

Chiarella v Atwood
2018 NY Slip Op 34304(U)
May 30, 2018
Supreme Court, Dutchess County
Docket Number: Index No. 52926/2016
Judge: James D. Pagonis
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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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
ROSEMARIA CHIARELLA,

Plaintiff,

-against-

HADLEY L. ATWOOD,

Defendant.

-----X

PAGONES, J.D., A.J.S.C.

Defendant moves for an order, pursuant to CPLR 3212, granting her summary judgment and dismissing plaintiff's complaint.

The following papers were read:

Notice of Motion-Affirmation-Exhibits A-D 1-6

Affirmation in Opposition-Exhibit A 7-8

Reply Affirmation 9

By way of background, this is an action to recover damages for personal injuries allegedly sustained by the plaintiff as a result of a motor vehicle accident which occurred on December 13, 2015. The collision took place on Burnett Boulevard in the Town of Poughkeepsie, New York.

On a motion for summary judgment, the test to be applied is whether triable issues of fact exist or whether on the proof submitted judgment can be granted to a party as a matter of law

(see *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (see *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]). Once the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]).

In support of her motion, defendant offers the deposition testimony of the plaintiff and her own deposition transcript. Plaintiff was traveling on Route 44, when she entered the right hand turn lane to turn onto Burnett Boulevard (see Deposition of Plaintiff at p 33 lines 12-25). The plaintiff testified that as she was turning onto Burnett Boulevard, she did not see any vehicles approaching from southbound Route 44 or from the "other direction on Burnett" (see Deposition of Plaintiff at p 44 lines 15-19). She did not see any vehicles cross in front of her vehicle prior to the impact (see Deposition of Plaintiff at p 44 lines 20-23). In fact, plaintiff testified that she did not see the other vehicle involved in the accident until the point of impact (see Deposition of Plaintiff at pp 44-45 lines 24-25, lines 2-3). Plaintiff stated that her driver's side front bumper cover and headlight were damaged (see Deposition of Plaintiff at

p 45 lines 14-22). Plaintiff was "several car lengths" onto Burnett Boulevard driving straight when the accident occurred (see Deposition of Plaintiff at p 46 lines 3-4). When asked for clarification, plaintiff testified that she would estimate that she was five car lengths onto Burnett (see Deposition of Plaintiff at p 52 lines 5-10).

Defendant testified that she was traveling on Route 44 in the left-hand turning lane as she approached the intersection with Burnett Boulevard (see Deposition of Defendant at p 14 lines 16-21). The defendant proceeded with the left-hand green turn signal illuminated (see Deposition of Defendant at p 17 lines 13-17). As she was completing her turn, she felt an impact in the rear of her vehicle and she was "flung through a white fence into a tree" (see Deposition of Defendant at pp 17-18 lines 22-25 lines 2-3). Defendant stated that she turned into the far right lane of Burnett Boulevard, instead of the left hand lane as she was going to be making a right into Stop & Shop shortly (see Deposition of Defendant at p 18 lines 4-21).

The law is clear that a rear-end collision establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see *Niyazov v. Hunter EMS, Inc.*, 154 AD3d 954 [2nd Dept 2017]). Here, the deposition testimony of the parties

establishes that the plaintiff's vehicle struck the defendant's vehicle in the rear. The Court would note that it did not consider the MV-104A, Police Accident Report, as it is uncertified and therefore inadmissible (see *Nationwide Gen. Ins. Co. v. Bates*, 130 AD3d 795 [2nd Dept 2015]).

Since defendant has made a *prima facie* showing of entitlement to judgment as a matter of law (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]), plaintiff must show that genuine triable issues of material fact exist in order to defeat defendant's motion (*id.*).

In opposition, plaintiff fails to raise a triable issue of fact. The affirmation of counsel, who has no personal knowledge of the facts, is insufficient, as a matter of law, to defeat summary judgment (see *Zuckerman v. City of New York*, 49 NY2d 557 [1980]; *9394 LLC v. Farris*, 10 AD3d 708 [2nd Dept 2004] leave to appeal denied by 4 NY3d 705). Moreover, the mere speculation and conjecture of plaintiff's counsel that defendant's purported violation of the Vehicle and Traffic Law caused the accident is unsupported by the deposition testimony of his client. Plaintiff testified that she traveled nearly five car lengths onto Burnett Boulevard prior to the point of impact. Additionally, defendant was traveling with a green light through the intersection and was entitled to assume that the plaintiff, who testified that defendant remained unseen until the point of impact, would yield

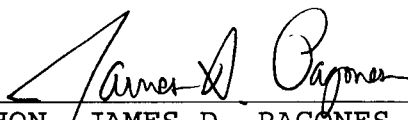
the right of way. Accordingly, plaintiff has failed to raise an issue of fact as to the movant's negligence (*see Nozine v. Anurag*, 38 AD3d 631 [2nd Dept 2007]; *Niyazov v. Bradford*, 13 AD3d 501 [2nd Dept 2004]).

Based upon the foregoing, defendant's motion for summary judgment is granted in its entirety. The plaintiff's complaint is dismissed.

The foregoing constitutes the decision and order of this Court. This decision and order has been filed electronically.

Dated: May 30, 2018
Poughkeepsie, New York

ENTER



HON. JAMES D. PAGONES, A.J.S.C.

TO: JOSHUA E. MACKEY, ESQ.
MACKEY, BUTTS & WISE, LLP
Attorney for Plaintiff
3208 Franklin Avenue
Millbrook, New York 12545
jmackey@mbw.wise.com

STACY L. JACOBS, ESQ.
LAW OFFICE OF BRYAN M. KULAK
Attorneys for Defendant
90 Crystal Run Road, Suite 409
Middletown, New York 10941
sjacobs@geib.com

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