendant Lider Construction Corp and operated by Defendant Elmer Maldonado (hereinafter "Defendant Maldonado").

Defendants Maldonado and Lider Construction Corp., filed the instant motion seeking pursuant to CPLR §2221, reargument and renewal of Co-Defendants' Brown and Rice motion for summary judgment to allow Defendants' opposition to said motion to be considered in the decision; and upon granting renewal/reargument, dismissing Co-Defendant's motion for summary judgment. Defendants Maldonado and Lider Construction Corp. asserts that on May 3, 2019, Co-Defendants Brown and Rice filed a motion for summary judgment, motion sequence 7,

which was originally made returnable on June 17, 2019 was adjourned on consent to July 1, 2019. Defendants Maldonado and Lider Construction Corp. further assert that a second stipulation was entered into adjourning the motion, on consent from July 1, 2019 to August 12, 2019 and that the stipulation provided that any opposition to said motion to be served on or before July 29, 2019. Defendants Maldonado and Lider Construction Corp. further assert that they subsequently e-filed an affirmation in opposition to Co-Defendants' Brown and Rice motion sequence 7 on July 30, 2019. Defendants Maldonado and Lider Construction Corp. further assert that they received the Decision & Order of Judge Modica, dated November 22, 2019, on December 9, 2019 and pursuant to the Order, the Co-Defendants motion sequence 7 was granted without opposition. Defendants Maldonado and Lider Construction Corp further assert that this Court erred in granting co-defendants motion without consideration of Defendants' opposition and that their opposition to the motion was e-filed in advance of the return date. In support of Defendants Maldonado and Lider Construction Corp.'s motion they submit the following evidence: Notice of Motion sequence 7, stipulation of adjournment executed in July 2019, Defendants Maldonado and Lider Construction Corp. affirmation in opposition to Notice of Motion sequence 7, Decision and Order rendered by Honorable Salvatore J. Modica dated November 22, 2019, and Order with Notice of Entry.

Co-Defendants Brown and Rice oppose Defendants Maldonado and Lider Construction Corp.'s motion to renew and reargue Brown/Rice's prior liability summary judgment motion and in opposition to their request that, upon renewal/reargument, the Brown/Rice summary judgment motion be denied. Defendants Brown and Rice further assert that the stipulation of adjournment clearly states that "[a]ny opposition to said motion to be served on or before July 29, 2019." Defendants Brown and Rice further assert that it is undisputed that the co-defendants did not comply with the stipulation as they did not serve their opposition until July 30, 2019 and, based on the foregoing, the codefendants' opposition was untimely and should not be considered by the Court. Defendants Brown and Rice further assert that even if the Court considers Co-Defendants Maldonado and Lider Construction Corp. untimely opposition Defendants Brown and Rice should still be granted summary judgment. In support of Defendants Brown and Rice, they submit the following evidence: WebCivil Supreme-efiled Documents Detail, WebCivil Supreme-Appearance Detail, Notice of Motion sequence 7 with annexed exhibits, and Reply affirmation to Co-Defendants' opposition.

CPLR 2221 governs motions to renew and reargue and CPLR 2221 in pertinent part states:

> "(d) A motion for leave to reargue:
> 1. shall be identified specifically as such;
> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
> 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall

not apply to motions to reargue a decision made by the appellate division or the court of appeals.

(e) A motion for leave to renew:

1. shall be identified specifically as such;
2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion."

The Second Department, Appellate Division held that "[s]ound jurisprudential principles underlie our determination that the Supreme Court providently exercised its discretion in granting… defendants leave to renew and reargue under the circumstances of this case." *Adzer v. Rudin Mgmt. Co.*, 50 A.D.3d 1070 (2008). The Second Department, Appellate Division further held that "[f]irst, there is a strong public policy which favors a determination on the merits *Adzer v. Rudin Mgmt. Co.,* 50 A.D.3d 1070 (2008) citing (*see Storchevoy v. Blinderman,* 303 A.D.2d 672, 757 N.Y.S.2d 82) and secondly, we have consistently held that the Supreme Court is possessed of broad discretion in granting renewal, and the application of that discretion and the governing principles are to be flexibly applied to advance the interests of justice" *Adzer v. Rudin Mgmt. Co*., 50 A.D.3d 1070 (2008) citing (*see Heaven v. McGowan,* 40 A.D.3d 583, 835 N.Y.S.2d 641; *Lafferty v. Eklecco, LLC,* 34 A.D.3d 754, 826 N.Y.S.2d 617; *Petsako v. Zweig,* 8 A.D.3d 355, 777 N.Y.S.2d 765; *Gomez v. Needham Capital Group, Inc.,* 7 A.D.3d 568, 775 N.Y.S.2d 903; *Bepat v. Chandler,* 2 A.D.3d 764, 769 N.Y.S.2d 731; *Matter of Orange and Rockland Util. v. Assessor of Town of Haverstraw,* 304 A.D.2d 668, 758 N.Y.S.2d 151).

Here, it is undisputed that the stipulation provided that any opposition was to be filed by on or before July 29, 2019 and that Defendants Maldonado and Lider Construction Corp. filed their opposition on July 30, 2019 after the date provided for in the stipulation. While the Court recognizes that stipulation, and the agreements therein should be upheld, the Court finds that strong public policy favors determinations on the merits; the fact that the delay in the filing of the opposition was one day; the lack of any discernable prejudice raised by Co-Defendants Brown and Rice regarding acceptance of the opposition; and the advancement of judgment, the Court grants Defendants motion for renewal to the extent that Co-Defendants Maldonado and Lider Construction Corp. opposition is accepted.

Now turning to Defendants Maldonado and Lider Construction Corp.'s application that upon granting renewal of motion sequence 7 for summary judgment to allow Defendants Maldonado and Lider Construction Corp. opposition to said motion to be considered in the decision.

CPLR 3212(b) governs the supporting proof, grounds, and relief to either party with respect to summary judgment motions. The pertinent portions of CPLR 3212(b) reads as follows:

> "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. Where an expert affidavit is submitted in support of, or opposition to, a motion for summary judgment, the court shall not decline to consider the affidavit because an expert exchange pursuant to subparagraph (i) of paragraph (1) of subdivision (d) of section 3101 was not furnished prior to the submission of the affidavit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

"In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" *Valentin v. Parisio* , 119 AD 3d 854 (2014) citing *Escobar v. Velez* , 116 A.D.3d 735 (2014); *Bravo v. Vargas* , 113 AD 3d 579 (2014); *Green v. Quincy Amusements, Inc.*, 108 AD 3d 591 (2013).

In addition, a plaintiff moving for summary judgment on the issue of liability in an action alleging negligence must establish, prima facie, not only that the defendant was negligent, but that the plaintiff was free from comparative fault (see *Thoma v. Ronai* , 82 N.Y.2d 736 (1993); *Valentin v. Parisio* , 119 AD 3d 854 (2014); *Freeman v. Tawil* , 119 AD 3d 521(2014); *Sirlin v. Schreib* , 117 AD 3d 819 (2014).

"In order to succeed on a motion for summary judgment it is necessary that the movant tender evidentiary proof in admissible form, sufficient to establish his cause of action so as to warrant the court, as a matter of law, directing judgment in his favor" *Pyeun v. Jin Woong Woo*, 44 Misc. 3d 1223(A) (Sup. Ct. 2014) citing *Zuckerman v. New York,* 49 N.Y.2d 557 (1980); CPLR 3212. A movant's "[f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" *Winegrad v. New York Univ. Med. Ctr*., 64 N.Y.2d 851, 853, 476 N.E.2d 642 (1985) citing (*Matter of Redemption Church of Christ v Williams*, 84 AD2d 648, 649; *Greenberg v Manlon Realty,* 43 AD2d 968, 969).

Co-Defendants Brown and Rice move for summary judgment under motion sequence 7 and sought an Order granting them summary judgment pursuant to CPLR §3212 dismissing the complaint and any and all cross claims against them on the basis that they were not negligent, are not liable, and did not breach any duty owed. Co-Defendants Brown and Rice assert *inter alia* that there is no dispute that defendant Brown was lawfully traveling straight on 194th Street when co-defendant Maldonado, who was controlled by a stop sign, did not yield the right of way and struck his vehicle. Defendants Brown and Rice further assert that there is no evidence of any negligent act or omission on defendants' Brown/Rice part that caused or contributed to the

happening of this accident. Defendants Brown and Rice further assert that under these circumstances, there is no liability attributable to defendants Brown/Rice and as a result, summary judgement should be granted in their favor. In support of Co-Defendants Brown and Rice motion for summary judgment they submit the following evidence: Summons and Verified Complaint filed in the instant case, the Note of Issue, transcript Defendant Brown's deposition testimony taken on March 8, 2019, transcript Plaintiff's deposition testimony taken on October 24, 2017, Defendant Maldonado's deposition testimony taken on March 8, 2019, Order of Consolidation, and Summons and Verified Complaint filed under index no. 707807/2017.

Defendants Maldonado and Lider Construction Corp. oppose Co-Defendants' Brown and Rice motion for summary judgment and assert inter *alia* that there are questions of fact that must be considered by the court regarding the reasonableness of Defendants' conduct and whether co-defendants were a contributing factor. Defendants Maldonado and Lider Construction Corp. further assert that the unresolved questions of fact concerning the reasonableness of defendants' actions illustrated that co-defendants Brown and Rice have not established their entitlement to judgment as a matter of law. Defendants Maldonado and Lider Construction Corp. further assert that the instant motion should be denied based on the fact that there are questions of fact that have been raised regarding the occurrence of the accident. In support of Defendants Maldonado and Lider Construction Corp. opposing papers they only rely upon their attorney's affirmation.

