

Klupacs v Rivera

2018 NY Slip Op 34317(U)

March 19, 2018

Supreme Court, Orange County

Docket Number: Index No. EF008503/16

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

NICHOLAS C. KLUPACS,

Plaintiff,

- against -

DAVID RIVERA and TANIA RIVERA,

Defendants.

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. EF008503/16

DECISION AND ORDER

Motion Date: February 28, 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.

Notice of Motion- Quattrocchi Affirmation- Exhibits 1-6 1-3

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted as against David Rivera, and otherwise denied.

Factual/Procedural Background

The Plaintiff Nicholas C. Klupacs commenced this action to recover personal injuries alleging arising from a motor vehicle accident.

According to a police report, on February 22, 2014, a vehicle being driven by the Plaintiff was struck by a vehicle being driven by the Defendant David Rivera as Rivera was attempting to pass on the left while driving on the meridian/shoulder of the road (Motion, Exhibit 3). The Plaintiff's vehicle rolled several time before coming to a stop. Rivera left the scene of the accident and was located at a Sunoco station further down the road. His vehicle showed damage

and a paint transfer from the Plaintiff's vehicle. Rivera admitted to being involved in the accident. The report lists several witnesses to the accident. Rivera was ticketed for several violations of Vehicle and Traffic Law (hereinafter the "VTL").

At an examination before trial, the Plaintiff testified that, just prior to the accident, he was in the left lane of travel on I-84, passing a vehicle (Motion, Exhibit 4, pp. 32-33). As he was doing so, Rivera attempted to pass him on his left, driving on the shoulder of the road (T-32-33). When Rivera attempted to return to the road way, his vehicle struck the front left side of the Plaintiff's vehicle, sending it across the road and over an embankment (T-32-33). The Plaintiff believed that Rivera might have bounced back into the road because he hit a snow bank. There was snow piled on the side of the road (T-35-36). When he first observed Rivera in his rear view mirror, Rivera was tailgating him (T-34).

At an examination before trial, David Rivera testified that he was involved in the subject accident (Motion, Exhibit 5, pp 21-22). The weather was dry and the road was clear (T-22). He was in a rush because he was driving his daughter to a birthday party. He passed the Plaintiff's vehicle on the left, using the median of the road (T-29). While on the median, he lost control, went back into the left lane of travel, and "kept going" (T-29). He did not notice snow on the side of the road until he began sliding on it (T-32). He was not aware that he had made contact with the Plaintiff's vehicle (T-34). Rather, his wife, the Defendant Tania Rivera, who was following him in a different vehicle, called and told him (T-34). He exited at the next exit and called the police (T-34).

At an examination before trial, Tania Rivera testified that she was following behind David Rivera at the time of the subject accident (Motion, Exhibit 6, pp 17-19). She did not see

the actual impact (T-19). Prior to the impact, she saw the Plaintiff's vehicle move to the right (T-19). She saw David Rivera pass the Plaintiff's vehicle using the shoulder of the road (T-20-23).

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

In so moving, the Plaintiff argues that David Rivera's violations of the VTL constitute negligence *per se*.

Further, he asserts, it may be determined, as a matter of law, that David Rivera was negligent in the happening of the accident.

The motion is not opposed.

Discussion/Legal Analysis

In general, violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence *per se*. *Pena v. Spade*, 145 A.D.3d 791 [2nd Dept. 2016]; *Adobea v Junel*, 114 A.D.3d 818 [2nd Dept. 2014]; *Barbieri v. Vokoun*, 72 A.D.3d 853 [2nd Dept. 2010].

However, 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. *Pena v. Spade*, 145 A.D.3d 791 [2nd Dept. 2016]; *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 demonstrated, *prima facie*, that David Rivera was negligent in the happening of the accident, and that he was free from negligence, with his sworn statements concerning the relevant facts, which are not disputed, and with evidence that David Rivera was ticketed at the scene, *inter alia*, for violating VTL § 1128, which prohibits unsafe passing, and

violating VTL § 1212, which prohibits reckless driving. *Davis v. Turner*, 132 A.D.3d 603 [1st Dept. 2013].

In opposition, David Rivera did not raise a triable issue of fact. Indeed, the motion is not opposed.

However, the basis for the imposition of liability as against the Defendant Tania Rivera is not clear and not established. If Tania Rivera is not a proper Defendant, the Plaintiff must discontinue the action as against her.

Thus, the Plaintiff is granted summary judgment on the issue of liability as against David Rivera only.

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

ORDERED, that the motion is granted as against David Rivera and otherwise denied; and it is further,

ORDERED, that the parties, through respective counsel, are directed to appear for a Status Conference to determine how the matter shall proceed on the issue of damages as against the Defendant David Rivera, which Conference shall be conducted on Tuesday, April 24, 2018, at 1:30 p.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York; and it is further

ORDERED, that if Tania Rivera is not a proper party defendant, the Plaintiff is directed to, and shall, discontinue the action as against her, which discontinuance shall be effectuated prior to the next scheduled Status Conference.

The foregoing constitutes the decision and order of the court.

Dated: March 19, 2018
Goshen, New York

ENTER



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

TO: Sobo & Sobo, LLP
for the Plaintiff
Office & P.O. Address
One Dolson Avenue
Middletown, New York 10940

Law Office of Bryan Kulak
Attorney for Defendants
Office & P.O. Address
90 Crystal Run Road, Suite 409
Middletown, New York 10941