

Ramirez v Harvey

2016 NY Slip Op 33180(U)

June 9, 2016

Supreme Court, Westchester County

Docket Number: Index No. 62852/15

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under 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 WESTCHESTER

-----X
ALEXANDRA RAMIREZ,

Plaintiff,

-against-

PATRICIA HARVEY and JANECE A. THOMAS,

Defendants.

-----X
EVERETT, J.

Index No. 62852/15
Motion Sequence No. 001
Decision and Order

The following papers were read on the motion:

- Notice of Motion/Aff in Supp/Exhibits A-D
- Aff in Opp/Exhibits A-B
- Reply Aff

Upon the forgoing papers, the motion is denied.

In this personal injury action arising from a motor vehicle accident, plaintiff Alexandra Ramirez (Ramirez) moves for an order, pursuant to CPLR 3212, granting summary judgment in her favor and against defendants Patricia Harvey (Harvey) and Janece A. Thomas (Thomas)¹ on the issue of liability and directing an immediate trial on damages. Harvey and Thomas jointly oppose the motion.

The following facts are taken from the parties' pleadings, motion papers, affidavits and documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office

¹ The complaint identifies defendant Thomas as "Janece" D. Thomas, while her sworn affidavit indicates that her first name is "Jacene" (aff in opp, exhibit A).

of the Westchester County Clerk on August 6, 2015, to recover damages for injuries she allegedly sustained in an automobile accident which occurred on December 11, 2014. In her complaint, Ramirez alleges that, at approximately 12:05 p.m., while driving on White Plains Road in Bronxville, New York, the vehicle she was operating was struck from behind by a vehicle being driven by Thomas, and owned by Harvey. Ramirez claims that she sustained serious physical injuries as a result of the accident. Issue was joined by service of defendants' joint answer with affirmative defenses on or about October 29, 2015. On February 4, 2016, the parties entered into a so-ordered preliminary conference order setting forth the agreed upon schedule for discovery. The preliminary conference order contemplates, among other things, the exchange of insurance information, witness information, medical authorizations and employment record authorizations by March 17, 2016, the appearance of all parties for depositions on May 3, 2016, and an independent medical examination of Ramirez within 30 days of the completion of her deposition. Despite this order, less than two weeks later, plaintiff served the instant motion for summary judgment on liability, which defendants oppose.

The gravamen of Ramirez's motion is that, because defendants' vehicle struck hers while she was stopped at a traffic light, negligence should be inferred against them. This, Ramirez contends, is because the occurrence of the rear-end collision itself constitutes proof that Thomas was either not watching where she was going, or she did not leave a reasonably safe distance between the car she was driving and the car directly in front. Ramirez's complaint against Harvey is premised on Harvey's status as owner of the vehicle.

As the proponent of the motion for summary judgment, Ramirez must tender evidentiary proof in admissible form sufficient to warrant the court to direct judgment in her favor as a

matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; CPLR 3212 [b]). Should plaintiff make the requisite showing, the burden would shift to defendants to produce evidentiary proof in admissible form sufficient to require a trial on one or more issues of fact (*id.*).

With respect to collisions between moving vehicles, or between a moving vehicle and a stopped vehicle, it is well settled that, “[w]hen the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle” (*Taing v Drewery*, 100 AD3d 740, 741 [2d Dept 2012]). Furthermore, “vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead” (*Robayo v Aghaabdul*, 109 AD3d 892, 893 [2d Dept 2013] [internal quotation marks and citation omitted]). It is also well settled law that “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*id.*). Finally, Vehicle and Traffic Law § 1129 provides, at subsection (a), that “[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.”

Here, Ramirez submits her sworn affidavit attesting to the facts surrounding the accident (notice of motion, exhibit C). In it, Ramirez states, in relevant part:

“5. I was stopped at a red light located on the main road in front of Concordia College.

6. The defendant’s 2010 Nissan was being driven by Jacene A. Thomas south bound on White Plains Road when the Nissan struck the vehicle I was driving in the rear”

(*id.*).

Ramirez also submits what purports to be a copy of the Report of Motor Vehicle Accident (*id.* exhibit D) generated by a police officer who responded to the scene (Police Report). The Police Report, which identifies Ramirez’s vehicle as “vehicle 1,” and defendants’ vehicle as “vehicle 2,” contains no descriptive account of how the accident occurred, other than to indicate that it was a rear-end accident which occurred on in the vicinity of Concordia College, on White Plains Road in Bronxville, New York (*id.*). The copy of the Police Report submitted for court review is neither certified, nor sworn.

