

**Giron v Ortreger**

2020 NY Slip Op 35197(U)

June 8, 2020

Supreme Court, Putnam County

Docket Number: Index No. 501242/2019

Judge: Gina C. Capone

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This opinion is uncorrected and not selected for official publication.

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.

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

-----X  
MAYRA GIRON,

Plaintiff,

-against-

JOSEPH ORTREGER, CAR LOT LLC, NICOLETTE  
FRANCES HALLENBECK, THALIA R. HALLENBECK,

Defendants.

-----X  
CAPONE, J.S.C.

**DECISION & ORDER**

Index No.:501242/2019  
Sequence No. 1

The following papers, numbered 1-16, were read and considered on the motion of the defendants Nicolette Frances Hallenbeck and Thalia R. Hallenbeck (hereinafter the Hallenbeck defendants) which is for summary judgment on liability and dismissal of the complaint and any cross claims insofar as asserted against them.

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/ Attorney Affirmation in Support/ Exhibits A-E	1-7
Attorney Affirmation of defendants Joseph Ortregger & Car Lot LLC in Opposition/ Exhibits A-G	8-15
Attorney Affirmation in Reply	16

This is an action to recover damages for personal injuries sustained as a result of a motor vehicle accident involving three vehicles. The plaintiff commenced this action against the driver and owner of the vehicle that purportedly rear ended her (defendants Joseph Ortregger and Car Lot LLC) as well as the driver and owner of a vehicle the plaintiff's car was allegedly caused to come into contact with as a result of the rear end collision (the Hallenbeck defendants). We now have a

motion by the Hallenbeck defendants for summary judgment on the issue of liability and dismissal of the complaint and all cross claims insofar as asserted against them. The plaintiff has not opposed the Hallenbeck defendants' motion. However, co-defendants Joseph Ortregger and Car Lot LLC (hereinafter the co-defendants) have opposed the motion and contend that the motion must be denied because, inter alia, issues of fact preclude summary judgment at this juncture. For the reasons discussed below, the Hallenbeck motion is granted.

“A defendant moving for summary judgment in a negligence action has the burden of establishing prima facie that he or she was not at fault in the happening of the subject accident” (*Boulos v Lerner-Harrington*, 124 A.D.3d 709, 709 [2d Dept 2015]). 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 (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Cruz v Valentine Packaging Corp.*, 167 AD3d 707 [2d Dept 2018]).

Here, in support of their motion for summary judgment, the Hallenbeck defendants submitted an affidavit of Nicolette Frances Hallenback, the driver of the vehicle at the time of the accident, in which she affirmed that, immediately prior to the accident, and upon observing traffic slowing, she began breaking and gradually slowed her vehicle. While she was still breaking but almost completely stopped, she felt an impact in the rear of her vehicle. At that time, her foot was still on the break, her vehicle remained in the center of her lane, and one or two car lengths separated her vehicle from the vehicle ahead of her. Following the impact, she observed a Nissan directly behind her and a pick-up truck directly behind the Nissan, which had clearly been involved in an accident based on the readily observable damage. She affirmed that she had no warning that an accident was going to occur and did not do anything to contribute to the accident occurring.

By their submissions, the Hallenbeck defendants have met their prima facie burden of

demonstrating their entitlement to judgment as a matter of law with respect to liability and dismissal of the complaint and cross claim for indemnification and/or contribution insofar as asserted against them. As such, the burden shifted to the operator of the rear vehicle, to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence (*see Greenidge v United Parcel Service, Inc.*, 153 AD3d 905 [2d Dept 2017]).

Here, the plaintiff has not opposed the Hallenbeck defendants' motion and, therefore, has not offered any non negligent explanation for the rear-end collision to rebut the inference of negligence. As such, the Hallenbeck defendants are entitled to dismissal of the complaint insofar as asserted against them.

The co-defendants, in opposition to the motion, contend that summary judgment in favor of the Hallenbecks is inappropriate, given the questions of fact surrounding how the accident occurred and, thus, dismissal of their cross claim is not appropriate. The co-defendants contend that the the Police Accident Report prepared in connection with the accident and submitted by the co-defendants, raises issues of fact as to how the accident occurred because that report states that the vehicle driven by Nicolette Hallenbeck "ma[de] impact with [the vehicle driven by the plaintiff]." The co-defendants also contend that Ms. Hallenbeck's affidavit lacked any information about the speed her vehicle was traveling, the timing between the impacts, and the manner in which her vehicle came into contact with the plaintiff's vehicle. As such, her claim to having not contributed to the accident was purely conclusory and self-serving. These contentions, however, are insufficient to raise a genuine triable issue of fact as to whether or not the Hallenbeck defendants may be held liable for either indemnification or contribution to the co-defendants. Indeed, as noted by counsel for the Hallenbecks' in reply, the co-defendants' opposition papers lack the submission of an affidavit of either client attesting to how the accident occurred such as to raise a genuine issue of material fact as to the role the Hallenbeck vehicle played in the events.

Moreover, their submission of the Police Accident Report shows that the police determined that the co-defendant was “following too closely at a speed not reasonable/prudent for conditions” and “hit the rear of” the plaintiff’s vehicle, “forcing [plaintiff’s vehicle] partially into the center lane” where the vehicle driven by Hallenbeck made impact with it and that the impact was “caused by [the co-defendants].” This submission supports Ms. Hallenbeck’s assertion that she did not contribute or cause the accident. Accordingly, the co-defendants have failed to raise a triable issue of fact as to whether the Hallenbeck defendants may be subject to common law contribution or indemnification to the co-defendants and dismissal of the cross claim asserted against them is warranted.

Moreover, while a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination (*see Skura v Wojtowski*, 165 AD3d 1196, 1200 [2d Dept 2018]), “[a] party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Antonyshyn v Tishman Constr. Corp.*, 153 AD3d 1308, 1310 [2d Dept 2017], quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041 [2d Dept 2015]). Here, the co-defendants have not satisfied their burden of demonstrating that the Hallenbeck defendants’ motion for summary judgment was premature (*see Skura v Wojtowski*, 165 AD3d at 1200).

Accordingly, it is hereby

ORDERED that the Hellenbeck defendants’ motion for summary judgment is granted and the complaint and all cross claims insofar as asserted against them is dismissed.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York  
June 8, 2020

  
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HON. GINA C. CAPONE, J.S.C.