Quinones v Gerardi
2019 NY Slip Op 34427(U)
September 19, 2019
Supreme Court, Orange County
Docket Number: Index No. EF003711/2018
Judge: Maria S. Vazquez-Doles
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At a term of the IAS Part of the Supreme Court of the State of New York,
held in and for the County of Orange, at 285 Main Street,
Goshen, New York 10924 on the 19th day of September, 2019.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

RAUL QUINONES, JR.,

PLAINTIFF,

-AGAINST-

RONALD A. GERARDI, JR.; RG AUTOBODY, INC.
and KRISTINA C. RIZZO,

DEFENDANTS.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

DECISION & ORDER
INDEX #EF003711/2018
Motion date: 06/24/19
Motion Seq.#1 & 2

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 10 were read on the threshold motion(seq. #1) by defendants, Ronald A. Gerardi, Jr. and RG Autobody, Inc., dismissing the complaint as against them; and on the motion(seq. #2) by plaintiff for partial summary judgment on the issue of liability:

Motion Seq. #1

Notice of Motion/Affirmation (Nosowitz)/Exhibits A-P/Memorandum of Law 1-4
Affirmation in Opposition (Bernsley)/Exhibits A-E 5-6
Reply Affirmation (Nosowitz) 7

Motion Seq. #2

Notice of Motion/ Affirmation (Bernsely)/Exhibits A-G 8-9
Affirmation in Opposition (Nosowitz)/Exhibit A 10

In this negligence action, plaintiff seeks to recover damages for personal injuries he allegedly sustained as a result of a rear-end motor vehicle accident that occurred on November 30, 2017 on Noxon Road located in the Town of Lagrange, County of Dutchess, State of New

Filed in Orange County 09/20/2019 03:09:43 PM $0.00 Bk: 5129 Pg: 1998 Index: # EF003711-2018 Clerk: DK

York. Plaintiff was the operator of a 2008 Nissan Altima that was struck in the rear by a 2016 Honda Civic being operated by defendant, Donald A. Gerardi, Jr. in furtherance of his employment for defendant, RG Autobody, Inc. Immediately prior to impact, plaintiff was stopped at a traffic light.

Motion Seq. #1

Plaintiff commenced this action by filing a Summons and Complaint (Exhibit A to moving papers) on or about April 3, 2018. Defendants served a Verified Answer with Affirmative Defenses, together with discovery demands, on or about June 27, 2018 (Exhibit B). Plaintiff subsequently served an Amended Complaint on January 30, 2019 and defendants thereafter served an Answer to same on February 11, 2019 (Exhibits E and F respectively). Plaintiff served a Verified Bill of Particulars alleging injuries to his right shoulder including tear of the supraspinatus tendon, partial tear of the anterior and superior labrum and rotator cuff tear requiring surgery which he underwent on March 14, 2018 and his right knee including peripheral tear and separation and intrasubstance tear of the posterior horn of the medial meniscus. The Examination Before Trial of plaintiff was held on October 24, 2018 (Exhibit H). Plaintiff filed her Note of Issue on or about February 25, 2019.

The report of Dr. Bradley D. Weiner, M.D., the defendants' examining physician, does not negate the plaintiff's contention that he has suffered serious injury under the significant limitation, permanent consequential limitation, and 90/180 categories of Insurance Law 5102(d). In his February 26, 2019 examination report, Dr. Weiner records a reduced range of motion in the plaintiff's right shoulder and right knee (*See Marquez v Oballe*, 14 AD3d 667 [2d Dept 2005]). After reviewing the MRI study of plaintiff's right knee and right shoulder, Dr. Weiner opines that

there is no described mechanism of injury to account for the radiological findings, and explains the plaintiff's restriction in range of motion as purely voluntary in nature. Further, Dr. Weiner does not address the plaintiff's 90/180 claim, aside from noting that plaintiff's absence from work since the date of the accident appears to be based predominantly on his subjective complaints and not on any objective findings of limitation (*See Taylor v Taylor*, 87 AD3d 1129, 1130 [2d Dept 2011]).

Even if the defendants had met their initial burden (*see Safer v Silbersweig*, 70 AD3d 921, 922 [2d Dept 2010]), the affidavit from Dr. Vincent J. Gulfo, M.D., the plaintiff's treating medical doctor, and the report from Dr. Gabriel L. Dassa, plaintiff's orthopedic surgeon, create issues of fact regarding the seriousness of the injuries and causation (*see Cariddi v Hassan*, 45 AD3d 516, 517 [2d Dept 2007]).

