

**Cesarz v O'Reilly**

2018 NY Slip Op 34366(U)

July 12, 2018

Supreme Court, Westchester County

Docket Number: Index No. 66960/16

Judge: David F. Everett

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To commence the 30-day statutory time period for appeals as of right under 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 WESTCHESTER

-----X  
ANGELA CESARZ,

Plaintiff,

-against-

BARBARA O'REILLY, TIMOTHY F. O'REILLY  
and KAROLINA AMY MEAGHER,

Defendants.

-----X  
EVERETT, J.

Index No. 66960/16  
Motion Seq. Nos. 001, 002  
Decision and Order

The following papers were read on the motions:

- 001 Notice of Motion/Affirmation in Supp/Exhibits A-F/ Aff of Serv (docs 27-35)  
Affirmation in Opp/Aff of Serv/Exhibits A-B (docs 49-52)
- 002 Notice of Cross Motion/Affirmation in Supp/Exhibits A-I/Aff of Serv (docs 37-48)

In this action arising from a multi-vehicle accident, co-defendant Karolina Anna Meagher, s/h/a Karolina Amy Meagher (Meagher), moves, under motion sequence number 001, for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all cross claims against her. Plaintiff Angela Cesarz (Cesarz) moves, under motion sequence number 002, for an order granting summary judgment in her favor and against co-defendants Barbara O'Reilly (B. O'Reilly) and Timothy F. O'Reilly (T. O'Reilly) (together, O'Reillys) on the issue of liability, and setting the matter down for a trial on damages. The motions, under motion sequence numbers 001 and 002, are consolidated for disposition, and upon the foregoing papers, the motions are granted.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on November 11, 2016, to recover damages for the serious physical injuries she allegedly sustained as a result of an automobile accident that occurred on April 15, 2016, on Underhill Avenue in Yorktown, New York. It is alleged, and not meaningfully disputed that, at approximately 4:25 p.m., the vehicle being operated by Cesarz was the middle vehicle in a three-vehicle collision, in which a vehicle owned by T. O'Reilly and being operated by B. O'Reilly, struck the rear of Cesarz's vehicle, pushing it into the rear of the vehicle being operated by Meagher. The complaint sounds in negligence, and alleges that the co-defendants' respective acts of negligence caused Cesarz to sustain serious personal injuries, as defined under Insurance Law § 5102 (d).

Issue was joined by service of B. O'Reilly and T. O'Reilly's joint answer with affirmative defenses and a cross claim against Meagher on or about January 25, 2017, and by service of Meagher's answer with affirmative defenses and a cross claim against B. O'Reilly and T. O'Reilly on or about February 1, 2017. The parties then conducted discovery pursuant to the terms of the preliminary conference and follow-up compliance conference orders, after which plaintiff filed a note of issue and certificate of readiness on February 8, 2018. Currently before the Court are the summary judgment motions of Meagher and Cesarz, which are opposed by the O'Reillys.

It is well settled that the proponent of a motion for summary judgment must tender evidentiary proof in admissible form sufficient to warrant the court to direct judgment in their favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

In support of their respective motions, both Meagher and Cesarz submit copies of, among other things, the pleadings, the bills of particulars, and the party deposition transcripts. They each assert that their submissions demonstrate their prima facie entitlement to judgment in their favor, and do not oppose the other's motion.

According to Cesarz, she was driving home from work on Underhill Avenue, and the cars traveling in her direction were stopping and starting due to existing traffic conditions. Cesarz testified that she had been traveling at approximately the same speed as the car directly in front of her, and that she brought her own vehicle to a complete stop when the car in front of hers came to a complete stop. She testified that it was about two to three seconds later when her stopped vehicle "was hit from behind and pushed into the car in front" (Cesarz tr at 27, 30-32). Cesarz stated that the first impact was a heavy impact straight on from behind, which then pushed her vehicle forward enough to hit the vehicle directly in front, despite her foot being on the brake (*id.* at 33-36). Upon further questioning, Cesarz stated that both the first and second impacts caused her head and knees to come into contact with the inside of her car. She did not know who called the police, but she recalled a police officer arriving at the scene and then being taken by ambulance to a hospital (*id.* at 43, 44).

