

Covell v Durso

2020 NY Slip Op 34951(U)

August 28, 2020

Supreme Court, Orange County

Docket Number: Index No. EF009422-2018

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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FLORENCE COVELL,
Plaintiff,

- against -

MELISSA PAIGE DURSO and ALBERT R. DURSO,
Defendants.

-----X

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Index No. EF009422-2018

DECISION and ORDER

Motion Date: July 29, 2020

The following papers numbered 1 to 3 were read and considered on a motion by the Plaintiff, pursuant to CPLR § 3212, for summary judgment on the issue of liability.

Notice of Motion- Learned Affirmation- Exhibits 1-5 1-3

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Florence Covell commenced this action to recover damages arising from a motor vehicle accident. She moves for summary judgment on the issue of liability. The motion is granted.

Factual/Procedural Background

At an examination before trial, the Plaintiff testified that, on July 18, 2017, she was stopped at a red light at the Exit 120 Off Ramp on Route 211 E in Middletown, New York. After

being stopped for several seconds, her vehicle was struck from rear by a vehicle being driven by the Defendant Melissa Durso (Exhibit 4).

At an examination before trial, Melissa Durso testified that she came to a complete stop behind the vehicle being driven by the Plaintiff, which was stopped for a red traffic light (Exhibit 5, page 20). After being stopped for about five seconds, she saw the Plaintiff's vehicle "inch forward passed [sic] the white line of the intersection," in order to turn right. She lifted her foot off the brake of her vehicle her vehicle moved slowly forward. After about two seconds, she hit the rear of the Plaintiff's vehicle, which has stopped in the intersection, about halfway past the stop line. Just before and at the time of impact, Durso was looking to the left for oncoming traffic.

The Plaintiff moves for summary judgment on the issue of liability.

In support of her motion, the Plaintiff an affirmation from counsel, Carl Learned.

Learned argues that, given the undisputed facts in the case, the Plaintiff is entitled to summary judgment on the issue of liability.

Discussion/Legal Analysis

A party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept. 2011].

Relevant to the case at bar, a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence. *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 A.D.3d 754 [2nd Dept. 2017]; *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. A non-negligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. However, while a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017].

To prevail on a motion for summary judgment on the issue of liability in a negligence case, the movant need no longer demonstrate that he or she was free from comparative fault. *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501 [2nd Dept. 2019].

Here, the Plaintiff submitted competent evidence in admissible form sufficient to demonstrate, *prima facie*, that the Defendant was negligent in the happening of the accident.

The Defendant does not oppose the motion, and nothing in the record otherwise raises a triable issue of fact as to liability.

Accordingly, and for the reasons cited herein, it is hereby,

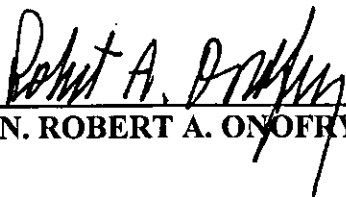
ORDERED, that the motion is granted; and it is further,

ORDERED that the parties are directed to appear for a status conference on Tuesday, November 10, 2020, 1:30 p.m., at the Orange County Supreme Court, Court room #3, 285 Main Street, Goshen, New York, to determine how the matter shall proceed on the issue of damages. If the Courts are not open to the public at that time, a virtual conference will be scheduled for that date, at a time to be determined by the Court.

The foregoing constitutes the decision and order of the court.

Dated: August 28, 2020
Goshen, New York

E N T E R



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