

Morales v Augelli

2019 NY Slip Op 34655(U)

November 1, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 620385/2018

Judge: Paul J. Baisley, Jr.

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SHORT FORM ORDER

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SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY**PRESENT:****Hon. Paul J. Baisley, Jr., J.S.C.**_____
JAMIE MORALES,

Plaintiff,

-against-

JOSEPH P. AUGELLI,

Defendant.
_____**ORIG. RETURN DATE:** June 21, 2019**FINAL RETURN DATE:** August 16, 2019**MOT. SEQ. #001 MD****PLTF'S ATTORNEY:**

ROSENBERG & GLUCK, LLP

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DEFT'S ATTORNEY:

LAW OFFICES OF DENIS J. KENNEDY

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Upon the following papers read on this e-filed motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers filed by plaintiff, May 31, 2019; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers filed by defendant, July 24, 2019; Replying Affidavits and supporting papers filed by plaintiff, August 9, 2019; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion for summary judgment in her favor on the issue of liability and dismissal of defendant's first affirmative defense of comparative negligence is denied; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference at 10:00 a.m. on November 26, 2019, at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York.

This action was commenced by plaintiff Jamie Morales to recover damages for injuries she allegedly sustained on March 24, 2017, when her motor vehicle was struck from the side by a vehicle owned and operated by defendant Joseph P. Augelli. The accident allegedly occurred when plaintiff's vehicle was traveling eastbound in the right lane of the Long Island Expressway, at or near its intersection with Sagtikos Parkway, in the Town of Islip, New York.

Plaintiff now seeks summary judgment on the issue of liability, arguing that defendant's actions were the sole proximate cause of the her alleged injuries. Plaintiff also moves for an order dismissing defendant's first affirmative defense of comparative negligence. In support of her motion, plaintiff submits, *inter alia*, her affidavit, the certified amended police report, the statement of nonparty witness, Elizabeth Buchert, and a certified copy of a certificate of disposition of criminal charges against defendant in *The People of the State of New York v Joseph P. Augelli*, under docket number 2017 SU 011285. Defendant opposes the motion, arguing that plaintiff's vehicle unsafely entered his lane of travel, causing the accident. Defendant submits in opposition, *inter alia*, his affidavit, and the certified unamended police report.

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In her affidavit, plaintiff states that on the date of the accident, she was operating her motor vehicle eastbound in the right lane of travel on the Long Island Expressway, and that she had been traveling in that lane for the previous five minutes. Plaintiff states defendant's vehicle entered her lane of travel from the on-ramp from Sagtikos Parkway, striking the passenger side of his vehicle. Plaintiff states that she did not see defendant's vehicle before the collision, and that she could not avoid the impact. Plaintiff also states that at the time of the accident, the road conditions were clear and dry, that she was traveling at the posted speed limit, and that her headlights were on.

In his affidavit, defendant states that he was operating his vehicle eastbound in the far right lane of travel on the Long Island Expressway. Defendant states that as he was approaching his exit, plaintiff's vehicle entered his lane and made contact with his vehicle. Defendant states that after the collision, he exited the Long Island Expressway at the next exit, and expected that plaintiff would also exit after the accident. Defendant states that plaintiff's vehicle did not exit and continued on the Long Island Expressway.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*id.*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 2019 NY Slip Op 01259 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]).

A plaintiff "is no longer required to show freedom from comparative fault in order to establish his prima facie entitlement to judgment as a matter of law on the issue of liability" (*Merino v Tessel*, 166 AD3d 760, 760, 87 NYS3d 554 [2d Dept 2018]; *see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see Shui-Kwan Lui v Serrone*, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]; *Barbieri v Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; *Coogan v Torrissi*, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]).

Vehicle and Traffic Law § 1128 (a) provides, in relevant part:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consisted herewith shall apply:

(a) A vehicle shall be driven as nearly as practicable entirely within a single

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lane and shall not be moved from such lane until the driver first has ascertained that such movement can be made with safety.

Additionally, an operator of a motor vehicle has a “common law duty to see that which [he or she] should have seen through the proper use of [his or her] senses” (*Botero v Erraez*, 289 AD2d 274, 275, 734 NYS2d 565, 566 [2d Dept 2001]; *see also Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]). Nevertheless, while “the driver with the right-of-way is entitled to assume that other drivers will obey the traffic laws requiring them to yield, the driver with the right-of-way also has an obligation to keep a proper lookout and see what can be seen through the reasonable use of his or her senses to avoid colliding with other vehicles” (*Miron v Pappas*, 161 AD3d 1063, 1064, 77 NYS3d 163 [2d Dept 2018][internal citation omitted]).

Plaintiff’s submissions establish a prima facie case of entitlement to judgment as a matter of law in her favor on the issue of defendant’s liability (*see Ricciardi v Nelson*, 142 AD3d 492, 35 NYS3d 724 [2d Dept 2016]; *see generally Alvarez v Prospect Hosp., supra*). Plaintiff demonstrated through competent evidence that defendant was negligent as he made an unsafe lane change, crossing his vehicle into plaintiff’s lane of travel, in violation of Vehicle and Traffic Law § 1128 (a), which resulted in a collision (*see Williams v New York City Trans.*, 37 AD3d 827, 832 NYS2d 54 [2d Dept 2007]; *Neryaev v Solon*, 6 AD3d 510, 775 NYS2d 348 [2d Dept 2004]).

Plaintiff having made her prima facie showing, the burden now shifts to the defendant to raise a triable issue of fact (*see Alvarez v Prospect Hosp., supra*). In opposition, defendant has rebutted the inference of negligence. Defendant submits his affidavit, wherein he states that plaintiff made an unsafe lane change, entering defendant’s lane of travel, which caused the accident (*see Butbul v City of New York*, 147 AD3d 897, 899, 48 NYS3d 192 [2d Dept 2017]; *Scheker v Brown*, 85 AD3d 1007, 925 NYS2d 528 [2d Dept 2011]). Therefore, questions of fact exist with respect to the happening of the accident, as “it is not the function of the court, on a motion for summary judgment, to resolve matters of credibility” (*Butbul v City of New York, supra* at 899; *see Bonomonte v City of New York*, 17 NY3d 866, 932 NYS2d 421 [2011]).

With respect to that portion of plaintiff’s motion seeking an order striking defendant’s affirmative defense of comparative negligence, CPLR 3211 (b) authorizes a plaintiff to move, at any time, to dismiss a defendant’s affirmative defense on the ground that it has no merit (*see Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). “[W]hen moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is ‘without merit as a matter of law’” (*Greco v Christoffersen*, 70 AD3d 769, 771, 896 NYS2d 363, quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559, 824 NYS2d 177). “In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference” (*Fireman’s Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]). As defendant, through his affidavit, has raised a triable issue of fact with respect to the proximate cause of the accident by averring that plaintiff’s vehicle made an unsafe lane change, that portion of plaintiff’s motion to strike defendant’s affirmative defense is denied.

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Accordingly, the motion by plaintiff for summary judgment in her favor on the issue of liability and dismissal of defendant's first affirmative defense of comparative negligence is denied.

Dated: 11/1/19



HON. PAUL J. BAISLEY, JR., J.S.C.