

Ferrari v Millan

2019 NY Slip Op 34972(U)

July 23, 2019

Supreme Court, Bronx County

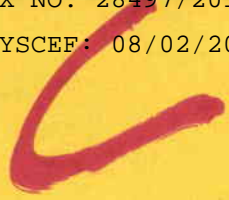
Docket Number: Index No. 28497/2017E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15



-----X
YASMINA FERRARI

Index No. 28497/2017E

-against-

Hon. MARY ANN BRIGANTTI

JESUS MILLAN and JESUS M. SEDA

Justice Supreme Court

-----X
The following papers numbered 1 to _____ were read on this motion (Seq. No. 1)
for SUMMARY JUDGMENT noticed on December 27, 2018 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3
Replying Affidavit and Exhibits	No(s). 4

Upon the foregoing papers and oral argument, the plaintiff Yasmina Ferrari ("Plaintiff) moves for summary judgment against the defendants Jesus Millan ("Millan") and Jesus M. Seda (collectively, "Defendants") on the issue of liability. Defendants oppose the motion.

I. Background

In support of her motion, Plaintiff submitted her deposition transcript wherein she testified that at the time of this accident she was driving her vehicle along 21st Avenue and 29th Street, in Queens, when her vehicle was struck by another vehicle at the intersection (Pl. EBT at 13, 15-16, 23, 37). Plaintiff described 21st Avenue as a two-way street, with one lane of moving traffic in each direction, and parking available on each side (*id.* at 15-16). She described 29th Street as a one-way street with parking available on each side (*id.* at 21). At the intersection of 21st Avenue and 29th Street there is no traffic control for vehicles traveling along 21st Avenue, but there is a stop sign for vehicles traveling along 29th Street (*id.* at 20-21). Had the accident not occurred Plaintiff's intention was to continue driving straight along 21st Avenue (*id.* at 21).

Plaintiff stated that as she was traveling along 21st Avenue, another vehicle traveling along the intersecting 29th Street "blew the stop sign" (*id.* at 37). She initially testified during her deposition that as a result of colliding with the adverse vehicle, her vehicle was impacted on its "front and side" or "front driver side" (*id.* at 23). She later testified that as a result of colliding with the adverse vehicle, her vehicle's "front bumper" her vehicle came into contact with the adverse vehicle's "driver side of the car" (*id.* at 26). Plaintiff additionally stated that the force of this first impact "pushed" her vehicle "forward," and forced Plaintiff's vehicle to cross over the "double yellow line" along 21st Avenue and come into contact with a

Motion is Respectfully Referred to Justice:
Dated: _____

parked vehicle on the opposite side of the street (*id.* at 23-25, 27, 37). Plaintiff testified that she only saw the adverse vehicle that she collided with approximately "two seconds" before impact, and that she "didn't have much time to dodge" the other vehicle (*id.* at 22, 34, 37). Plaintiff pointed out that this accident occurred at approximately 3:00 AM, and that she was driving with her headlights on (*id.* at 15-16).

Plaintiff also submitted the testimony of Millan, who could not recall the name of the street that he was traveling on prior to this accident, but did state that he was on a one-way street that had a stop sign at the point of the intersection where this accident occurred, and that at the stop sign there was an intersecting two-way street (Millan EBT at 23, 26-28, 31). Millan stated that he stopped at the stop sign at the intersection of 29th Street and 21st Avenue, and looked to his left and right (*id.* at 30). When Millan looked to his left and right at the intersection he could see approximately the entire "block" along 21st Avenue, and did not "see any vehicle on that intersecting street" (*id.* at 31-32). Had the accident not occurred Millan's intention was to continue driving straight along 29th Street (*id.* at 24).

Millan was stopped at the stop sign for approximately "two or three seconds" before proceeding straight across the intersection (*id.* at 32). As Millan began to proceed forward into the intersection he was involved in a motor vehicle accident "one or two seconds" later after moving "10 to 15 feet into the intersection" with a vehicle that came from his "left" (*id.* at 33-34, 38). Millan testified that his vehicle's "driver side door and the driver side passenger door" was impacted as a result of this accident (*id.* at 35). Millan also stated that he was driving with his headlights on (*id.* at 26).

II. Standard of Review

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). "On a motion for summary judgment, facts must be viewed "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal citation and quotations omitted]).

