

Rios v Almstead Tree & Shrub Care, Co., LLC

2019 NY Slip Op 34473(U)

September 9, 2019

Supreme Court, Westchester County

Docket Number: Index No. 56596/2017

Judge: Janet C. Malone

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This opinion is uncorrected and not selected for official publication.

To commence the statutory 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
WESTCHESTER COUNTY

-----X
ROSA RIOS and MARIA RIOS,

Index No. 56596/2017

Plaintiffs,

-against-

ALMSTEAD TREE & SHRUB CARE, CO., LLC,
ENVIRONMENTAL EQUIPMENT CORP., and MIGUEL
ANGEL CABRERA ROSA,

DECISION AND ORDER
(*Summary Judgment on
Liability*)
Motion Sequence: 1

Defendants.

-----X
MALONE, J.

The following papers numbered 1-3 were read in deciding the motion for summary judgment filed by Plaintiffs Rosa Rios and Maria Rios:

<u>Papers</u>	<u>Numbered</u>
Amended Notice of Motion ¹ /Affirmation in Support of Robert Borrero, Esq./ Memorandum of Law/Exhibits A-E ²	1
Affirmation in Opposition of Martin Galvin, Esq./Exhibit A	2
Stipulation to Consolidate dated October 17, 2017 ³	3

Plaintiffs Rosa Rios and Maria Rios' motion for summary judgment on the issue of liability is **granted** against Defendants Almstead Tree & Shrub Care, Co., LLC, Environmental Equipment Corp., and Miguel Angel Cabrera Rosa as set forth herein. *See*, CPLR R 3212 (e).

¹ The Notice of Motion was amended to change the return date.

² Plaintiffs' Affidavits are attached as Exhibits D and E.

³ This document was reviewed on the New York State Courts Electronic Filing system.

On November 16, 2016 at approximately 8:33 a.m., Plaintiff Rosa Rios was operating a vehicle travelling north on North Avenue, in the City of New Rochelle, County of Westchester, State of New York, with passenger Plaintiff Maria Rios, when the vehicle owned by Defendants Environmental Equipment Corp., and Almstead Tree & Shrub Care, Co., LLC. and operated by Defendant Miguel Angel Cabrera Rosa rear-ended Plaintiffs' vehicle that was stopped at a traffic light at or near the intersection of North Avenue and Mill Street. *See*, Affirmation in Support of Robert Borrero, Esq. at paragraph 3, 5-7, 16-19; *see also*, Verified Complaint at paragraphs 7, 9-16, and Plaintiffs' Affidavits as Exhibits B, D, and E.

Plaintiff Rosa Rios commenced this negligence action on May 2, 2017 and issue was joined on August 8, 2017⁴. *See*, Affirmation in Support of Robert Borrero, Esq. at paragraph 4; *see also*, Summons and Verified Complaint and Verified Answer as Exhibits B and C.

As the operator of a motor vehicle, Defendant Miguel Angel Cabrera Rosa had a duty to maintain a safe distance between his vehicle and the cars in front of him and to be aware of the speed of such vehicles and traffic conditions, including vehicle stoppages. *See*, Vehicle and Traffic Law § 1129(a), *Young v. New York*, 113 A.D.2d 833, (2d Dept. 1985) and *Silberman v. Surrey Cadillac Limousine Serv., Inc.*, 109 A.D.2d 833 (2d Dept. 1985); *see also*, Affirmation in Support of Robert Borrero, Esq. at paragraphs 29 and 30 and Memorandum of Law.

It is well settled that when a moving vehicle rear-ends a stopped vehicle, a prima facie case of liability is created against the operator of the moving vehicle unless the operator of the moving vehicle can demonstrate, in evidentiary form, a non-negligent explanation. *See*, *Niyazov v. Bradford*, 13 A.D.3d 501 (2d Dept. 2004), *McGregor v. Manzo*, 295 A.D.2d 487 (2d Dept. 2002),

⁴ On October 17, 2017, the matter of Rosa Rios v. Almstead Tree & Shrub Care Co., LLC, et. al. Index No. 56596/2017 and Maria Rios v. Almstead Tree & Shrub Care Co., LLC, et. al. Index No. 56671/2017 were consolidated by Counsel. *See*, Stipulation to Consolidate dated October 17, 2017.

and *McKeough v. Rogak*, 288 A.D.2d 196 (2d Dept. 2001); *see also*, Affirmation in Support of Robert Borrero, Esq. at paragraphs 30-32 and Memorandum of Law.

Plaintiffs' sworn Affidavits that while Plaintiff Rosa Rios was travelling north on North Avenue, the vehicle Plaintiffs were operating came to a complete stop, when the vehicle was struck by the vehicle operated by Defendant Miguel Angel Cabrera Rosa, creates a prima facie case of liability against Defendant Miguel Angel Cabrera Rosa, which he fails to rebut. *See*, CPLR R 3212(b), *Zuckerman v. New York*, 49 N.Y.2d 557 (1980), and *Niyazov v. Bradford*, 13 A.D.3d 501 (2d Dept. 2004); *see also*, Plaintiffs' Affidavits as Exhibits D and E.

While Defendants' Counsel attaches an Incident Report claiming that the Plaintiff driver was on her cell phone in violation of Vehicle and Traffic Law § 1225-C, such evidence is not in admissible form and Counsel did not demonstrate an acceptable excuse for Counsel's failure to meet the requirement of tender in admissible form. Additionally, Defendants' Counsel's argument that the Plaintiff suddenly, abruptly, and without warning stopped her vehicle in front of Defendants' vehicle must also fail as Defendant Miguel Angel Cabrera Rosa had a duty to maintain a safe distance between the two vehicles and his failure to do so, in the absence of an adequate, nonnegligent explanation, constitutes negligence as a matter of law. *See*, *Zuckerman v. New York*, 49 N.Y.2d 557 (1980), *Silberman v. Surrey Cadillac Limousine Serv., Inc.*, 109 A.D.2d 833, 486 N.Y.S.2d 357 (2d Dept. 1985), *Cohen v. Terranella*, 112 A.D.2d 264, 491 N.Y.S.2d 711 (2d Dept. 1985); *see also*, Affirmation in Opposition of Martin Galvin, Esq. at paragraphs 3, 4, 7, 11 and Incident Report attached as Exhibit A, and Memorandum of Law at pages 12 and 13.

Defendants Almstead Tree & Shrub Care, Co., LLC, and Environmental Equipment Corp. can also be held liable as such Defendants admit that Defendant Miguel Angel Cabrera Rosa operated the vehicle with the consent of such owners. *See*, Vehicle and Traffic Law § 388(1) and

Sarine v. American Lumbermen's Mut. Casualty Co., 258 A.D. 653 (2d Dept. 1940) (holding the owner's liability "is derivative and is akin to that imposed on a master for the negligent acts of his servant under the doctrine of *respondeat superior*"); see also, Defendants' Answer as Exhibit C at paragraphs 7-8.

Therefore, Plaintiffs Rosa Rios and Maria Rios' motion for summary judgment on the issue of liability is **granted** against Defendants Almstead Tree & Shrub Care, Co., LLC, Environmental Equipment Corp., and Miguel Angel Cabrera Rosa. The Parties shall appear before the **Settlement Conference Part on October 8, 2019 at 9:15 a.m., Courtroom 1600.**

This constitutes the Decision and Order of this Court.

To the extent not addressed, the remaining relief is denied.

Dated: September 9, 2019
White Plains, New York

ENTER:


HON. JANET C. MALONE
Justice of the Supreme Court

To: *VIA NYSCEF*

Robert Borrero, Esq.
Law office of Michael Lamensoff
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Burke, Conway & Stiefeld
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