

<b>Marchese v Larosa</b>
2021 NY Slip Op 33418(U)
January 13, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 609162/2019
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 609162/2019

CAL. No. \_\_\_\_\_

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 29 - SUFFOLK COUNTY

**P R E S E N T:**

MOTION DATE 9/29/2020

**HON. LINDA KEVINS**  
*Justice of the Supreme Court*

Mot. Seq. # 002 - MD

-----X  
DIANNE MARCHESE,

Plaintiff,

- against -

ROSEMARY LAROSA AND SALVATORE  
LAROSA

Defendants.  
-----X

Upon the following papers e-filed and read on this motion for partial summary judgment: Notice of Motion and supporting papers by plaintiff, dated August 26, 2020; Answering Affidavits and supporting papers by defendants, dated September 21, 2020; Replying Affidavits and supporting papers by plaintiff, dated September 23, 2020; Other \_\_\_\_; (~~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 denied; and it is further

**ORDERED** that counsel for the parties, and if a party has no counsel, then the party, are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, on **March 2, 2021 at 9:30 a.m.**, for a Conference, or if the court is still operating remotely due to the COVID-19 health crisis, such appearance shall be held remotely on the same date by counsel. Counsel and any parties who are not represented by counsel shall, **with a copy to all parties, contact the court by email at [Sufkevins@nycourts.gov](mailto:Sufkevins@nycourts.gov) at least one week prior to the date of the scheduled conference** to obtain the time and manner of such conference; and it is further

**ORDERED** that if this Order has not already been entered, plaintiff is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

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**ORDERED** that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

Plaintiff commenced this action in May 2019 to recover damages for personal injuries she allegedly sustained on December 14, 2018 as a result of being hit by a vehicle driven by defendant Rosemary Larosa and owned by defendant Salvatore Larosa. The complaint alleges that defendant negligently drove her vehicle on a public highway, Commack Road, at or near its intersection with Wicks Road and hit plaintiff, a pedestrian. Plaintiff alleges that defendant was negligent in failing to operate her vehicle in a reasonable manner, “in failing to take proper steps to avoid causing their motor vehicle to come into contact with Plaintiff’s vehicle; in failing to properly slow down or stop their motor vehicle in sufficient time to avoid collision with the vehicle operated by Plaintiff; in failing to yield the right of way; in failing to stop and/or slowdown in sufficient time to avoid the accident as is necessary for safe operation; and was the sole proximate cause of plaintiff’s injury.”

Notwithstanding the allegations in the complaint, it is undisputed that the incident occurred in a parking lot of a CVS store and that plaintiff is a pedestrian.

Plaintiff now moves for an order granting summary judgment in her favor on the issue of liability, arguing that defendant operated the vehicle in a negligent manner and was the sole proximate cause of her injuries. In support of the motion, plaintiff submits copies of the pleadings, transcripts of the parties’ deposition testimony and a police accident report.

At her deposition, plaintiff testified that on the date of the accident, at approximately 4:00 p.m., she arrived at a CVS Store located at 341 Commack Road, Commack, New York. She testified that the weather was clear, the roads were dry, and it was light outside. Plaintiff testified that she parked her vehicle in the CVS parking lot, exited the vehicle and intended to go inside the store. She testified that she checked her surroundings by looking towards the right and looking towards the left, and that she did not see any moving vehicles until she looked towards the left a third time and observed defendant’s SUV driving in reverse, three to four feet in front of her. She testified that she was directly behind the SUV, and that she was unable to move out of the way, and it struck her at the left side of her body.

Plaintiff testified that while she was walking, she was talking to her mother on her cell phone that she held with her right hand, and that the incident occurred less than 30 seconds from when she exited her vehicle and began walking. She testified that after the impact she screamed, and defendant exited her vehicle and they walked on to the sidewalk. She told defendant that she was okay, and that defendant could leave, and she telephoned the police. While defendant was stopped at the traffic light, the police arrived so defendant came back to the parking lot. Plaintiff testified that she told the police that she was walking to CVS and “she got hit.” She testified that she observed defendant speaking to the police officer, but she does not know what was said, and that she was taken by ambulance to the emergency department at Huntington Hospital with complaints of pain.

