Rosa v Dilone
2019 NY Slip Op 35060(U)
October 8, 2019
Supreme Court, Bronx County
Docket Number: Index No. 34060/2018E
Judge: John R. Higgitt

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

----------X

PROVIDENCIA ROSA,

Plaintiff,

- against -

ALEXANDER R. DILONE,

Defendant.

----------X

DECISION AND ORDER

Index No. 34060/2018E

John R. Higgitt, J.

Upon plaintiff's May 30, 2019 notice of motion and the affirmation, affidavit, and exhibits submitted in support thereof; defendant's August 7, 2019 affirmation in opposition and the exhibit submitted therewith; plaintiff's August 9, 2019 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the accident and dismissal of defendant's affirmative defense alleging plaintiff's culpable conduct is granted.

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained in a motor vehicle accident that took place on September 13, 2017. In support of her motion, plaintiff submitted the pleadings, the police accident report, and her affidavit. Plaintiff averred that she was a passenger in a non-party driver's vehicle that was stopped behind defendant's vehicle when defendant's vehicle moved in reverse and struck the vehicle occupied by plaintiff.

In opposition, defendant asserts that there are questions of fact as to how the accident occurred. Defendant averred that at the time of the accident he was at a complete stop when the vehicle occupied by plaintiff struck the rear of his vehicle. Defendant averred that, at the time of the accident, his vehicle was not moving.

Plaintiff's proof was sufficient to meet her prima facie burden. Under Vehicle and Traffic Law § 1211, the driver of a vehicle should not move a vehicle in reverse gear without ensuring that such movement can be made safely. A driver who reverses his or her vehicle before taking adequate precautions is liable for such negligence (*see Pressner v Serrano*, 260 AD2d 458 [1st Dept 1999]).

In opposition to plaintiff's prima facie showing of entitlement to judgment as a matter of law on the issue of defendant's liability, defendant failed to raise a triable issue of fact.

In light of defendant's police-report admission that "he was reversing backward but did not see or hear [the non-party vehicle]," his subsequent affidavit submitted in opposition to the motion, which contains an exculpatory narrative of the accident, raises nothing more than a feigned issue of fact (*see Colon v Vals Ocean Pac. Sea Food, Inc.*, 157 AD3d 462 [1st Dept 2018]; *see also Estate of Mirjani v DeVito*, 135 AD3d 616 [1st Dept 2016]). Notably, defendant did not deny making the admission or attempt to explain it. Because defendant's affidavit is without probative force, he failed to raise a triable issue of fact as to his liability.

Defendant asserts that the motion should be denied because plaintiff failed to submit evidence in admissible form, relying solely on a "self-serving" affidavit. However, an affidavit submitted by an interested party is competent evidence and may be sufficient to discharge the interested party's summary judgment burden (*see Miller v City of New York*, 253 AD2d 394, 395 [1st Dept 1998]).

Defendant asserts that plaintiff's motion should be denied as premature because no discovery has been conducted. The mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment

(*see Castaneda, supra*; *Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]).

As to the aspect of plaintiff's motion seeking dismissal of those aspects of defendant's first affirmative defense alleging plaintiff's culpable conduct, plaintiff made prima facie showing that he bears no comparative fault. Under the circumstances, as a "innocent passenger" plaintiff is entitled to dismissal of defendant's affirmative defense of comparative fault (*see Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]). Moreover, the doctrine of assumption of risk has no applicability in this case (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d 392 [2010]).

Accordingly, it is

ORDERED, plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the accident and dismissal of those aspects of defendant's first affirmative defense alleging plaintiff's culpable conduct is granted; and it is further

ORDERED, that the aspects of defendant's first affirmative defense alleging plaintiff's culpable conduct are dismissed.

The parties are reminded of the December 06, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: October 8, 2019

John R. Higgitt, A.J.S.C.