During B. O'Reilly's deposition, she acknowledged seeing the two cars in front of her in a stopped position prior to the moment when her vehicle struck the one directly in front of her. She was unable to say how long they had been stopped, or how long they had been ahead of her (O'Reilly tr at 32, 33). When asked the following questions about what she did to try to stop her vehicle, B. O'Reilly gave the following replies.

"Q. After you saw them stopped did you try to stop your vehicle?

A. Yes.

Q. And how did you attempt to stop your vehicle?

A. I pumped the brake and I put on the brake.

Q. When you say you pumped the brake, how many times did you pump the brake?

A. Twice, maybe. It's not - - I know better than to push down hard and you know - - so I pumped as, you know, soon as I saw them, to try to slow down and then stop"

(id. at 34).

\* \* \*

"Q. Were you distracted, just immediately before the accident?

A. No.

Q. Was your vision out the front windshield of your vehicle in any way obstructed by anything, from the rearview mirror or anything in front of you?

A. No"

(id. at 36).

\* \* \*

"Q. Where you distracted by anything just before the accident happened?

A. No"

(id. at 37).

\* \* \*

"Q. Okay. When you applied the brakes did the brakes respond?

A. Yes.

Q. But you continued to move, correct?

A. Yes. I - - well - -

Q. Was there an impact between the front of your vehicle and vehicle that had been stopped in front of you?

A. Yes, but a tap, very, very light. There was not - - I had no damage to the front of my car, whatsoever"

(id. at 39).

\* \* \*

"Q. Did your brakes fail?

A. No.

Q. Were you following too closely ?

A. No.

Q. Do you have any understanding of why your vehicle contacted the rear of the other vehicle?

A. There wasn't enough room not to. There wasn't enough time not to. They were stopped and I - - and they were - - I couldn't really see them until I went over. It wasn't a far enough, to see them that much in advance I guess.

A. Did you make a mistake?

A. No. I don't think I made a mistake at all, I don't think, no. No"

(id. at 54-55).

Meagher testified that, immediately prior to the accident, she had been traveling on Underhill Avenue in Yorktown, and was stopped some five to ten car lengths from the intersection of Underhill Avenue and Route 118 (Meagher tr at 18, 21). Meagher described the movement of the traffic in front of her as “stop and go,” and that, prior to the impact to the back of her vehicle, she had been stopped for at least 10 seconds, because the cars in front of her had stopped (*id.* at 21, 24). She also testified that her vehicle did not impact with the vehicle directly in front of hers, and that she saw the plaintiff’s vehicle stopped close behind hers prior to the accident (*id.* at 27, 28).

It is well settled that, with respect to collisions between moving vehicles, or between a moving vehicle and a stopped vehicle, “[w]hen the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle” (*Taing v Drewery*, 100 AD3d 740, 741 [2d Dept 2012]). Furthermore, “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” (*Robayo v Aghaabdul*, 109 AD3d 892, 893 [2d Dept 2013] [internal quotation marks and citation omitted]).

It is also well settled law that “[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” (*Chiok v Kouridakis*, 57 AD3d 706, 706 [2d Dept 2008] [internal quotation marks and citations omitted]). Finally, Vehicle and Traffic Law § 1129 provides, at subsection (a), that “[t]he driver of a motor vehicle shall not follow another vehicle more closely

than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.”