Defendant testified that at the time of the incident she was leaving the CVS store in an SUV and pulled out of the parking space and was in the aisle when she heard a scream. She testified that while she was driving out of the parking space, she looked over her right shoulder and did not observe anyone or

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anything behind her, and that prior to the sound of plaintiff's scream she did not feel an impact to her vehicle. Defendant testified that she looked over her left shoulder once, and she looked over her right shoulder and continued to look while she was backing out. She testified that the vehicle she was driving has a camera, but that she does not utilize it, and it also has an alert system when an object is close by, but she did not hear it make a sound. Defendant describes the incident as plaintiff walking into her vehicle.

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, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Every driver has a common law duty to keep a proper lookout and to see that which should be seen through the proper use of his or her senses (*see Elkholy v Dawkins*, 175 AD3d 1487, 109 NYS3d 392 [2d Dept 2019]; *Palmeri v Erricola*, 122 AD3d 697, 996 NYS2d 193 [2d Dept 2014]; *Calderon-Scotti v Rosenstein*, 119 AD3d 722, 989 NYS2d 514 [2d Dept 2014]). However, a pedestrian has as much of a duty to avoid being hit by a motor vehicle as it is the duty of a motorist to avoid hitting the pedestrian (*Ali v Paul*, 140 AD3d 992, 34 NYS3d 166 [2d Dept 2016]; *Braxton v Jennings*, 63 AD3d 772, 880 NYS2d 516 [2d Dept 2009]).

To prove a prima facie case of negligence, a plaintiff must demonstrate the existence of a duty, a breach of that duty, and that the breach of such duty was a proximate cause of his or her injuries (*see Pulka v Edelman*, 40 NY2d 781, 390 NYS2d 393 [1976]). A plaintiff moving for summary judgment in a negligence action on the issue of liability must establish, prima facie, that the defendant breached a duty owed to plaintiff and that defendant's negligence was a proximate cause of plaintiff's alleged injuries (*see Cioffi v S.M. Foods, Inc.*, 178 AD3d 1006, 116 NYS3d 306 [2d Dept 2019]). A plaintiff is no longer required to establish freedom from comparative fault to sustain her burden on a motion for summary judgment on liability (*Rodriguez v City of New York*, 831 NY3d 312, 76 NYS3d 898 [2018]; *Wray v Galella*, 172 AD3d 1446, 101 NYS3d 401 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Here, the deposition testimony of the parties provide conflicting inferences that may be drawn as to the negligence of each party, and, therefore precludes summary judgment (*Sanders v Sangemino*, 185 AD3d 617, 124 NYS3d 820 [2d Dept 2020]; *Ruiz v Griffin*, 71 AD3d 1112, 898 NYS2d 590 [2d Dept 2010]). When viewing the facts in the light most favorable to defendant nonmoving party, as the Court must do (*Sherman v NY State Thruway Auth.*, 27 NY3d 1019, 32 NYS3d 568 [2016]), it is evident that plaintiff has failed to eliminate triable issues of fact as to whether defendant was negligent and whether she was a cause of plaintiff's injuries or contributed to her injuries (*Flores v Rubenstein*, 175 AD3d 1490, 109 NYS3d 390 [2d Dept 2019]).

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It is well settled that summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (*see Rotuba Extruders v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1979]). As plaintiff failed to meet her prima facie burden, the sufficiency of the opposition papers need not be determined (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316). Having failed to establish a prima facie entitlement to judgment as a matter of law, plaintiff's motion for summary judgment on the issue of liability is denied.

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

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LINDA KEVINS, JSC

Dated: 1/13/21

\_\_\_\_\_ FINAL DISPOSITION      X   NON-FINAL DISPOSITION