

Gonzalez v Danischewski

2019 NY Slip Op 34816(U)

May 17, 2019

Supreme Court, Orange County

Docket Number: Index No. EF00614/17

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, A.J.S.C.

SUPREME COURT : ORANGE COUNTY

LISA GONZALEZ,

Plaintiff,

- against -

J. DANISCHEWSKI and GLEN DANISCHEWSKI,

Defendants.

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

Index No. EF000614/17

DECISION AND ORDER

Motion Date: April 17, 2019

The following papers numbered 1 to 6 were read and considered on a motion by the Plaintiff, pursuant to CPLR § 3212, for summary judgment on the issue of liability.

Notice of Motion- Eisen Affirmation- Exhibits A-D	1-3
Affirmation in Opposition - Shoshany- Exhibits A-E	4-5
Affirmation in Reply- Eisen	6

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Lisa Gonzalez commenced this action to recover damages arising from a motor vehicle accident. The Plaintiff alleges that she was injured when her vehicle was rear-ended by a vehicle owned by the Defendant Glen Danischewski and being driven by the Defendant Judith Danischewski.

The Plaintiff moves for summary judgment on the issue of liability.

The motion is granted.

Factual/Procedural Background

At an examination before trial, the Plaintiff testified that, on September 20th, 2016, she was driving her vehicle on the Palisades Parkway (T-10). It was sunny and dry (T-10). At approximately 2:20 p.m., as she was headed northbound toward a left hand exit for the roundabout to enter onto Route 6, she saw a vehicle ahead of her stopped at a yield sign (T-12-13). She came to a complete stop behind the vehicle (T-15-18). The vehicle in front of her moved, but she remained stopped (T-15-20). As she remained stopped, she was struck from the rear by a vehicle owned by a vehicle being driven the Defendant Judith Danischewski (T-19-20). Traffic was generally heavy (T-20). The contact between the vehicles was "medium" (T-21).

At an examination before trial, the Defendant Judith Danischewski testified that she saw the Plaintiff's vehicle stopped ahead of her at the roundabout and came to a complete stop (T-19). The Plaintiff then moved her vehicle about 30 feet (T-19). When the Plaintiff's vehicle was about 30 feet in front of her, Judith Danischewski moved her vehicle about 30 feet and made contact with the rear of the Plaintiff's vehicle (T-20). She was about 5 to 10 feet away when she first observed the Plaintiff's vehicle stopped for a second time (T-31). She didn't expect plaintiff to be right there in front of her. Rather, she expected her to have proceeded already, because she had begun to proceed into the circle (T-31).

Based upon the foregoing, the Plaintiff moves for summary judgment on the issue of liability.

In support of her motion, the Plaintiff submits an affirmation from counsel, Robert Eisen.

Eisen notes that it is well-settled that a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby

requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.

Here, he argues, Judith Danischewski struck the Plaintiff from the rear while the Plaintiff was stopped, and did not proffer a non-negligent explanation for the collision.

In opposition to the motion, the Defendants submit an affirmation from their attorney, Hanna Shoshany.

Shoshany argues that the Plaintiff failed to demonstrate a *prima facie* entitlement to judgment as a matter of law. Rather, she asserts, although the parties agree that the accident occurred while the Plaintiff was stopped at a yield sign, the Plaintiff proffered “no evidence in her motion, nor through her deposition testimony, that she in fact had a reason to remain stopped at that yield sign after the car in front of her had proceeded past the sign.” Shoshany notes that there is a distinction between a stop sign and a yield sign.

Here, Shoshany argues, because the Plaintiff’s testimony “clearly establishes that she came to a full stop at the yield sign, that she did not remove her foot from the brake pedal, and she did not offer any reasonable explanation as to why she did so, the fact that Defendant’s vehicle rear-ended [her’s] does not amount to a *prima facie* showing of entitlement to judgment as a matter of law on the issue of liability.”

Thus, she asserts, the motion should be denied.

In reply, counsel for the Plaintiff, Robert Eisen, asserts that the only defense proffered by the Defendants is that Judith Danischewski did not realize that the Plaintiff was still stopped in front of her. Eisen argues that this does not provide a non-negligent explanation for the collision. To the contrary, he asserts, it actually supports the finding of negligence as against Judith

Danischewski.

Otherwise, he argues, that the Plaintiff provided no explanation as to why she was still stopped is completely irrelevant.

Discussion/Legal Analysis

A party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept. 2011].

To prevail on a motion for summary judgment on the issue of liability in a negligence case, the plaintiff must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018); *Brodney v. Picinic*, – AD3d – [2nd Dept. May 1, 2019]; *Poon v. Nisanov*, 162 A.D.3d 804 [2nd Dept. 2018].

Until fairly recently, a plaintiff's *prima facie* case also required a demonstration that the plaintiff was free from comparative fault. *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 A.D.3d 754 [2nd Dept. 2017]. However, this has recently changed. Under current case law, it is no longer part of the Plaintiff's *prima facie* burden. Rather, once a *prima facie* case is otherwise made, the burden shifts to the defendant to raise a triable issue of fact as to the comparative fault of the plaintiff. *Rodriguez v. City of New York*, 31 N.Y.3d 312 (2018);

Brodney v. Picinic, – AD3d – [2nd Dept. May 1, 2019]; *Poon v. Nisanov*, 162 A.D.3d 804 [2nd Dept. 2018].

Relevant to the case at bar, a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence. *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 A.D.3d 754 [2nd Dept. 2017]; *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. A non-negligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017].

Here, the Plaintiff submitted competent evidence in admissible form sufficient to demonstrate, *prima facie*, that Judith Danischewski breached a duty owed her, and that Judith Danischewski's negligence was a proximate cause of her alleged injuries.

Further, although not part of her *prima facie* burden, the Plaintiff also demonstrated that she was free from contributory negligence.

In opposition, Judith Danischewski failed to raise a triable issue of fact of fact either as to her negligence in the happening of the accident, or as to the Plaintiff's contributory negligence in the same.

Thus, the Plaintiff is entitled to summary judgment as against the Defendants on the issue of liability.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the Plaintiff's motion is granted, and the Plaintiff is granted summary

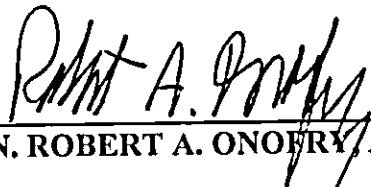
judgment on the issue of liability; and it is further,

ORDERED that the parties are directed to appear for a conference on Wednesday, June 4, 2019, at 1:30 p.m., at the Orange County Surrogate's Court House, 30 Park Place, Goshen, New York, to determine how the matter shall proceed on the issue of damages.

The foregoing constitutes the decision and order of the court.

Dated: May 17, 2019
Goshen, New York

ENTER



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