

Lupinacci v Mannel
2018 NY Slip Op 33978(U)
March 20, 2018
Supreme Court, Suffolk County
Docket Number: 607283/2017E
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Jamie Lupinacci,

Plaintiff,

-against-

Eric Mannel and Melissa Yilmaz,

Defendants.

Motion Sequence No.: 001; MD
Motion Date: 9/6/17
Submitted: 11/22/17

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Attorney for Plaintiff:

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Garden City, NY 11530

Attorney for Defendants:

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New York, NY 10016

Clerk of the Court

Upon the **E-file document list** numbered 10-25 read on this application for partial summary judgment on the issue of liability; it is

ORDERED that plaintiff's motion pursuant to CPLR 3212 for partial summary judgment on the issue of liability is denied; and it is further

ORDERED that the plaintiff's motion to dismiss defendants' first, second, third, fourth, seventh, and ninth affirmative defenses is denied.

By the filing of a summons and complaint on April 18, 2017, plaintiff commenced this action to recover damages for personal injuries she alleges were the result of being struck by a motor vehicle operated by defendant Melissa Yilmaz ("Yilmaz"). Plaintiff alleges in her complaint that she

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was a pedestrian at the time that she was struck by defendants' vehicle in a parking lane in front of 48 Main Street near Renwick Avenue in Smithtown, New York. Defendants joined issue by the service and filing of an answer on May 25, 2017. Plaintiff now moves for an order granting summary judgment in her favor on the issue of liability and dismissing the first, second, third, fourth, seventh, and ninth affirmative defenses asserted in defendants' answer. In support of the motion, plaintiff submits copies of the pleadings, an affirmation of her attorney, her affidavit, an affidavit of an alleged witness to the accident, and photographs of the location of the accident. Plaintiff moves for summary judgment on liability on the grounds that a prima facie showing has been made that defendant violated Vehicle and Traffic Law §§1128 (a) and 1146 (a) by looking down inside her vehicle when her vehicle veered from a lane of travel into a designated parking lane, striking the plaintiff, a pedestrian. Plaintiff contends that her affidavit along with the affidavit of an independent witness establish defendant's negligence as a matter of law in making an unsafe lane change into a parking lane and failing to keep a proper lookout under the circumstances. Plaintiff also claims that there was no comparative negligence on her part because defendants' vehicle struck her as she was about to enter her vehicle from the parking lane and that she had no opportunity to avoid the collision. Plaintiff finally asserts that the emergency doctrine cannot operate as a defense because the defendant created the emergency.

In opposition, defendant claims that discovery has not been completed and that there are material facts in dispute which require a denial of plaintiff's motion. Counsel for defendant asserts in his affirmation that defendants deny in their answer that a motor vehicle accident occurred on the date and location alleged by plaintiff and that plaintiff failed to submit a certified MV104(A) police accident report to verify that the collision occurred and that there were any alleged witnesses to the collision. Defendant Yilmaz submits an affidavit that on November 29, 2016 at approximately 7:30 p.m. she was operating a white Nissan at a time when it was dark outside and raining, that she had both headlights and windshield wipers on due to the conditions, that there were no streetlights or marked crosswalks in the immediate vicinity, that while she was driving she was looking through the front windshield of her vehicle and maintained constant observation of the roadway ahead and that as she was traveling, plaintiff suddenly appeared alongside the sole eastbound lane of traffic, immediately ahead of defendant's approaching vehicle. Defendant Yilmaz further asserts in her affidavit that she had no warning or time to react to the plaintiff suddenly appearing alongside the traffic lane and was unable to avoid coming into contact with the plaintiff. Defendant Yilmaz contends that it was plaintiff who acted in a reckless and negligent manner by suddenly stepping out alongside the lane of oncoming traffic.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The failure to make such 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]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish

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the existence of material issues of fact which require a trial of the action” (*Alvarez v Prospect Hosp.*, 68 NY2d at 324, 508 NYS2d 923, citing to *Zuckerman v City of New York*, 49 NY2d at 562, 427 NYS2d 595).

It is only in rare cases that a trial court is justified in holding that the acts of parties are negligent per se. The questions of negligence and contributory negligence are usually questions of fact (*Kellegher v Forty-Second Street, Manhattanville and St. Nicholas Avenue Railroad Company*, 171 NY 309 [1902]).

In addition to the common law duty owed by every driver to see that which should be seen through the proper use of his or her senses (see *Barbieri v. Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept.2010]; *Domanova v. State of New York*, 41 AD3d 633, 838 NYS2d 644 [2d Dept. 2007]), Vehicle & Traffic Law § 1146 (a) provides in relevant part that “[n]otwithstanding the provisions of any other law to the contrary, every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary.” Vehicle & Traffic Law § 1151 (b) provides that “[n]o pedestrian shall suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close that it is impractical for the driver to yield.”

In the instant action, there are issues of fact as to where the plaintiff was located immediately prior to the accident and the moments leading up to the accident, whether defendant had an ability to stop, swerve, or sound her horn (see *Deegan v Getter*, 42 Misc3d 1225 (A) [Sup Ct, Kings County 2014]), whether defendant was looking forward immediately prior to when her vehicle made contact with plaintiff, whether the defendant exercised reasonable care and observed what was there to be seen, and whether, under the conditions and circumstances, plaintiff was negligent in entering the roadway and/or her vehicle (see *Breslin v. Rudden*, 291 AD2d 471 [2d Dept. 2002]; *McLeod v. Taccone*, 122 AD3d 1410 [4th Dept. 2014]). At the very least, plaintiff’s submissions fail to establish as a matter of law that she was free from comparative negligence (see *Melchiorre v. Dreisch*, 95 AD3d 845, 942 NYS2d 892 [2d Dept. 2012]; *Cohn v. Khan*, 89 AD3d 1052, 933 NYS2d 402 [2d Dept. 2011]; *Roman v. Ai Limousine, Inc.*, 76 AD3d 552, 907 NYS2d 251 [2d Dept. 2010]; *Wilson v. Rosedom*, 82 AD3d 970 [2d Dept. 2011]; *Myles v. Blain*, 81 AD3d 798 [2d Dept. 2011]; *Goldenberg v. Palewicz*, 65 AD3d 518 [2d Dept. 2008]; *Sokolovsky v. Mucip, Inc.*, 32 AD3d 1011 [2d Dept. 2006]; *Cox v. Nunez*, 23 AD3d [2d Dept. 2005]).

In view of the determination that plaintiff failed to prove defendant’s negligence was the sole proximate cause of the accident. For the reasons set forth above, the application to dismiss the first, second, third, fourth, and seventh affirmative defenses also is denied, as is the motion to dismiss the ninth affirmative defense (see *Stewart v. Ellison*, 28 AD3d 252, 813 NYS2d 397 [1st Dept. 2006]).

Accordingly, the plaintiff’s motion is denied in its entirety.

NYSCEF DOC. NO. 26

RECEIVED NYSCEF: 03/26/2018

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The parties' attorneys shall appear for a preliminary conference on **Wednesday May 16, 2018 at 9:30 a.m.** at Part 7 of the Supreme Court, 1 Court Street, Riverhead, New York.

Dated: 3/20/2018


HON. WILLIAM B. REBOLINI, J.S.C.

_____ FINAL DISPOSITION ___ X ___ NON-FINAL DISPOSITION