

Fonseca v Heller

2018 NY Slip Op 34385(U)

April 17, 2018

Supreme Court, Orange County

Docket Number: Index No. EF008492-2016

Judge: Catherine M. Bartlett

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

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

OLDIN FONSECA,

Plaintiff,

-against-

DOUGLAS HELLER and EDWIN RODRIGUEZ,

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. EF008492-2016
Motion Date: September 7, 2017

The following papers numbered 1 to 7 were read on Defendants' motions for summary judgment dismissing the claims against them:

Table listing documents: Notice of Motion (Rodriguez) - Affirmation / Exhibits (1-2), Amended Notice of Motion (Heller) - Affirmation / Exhibits (3-4), Affirmation in Opposition (5), Reply Affirmation (Rodriguez) (6), Reply Affirmation (Heller) (7)

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

Plaintiff's complaint, which she personally verified, alleges that on April 21, 2015 at about 4:20 p.m., she was involved in a three-car chain collision motor vehicle accident with defendants Edwin Rodriguez and Douglas Heller. Plaintiff testified that she was stopped at a traffic light for about twenty seconds, with a brown car (purportedly that of defendant Rodriguez)

stopped behind her, when a black car (purportedly that of defendant Heller) rear ended the brown car and pushed it into Plaintiff's vehicle. She testified:

Q And prior to anything happening, did you see the brown car behind you ?

A Yes, I saw it through my rearview mirror.

Q Was it moving when you saw it or was it stopped ?

A It was stopped behind me.

Q Did you feel one or more than one impact ?

A No. I felt two impacts.

Q How much time was there between the two impacts ?

A I would not be able to tell you but it was very fast.

Q What was, can you describe the first impact that you felt ?

A The first impact was when the black car hit the brown car and then I felt the brown car hit me.

Q So, you did not actually feel two impacts, you heard two impacts ?

A Yes, I heard the impact from the black car with the brown car and then the brown car with my car.

Plaintiff further testified, contrary to the allegations in her Verified Complaint, that the operators of the brown and black vehicles involved in the accident were both women, not men. According to Plaintiff, these women left the scene without waiting for the police. Plaintiff claims to have written the license plate of the brown vehicle on a piece of paper, but the paper was defaced by her children and was not preserved. Plaintiff also claims to have taken a photograph of the license plate of the black vehicle on her phone, but she thereafter dropped the phone in the toilet and the photograph was destroyed.

Defendants Edwin Rodriguez and Douglas Heller both testified that neither they nor their vehicles were involved in any accident on April 21, 2015. Mr. Heller, who lives and works on the east side of the Hudson River, produced documentary evidence in the form of an EZ Pass transaction statement purporting to show that the vehicle purportedly involved in the accident did not pass through the Hudson River toll crossings at any time proximate to April 21, 2015.

Plaintiff's counsel, in opposition to Defendants' motions, states only:

[P]laintiff opposes these motions to the extent that she stands on her testimony in her deposition. If plaintiff is deemed credible, multiple issues of fact exist, and summary judgment should be denied.

Defendant Rodriguez's Motion

Concerning motions for summary judgment by the operator of a middle vehicle in a multi-vehicle chain collision, the Second Department has held:

In a multi-vehicle, chain reaction accident, when the operator of a vehicle that was propelled into another vehicle by a following vehicle presents evidence that he...was able to safely bring his...vehicle to a stop behind the lead vehicle before being struck in the rear by a following vehicle, that operator has established his...prima facie entitlement to judgment as a matter of law [cit.om.]. Thus, "[i]n chain collision accidents, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle" (*Kuris v. El Sol Contr. & Constr. Corp.*, 116 AD3d 675, 676...).

Niosi v. Jones, 133 AD3d 578, 579 (2d Dept. 2015). See also, *Morales v. Amar*, 145 AD3d 1000, 1002 (2d Dept. 2016) (same); *Chuk Hwa Shin v. Correale*, 142 AD3d 518, 519 (2d Dept. 2016) (same); *Marcellin v. Passaro*, 118 AD3d 758 (2d Dept. 2014) (same). Plaintiff's own testimony establishes defendant Rodriguez's *prima facie* entitlement to summary judgment by demonstrating that the brown car, purportedly Rodriguez' vehicle, was stopped behind Plaintiffs' vehicle before it was rear ended and pushed into Plaintiff's vehicle by the black car. Inasmuch as

neither Plaintiff nor defendant Heller have in response demonstrated the existence of any triable issue of fact, Mr. Rodriguez is entitled to summary judgment.

In addition, although Plaintiff alleges in her Verified Complaint that defendant Rodriguez himself was involved in the accident, she testified to the contrary that a woman was driving the vehicle which she contends belonged to him. Inasmuch as there is no allegation that this woman was operating the vehicle with the permission, express or implied, of defendant Rodriguez, there is no basis in the Verified Complaint for a finding of his vicarious liability under Vehicle and Traffic Law §388. For this reason, too, Plaintiff's claims as against defendant Rodriguez must be dismissed.

Defendant Heller's Motion

Defendant Douglas Heller established *prima facie* that his vehicle was not involved in an accident on April 21, 2015. Plaintiff has failed in opposition to demonstrate the existence of any genuine issue of fact. Plaintiff cannot of her own knowledge testify that Mr. Heller's vehicle was involved in the accident. The only meaningful confirmation of its involvement – the purported cell phone photograph – does not exist, Plaintiff herself having negligently failed to take steps to preserve it and then negligently destroying it. Moreover, there is no evidence that Plaintiff took any steps to establish Mr. Heller's complicity or rebut his denials, e.g., (1) inspecting the Heller vehicle to see if she could identify it as the car involved in the accident, (2) having an expert inspect the vehicle to determine whether it had been involved in an accident, (3) obtaining the vehicle's repair records, (4) performing a VIN search (e.g., Carfax) to determine whether the vehicle had been presented for repair at any time on or after April 21, 2015, or (5) seeking images of Mr. Heller's female relatives to see if she could identify the driver.

Consequently, Plaintiff's claim against defendant Heller rests entirely on her unsubstantiated and unverifiable claim that she memorialized the license plate number of the car involved in the accident in a photograph which no longer exists, and that she accurately conveyed that license plate number to the police, who then accurately recorded it in a police report dated May 15, 2014, more than three weeks after the accident occurred. That is much too slender a thread. Under the circumstances, the court concludes that Plaintiff has failed in response to Mr. Heller's *prima facie* showing of entitlement to summary judgment to demonstrate the existence of any genuine issue of fact.

In addition, although Plaintiff alleges in her Verified Complaint that defendant Heller himself was involved in the accident, she testified to the contrary that a woman was driving the vehicle which she contends belonged to him. Inasmuch as there is no allegation that this woman was operating the vehicle with the permission, express or implied, of defendant Heller, there is no basis in the Verified Complaint for a finding of his vicarious liability under Vehicle and Traffic Law §388. For this reason, too, Plaintiff's claims as against defendant Heller must be dismissed.

It is therefore

ORDERED, that the motion of defendant Edwin Rodriguez for summary judgment dismissing the claims against him is in all respects granted, and he is awarded costs pursuant to CPLR §§ 8106 and 8202 in the amount of \$100.00, and it is further

ORDERED, that the motion of defendant Douglas Heller for summary judgment dismissing the claims against him is in all respects granted, and he is awarded costs pursuant to CPLR §§ 8106 and 8202 in the amount of \$100.00.

The foregoing constitutes the decision and order of this Court.

Dated: April 17, 2018 ENTER
Goshen, New York



HON. CATHERINE M. BARTLETT, A.J.S.C.

HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE