

Garcia v Fernandez

2015 NY Slip Op 32363(U)

March 16, 2015

Supreme Court, Orange County

Docket Number: 1201/2013

Judge: Sandra B. Sciortino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

D ORIGINAL

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 ORANGE

-----X
ARIANNA GARCIA,

Plaintiff,

-against-

JUAN FERNANDEZ and NORBERTO GONZALEZ,

Defendants.

-----X
SCIORTINO, J.

DECISION AND ORDER

INDEX NO.: 1201/2013

Motion Date: 1/12/15

Sequence No. 1

The following papers numbered 1 to 18 were considered in connection with the application of plaintiff for an order granting partial summary judgment on the issue of liability:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion/Affirmation (Phemister)/Exhibits 1-7	1 - 9
Affirmation in Opposition (Berkley)/Exhibits A-F	10 - 16
Reply Affirmation (Linn)/Exhibit	17 - 18

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on October 1, 2012 at the intersection of Academy Avenue and Houston Avenue in the City of Middletown in Orange County. Plaintiff commenced this action by filing a Summons and Complaint (Exhibit 1 to moving papers) on February 8, 2013. The Complaint asserts that, on the day of the accident, plaintiff was operating her 2013 Audi automobile car when it came into contact with a 2001 Dodge automobile owned by defendant Gonzalez and operated by defendant Fernandez. Plaintiff alleges

[* 2]

that the collision and the resultant injuries were caused by the negligence of defendants, occasioned when Fernandez failed to stop at a stop sign on Houston Avenue and thereafter failed to yield the right-of-way to plaintiff. (Phemister Affirmation at ¶4)

Defendants interposed an Answer (Exhibit 2 to moving papers) dated July 12, 2013.

By Notice of Motion, originally filed October 24, 2014, plaintiff seeks partial summary judgment on the issue of liability, on the ground that the conduct of defendant Fernandez, in entering the intersection without regard to oncoming traffic and failing to yield the right-of-way to plaintiff, constituted a violation of Vehicle and Traffic Law §1142(a), and, as such, negligence as a matter of law. (Phemister Affirmation at ¶¶ 17-19)

In support of her motion, plaintiff appends the transcript of her examination before trial. She further appends the testimony of defendant Fernandez, from the same date, as well as the testimony of non-party Janet Nino-Leon¹. All three depositions were taken on April 8, 2014.

Testimony of Plaintiff

On October 1, 2012, at approximately 6:00 p.m., plaintiff was driving her car northbound on Academy Avenue. It was still light out, but starting to get dark. (Exhibit 3 at pp. 22-22, 28-30) Plaintiff was on Academy Avenue for about a half mile before the accident. (Exhibit 3 at page 32) As she approached the intersection of Academy Avenue and Houston Avenue, she first saw the Fernandez vehicle, about a foot from the stop sign controlling traffic traveling on Houston. (Exhibit 3 at pp. 37-38) The Fernandez vehicle was moving at about 15 miles per hour. Plaintiff

¹Ms. Nino-Leon is a plaintiff in a related matter, *Nino-Leon v. Fernandez, Gonzalez & Garcia*, under Index No. 3935/2013.

watched the car from that point until the point of impact. (Exhibit 3 at p. 39) Plaintiff was driving at no more than 20 miles per hour prior to the impact. (Exhibit 3 at page 33)

Plaintiff observed that the Fernandez vehicle did not stop at the stop sign before entering the intersection and did not reduce his speed before coming into contact with her car. (Exhibit 3 at page 30) When she saw that the Fernandez vehicle had not stopped, she applied her brakes with sudden force, but "he was already on top of her." (Exhibit 3 at page 40)

Testimony of Defendant Juan Fernandez

On October 1, 2012, Fernandez was operating a vehicle with the consent of its owner, defendant Norberto Gonzalez. (Exhibit 4 at page 8) He was driving home from work at M&M Farms in Goshen. (Berkley Affirmation at ¶3) He had been driving on Houston Avenue for about two minutes, heading toward Academy Avenue. (Exhibit 4 at page 12) He was familiar with the intersection of Houston Avenue and Academy Avenue and had traveled through there "maybe twice a day." He was traveling at 10-15 miles per hour. (Exhibit 4 at page 13) The weather was "fine" and the roads were dry. (Exhibit 4 at pp. 13-14)

Fernandez could not remember if he stopped at the stop sign at the corner of Academy Avenue. (Exhibit 4 at pp. 14, 18) Nor could he remember if he looked to his right or his left onto Academy Avenue prior to entering the intersection. (Exhibit 4 at pp. 20, 30) However, he never saw the plaintiff's vehicle prior to the point of impact. (Exhibit 4 at pp. 13-14, Berkley Affirmation at ¶3)

According to an uncertified copy of a police report appended to plaintiff's moving papers as Exhibit 7 and to defendants' opposing papers as Exhibit B, Fernandez told the responding officer

[* 4]
that he had stopped. (Berkley Affirmation at ¶3)