Ramirez relies on both her affidavit and the Police Report to establish negligence (liability) on the part of defendants as a matter of law. It does not. The only competent evidence submitted by her is her sworn affidavit attesting to her version of the event. As the Police Report is uncertified and unsworn, it is not in admissible form and cannot be considered by the motion court for the purpose of plaintiff’s motion for summary judgment (*Rodriguez v Ryder Truck, Inc.*, 91 AD3d 935, 936 [2d Dept 2012]; *Toussaint v Ferrara Bros. Cement Mixer*, 33 AD3d 991, 992 [2d Dept 2006]; CPLR 4518[c]). Moreover, there is also no indication that the police officer who generated the Police Report was a witness to the accident. Therefore, even if the Police Report contained a verbal description of how the accident occurred, in addition to the circled words “rear end” (notice of motion, exhibit D), “[a] police accident report made by a police

officer who was not an eyewitness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question” (*Kajoshaj v Greenspan*, 88 AD2d 538, 539 [1st Dept 1982] [internal citation omitted]; *see also Figueroa v Luna*, 281 AD2d 204, 205 [1st Dept 2001]).

However, even if Ramirez’s evidentiary submissions were sufficient to establish liability, the motion would still be denied, as defendants have come forward with a nonnegligent explanation for the collision (*Robayo v Aghaabdul*, 109 AD3d at 893).

To this end, defendants submit Thomas’s sworn affidavit in which she states, in relevant part:

“4. As I was traveling on White Plains Toad, I observed a 2010 Ford Suburban vehicle, bearing license plate number GTZ 2710 (now known as . . . RAMIREZ’s vehicle), traveling directly ahead of mine.

5. As both of our vehicles were traveling on White Plains Road my vehicle was struck from behind by a dark colored four door Sudan vehicle. This vehicle then fled the scene.

6. As a result, my vehicle was pushed forward into the rear of the plaintiff’s vehicle.

7. In an attempt to avoid the accident, I applied my brakes heavily.

8. I was not speeding at the time of the accident and maintained a safe distance behind the plaintiff’s vehicle at all times prior to the accident.

9. The four photographs depicting the rear of the vehicle that I was operating fairly and accurately depict the damage sustained to the rear bumper and rear passenger side tail light caused by the impact to the rear”

(aff in opp, exhibit A). Annexed, as exhibit B to their opposition, are the four photographs referenced in Thomas’s affidavit. The photographs indicate that they were taken on December 16, 2014, five days after the accident.

Defendants point out the evidentiary problem concerning the uncertified and unsworn Police Report, and argue that Thomas's sworn statement, together with the photographs, are "sufficient to require a trial of material questions of fact" as to whether, and/or to what extent, they should be held liable for the accident and resulting injuries (*Zuckerman v City of New York*, 49 NY2d at 562). In reply, Ramirez reiterates why she believes she is entitled to summary judgment in her favor. She also challenges the veracity of Thomas's statement, noting that there is no reference to a dark colored four door "phantom vehicle" contained in the Police Report, and questions the probative value of photographs taken five days after the accident.

For the following reasons, plaintiff's motion for summary judgment is denied.

"To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. This drastic remedy should not be granted where there is any doubt as to the existence of such issues, or where the issue is arguable; issue-finding, rather than issue-determination is the key to the procedure" (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957] [internal quotation marks and citations omitted]). In its evaluation of the motion, the motion "court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility" (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989] [internal citations omitted]; *see also S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

A review of the parties' submissions reveals that the probative evidence consists of two self-serving sworn affidavits attesting to two different versions of the accident. Material questions of fact exist as to whether, as Ramirez claims, Thomas simply drove into the back of her stopped vehicle, or as Thomas claims, a third car's negligence caused her to strike Ramirez's

vehicle from behind. Inasmuch as the Court must draw all favorable inferences in favor of defendants, and is barred from passing on issues of credibility, the Court cannot find, as a matter of law, that Ramirez is entitled to summary judgment by "tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is denied; and it is further ORDERED that the parties are directed to appear with counsel in the Hon. Richard J. Daronco Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, at the Compliance Conference Part, Courtroom 800, on Friday, July 8, 2016, at 9:30 a.m., to make the changes to the preliminary conference order needed to ensure adequate disclosure.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
June 9, 2016

ENTER:


HON. DAVID F. EVERETT, A.J.S.C.

To:

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