The pertinent evidence in support of Co-Defendants Brown and Rice motion is the testimony provided at the depositions of Defendant Brown, Defendant Maldonado, and Plaintiff Montague. Defendant Brown's testimony provided at the deposition conducted on March 8, 2019 in pertinent part reads as follows:

> "Q. Was your vehicle moving or stopped at the time of the accident?
> A. Moving.
> Q. And if you can describe for me, how did the accident occur? -- withdrawn. When was the first time that you were indicated that you were in an accident? Did you see something? Did you feel something? Did you hear something or something else.
> A. I felt the car hit me.
> Q. And where did you feel the car come into contact with your car with respect to your vehicle? Did you feel it on the side, the back, the front, something else?
> A. The side.
> MR. MARTIN: Indicating the to the right side.
> A. Right side.
> Q. The passenger side?
> A. Yes.
> Q. When was the first time that you saw the other vehicle that came into contact with your vehicle?
> A. When he hit me.
> Q. What part of the other vehicle came into contact with your vehicle?
> A. The front-end.
> Q. Had you seen that vehicle at any time prior to the accident occurring?

A. No.
Q. Did you see the other vehicle or feel the other vehicle first?
A. I felt the other vehicle.
Q. And when you felt it, what did you do next? Did you look to your side? Did you look in front or something else?
A. I looked at the vehicle.
Q. And was that to your right?
A. To my right, yes." (pages 59 -60)

Plaintiff's testimony provided at the deposition conducted on October 24, 2017 in pertinent part reads as follows:

"Q. When you first saw that other vehicle, was it moving? Stopped? Something else?
A. Moving.
Q. Do you know which road that vehicle was moving on when you first saw it?
A. I don't know the street precisely. It's either 113th or 114th. I know we were on the right-way street, which was 194th.
Q. When the accident occurred, was the vehicle in which you were a passenger moving, stopped or something else?
A. Moving.
Q. How much time passed between when you first saw that white truck up until the time of the accident?
A. Seconds.
Q. At some point was there a contact between the white truck and your minivan?
A. Yes.
Q. When you first saw that white truck, was it coming towards you? Was it driving away from you? Something else?
A. Coming towards me.
Q. What portion of the mini was it coming toward? The front? Passenger side? Driver's side? Something else?
A. It was coming towards the passenger side of Mark's minivan.
Q. That was the side which you were a passenger?
A. Yes.
Q. Can you approximate the speed of the minivan?
A. I can pretty much guarantee --
MR. BLOOMFIELD: The minivan or the truck?
MR. BRUNO: I said minivan.
MR. BLOOMFIELD: I apologize.
A. Mark drives slow, so we were probably doing 20.
Q. Do you know the speed limit, at the time of the accident, on the street on which you were? driving?
A. I don't know.

Q. Can you approximate the speed or give me specifically the speed of the white truck at the time of the accident?
A. No, I can't approximate his speed.
Q. Did this accident occur within an intersection of two streets?
A. Yes.
Q. As far as you know, it was the intersection of 194th Street and 113th Road?
A. Yes.
Q. Were there any traffic control devices for vehicles traveling on 194th Street before the intersection, such as a stop sign, traffic light, something else?
A. At the intersection?
Q. yes.
A. Yes.
MR. BLOOMFIELD: He only asked about 194th.
THE WITNESS: He said the intersection.
MR. BRUNO: At the intersection we talked about.
Q. Specifically with respect to 194th Street, were there any traffic control devices?
A. On 194th?
Q. Correct.
A. No.
Q. You don't remember a stop sign?
A. Not on 194th, no.
Q. Was there, to the best of your knowledge -- were there any traffic control devices for vehicles 13 traveling on 113th Road at the intersection of 194th 14 Street and 113th Road?
A. Yes. There was a stop sign.
Q. Did you see that stop sign?
A. Yes.
Q. At any point before the accident did you see if that white truck came to any type of stop for that stop sign?
A. No.
Q. No you didn't see it, or no, that vehicle did not?
A. If you're asking me if the vehicle stopped, no, it didn't.
Q. And you saw that with your own eyes?
A. Yes.
Q. There was an impact between your vehicle and the white truck, correct?
A. yes.
Q. Where was that impact with respect to your minivan?
A. The impact on Mark's minivan was between the passenger front door and the sliding door -- the side sliding door." (Pages 31 – 35)

Defendant Maldonado's testimony provided at the deposition conducted on March 8, 2019 in pertinent part reads as follows:

"Q. Okay. As you arrived at the intersection of 194th and 113th Road, what did you do? A. Made a complete stop.
Q. Why?
MS. MACKIN: Just note my objection. You can answer.
A. There was a stop sign.
Q. You made a complete stop?
A. I made a complete stop.
Q. After you made a complete stop, what did you do?
A. I looked to my left, there was no car. I remember seeing the lights, traffic lights, it was still on red. I looked to my right, there was no car. I didn't look back to my left. So I continued and out of nowhere I seen the van and I made contact with him." (Pages 44-45)

"Q. So you stated when you got to the intersection of 113th and 194th that you looked to the left, saw a traffic light two blocks, three blocks down that was red?
A. There were no cars coming my way.
Q. And then you looked to your right?
A. To my right and then that's when I started accelerating.
Q. And then you started to do what?
A. I accelerated." (page 52)

"Q. When did you first notice the vehicle that you were involved in the accident with?
A. When he was in front of me.
Q. When he was in front of you?
A. Yes.
Q. Can you approximate for me how much time elapsed between when you looked to the left down 194th and visualized the red traffic light a few blocks away and then looked to your right and then proceeded, how much time elapsed from when you saw the red light and you started to proceed?
A. From when I saw the red light, three seconds.
Q. Three seconds. And you said there was no cars on the roadway on 194th when you looked to the left?
A. No.
Q. When you proceeded to the intersection of 194th, did you hear any honking horns, screeching tires, or any indication that you were about to be involved an accident?
A. No, sir.
Q. Were you wearing. your seatbelt?

A. Yes, sir.
Q. Did you get injured in this accident?
A. No, sir." (Pages 53 – 54)

It is undisputed by Defendant Maldonado's testimony that after he stopped at the stop sign that he looked left, looked right and in that time three seconds had lapsed and that he started to accelerate his vehicle without looking to see if any vehicles were approaching on the right side before accelerating. The Second Department, Appellate Division has held that it is well settled that "[a] driver who fails to yield the right-of-way after stopping at a stop sign controlling traffic is in violation of Vehicle and Traffic Law § 1142 (a) and is negligent as a matter of law" *Fuertes v. City of New York*, 146 A.D.3d 936, 937, 45 N.Y.S.3d 562 (N.Y. App. Div. 2017). See also *Yelder v. Walters*, 64 A.D.3d 762, 763–64, 883 N.Y.S.2d 290 (2009). In addition, "when a driver with the right-of-way has only seconds to react to a vehicle which has failed to yield, the driver with the right-of-way is not comparatively at fault for failing to avoid the accident" *Fuertes v. City of New York*, 146 A.D.3d 936, 937, 45 N.Y.S.3d 562 (N.Y. App. Div. 2017) citing (*see Smith v. Omanes*, 123 AD3d 691 [2014]; *Bennett v Granata*, 118 AD3d 652 [2014]; *Yelder v Walters*, 64 AD3d 762, 764 [2009]).

Defendant Brown's vehicle, which had the right-of-way, was entitled to anticipate that the Defendant Maldonado's vehicle would obey the traffic laws as a violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (see *Vainer v. DiSalvo*, 79 AD3d 1023 [2d Dept.2010]). Therefore, Defendant Maldonado's violation of the Vehicle and Traffic Law was prima facie evidence that his actions were the sole proximate cause of the accident (see *Martin v. Ali*, 78 AD3d 1135 [2d Dept.2010]; *Bongiovi v. Hoffman, 18 AD3d 686* [2d Dept.2005]; *Torro v. Schiller*, 8 AD3d 364 [2d Dept.2004]). Thus, Defendants Brown and Rice established, prima facie, his entitlement to judgment as a matter of law. Further, the deposition testimony submitted in support of the motion demonstrated that the subject motor vehicle accident was not proximately caused by any negligence on the part of defendant Lall (see *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]).

Moreover, Defendants Maldonado and Lider Construction Corp.'s opposing papers fail to provide any evidence in admissible form refuting Co-Defendant Brown or Plaintiff Montague's accounts of how the collision occurred. In addition, Defendants' failed to establish any triable issue of fact warranting denial of Plaintiff's Motion. Furthermore, Defendants Maldonado and Lider Construction Corp.'s opposing papers do not submit an affidavit from someone with personal knowledge of the facts and they only rely upon their attorney affirmation who does not allege to have personal knowledge of the facts therein and thus, does not have any evidentiary value. *Feratovic v. Lun Wah, Inc.,* 284 A.D.2d 368, 369 [2nd Dept 2001]).

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Accordingly, the Court adheres to its original determination in granting Co-Defendants' Brown and Rice motion for summary judgment pursuant to CPLR 3212 dismissing the complaint and any and all cross claims against them. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Date: May 29, 2020

LOURDES M. VENTURA, J.S.C.