Valenza v Kroner
2018 NY Slip Op 34301(U)
March 23, 2018
Supreme Court, Orange County
Docket Number: Index No. EF008506/2016
Judge: Maria S. Vazquez-Doles
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At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the 1841 Court House, 101 Main Street, Goshen, New York 10924 on the 23rd day of March, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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, on all parties.

MADISON VALENZA,

PLAINTIFF,

-AGAINST-

LOUISE KRONER and RICHARD KRONER,

DEFENDANTS.

DECISION & ORDER
INDEX#EF008506/2016
Motion date: 03/15/18
Motion Seq.# 2 & 3

LOUISE KRONER and RICHARD KRONER,

Third Party Plaintiffs,

-AGAINST-

ANTHONY M. DIMARTINO,

Third Party Defendant.

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 32 were read on Defendants' motion for summary judgment dismissing the complaint on the issue of liability and Plaintiff's cross motion for summary judgment on the issue of liability:

Notice of Motion/ Affirmation/ Exhibits A-O/ Memorandum of Law. 1- 18
Affirmation in Opposition (Andris)/ Exhibits A-B. 19-21
Notice of Cross-Motion/ Affirmation/ Exhibits A - E . . . . . 22 -28
Reply Affirmation. 29
Reply Affirmation/ Exhibits A-B 30-32

Upon review of the foregoing, it is **ORDERED** that the motion by defendants Louise

Kroner and Richard Kroner for summary judgment as to liability is hereby denied and the cross-motion by the plaintiff is hereby denied; and it is further

ORDERED that all parties are directed to appear for a pre-trial conference on March 28, 2018 at 9:15am.

This action is to recover damages for physical injuries allegedly sustained by the plaintiff in a motor vehicle accident, which occurred at or near the intersection of Browns Road and Berea Road (the "subject intersection"), in Walden, New York on November 23, 2016. According to the verified complaint, the plaintiff was a seated passenger of the vehicle operated by Third-Party Defendant, Anthony M. DiMartino ("DiMartino") which was traveling North on Berea Road. Defendant, Louise Kroner, ("Mrs. Kroner") was traveling on Browns Road that is governed by a stop sign at its intersection with Berea Road. Plaintiff alleges that Mrs. Kroner, while attempting to make a left hand turn from Browns Road onto Berea Road, failed to yield the right of way and failed to stop at the stop sign causing the two vehicles to collide.

It is well established that summary judgment is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue of fact (*see Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223 [1978]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; CPLR 3212 [b]). The court's function on a motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). For summary judgment to be granted, the moving party must establish his or her cause of action or defense by presenting evidentiary proof in admissible form that would be sufficient to warrant the court in directing judgment in favor of the moving party (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065 [1979]). 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 the existence of material issues of fact which require a trial of the action (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

The moving defendants contend that, DiMartino, bears sole liability for the accident due to his speeding and crossing over into defendants' lane of traffic immediately before impact, citing violations of the Vehicle and Traffic Law §1120A, §1126, §1180A and §1180D. Where the operator of a vehicle fails to abide by the mandates of the VTL's statutory provisions, such proscribed conduct is deemed negligent as a matter of law (*Martin v Herzog*, 228 NY 164 [1920]; *Davis v Turner*, 132 AD3d 603 [1st Dept. 2015]). Nonetheless, "the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" *(Desio v Cerebral Palsy Transp., Inc.*, 121 AD3d 1033 [2nd Dept. 2014], *quoting Pollack v Margolin*, 84 AD3d 1341, 1342 [2nd Dept. 2011]).

In support of their motion for summary judgment, the moving defendants furnished this court with an affidavit of John McManus, P.E. Professional Engineer, to demonstrate DiMartino's negligence was the sole cause of the accident. Mr. McManus concludes that DiMartino had been traveling at least twice the posted speed limit and that the impact occurred in the southbound lane of travel after Mrs. Kroner, completed the left hand turn onto Berea Road. The moving defendants further highlight testimony from Mrs. Kroner's deposition, during which she indicated that she stopped at the stop sign, looked both ways and did not see DiMartino's vehicle at any time prior to impact. She accelerated to proceed through the intersection to make the left turn onto Berea Road going southbound, and from the time she stopped at the stop sign

and pulled forward all the way up to the point of impact, she was looking left and never saw another vehicle approaching from the left. Because every driver is bound by the common-law "duty to see what should be seen and exercise reasonable care under the circumstances to avoid an accident" (*Johnson v. Phillips*, 261 AD2d 269 [1st Dept. 1999]), Mrs. Kroner's own admission that she did not see DiMartino's vehicle at any time prior to impact suggests negligence on her own part, precluding her from entitlement to summary judgment as to liability.

Defendants also highlight testimony from plaintiff which contradicts both Mrs. Kroner's testimony and McManus' report. Plaintiff testified that Mrs. Kroner, failed to stop at the stop sign and made a left hand turn in front of DiMartino's vehicle which caused him to swerve to the left in an attempt to avoid the accident. Mrs. Kroner, testified that she proceeded through the intersection diagonally to make the left hand turn. The fact that Mrs. Kroner was proceeding on a diagonal across Berea Road and that DiMartino swerved to the left, same could account for the gouge marks in the southbound lane and the points of impact for both vehicles as revealed by Mr. McManus' scene investigation. Thus, plaintiff's contentions raise issues of fact with respect to exactly how and where the accident occurred, further militating against granting summary judgment in favor of the moving defendants.

With respect to plaintiff's cross-motion, counsel for the plaintiff contends that, as an innocent passenger, plaintiff is entitled to summary judgment on the issue of liability regardless of any factual issues concerning comparative fault as between the defendant drivers. While it is correct that an innocent passenger's right to summary judgment should not be precluded on the basis that there are potential issues of comparative negligence as between the drivers of the vehicles involved in the accident (*Johnson v. Phillips*, 261 A.D.2d 269 [1st Dept. 1999]), the

plaintiff must satisfy the two-fold burden of demonstrating both that she is free from comparative fault as an innocent passenger, and that the operators of the vehicles at issue were at fault. (*Oluwatayo v Dulinayan*, – NYS3d –, 2016 NY Slip Op 05455 [1st Dept. 2016]; *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]). "If the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition… summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger" (*Oluwatayo*, 2016 NY Slip Op 05455; *see Sanchez v Taveraz*, 129 A.D.3d 506 [1st Dept. 2015]).

It is undisputed that the plaintiff does not bear any liability for the motor vehicle accident's occurrence, so her entitlement to the relief requested herein centers upon whether she has adequately proven that the defendants are liable as a matter of law. Given that the proof submitted establishes issues of fact as to which vehicle was responsible for the accident, summary judgment is not appropriate on the issue of liability as against the defendants (*Buffa v Carr*, 148 AD3d 606 [1st Dept 2017]).

The foregoing constitutes the Decision and Order of this Court

Dated: March 23, 2018
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of Record via NYSCEF