

Lopez v Ramirez

2020 NY Slip Op 35096(U)

February 4, 2020

Supreme Court, Westchester County

Docket Number: Index No. 59338/2019

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
DIANA LOPEZ,

Plaintiff,

DECISION/ORDER

-against-

INDEX NO. 59338/2019

GUADALUPE LOPEZ RAMIREZ, VASQUEZ MENDEZ
CONSTRUCTION LLC. and G.K. KREIELSHEIMER,

**Motion Date 12/18/2020
Motion Seq. 1**

Defendants.
-----X

ECKER, J.

The following papers were read on: the motion of plaintiff DIANA LOPEZ (plaintiff) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability as against defendant G.K. KREIELSHEIMER (Kreielsheimer), or alternatively, granting plaintiff partial summary judgment as to liability as against Kreielsheimer and defendants GUADALUPE LOPEZ RAMIREZ and VASQUEZ MENDEZ CONSTRUCTION LLC. (jointly Ramirez) based on the innocent passenger doctrine and dismissing defendants' affirmative defenses based on comparative negligence¹ (culpable conduct); and the application of Ramirez requesting that the court search the record and grant summary judgment in favor of Ramirez and dismiss the complaint and all cross-claims against him:

PAPERS

Notice of Motion, Affirmation, Exhibits A-D
Affidavit in Opposition, Exhibit A
Affidavits (2) in Reply

Upon the foregoing papers, the court determines as follows:

In this personal injury action, plaintiff alleges that she sustained serious injuries as a result of an automobile accident that occurred on January 29, 2017, at

¹ Specifically, Kreielsheimer's first affirmative defense, and Ramirez's and Mendez's second and third affirmative defenses (comparative negligence and culpable conduct).

approximately 12:17 p.m. at the intersection of Bryant Avenue and Middale Avenue in White Plains, N.Y. Plaintiff commenced the action on June 20, 2019. The parties have not yet conducted discovery or participated in a Preliminary Conference.

At the time of the accident, plaintiff was a passenger in the vehicle being driven by Ramirez and owned by Vasquez. It is undisputed that the vehicle of Kreielsheimer rear-ended the Ramirez vehicle.

Plaintiff moves for an order granting partial summary judgment as to liability and dismissing the defendants' affirmative defenses based on comparable negligence and culpable conduct before discovery has been completed. In support of the motion, plaintiff submits an affidavit averring that she was a back seat passenger in the Ramirez car when she felt something hit the back of the car. At the time she was talking to another passenger, and was not speaking to or distracting the driver of her vehicle. The Ramirez vehicle was stopped when it was rear-ended by the vehicle driven by defendant. She later learned that the vehicle that hit the motor vehicle that she was in was the Kreielsheimer vehicle.

In opposition to plaintiff's motion for partial summary judgment on liability, defendant Kreielsheimer submits an affidavit stating that:

"the accident occurred when a cyclist entered the intersection in front of [the Vasquez Vehicle] which caused that vehicle to stop abruptly. I was unable to avoid striking the rear of that vehicle. I was operating my vehicle in a reasonable manner and at a reasonable rate of speed for the traffic conditions existing at the time. It is my belief that the accident was caused by the cyclist who entered the roadway without looking for oncoming cars and not as the result of any negligent action on my part." [NYSCEF No. 19].

Ramirez submits an uncertified police report which states that Ramirez stopped short to avoid a cyclist who crossed the street in front of it without looking, and that the cyclist remained on scene. The report contains the cyclist's name and contact information.

Kreielsheimer argues that, in light of the conflicting versions of events, partial summary judgment must be denied until discovery is completed. [NYSCEF No. 27]. Ramirez argues that the court must search the record and award Ramirez summary judgment on the complaint and all cross-claims because plaintiff's affidavit and the police report prove that Ramirez's stop was in response to an emergency situation, and as such, Ramirez is protected from liability by the emergency doctrine.

Plaintiff's motion

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*Tsyganash v Auto Mall Fleet Management, Inc.*, 163 AD3d 1033 [2d Dept

2018]; see *Rodriguez v City of New York*, 31 NY3d 312 [2018]). A plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case (see *Tsyganash v Auto Mall Fleet Management, Inc.*, *supra*; *Rodriguez v City of New York*, *supra*). As such, 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 nonnegligent explanation for the collision in order to rebut the inference of negligence (*Tsyganash v Auto Mall Fleet Management, Inc.*, *supra*; *Arslan v Costello*, 164 AD3d 1408 [2d Dept 2018]). The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (see *Balladares v City of New York*, 177 AD3d 942 [2d Dept 2019]; *Romain v City of New York*, 177 AD3d 590 [2d Dept 2019]; CPLR 3212[g]; *Jung v Glover*, 169 AD3d 782, 783 [2d Dept 2019]).

Here, it is uncontested that the injured plaintiff was a passenger seated in the rear passenger seat of the Ramirez vehicle. While the defendants involved in the accident submit papers in which each maintains that they were free from fault, no defendant suggests that the injured plaintiff bore any fault in the happening of the accident and, as such, defendants concede that plaintiff was not negligent (*Romain v City of New York*, *supra*; see *Phillip v D & D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]). However, a question of fact exists herein as to whether a non-party, the cyclist, was partially or entirely liable for the accident. As there has been no discovery as yet, the court finds it is premature to grant summary judgment on liability, given the factual discrepancies and unconfirmed facts based on the emergency doctrine (see *Grant v Carrasco*, *supra*; see generally *Hawana v Carbuccia*, 164 AD3d 563 [2d Dept 2018]; *Betz v NYC Premier Properties*, 38 AD3d 815 [2d Dept 2007][plaintiff raises issues warranting further discovery; summary judgment denied to defendants as premature]). Accordingly, plaintiff motion for an order awarding plaintiff summary judgment on liability as against defendants is denied as premature, but that part of the motion that seeks to strike defendants' affirmative defenses based on comparative negligence is granted.

The application of Ramirez requesting that the court search the record and grant summary judgment dismissing the complaint and all cross-claims against it:

The questions of fact regarding whether: the Ramirez vehicle stopped suddenly due to an emergency situation; Kreielsheimer had a nonnegligent reason for hitting the Ramirez vehicle; and the cyclist was partially or entirely liable for the accident preclude the award of summary judgment to Ramirez at this early stage of the action (*Grant v Carrasco*, 165 AD3d 631 [2d Dept 2018]). As there has been no discovery as yet, the court finds it is premature to grant the motion, given the factual discrepancies and unconfirmed facts based on the emergency doctrine (see *Grant v Carrasco*, *supra*; see generally *Hawana v Carbuccia*, *supra*; *Betz v NYC Premier Properties*, *supra*).

“Summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue”(Alvarez v Prospect Hospital, supra; Andre v Pomeroy, 35 NY2d 361 [1974]). The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (Stukas v Streiter, 83 AD3d 18, 23 [2d Dept 2011]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion of plaintiff DIANA LOPEZ [Mot. Seq. 1], made pursuant to CPLR 3212, that seeks an order granting plaintiff DIANA LOPEZ partial summary judgment as to liability as against defendant G.K. KREIELSHEIMER, or alternatively, seeks an order granting plaintiff DIANA LOPEZ partial summary judgment as to liability as against G.K. KREIELSHEIMER and defendants GUADALUPE LOPEZ RAMIREZ and VASQUEZ MENDEZ CONSTRUCTION LLC. is denied as premature, with leave to renew; and it is further

ORDERED that the part of the motion of plaintiff DIANA LOPEZ [Mot. Seq. 1] that seeks an order dismissing defendants’ affirmative defenses based on comparative negligence (culpable conduct) based on the innocent passenger doctrine is granted; and it is further

ORDERED that accordingly defendant G.K. KREIELSHEIMER’S first affirmative defense and the second and third affirmative defenses (based comparative negligence and culpable conduct) of defendants GUADALUPE LOPEZ RAMIREZ and VASQUEZ MENDEZ CONSTRUCTION LLC. are stricken; and it is further

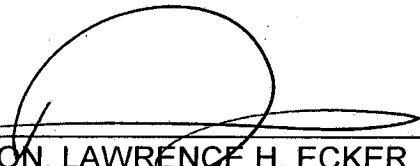
ORDERED that the application of defendants GUADALUPE LOPEZ RAMIREZ and VASQUEZ MENDEZ CONSTRUCTION LLC. requesting that the court search the record and grant summary judgment in favor of defendants GUADALUPE LOPEZ RAMIREZ and VASQUEZ MENDEZ CONSTRUCTION LLC. and dismiss the complaint and all cross-claims against said defendants is denied as premature, with leave to renew; and it is further

ORDERED that the parties shall appear at the Preliminary Conference Part of the Court, Room 811, on March 2, 2020 at 9:30 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
February 4, 2020

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

All parties via NYSCEF