There was a heavy impact with plaintiff's car on the driver's side of the Fernandez vehicle. (Exhibit 4 at page 15) Thereafter, the Fernandez vehicle came into contact with a wall on the other side of the intersection. That was also a heavy impact. (Exhibit 4 at page 22)

Fernandez did not have a valid driver's license on the date of the accident, and in fact, had never had a driver's license. (Exhibit 4 at pp. 18-19) He received a ticket at the hospital for driving without a license, but could not remember if he received additional tickets. (Exhibit 4 at page 21)

Testimony of Janet Nino-Leon

Janet Nino-Leon was a passenger in the vehicle driven by defendant Fernandez, a Dodge Caravan minivan, on her way home from work in Goshen, New York. On October 1, 2012, between 6:00 and 7:00 p.m., she was sitting in the middle row seat behind the driver. (Exhibit 5 at page 17) She was familiar with the area where the accident took place, and was aware that there was a stop sign on the corner of Houston Avenue in the direction in which Fernandez was driving. (Exhibit 5 at page 21)

The Fernandez vehicle had been driving on Houston Avenue for two or three minutes before the accident happened. (Exhibit 5 at page 18) Nino-Leon was not aware that they were approaching the stop sign because she was looking down at her phone. (Exhibit 5 at page 21) She was still looking at her phone at the moment of impact. (Exhibit 5 at page 24) However, she testified that she felt the vehicle maintaining an average speed on Houston Avenue (Exhibit 5 at page 44) and did not feel that Fernandez stopped at the stop sign. (Exhibit 5 at page 27)

Plaintiff argues that the sworn testimony clearly establishes that defendant Fernandez violated Vehicle and Traffic Law §1142(a), and that such conduct was the sole cause of the accident. (Phemister Affirmation at ¶17) Such a violation constitutes negligence as a matter of law. (Phemister Affirmation at ¶19)

In opposition, defendant argues that there are triable issues of fact that preclude summary judgment. Primarily, whether Fernandez came to a stop for the stop sign on Houston Avenue before entering the intersection is at issue. Although plaintiff testified that she saw Fernandez go through the stop sign, Nino-Leon testified that she did not feel him coming to a stop, and even Fernandez acknowledged that he could not remember if he stopped. Defendants put forth the fact that Nino-Leon's attention was diverted and the contradictory indication in the police report establish a question of fact. (Berkley Affirmation at ¶6)

Further, defendants assert there is an issue of fact regarding the speed at which the respective vehicles are traveling. Plaintiff acknowledges traveling at 20 miles per hour, and estimated that Fernandez was traveling at 15 miles per hour at impact. However, the testimony and photos show a heavy impact, making it unlikely that either vehicle was going less than 20 miles per hour. (Berkley Affirmation at ¶6)

Finally, defendants assert that there are issues regarding the steps that plaintiff took, if any, to avoid the accident. She testified that she saw the Fernandez vehicle less than five seconds before impact, and was able to slam on her brakes, but did not sound her horn or turn the steering wheel. These issues may impact on liability for a failure to take sufficient evasive action and, thus, show that there are significant issues of fact which must be resolved by the trier of fact. (Berkley

[* 6]
Affirmation at ¶6)

Defendants assert that the fact that Fernandez did not have a driver's license does not mean he operated the vehicle negligently on October 1, 2012. The issue of no driver's license and Nino-Leon looking at her cell phone at the of the accident are issues of credibility for a jury. (Berkley Affirmation at ¶7)

Plaintiff's failure to conclusively establish that she is free from comparative fault demonstrates that summary judgment must be denied. (Berkley Affirmation at ¶8)

In reply, plaintiff asserts that the police report is inadmissible hearsay (Linn Affirmation at ¶¶ 7, 12); but, even if it were not, the issue of whether Fernandez stopped is irrelevant. It is his failure to have yielded the right of way which was the proximate cause of the accident. (Linn Affirmation at ¶14)

Moreover, defendants' attempts to show potential comparative negligence fails. Fernandez testified that he never saw the plaintiff's vehicle prior to impact, so he could not know whether she was speeding. (Linn Affirmation at ¶19) Plaintiff faced an emergency situation, and, given those facts, the suggestion that there were other accident-avoiding measures is nothing but speculation. (Linn Affirmation at ¶¶ 32-33)

The Court has fully considered the submissions of the parties.