Addressing Cesarz’s motion first, the Court finds that she has satisfied her prima facie burden of establishing negligence on the part of the O’Reillys as a matter of law on the issue of liability, as the O’Reilly vehicle struck the rear of Cesarz’s vehicle during “stop and go” traffic conditions. The burden, therefore, shifts to the O’Reillys to submit, in admissible form, a non negligent explanation either for the collision, or for B. O’Reilly’s failure to maintain a reasonably safe distance under the prevailing traffic conditions between her vehicle and the vehicle in front of her (*Robayo v Aghaabdul*, 109 AD3d at 893; *Taing v Drewery*, 100 AD3d at 741). The Court further finds that Meagher has also demonstrated prima facie entitlement to judgment in her favor as to the question of negligence, shifting the burden to the O’Reillys to raise a question of fact sufficient to forestall a summary dismissal of the complaint and cross claim against her.

Central to their opposition is the O’Reillys’ contention that questions of fact exist as to whether Meagher and Cesarz were each negligent and/or comparatively negligent in the sudden manner in which they stopped their vehicles, including Cesarz’s purported failure to leave enough space between her vehicle and Meagher’s vehicle. The O’Reillys support their contention by pointing to Meagher’s testimony where she opines that Cesarz’s stopped vehicle was close to hers (Meagher tr at 28), and to the uncertified copy of the police accident report/MV-104A report relative to the accident, which contain Meagher’s and B. O’Reilly’s versions of the event, as reported to the police officer at the scene.

Inasmuch as the copy of the police accident report submitted with the O’Reillys’ papers is neither certified, nor otherwise properly authenticated, it constitutes inadmissible hearsay and cannot be considered by the Court (*see Torres v Kalloff*, 128 AD3d 1052, 1052 [2d Dept 2015]);

*Silva v Lakins*, 118 AD3d 556, 557 [1<sup>st</sup> Dept 2014]; *Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525, 526 [1<sup>st</sup> Dept 2010]). Additionally, even if it were submitted in admissible form, the report contains no indication that the police officer who prepared the report witnessed the accident. Under New York law, a police accident report “by a police officer who was not an eyewitness containing hearsay statements regarding the ultimate issues of fact may not be admitted into evidence for the purpose of establishing the cause of the accident in question” (*Figueroa v Luna*, 281 AD2d 204, 205 [1<sup>st</sup> Dept 2001]; see also *Memenza v Cole*, 131 AD3d 1020, 1021 [2d Dept 2015]; CPLR 4518).

Not only do the O’Reillys’ contentions fall short of a non negligent explanation for striking Cesarz’ vehicle from behind, but contrary to their assertions, Meagher did not testify that she stopped short. She testified that she was driving in “stop and go” traffic, and that she stopped about 10 seconds before the accident, because the cars in front of her stopped. Similarly, Cesarz testified that she was traveling at the same rate of speed as the car immediately in front of hers, brought her vehicle to a stop when the car in front of hers came to a stop, and was struck from behind some two to three seconds later.

Inasmuch as the O’Reillys’ have failed to present a triable issue of fact, or to produce competent evidence which supports a non negligent explanation for B. O’Reilly’s failure to leave a reasonably safe distance between her vehicle and the vehicle in front of her under the prevailing traffic conditions at the time of the accident (*Zuckerman v City of New York*, 49 NY2d at 562; *Chiok v Kouridakis*, 57 AD3d at 706; *Robayo v Aghaabdul*, 109 AD3d at 893), the instant motions must be granted.

Accordingly, it is

ORDERED that the summary judgment motion of defendant Karolina Amy Meagher is

granted, and the complaint and all cross claims against her are dismissed, with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an affirmed bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

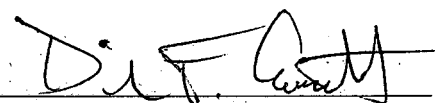
ORDERED that the summary judgment motion of plaintiff Angela Cesarz is granted as to liability, and that the only triable issues of fact arising on plaintiff's motion related to the amount of damages to which plaintiff is entitled; and it is further

ORDERED that the remaining parties are directed to appear with counsel at the Settlement Conference Part, courtroom 1600 of the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, on Tuesday, August 7, 2018 at 9:15 a.m., to schedule a trial on damages.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
July 12, 2018

ENTER:



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