Gbajumo v Mecchella
2014 NY Slip Op 30789(U)
March 27, 2014
Supreme Court, Nassau County
Docket Number: 8217/12
Judge: F. Dana Winslow
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice

TRIAL/IAS, PART 3
NASSAU COUNTY

ROSE GBAJUMO,

Plaintiff,

-against-

KEVIN MECCHELLA and JOSEPH MECCHELLA,

Defendants.

MOTION DATE: 12/6/13
MOTION SEQ. NO.: 003

INDEX NO.: 8217/12

The following papers read on this motion (numbered 1-3):

Notice of Motion..... 1
Affirmation in Opposition..... 2
Affirmation in Reply..... 3

In this action to recover damages for personal injuries sustained in a motor vehicle accident, plaintiff moves pursuant to **CPLR §3212** for partial summary judgment on the issue of liability.

The Court refers to the foregoing papers and to the prior order of this Court, entered April 12, 2013 (the "Prior Order") [Exhibit D], for a complete recitation of the facts and procedural history of this action. In the Prior Order, the Court denied plaintiff's motion for summary judgment, which was made prior to the parties' depositions. The Court determined that plaintiff had established defendant's negligence as a matter of law, but that defendant had raised issues of fact regarding plaintiff's comparative negligence; particularly, whether or not "plaintiff in merging may have contributed to the happening of the accident."

Plaintiff has filed this second motion for summary judgment based upon the evidence adduced at depositions. *See* **Alaimo v. Mongelli**, 93 A.D.3d 742. The Court notes that defendant's opposition was served four days late, without excuse. *See* **CPLR §2214(b)**. Insofar as plaintiff was not prejudiced thereby, the Court elects to disregard this defect. *See* **CPLR §2001.**

It is undisputed that plaintiff had entered the Long Island Expressway eastbound, and had been traveling in the right lane for about 100 feet (5 car lengths) when the accident occurred. Defendant testified that: (i) he was traveling at a speed of 55 mph in the center lane; (ii) he saw plaintiff's vehicle about 40 feet in front of him in the right lane; (iii) intending to move into the right lane, he looked over his right shoulder to check his blind spot for about two seconds; (iv) when he looked back, the accident occurred – his vehicle was halfway into the right lane when the front of his vehicle contacted the rear of plaintiff's vehicle. [Tr. Kevin Mecchella EBT, Exhibit F]

In support of her motion for summary judgment, plaintiff argues that the accident was a hit in the rear caused entirely by the negligence of defendant. In opposition, defendant does not revive his original argument that plaintiff's merger onto the Expressway contributed to the accident. Rather, defendant argues that an issue of fact exists regarding whether or not plaintiff was traveling at an unreasonably slow speed, or a speed less than the established minimum speed, in violation of **Vehicle & Traffic Law ("VTL") §1181**. Defendant asserts that the established minimum speed on the Long Island Expressway is 40 mph, and that plaintiff's own testimony raises an issue of fact as to whether or not she was traveling too slowly:

Q. What was your speed at the moment you felt the impact to your car?
A. It was – let's see, when I was on the ramp it was like about 30. So, once I got on the highway I would say it was like about maybe 35, maybe 40,

. . .

Q. And when you first saw the other car, what was your speed at that moment?
A. It was about – I was accelerating on the highway. So it was maybe about, I would say 35, 40, gradually going up.

. . .

Q. How much time in between first seeing that car and the impact with your car?
A. I would say maybe about three or four seconds. [Tr. Rose Gbajumo, Exhibit E]

On a motion for summary judgment, "the opposing party's version of the facts must be accepted and viewed in the a light most favorable to them." **Schaffe v. SimmsParris**, 82 A.D.3d 867. For purposes of this determination, the Court assumes the truth of defendant's assertion that the minimum speed limit on the Long Island Expressway is 40 mph. **VTL §1181** provides:

§ 1181. Minimum speed regulations

(a) No person shall drive a motor vehicle at such a slow speed as to impede the normal and reasonable movement of traffic except when reduced speed is necessary for safe operation or in compliance with law.

(b) Whenever a minimum speed limit has been established as authorized in sections sixteen hundred twenty or sixteen hundred forty-two, no person shall drive at a speed less than such minimum speed limit except when entering upon or preparing to exit from the highway upon which such a minimum speed limit has been established, when preparing to stop, or when necessary for safe operation or in compliance with law.

With respect to **VTL §1181(a)**, there is no evidence that plaintiff was driving as "such a slow speed as to impede the normal and reasonable movement of traffic." In fact, defendant testified that at the moment of impact, plaintiff was traveling at the same speed as he was. [Exhibit F, p.28, l4-7]

With respect to **VTL §1181(b)**, plaintiff may have been exempt from the requirement to travel at the established minimum speed to the extent that she had just entered the highway and was in the process of accelerating when the accident occurred. Even assuming, however, that plaintiff's entry to the highway was complete and that she was required to have reached a minimum speed of 40 mph, the evidence does not create a genuine issue of material fact as to whether or not plaintiff was driving below the minimum speed. Plaintiff testified that she was traveling at about 35 or 40 mph when she first saw defendant's vehicle, that she was accelerating, and that the accident occurred 3-4 seconds later. Defendant testified that plaintiff was driving at about the same speed as he was at the time of the accident – about 55 mph. The only inference consistent with both parties' testimony is that plaintiff was traveling at least 40 mph at the time of the accident.

Even if the Court assumes, however, that plaintiff's speed had yet not reached 40 mph, there is no evidence that plaintiff's speed contributed to causing the accident. Defendant admits that he looked over his right shoulder, away from the direction in which his vehicle was traveling, and that when he looked back, his vehicle had entered plaintiff's lane and had struck plaintiff's vehicle in the rear. The only permissible inference is that the accident was caused entirely by defendant's negligence – in entering plaintiff's lane at full speed while looking in the opposite direction.

Insofar as there is no evidence of comparative fault on the part of plaintiff, plaintiff is entitled to a determination of defendant's liability as a matter of law. *See* **Lanigan v. Timmes**, 111 AD3d 797.

The court has considered the remaining contentions of the parties and finds them to be without merit. Based upon the foregoing it is

ORDERED, that plaintiff's motion for partial summary judgment on the issue of liability is **granted.**

Dated: 3/27/14

J.S.C.