Discussion

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. *Piccirillo v. Piccirillo*, 156 AD2d 748 (2nd Dep't 1989), citing *Andre v. Pomeroy*, 35 NY2d 361 (1974) The function of the Court on such a

[* 7]

motion is issue finding, and not issue determination. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957). The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." *Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 (2nd Dep't 1996)

The Court is obliged to draw all reasonable inferences in favor of the non-moving party. *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2nd Dep't 1995) Where there is any doubt about the existence of a material and triable issue of fact, summary judgment must not be granted. *Anyanwu v. Johnson*, 276 AD2d 572 (2nd Dep't 2000) Where facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility, summary judgment must not be granted. *Jastrzebski, supra*, 223 AD2d at 678

Vehicle and Traffic Law section 1142(a) provides that:

Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

Undisputed evidence that a driver who proceeds into an intersection controlled by a stop sign, failed to yield the right-of-way to an approaching vehicle in violation of section 1142(a) establishes negligence as a matter of law. *Bongiovi v. Hoffman*, 18 AD3d 686 (2nd Dep't 2005); *Friedberg v. Citiwide Auto Leasing, Inc.*, 22 AD3d 522 (2nd Dep't 2005) A driver who fails to yield the right-of-way after stopping at a stop sign is in violation of Vehicle and Traffic Law §1142(a) and is negligent as a matter of law. *Czarnecki v. Corso*, 81 AD3d 774 (2nd Dep't 2011)

Regardless of whether the driver stopped at the stop sign, the failure to yield to another vehicle in the intersection constitutes the negligence. *Morgan v. Hachmann*, 9 AD3d 400 (2nd Dep't 2004)

While every driver is charged with a duty to see what is there to be seen, a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him to yield. *Laino v. Lucchese*, 35 AD3d 672 (2nd Dep't 2006) A driver is required to stop and remain stationary until it was clear to proceed across the intersection. *Friedberg v. Citiwide, supra*, 22 AD3d at 523

In the instant matter, the facts are not significantly contested. It is undisputed that the Fernandez vehicle was controlled by a stop sign. Whether or not Fernandez stopped at the stop sign, it is undisputed that he proceeded into the intersection, failing to yield the right-of-way to plaintiff, who was proceeding without such a traffic control. The testimony of the parties clearly establishes that, when Fernandez proceeded into the intersection, he did so in violation of Vehicle and Traffic Law §1142(a). Plaintiff has thus established negligence as a matter of law.

Negligence *per se* is not liability *per se*. Plaintiff must still establish that the statutory violation was the proximate cause of the accident. *Dance v. Town of Southampton*, 95 AD2d 442 (2nd Dep't 1983) The Second Department has made it clear that, by establishing that a driver failed to yield the right-of-way after stopping at a stop sign, a party establishes that the negligence of the driver was the sole proximate cause of the accident, and establishes the party's right to judgment as a matter of law. *Friedberg v. Citiwide, supra*, 22 AD3d at 523; *Bongiovi v Hoffman, supra*, 18 AD3d at 687; *Nolan v. Mizrahi*, 12 AD3d 430 (2nd Dep't 2004)

On the basis of the foregoing, plaintiff has established *prima facie* entitlement to summary

judgment. The burden thus shifts to defendant to demonstrate, by admissible evidence, a triable issue of fact as to whether plaintiff was comparatively negligent. *Czarnecki v. Corso, supra*, 81 AD3d at 775

The Court finds that defendants have failed to raise such a triable issue. The issue of whether Fernandez stopped or not is irrelevant. *Id.* The remainder of defendants' opposition consists of speculative assertions concerning the speed of the vehicles and plaintiff's efforts, if any, to avoid the accident.

Defendants assert that, in contrast to plaintiff's statement that Fernandez was driving at 15 miles per hour and she was driving at 20 miles per hour, the vehicles were likely both operating at 20 miles per hour. Accepting that assertion as true for the purpose of this motion, the Court cannot discern how a faster speed by defendant creates comparative negligence by plaintiff. But given Fernandez's assertion that he did not see plaintiff's vehicle until impact, any estimate as to the speed of that car can be viewed as nothing but speculation. *Meliarenne v. Prisco*, 9 AD3d 353 (2nd Dep't 2004)

Although plaintiff, like defendant, is required to see that which, through proper use of her senses, she should have seen, a driver who has the right-of-way is entitled to anticipate that the other motorist will obey the traffic law requiring him to yield. When the driver with the right-of-way has only seconds to react to a vehicle which has failed to yield, she is not comparatively negligent for failing to avoid the collision. *Vanier v. DiSalvo*, 79 AD3d 1023 (2nd Dep't 2010)

Mere speculation, unsupported by any evidence, that plaintiff may have failed to take some unspecified accident-avoidance measure or in some other way contributed to the occurrence of the


accident is insufficient to defeat a motion for summary judgment. *Williams v. Econ*, 221 AD2d 429 (2nd Dep't 1995); *Batts v. Page*, 51 AD3d 833 (2nd Dep't 2008)

On the basis of the foregoing, the Court finds that defendants have failed to raise a triable issue of fact on the issue of comparative negligence. The application of plaintiff for partial summary judgment on liability is granted.

The parties shall appear for conference on April 17, 2015 at 9:00 a.m.

This decision shall constitute the order of the Court.

Dated: March 16, 2015
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: Sobo & Sobo, LLP
One Dolson Avenue
Middletown, NY 10940

Burke, Gordon & Conway
10 Bank Street, Suite 790
White Plains, NY 10606