Motion Seq. #2

Plaintiff asserts he is entitled to summary judgment on liability based on the rear-end collision, which establishes a *prima facie* case of negligence on the part of defendant. He argues that defendants' purported non-negligent explanation, that plaintiff stopped suddenly after the light turned green, is insufficient to raise a triable issue of fact, based upon the Vehicle & Traffic Law which requires a driver to maintain a safe distance between his vehicle and the vehicle in front of him. McKinney's Veh. & Traffic Law §1129(a).

Opposition

In opposition, defendants assert that there are bona fide issues of fact regarding defendants' liability and plaintiff's comparative negligence, in light of plaintiff's sudden stop. Defendants assert that the front driver has a duty not to stop suddenly or slow down without

proper signaling. McKinney's Veh. & Traffic Law §1163(c) Moreover, a sudden stop of the lead vehicle has frequently been deemed a potential non-negligent explanation for a rear-end collision, which precludes an award of summary judgment. Even the driver of a stopped car can be found to be negligent, and the actions of that driver a proximate cause of the collision, where the stop was sudden. Defendants argue that there are issues of fact regarding whether plaintiff's conduct in stopping suddenly, contributed to the happening of the accident.

Discussion

For the reasons which follow, plaintiffs' motion is granted.

Summary judgment is a drastic remedy, and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]). The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996])

The Court of Appeals has recently held that a plaintiff does not bear the burden of establishing the absence of her own comparative negligence in order to obtain partial summary judgment in a comparative negligence case. (*Rodriguez v. City of New York*, 31 NY3d 312 [2018])

In *Rodriguez*, the Court of Appeals reversed the finding of the Appellate Division, First Department, that affirmed the denial of plaintiff's motion for partial summary judgment, on the

basis that plaintiff failed to make a *prima facie* showing that he was free of comparative negligence. (*See, Rodriguez v. City of New York*, 142 AD3d 778 [1st Dept 2016])

The Court of Appeals held that Article 14-A of the Civil Practice Law & Rules provides that comparative negligence does not *bar* recovery, but can act to diminish the amount of damages otherwise recoverable, in the proportion of the claimant's culpable conduct. Civ. Prac. Law & Rules §1411. Moreover, section 1412 provides that such culpable conduct shall be an affirmative defense to be pleaded and proved by the party asserting the same.

The majority thus reasoned that to place the burden on the plaintiff to show an absence of comparative fault is inconsistent with the language of section 1412. (See 2018 NY Slip Op. at 3) "Comparative fault is not a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence...but rather a diminishment of the amount of damages." (See 2018 NY Slip Op. at 4)

Further, plaintiff has established her prima facie entitlement to judgment as a matter of law by demonstrating that her car was struck from behind by the defendants' car. In opposition, the defendants failed to raise a triable issue of fact. Even if the plaintiff did, in fact, come to a sudden stop, "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" (*Shamah v Richmond County Ambulance Service, Inc.*, 279 AD2d 564 [2d Dept 2001]; *see* Vehicle and Traffic Law §1129[a]). Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence (*see, Levine v Taylor*, 268 AD2d 566 [2d Dept 2000]).

On the basis of the foregoing, plaintiffs' application for partial summary judgment on the

issue of liability is granted.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is denied, and it is further

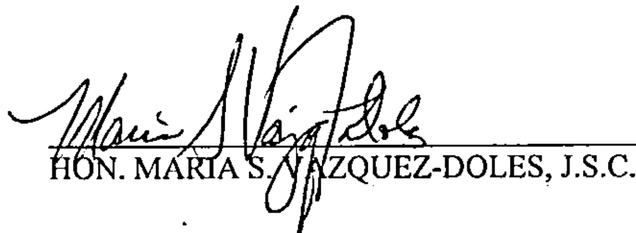
ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is granted; and it is further

ORDERED that this matter is scheduled for a settlement conference on December 5, 2019 at 10:00 a.m..

The foregoing constitutes the Decision and Order of this Court

ENTER:

Dated: September 19, 2019
Goshen, New York



HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

TO: Counsel of record via NYSCEF