Llivicura v Sizse
2019 NY Slip Op 34703(U)
May 2, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 607858/2018
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 607858/2018**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motions Submit Date: 11/29/18
Mot Conf Date: 11/07/18
Mot Seq 002 - MG

PLAINTIFF'S COUNSEL:
Gruenberg Kelly Della
700 Koehler Avenue
Ronkonkoma, New York 11779

MARIA LLIVICURA & ANGEL MAURAD,

Plaintiffs,

-against-

CHRISTINE SIZSE & WILLIAM SIZSE,

Defendants.

DEFENDANT'S COUNSEL:
Karen L. Lawrence, Esq.
878 Veterans Memorial Highway, Suite 100
Hauppauge, New York 11788

In this electronically filed personal injury action, concerning plaintiff's opposed motion for partial summary judgment on liability, the following papers were considered: NYSCEF Docket Entries ## 28 - 37; and upon due deliberation and full consideration of all of the foregoing, it is

ORDERED that plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendant is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry on defense counsel electronically; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

BACKGROUND

Plaintiff brought this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on May 13, 2017 at or near the intersection of Montauk Highway and Baymens Court, in Sayville, Suffolk County, New York. By the pleadings filed, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries. Pretrial disclosure in this matter is ongoing and the parties have appeared before the Court for discovery compliance conferences. Now before the Court is plaintiff's opposed motion for partial

summary judgment on liability against the defendants, which is resolved as follows.

In support of the application, plaintiff submits a copy of the pleadings, plaintiff's affidavit in support and a certified copy of the police accident investigation report.

Testifying by affidavit in support of the application for judgment as a matter of law on liability, plaintiff states that on May 13, 2017, she operated a 2008 Kia motor vehicle owned by defendant Luis Maurad that traveled eastbound on Montauk Highway. She further testifies that "suddenly and without warning" while traveling eastbound on Montauk Highway, defendant's 2015 Nissan vehicle operated by Christine Sisze pulled out from an adjacent 7-11 convenience store parking lot on the south side of Montauk Highway, attempting to crossover the eastbound and westbound lanes of travel in front of the plaintiff, causing a collision with the front-end of plaintiff's vehicle impacting the driver's side of defendant's vehicle.

STANDARD OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d

Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

DISCUSSION

The plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries (***Montalvo v Cedeno***, 170 AD3d 1166 [2d Dept 2019]; *accord* ***Buchanan v Keller***, 169 AD3d 989, 991, 95 NYS3d 252, 254 [2d Dept 2019][holding that plaintiff-movant seeking summary judgment on liability is no longer required to show freedom from comparative fault in order to establish prima facie entitlement to judgment as a matter of law]; *quoting* ***Rodriguez v. City of New York,***31 NY3d 312 [2018]).

" 'Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, ... a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision' " (***Foley v Santucci***, 135 AD3d 813, 814, 23 NYS3d 338, 339 [2d Dept 2016]; ***Adobea v Junel***, 114 AD3d 818, 820, 980 NYS2d 564, 567 [2d Dept 2014]). Moreover, a driver is negligent where he or she has failed to see that which through proper use of his or her senses he or she should have seen (***Pivetz v Brusco***, 145 AD3d 806, 807, 43 NYS3d 457, 458 [2d Dept 2016]; ***Amalfitano v Rocco***, 100 AD3d 939, 940, 954 NYS2d 644, 646 [2d Dept 2012]).

Here, plaintiff makes out a *prima facie* case for judgment as a matter of law on liability, offering her affidavit arguing that defendants turned in front of her vehicle, leaving her an insufficient distance/time to stop and avoid collision. Arguing in opposition to plaintiff's application, defendants offer affidavits stating that as a result of the collision, both were rendered unconscious and therefore neither has a recollection of the facts and circumstances leading up to the collision, other than being present at the 7-11 convenience store prior to the incident. Thus, in sum, in opposition, the defendant failed to submit evidence either denying the plaintiff's allegations or offering a nonnegligent explanation for the collision (***Binkowitz v Kolb***, 135 AD3d 884, 885, 24 NYS3d 186, 187 [2d Dept 2016]).

Further, concerning any argument regarding prematurity of the application concerning a lack of discovery on details of the incident, the courts have recently ruled that summary judgment [is] not premature due to outstanding discovery (within the meaning of CPLR 3212[f]). Where outstanding discovery identified by the non-movant seeks production solely of evidence pertaining to plaintiff's comparative fault, such a motion is not premature in light of the fact that plaintiff is no longer required to show freedom from comparative fault in order to establish a *prima facie* case of the defendants' liability (***Francois v Tang***, 2018-03447, 2019 WL 1782208, at *1 [2d Dept Apr. 24, 2019]). Moreover, defendants at most state they lack any memory or recollection of the salient facts leading to the incident. As a result, defendants' fail to offer anything in admissible form to raise a triable question of fact for a jury and fail to carry their burden on motion to prevent judgment as a matter of law on liability.

Having reviewed his moving papers, the Court finds that plaintiff has met his *prima facie*

burden for entitlement to summary judgment on liability based on the submission of her sworn testimony which demonstrates a *prima facie* case of negligence against the defendant. Thus, the burden has shifted to defendants to come forward with a non-negligent explanation for the incident.

Because defendants have failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the collision here, necessitating a trial on their liability, this Court **grants** plaintiff partial summary judgment on liability against defendants under CPLR 3212.

The foregoing constitutes the decision and order of this Court.

Dated: May 2, 2019
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**