Rosa v Torres
2014 NY Slip Op 32650(U)
September 23, 2014
Supreme Court, Bronx County
Docket Number: 307647/11
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 4

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Jeanine Rosa

Plaintiff Index No. **307647/11**

-against - Decision and Order

Diana Torres, Yolanda Morel Depena ,
Leandro C. Hidalgo and **John Doe**

Defendants

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FACTS AND PROCEDURAL HISTORY

Plaintiff Jeanine Rosa (" Rosa ") seeks recovery for injuries allegedly sustained on September 5, 2009 in a two- car collision that occurred at the intersection of City Island Avenue and Cross Street, Bronx, New York. At the time, plaintiff was a passenger in a motor vehicle being driven by defendant Diana Torres ("Torres") that was owned by defendant Yolanda Morel Depena ("Depena "). As pertinent here, the other vehicle, which impacted the left side of Torres' turning vehicle , left the scene of the accident prior to the arrival of the police.

This action was commenced in June 2011 and issue was joined with the service of the answer of defendants Torres and Depena in October. The answer interposed a cross-claim against defendant Leandro C. Hildago ("Hidalgo") and John Doe alleging that the intersection collision was caused wholly in the part of the co-defendants .

In the following month, Hildago served his answer alleging as an affirmative defense, *inter alia*, a specific denial of involvement in the motor vehicle accident. Hidalgo also interposed a cross-claim against Torres and Depena.

By stipulation, the parties extended the time to file dispositive motions, and as such, the motion and cross-motion are timely made.

Motion /Cross-Motion and Contentions of the Parties

1) Defendants Torres and Depena now move for an order awarding summary judgment on the issue of liability dismissing the complaint and any cross-claims asserted

against them on the grounds that there is no triable issue of fact that Torres bears no liability for the accident , and that the sole proximate cause of the accident is Hildago's entering the intersection against a red light and failing to yield to Torres' turning vehicle. It is argued alternatively that defendants are entitled to summary judgment pursuant to the emergency doctrine as Torres was not required to anticipate that Hidalgo would fail to stop at the red light .

Plaintiff opposes the motion contending that an award of summary judgment is precluded by material issues of fact as to whether Torres breached her duty to keep a proper lookout and to be aware of what is in view, and to use reasonable care to avoid colliding with other vehicles . Specifically, plaintiff argues that it is unresolved on this record as to whether Torres failed to yield to the co-defendant's vehicle in the

intersection. It is maintained that were Torres making a left turn , there are issues of fact as to whether she violated Vehicle Traffic § 1141 by failing to yield to the other vehicle . It is noted that the statement attributable to Torres in the police accident report as to the direction of her turn at the intersection conflicts with her deposition testimony, and as such, also raises an issue of fact.

2) Co-defendant **Hidalgo** cross-moves for summary judgment dismissal of the complaint and all cross-claims predicated upon his testimony that he was not involved in the accident, and the inadmissibility of the document prepared by a passenger in which his license plate was recorded .

Plaintiff opposes the motion contending that Hidalgo fails to demonstrate his non-involvement as a matter of law in light of his testimony that when contacted by his insurer that he was listed as the driver who left the scene of the accident, he neither attempted to obtain a copy of the police report nor sought to amend it. It is noted that no amended report is tendered in support of the motion.

Co-defendants **Torres and Depena** also argue that Hidalgo has failed to sustain his burden on the motion for dispositive relief in light of the testimony of plaintiff describing the silver color and the model of the other vehicle as a Toyota Corolla , descriptions of which correspond with that of Hidalgo's grey Corolla , as well as her non-hearsay testimony based upon her personal knowledge of her observations of the

license plate number she wrote down on her hand at the accident scene , and then transcribed onto a piece of paper when she returned home after accompanying Torres to the hospital .

In **reply to plaintiff's opposition** defendant maintain that the plate number is not admissible as a business record and there is nothing in the opposing papers to dispute defendant's contention that it neither qualifies as an "present sense impression" or a "past recollection recorded" exception to the hearsay rule.

In **reply to the co-defendants'** papers in opposition, Hildago argues that the only documented evidence connecting his vehicle with the accident is the entry of his plate number in the Police Accident Report , an entry that is inadmissible hearsay.

DISCUSSION AND CONCLUSIONS

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of a material issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E. 2d 718 , 427 N.Y.S. 2d 595 [1980]).

To sustain the initial heavy burden on the motion, it is not sufficient merely to " point [ ] to gaps in opponent's proof , but [the movant] must affirmatively demonstrate the merit of its claim or defense" (*Larkin Trucking Co. v. Lisbon Tire Mart,*

185 AD2d 614, 615 [4th Dept. 1992])" Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634, 757 N.Y.S. 2d 594 [2d Dept. 2003]; Torres v. Indus. Container, 305 A.D.2d 136 , 760 N.Y.S.2d 128 [1st Dept. 2003]; Bryan v 250 Church Associates, LLC, 60 A.D.3d 578, 876 N.Y.S.2d 38 [1st Dept. 2009]).

In deciding a motion for summary judgment , it is not the court's function court to make credibility determinations, or findings of fact, but rather, to identify material triable issues of fact or the lack thereof (see, Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 505 965 N.E.2d 240 [2011]; Sillman v. Twentieth Century-Fox Film, op. cit., at 404), and in its review of the submissions, the court is required to draw all reasonable inferences in favor of the party opposing summary judgment (see, Henderson v City of New York, 178 AD2d 129, 130, 576 NYS2d 562 [1st Dept. 1991]; see also, Sodexho Mgt., Inc. v Nassau Health Care Corp., 23 AD3d 370, 371, 805 NYS2d 551 [1st Dept. 2005]) .

While summary judgment is "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (Wilson v. Sponable, 81 AD2d 1, 5; Siegel , Practice Commentaries , McKinney's Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) " Johnannsdottir v. Kohn, 90 AD2d 842 [1st Dept. 1982] , such a motion will be granted "where the facts clearly point to the negligence of one party

without any fault or culpable conduct by the other party." (Morowitz v. Naughton , 150 AD2d 536 [1st Dept. 1989[; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 AD 3d 276, 788 NYS2d 337 [1st Dept. 2004]).

Also as pertinent here, to obtain summary judgment on the issue of liability in a negligence action, the movant must eliminate any material issue, not only as to the nonmoving party's negligence, but also as to whether its own negligence contributed to the accident (see , Thoma v Ronai, 82 NY2d 736, 621 N.E.2d 690, 602 N.Y.S.2d 323 [1993]; Calcano v Rodriguez, 103 A.D.3d 490, 962 N.Y.S.2d 37 [1st Dept. 2013]).

Concerning, as here, an intersection collision , it is also settled that

> [u]nder the doctrine of comparative negligence, a driver who lawfully enters an intersection may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection.
>
> Nevarez v. S.R.M. Mgt. Corp., 58 A.D.3d 295, 298, 867 NYS2d 431 [1st Dept. 2008]

Upon review of the testimony of the defendant driver and the plaintiff passenger concerning the circumstances of the accident, and the certified police report of the accident, as afforded all favorable inferences in favor of the non-moving party , it is the finding of this court that the moving defendants have failed to demonstrate as a matter of law that there is no issue of fact of Torres' comparative negligence in failing to either see the other vehicle in the intersection, or when having observed it and over the

course of the intervening ten seconds, failing to take any evasive action to avoid the collision.

Upon review of the cross-moving papers consisting of Hidalgo's deposition testimony and that of Torres and Rosa, it is the finding of this court that there are material issue of fact precluding an award of summary judgment predicated on the defendants's defense of non-involvement.

It is not disputed that the license plate number observed by Rosa at the accident scene as belonging to the silver Toyota Corolla that impacted her vehicle was reduced to writing by her before the police arrived . Nor is it disputed that Hidalgo was at the time of the accident the owner of a grey Toyota Corolla.

What is unresolved on the record is when this identifying information was imparted to the police, with Torres testifying that the identifying information, as well as the make and model of the car was provided at the scene , and Rosa testifying that a couple of days after the accident, she was visited by the police concerning the accident, and she gave them the number that she had written down on paper when she got home after the incident. At the scene she had written the number on her hand having "kept repeating it" after she saw the vehicle move away from the scene [ROSA EBT: 46] It is noted that the Police Accident Report is dated as being reviewed

"09/06/09", within twenty-four hours of the incident.

Also significant is Rosa's description of the driver as looking "Spanish, heavy set, dark hair." [ROSA EBT: 25:25]. Hildalgo testified that he is six-one and a half and weighs "about" 220 [HIDALGO EBT: 46-47].

It is submitted that such corresponding identifying information testified to by the plaintiff -passenger based upon her observations at the time of the incident, renders the designation of the Hidalgo vehicle in the police report, to the extent it may be considered hearsay, "not the only evidence" to support the identification of defendant Hidalgo as the second driver in the underlying collision. Issues of credibility devolving from such identification and the defendant's denial of involvement are issues more properly resolved by the triers of fact.

Accordingly, the motion and the cross-motion for summary judgment are denied.

This constitutes the decision and order of this court.

Dated : September 23 , 2014

Howard H. Sherman