McDonnell v Zhi Zhao
2019 NY Slip Op 34363(U)
August 21, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 622525/2018
Judge: Sanford Neil Berland

SHORT FORM ORDER **INDEX NO.: 622525/2018**

SUPREME COURT - STATE OF NEW YORK
PART 6- SUFFOLK COUNTY

PRESENT:
Hon. Sanford Neil Berland, A.J.S.C.

AMANDA MCDONNELL,

Plaintiff(s),

-against-

ZHI ZHAO,

Defendant(s).

ORIG. RETURN DATE: June 14, 2019
FINAL RETURN DATE: July 16, 2019
MOT. SEQ. #: 001 **MG**

PLAINTIFF'S ATTORNEY:
ROSENBERG & GLUCK, LLP
1176 PORTION ROAD
HOLTSVILLE, NY 11742

DEFENDANT'S ATTORNEY:
GENTILE & TAMBASCO, ESQS.
115 BROAD HOLLOW ROAD, STE 300
MELVILLE, NY 11747

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by plaintiff, filed May 15, 2019, and supporting papers; (2) Affirmation in Opposition by defendant, filed June 16, 2019; (3) Affirmation in Reply by counsel plaintiff, filed July 8, 2019, it is

ORDERED that so much of plaintiff's motion as seeks an order granting summary judgment in her favor and against the defendant , pursuant to CPLR § 3212, on the issue of liability is granted; and it is further

ORDERED that so much of plaintiff's motion as seeks an order striking the defendant's first affirmative defense alleging comparative negligence on the part of the plaintiff is denied as premature, and without prejudice to renewal upon a more complete record.

This action involves a motor vehicle collision that occurred on December 13, 2017, when a vehicle owned and operated by defendant Zhi Zhao attempted to make a left-hand turn at an intersection directed by a traffic signal and collided with a vehicle traveling in the opposite direction owned and operated by plaintiff Amanda McDonnell. The accident occurred on Hallock Landing Road at or near its intersection with Route 25A in the Town of Brookhaven, New York. Plaintiff alleges that she sustained serious personal injuries as a result of the accident.

Plaintiff now moves for partial summary judgment on the issue of liability and to strike defendant's affirmative defense of comparative negligence. In support of the motion, counsel

for plaintiff proffers, *inter alia*, plaintiff's affidavit describing the accident and a certified copy of an MV104A Police Accident Report. In opposition, defendant argues that plaintiff's affidavit is deficient, warranting denial of the motion, and that further discovery is necessary before summary judgment may be considered.

In her affidavit, plaintiff states that at the time of the accident, she was traveling southbound on Hallock Landing Road proceeding through its intersection with Route 25A. According to plaintiff, she had entered the intersection on a green light, which turned yellow as she continued through the intersection, when defendant, who was traveling northbound on Hallock Landing Road, attempted to make a left turn onto Route 25A and struck the front of plaintiff's vehicle. Plaintiff also refers to the police accident report, which recites that "V2" - the defendant driver - "states the light was yellow so he sped up to make a left turn when he collided with [plaintiff's vehicle]."

In moving for summary judgment, plaintiff urges that the plaintiff's affidavit, coupled with the admission made by defendant recorded in the police report, establishes that defendant was the sole proximate cause of the accident, as he failed to yield the right of away to approaching traffic and negligently executed a left-hand turn directly into the path of another driver in violation of the Vehicle and Traffic Law.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. Before summary judgment may be granted, it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corp.***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn from them are to be accepted as true (*See* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; ***Vainer v DiSalvo***, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Accordingly, a driver who is intending to make a left turn at an intersection is negligent as a matter of law if it is established that he or she failed to yield the right of way to a vehicle which was in the intersection approaching from the opposite direction (Vehicle and Traffic Law § 1141; *see* ***Gobin v Delgado***, 142 AD3d 1134, 1135, 38 NYS3d 63 [2d Dept 2016], *citing* ***Katikireddy v Espinal***, 137 AD3d 866, 867, 26 NYS3d 775 [2d Dept 2016]; ***Vainer v DiSalvo***, 79 AD3d 1023, 1024, 914 NYS2d 236 [2d Dept

2010]). The operator of an oncoming vehicle with the right-of-way is entitled to assume that the opposing operator will yield in compliance with the Vehicle and Traffic Law (*see* ***Gobin v Delgado***, 142 AD3d at 1135, *citing* ***Attl v Spetler***, 137 AD3d 1176, 1176, 28 NYS3d 699 [2d Dept 2016]; ***Arias v Tiao***, 123 AD3d 857, 858, 1 NYS3d 133 [2d Dept 2014]).

A motorist is required to "see that which through proper use of [his or her] senses [he or she] should have seen" (***Bongiovi v Hoffman***, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; *see* ***Thompson v Schmitt***, 74 AD3d 789, 902 NYS2d 606 [2d Dept 2010]). The operator of a vehicle with the right-of-way is entitled to assume that the opposing driver will obey traffic laws requiring him or her to yield (*see* ***Kassim v Uddin***, 119 AD3d 529, 987 NYS2d 878 [2d Dept 2014]; ***Ducie v Ippolito***, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]; ***Ahern v Lanaia***, 85 AD3d 696, 924 NYS2d 802 [2d Dept 2011]; ***Dominguez v CCM Computers, Inc.***, 74 AD3d 728, 902 NYS2d 163 [2d Dept 2010]; ***Yelder v Walters***, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]).

Here, plaintiff established her *prima facie* entitlement to summary judgment on the issue of defendant' liability for the accident by showing that defendant was negligent in making a left turn at the intersection without yielding the right-of-way to plaintiff, as a result of which his vehicle collided with plaintiff's vehicle. Plaintiff having thus established that defendant violated the Vehicle and Traffic Law and was negligent as a matter of law (*see* Vehicle and Traffic Law §§ 1141 and 1163; ***Gobin v Delgado***, *supra*; ***Katikireddy v Espinal***, *supra*; ***Vainer v DiSalvo***, *supra*) and that his negligent conduct was a proximate cause of the accident, the burden shifted to defendant to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident (*see* ***Alvarez v Prospect Hosp.***, *supra*). In opposition, defendant has failed to raise any triable issue of fact with respect to his liability, offering no first-hand account of the accident at all, much less one that differs from plaintiff's, nor any factually supported non-negligent explanation of his role in it. Instead, he relies entirely on the affirmation of his attorney, who argues that plaintiff's motion is premature because discovery, particularly the deposition of plaintiff, has yet to be conducted. However, counsel's argument is insufficient to demonstrate that discovery might lead to facts or evidence currently unknown to defendant that are relevant to refuting plaintiff's *prima facie* showing that his conduct was negligent and was a proximate cause of the accident or that facts essential to justify opposition to the motion for summary judgment against him on the issue of liability are exclusively within the knowledge and control of the plaintiff or others (*see* ***Turner v Butler***, 139 AD3d 715, 32 NYS3d 174 [2d Dept 2016]; ***Deleg v Vinci***, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; ***Monteleone v Jung Pyo Hong***, 79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]). "The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (***Turner v Butler***, 139 AD3d 715, 716, 32 NYS3d 174 [2d Dept 2016], *quoting* ***Lopez v WS Distrib., Inc.***, 34 AD3d 759, 760, 825 NYS2d 516 [2d Dept 2006]). Further, although defendant's counsel also argues that plaintiff has failed to meet her *prima facie* burden on the issue of liability because she has not demonstrated the absence of comparative negligence on her part, the Court of Appeals has made it clear that a plaintiff is no longer required to show freedom from comparative fault to be entitled to summary judgment on the issue of liability (*see* ***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Edgerton v City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). Accordingly, plaintiff having made a *prima facie* that defendant was negligent and that his negligence was a proximate cause of the accident, and defendant having failed to demonstrate the

existence of a triable issue of fact with respect to his liability, so much of plaintiff's motion as seeks summary judgment in her favor and against defendant on the issue of liability is granted.

To the extent, however, that plaintiff's also seeks an order striking the defendant's affirmative defense of comparative fault, that prong of plaintiff's motion is premature, as the issue of plaintiff's alleged comparative fault, or, conversely, her freedom from it, is distinct from the issue of whether the defendant bears liability - that is, whether he was negligent and whether his negligence was *a* substantial factor in causing the accident (*see* ***Rodriguez v City of New York***, *supra*). As the Court of Appeals made clear in its decision in ***Rodriguez v City of New York***, the comparative fault, if any, of a plaintiff claiming personal injury as a result of the defendant's allegedly tortious conduct is an issue independent of the issue of whether the defendant has any liability for those injuries and "is only relevant to the mitigation of plaintiff's damages" (*id.*, 31 NY3d at 321). Although plaintiff's submissions are factually sufficient to establish, *prima facie*, liability on the part of the defendant, they are not sufficient to deprive defendant of the opportunity to conduct discovery related to the issue of comparative fault before that issue is decided on the merits. Accordingly, so much of plaintiff's motion as seeks an order striking defendant's first affirmative defense is denied as premature and without prejudice to renewal upon a more complete record.

The foregoing constitutes the decision and order of the court.

Dated: 8/21/2019
Riverhead, New York

HON. SANFORD NEIL BERLAND, A.J.S.C.