

Volpe v Bascone

2018 NY Slip Op 34105(U)

July 19, 2018

Supreme Court, Orange County

Docket Number: Index No. EF003875/17

Judge: Robert A. Onofry

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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

JILLIAN A. VOLPE,

Plaintiff,

- against -

JAMES J. BASCONE,

Defendant.

To commence the statutory time period 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.

Index No. EF003875/17

DECISION AND ORDER

Motion Date: April 25, 2018

The following papers numbered 1 to 3 were read and considered on a motion by the Plaintiff, pursuant to CPLR § 3212, for summary judgment on the issue of liability, and for an inquest as to damages.

Notice of Motion - Dreyer Affirmation - Exhibits A-H 1-3

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Jillian A. Volpe alleges that she sustained personal injuries on September 1, 2016, when a vehicle she was driving was struck from the rear by a vehicle being driven by the Defendant James J. Bascone.

The Plaintiff moves for summary judgment on the issue of liability.

The motion, which is unopposed, is granted.

Factual Background

In an affidavit, the Plaintiff avers as follows.

On September 1, 2016, at approximately 8:10 p.m., she was driving on Route 55 at the point where it enters a traffic circle at or near Stringham Road in the Town of LaGrange (Exhibit G). Just prior to the accident, she brought her vehicle to a complete stop behind two or three other vehicles that were stopped ahead of her, waiting to enter the traffic circle. After she had been stopped for between 5 and 10 seconds, her vehicle was struck from the rear by the Defendant's vehicle. Prior to the impact, she did not hear the sound of a horn, squealing tires, or any other sound which might have warned of an impending crash.

At an examination before trial, the Defendant testified as follows.

The traffic circle at issue is near his home and he was familiar with it (Exhibit H). He had been following the Plaintiff's vehicle for several minutes before his vehicle came into contact with the rear of the same (T-11-12). When he struck the Plaintiff's vehicle, it was coming to a stop, but was still moving (T-12). He "believed" that the Plaintiff's vehicle was the only one in front of him at the time of the contact (T-14). There was a yield sign in their direction of travel, but no traffic (T-13). His expectation was that the Plaintiff was going to slow down and then roll through the yield sign (T-18). As they approached the yield sign, he saw the Plaintiff's brake lights illuminate and then go off when she was about 10 feet from the sign (T-33). He made contact within 20 seconds of when her lights went off (T-34). At the time of impact, his vehicle was traveling approximately three to four miles an hour (T-15). Nothing obstructed his view of the Plaintiff's vehicle prior to the collision (T-38). At the time of the accident, he was seventeen years old (T-4).

Based upon the foregoing, the Plaintiff moves for summary judgment on the issue of liability.

In support of her motion, the Plaintiff submits an affirmation from her attorney Darryl Dreyer.

Dreyer argues that the Plaintiff's affidavit *supra* is sufficient to demonstrate a *prima facie* entitlement to judgment as a matter of law on the issue of liability.

Further, he asserts, although the Defendant's testimony at his examination before trial varies from the Plaintiff's in some aspects, nothing stated by the Defendant, however substantively alters this result.

Thus, he argues, the Plaintiff should be awarded summary judgment as to liability.

Appended to the Plaintiff's motion papers are, *inter alia*:

(B) A certified police report of the accident (Exhibit A).

According to the police report, there was one vehicle ahead of the Plaintiff's at the time of the accident.

Discussion/Legal Analysis

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 non-negligent explanation for the collision. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]; *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]. A nonnegligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084

[2nd Dept. 2017]. However, while a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, 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. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017].

A driver is negligent where he or she fails to see that which, through proper use of his or her senses, he or she should have seen. *Aponte v. Vani*, 155 A.D.3d 929 [2nd Dept. 2017].

There can be more than one proximate cause of an accident. Thus, to prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, *prima facie*, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault. *Pillasagua v. Losco*, 135 A.D.3d 843 [2nd Dept. 2016]; *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015].

Here, the Plaintiff's sworn assertions are sufficient to demonstrate, *prima facie*, that the Defendant was negligent in the happening of the accident, and that she was free from comparative fault.

The Defendant submitted no opposition to the motion.

In any event, the Defendant's testimony at his examination before trial, even if credited, did not raise a triable issue of fact as to a non-negligent explanation for the collision.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion is granted, the Plaintiff is granted summary judgment as to liability, and the matter is set down for a trial as to damages; and it further,

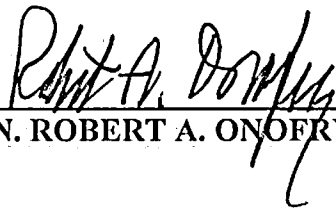
ORDERED, that the parties are to appear, through respective counsel, for a Pre-trial

conference on Tuesday, July 17, 2018, at 1:30 p.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York.

The foregoing constitutes the decision and order of the court.

Dated: June 19, 2018
Goshen, New York

ENTER



HON. ROBERT A. ONOFREY, A.J.S.C.

TO: Dreyer Law Offices, PLLC
for the Plaintiff
Office & P.O. Address:
5419 Route 9W
Newburgh, New York 12550

Goergen, Manson & McCarthy
for the Defendant
Office & P.O. Address:
90 Crystal Run Road, Suite 405
Middletown, New York 10941