III. Analysis

A driver who has the right-of-way is "entitled to anticipate that other vehicles would obey traffic laws that require them to yield" (*Martinez v. Cofer*, 128 A.D.3d 421, 422 [1st Dept. 2015], quoting *Namisnak v. Martin*, 244 A.D.2d 258, 260 [1st Dept. 1997]). Even if a driver has the right-of-way, however, he or she may be found partially at fault for an accident if he or she failed to use reasonable care to avoid colliding with another vehicle already in an intersection (*see Nevarez v. S.R.M. Management Corp.*, 58 A.D.3d 295, 297-98 [1st Dept 2008]). Indeed, drivers with the right of way are still "obligated to be vigilant for oncoming traffic" as they travel down a roadway (*see Parris v. Gonzalez-Martinez*, 129 A.D.3d at 519, quoting *Calcano v Rodriguez*, 91 A.D.3d 468, 472 [1st Dept 2012]). Furthermore, when there is a circumstance of "conflicting versions as to how the accident occurred" (*Morris v Green*, 156 A.D.3d 540 [1st Dept 2017]), a plaintiff is not entitled to summary judgment on the issue of liability (*Langhorn v. K. Solo Serv. Corp.*, 302 A.D.2d 307 [1st Dept 2003]).

In this case, Plaintiff has established her prima facie entitlement to summary judgment as she testified that at the time of this accident she was traveling straight along 21st Avenue, at or near its intersection with 29th Street, and had no traffic control devices controlling her lane of travel. Thus, Plaintiff, who had the right of way, was "entitled to anticipate that other vehicles will obey the traffic laws that require them to yield, and had no duty to watch for and avoid a driver who might fail to stop at a stop sign" (*Gonzalez v Bishop*, 157 A.D.3d 460 [1st Dept 2018] [internal citation, quotation marks, and brackets omitted]; *see also Dinham v. Wagner*, 48 A.D.3d 349, 349-350 [1st Dept 2008], citing *Namisnak by Namisnak v. Martin*, 244 A.D.2d 258, 260 [1st Dept 1997]). The Court points out that Plaintiff's conflicting versions of the sequence of events leading up to this accident are not "so fundamental" as to provide a basis for failing to establish her prima facie case (*see e.g., Savall v New York City Tr. Auth.*, 2019 NY Slip Op 04999 at *1 [1st Dept June 20, 2019]). Plaintiff's testimony, when considered along with Millan's deposition transcript, demonstrates as a matter of law that Millan's negligence was a proximate cause of this accident (*see Ugarriza v. Schmieder*, 46 N.Y.2d 471, 474 [1979]; *Ayala v Pascarelli*, 168 A.D.3d 613, 614 [1st Dept 2019]; *Bajaha v Mercy Care Transp., Inc.*, 2019 NY Slip Op 03457 at *8-9 [1st Dept May 2, 2019]).

In opposition to the motion, Defendants failed to raise an issue of fact. While Millan asserts that he stopped at the stop sign along 29th Street, and looked both ways along 21st Avenue before crossing the intersection, he admitted that as he began to proceed forward into the intersection he was involved in a motor vehicle accident "one or two seconds" later after moving "10 to 15 feet into the intersection" with a vehicle that came from his "left", and Plaintiff equally asserted that she "didn't have much time to dodge" Defendants' vehicle (Millan EBT at 33-34, 38; Pl. EBT at 37). Millan thus failed to demonstrate that he

exercised reasonable care before entering the intersection, as he failed to see that which, through the proper use of senses, should have been seen before the impact (see Griffin v. Pennoyer, 49 A.D.3d 341, 342 [1st Dept 2008, citing Berner v. Koegel, 31 A.D.3d 591 [1st Dept 2006]). As a result, the testimony makes it clear that Plaintiff did not have any opportunity to avoid this accident (see Gonzalez, 157 A.D.3d at 461 [citations omitted] ["[t]he evasive measures that [defendant driver] took during the less than three seconds before impact did not constitute negligence"). Even assuming Millan raised an issue of fact as to Plaintiff's comparative fault, Plaintiff would still be entitled to summary judgment on the issue of Millan's liability (Derix v Port Auth. of N.Y. & N.J., 162 A.D.3d 522 [1st Dept 2018], citing Rodriguez v City of New York, 31 N.Y.3d 312 [2018]).

Defendants' counsel's contention that Plaintiff was speeding is "speculative and conclusory" (id. [citations omitted]). Plaintiff is entitled to summary judgment even without considering the uncertified police accident report as it "constitutes inadmissible hearsay" (Silva v Lakins, 118 A.D.3d 556, 557 [1st Dept 2014], citing Rivera v. GT Acquisition 1 Corp., 72 A.D.3d 525, 526 [1st Dept 2010]).

IV. Conclusion

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendants' liability is granted.

This constitutes the Decision and Order of this Court.

Dated: 7/23/19

Hon. Mary Ann Briganti J.S.C.
Hon. Mary Ann Briganti

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT