Onore v Rokeach
2019 NY Slip Op 34944(U)
June 28, 2019
Supreme Court, Kings County
Docket Number: Index No. 508982/2018
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part 91

MARIE ONORE AND ROBINETTA MCGETT,

Plaintiffs,

against

MICHAEL ROKEACH,

Defendant.

Index Number 508982/2018

SEQ #001

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers Numbered	
Notice of Motion and Affidavits Annexed........	1
Order to Show Cause and Affidavits Annexed...	
Answering Affidavits..............................	2
Replying Affidavits..................................	
Exhibits..	
Other	

Upon the foregoing papers, plaintiffs' motion for summary judgment is decided as follows:

Plaintiffs bring this action against defendant for damages caused in a motor vehicle accident on June 6, 2016. Defendant asserts a counterclaim for negligence against plaintiff Onore only.

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Plaintiffs state in their affidavits in support of their motion that, on the day of the accident, plaintiff Onore was driving the car and plaintiff McGett was a passenger. Plaintiffs stopped their vehicle at a red light at the intersection of Gateway Drive and Erskine Street. They were stopped at the light for 15 seconds when they were struck in the rear by defendant. Plaintiffs state that neither mechanical difficulties, weather, nor road conditions contributed to the accident.[1]

Defendant states in his opposing affidavit that he was traveling on Gateway Drive, where the traffic was "medium". Prior to the accident, he saw the Onore vehicle "jerk to a stop" before

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[1] Plaintiffs also submit a copy of the police report for the accident, but the report is not certified, and so it is not admissible (*Pavane v Marte*, 109 AD3d 970, 971 [2d Dept 2013]).

the intersection, but he did not see its brake lights illuminate. Nevertheless, he was able to stop without coming into contact with the Onore vehicle. After 10 seconds, the Onore vehicle began to move forward. Defendant describes that the Onore vehicle traveled approximately 5 to 10 seconds at about 5 to 10 miles per hour, but then stopped suddenly again, even though the traffic light was green and traffic was moving. Again, defendant did not see the Onore vehicle's brake lights illuminate, and he did not stop before hitting the rear of the Onore vehicle.

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

"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, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Tumminello v City of New York*, 148 AD3d 1084 [2d Dept 2017]). "A nonnegligent 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" (*id.* at 1085). That said, stops which are foreseeable under the circumstances, "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'" (*id.*, quoting *Brothers v Bartling*, 130 AD3d 554, 556 [2d Dept 2015]).

Plaintiffs' explanation in their affidavits that they were hit in the rear by defendant's vehicle sufficiently makes a prima facie case for defendant's negligence. Defendant contends

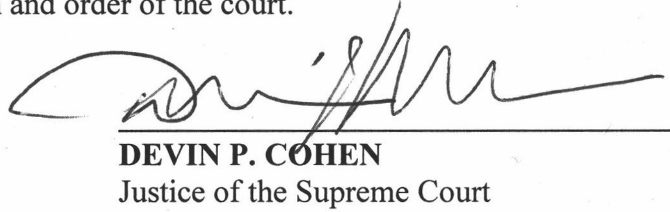
that he was not negligent because, he claims, plaintiff Onore stopped suddenly when the light was green and he did not see the Onore vehicle's brake lights illuminate. However, defendant submits no evidence that the brake lights were not operable; he states only that he did not see the lights illuminate. Moreover, even assuming his re-telling of the events immediately preceding the accident is accurate , defendant had already seen the plaintiffs stop suddenly once, thereby putting him on notice that he would need to keep a safe distance from the Onore vehicle. Additionally, defendant had sufficient time to stop before hitting plaintiffs if they were moving only 5 to 10 miles per hour for 5 to 10 seconds, as defendant claims. Consequently, defendant has not provided a non-negligent explanation for the accident, and has not fully rebutted plaintiffs' prima facie showing.

Plaintiff McGett was a passenger in Onore's vehicle, and there is no evidence of any negligence on her part. Accordingly, this court finds that plaintiff McGett was not negligent and that she is entitled to summary judgment against defendant on liability (*Gallo v Jairath*, 122 AD3d 795, 796 [2d Dept 2014]).

That said, consistent with the Court of Appeals's holding in *Rodriguez v City of New York* (31 NY3d 312, 322 [2018]), this court makes no determination about plaintiff Onore's comparative negligence, if any, which remains an issue to be resolved at trial or by motion in this case. Additionally because McGett did not assert any claims against Onore, the court is required to wait to award damages until Onore's comparative fault, if any, is determined. Onore's percentage of fault, if any, would reduce any damages award to McGett (*McNally v Corwin*, 30 AD3d 482, 485 [2d Dept 2006]; CPLR 1411).

For the foregoing reasons, plaintiffs' motion for summary judgment is granted to the extent that the court determines that defendant was negligent and that defendant's negligence was a substantial factor in causing the subject accident. The court further determines that plaintiff McGett does not bear any comparative fault for the accident.

This constitutes the decision and order of the court.



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