

Soler v Laird

2019 NY Slip Op 35105(U)

November 21, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30641/2017E

Judge: Mary Ann Brigantti

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

SANDY SOLER

Index No. 30641/2017E

-against-

Hon. MARY ANN BRIGANTTI

MATTHEW J. LAIRD

Justice Supreme Court

The following papers numbered 1 to 5 were read on this motion (Seq. No. 002)
for SUMMARY JUDGMENT LIABILITY noticed on June 19, 2019 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s)1,2
Answering Affidavit and Exhibits	No(s).3,4
Replying Affidavit and Exhibits	No(s).5

Motion is Respectfully Referred to Justice:
Dated:

Upon the foregoing papers, the plaintiff Sandy Soler ("Plaintiff") moves for an order granting her summary judgment on the issue of liability pursuant to CPLR 3212, and an immediate inquest and assessment of damages, and such other and further relief as the Court deems just and proper (motion seq. #002). The defendant Matthew J. Laird ("Defendant") opposes the motion. By separate motion, Defendant moves for summary judgment, dismissing Plaintiff's complaint pursuant to CPLR 3212 (motion seq. #003). Plaintiff opposes the motion. In the interest of judicial economy, the two motions are consolidated and disposed of in the following Decision and Order.

In support of her motion, Plaintiff alleges in an affidavit that she was operating her vehicle along a ramp to the upper expressway of I-95, when she had to slow her vehicle due to traffic ahead of her. Plaintiff alleges that at that time, she was struck in the rear by Defendant's vehicle.

Plaintiff also submits an uncertified police accident report. The report states, in pertinent part, that "D#1 [Plaintiff] reported that she slowed to merge when veh #2 [Defendant] hit rear of her veh. D#2 reported that while traveling straight in free moving traffic veh #1 suddenly came to a complete stop on roadway and he hit the rear of veh #1." The report further indicates that the accident occurred on the "west bound Amsterdam Ramp into upper expressway."

Plaintiff also submits Defendant's deposition transcript. Defendant testified that before the accident, he was traveling on the Harlem River Drive and it was his intention to continue on the upper level of the George Washington Bridge (Def. EBT at 14). The accident occurred "just after" the Amsterdam Avenue exit, on a "decline" (id.). He described traffic as "light," and the accident involved two vehicles - his, and another (id. at 14-15). When asked if he saw the other vehicle before the accident, Defendant responded "[d]on't remember" (id. at 15). He stated that the other vehicle was not in motion at the point of

impact (*id.* at 16). Defendant testified that the front of his vehicle impacted the rear of the other vehicle. There lane that he was traveling in was the only lane in that direction (*id.*). Defendant also testified that he never saw a copy of the police report (*id.* at 20). Immediately prior to the accident, he was traveling at 30-35 miles per hour and there was nothing obstructing his view ahead for about 20 feet prior to the impact (*id.* at 23).

The above submissions sufficiently carry Plaintiff's initial summary judgment burden, as they establish that Plaintiff's vehicle was struck in the rear by Defendant's vehicle on a ramp leading to a highway. "It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident." (*Cabrera v Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010] citing *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept. 2001]; see also *Dattilo v Best Transp. Inc* 79 A.D.3d 432 [1st Dept. 2010]).

Plaintiff's submissions include an uncertified police accident report which contains Defendant's statement that Plaintiff came to a sudden stop in free flowing traffic. Since Plaintiff relied in part on this report in support of her motion, she waived any objection to the admissibility of the statements contained in the police report (*Cruz v. Finney*, 148 A.D.3d 772 [2d Dept. 2017]; *Espinal v. Volunteers of Am-Greater N.Y. Inc.*, 121 A.D.3d 558 [1st Dept. 2014]). Nevertheless, "[a] claim that the lead driver came to a sudden stop, standing alone, is insufficient to rebut the presumption that the rearmost driver was negligent and the stopped vehicle was not negligent" (*Ly Giap v. Hathi Son Pham*, 159 A.D.3d 484, 485 [1st Dept. 2018]). Plaintiff's motion papers establish that, despite the statements contained in the police accident report, Defendant testified that he did not remember if he even saw Plaintiff's vehicle before the accident, even though he had an unobstructed view of traffic in front of him. This demonstrates that any alleged sudden stop is not a non-negligent explanation for the accident, because Defendant did not even remember seeing Plaintiff's vehicle and thus he failed see what there was to be seen, and make reasonable use of his senses prior to the collision (*see, e.g., Miller v. DeSouza*, 165 A.D.3d 550 [1st Dept. 2018]). The Court further notes that Defendant did not testify that Plaintiff came to a sudden or abrupt stop, he did not testify that he ever applied his brakes, and he did not allege or establish that he was maintaining a safe following distance behind the lead vehicle before the accident (*see Giap*, 159 A.D.3d 484). Since Defendant never actually testified to a sudden stop or confirmed the statements attributed to him in the police accident report, and acknowledged that he did not remember ever seeing Plaintiff's vehicle before the accident, it cannot be said that this was a case where Defendant "reasonably expected that traffic would continue unimpeded" (*cf. Baez-Pena v. MM Truck and Body Repair, Inc.*, 151 A.D.3d 473, 477 [1st Dept. 2017],

citing *Tutrani v. County of Suffolk*, 10 N.Y.3d 906 [2008]). It is further undisputed that this accident occurred on a ramp, and not actually on the highway, similar to *Giap* and unlike *Baez-Pena*.

In opposition to the motion, Defendant submits Plaintiff's deposition testimony and alleges that summary judgment in Plaintiff's favor is not warranted. Contrary to Plaintiff's contentions, her unsigned deposition transcript is admissible, since it was certified by the reporter and Plaintiff does not challenge its accuracy (*Franco v. Rolling Frito-Lay Sales, Ltd.*, 103 A.D.3d 543 [1st Dept. 2013]). Defendant argues that Plaintiff gave varying versions of the accident and conflicting testimony. Defendant also asserts that Plaintiff is wholly responsible for this accident.

First, there are no material deviations between Plaintiff's deposition testimony and the affidavit she submitted in support of her motion. While Plaintiff initially stated that the accident occurred on "I-95 southbound" (Pl. EBT at 20), she thereafter clearly and consistently testified that the accident occurred while she was "coming down the ramp" to go onto I-95, "getting on by way of the ramp" (*id.* at 20-21), or that she was on "the ramp from the Bronx that leads to I-95" (*id.* at 21). Her testimony that she was "on the right side, merging off the ramp" is consistent with the above - as it is her testimony that she was on a ramp that led to the highway at the time of the accident. Plaintiff's later testimony that she was "at the bottom of the ramp" (*id.* at 34) is not inconsistent with her prior descriptions of the accident location. In sum, the testimony presented as to the accident location is not contradictory and does not present "different versions of events."

Plaintiff described traffic as "heavy" and "bumper to bumper" (*id.* at 22), and prior to the accident, she was traveling behind about five other cars on the ramp (*id.* at 26), traveling at 10-12 miles per hour (*id.*), when she was struck in the rear by another vehicle (*id.* at 26-27). Furthermore, contrary to Defendant's counsel's characterizations, Plaintiff never testified that the accident involved more than two vehicles. While Plaintiff claimed that the rear-end impact caused her vehicle to move forward (*id.* at 30), she testified that she was able to hit her brakes and stop her vehicle was striking the car in front of her (*id.* at 33).

The only real disparity between Plaintiff's affidavit and her testimony is that she testified that Defendant struck her in the rear twice - once while she was moving, and again while she was stopped (*id.* at 32; 35). Plaintiff's affidavit only asserts that she was struck "in the rear" without stating how many impacts there were. Nevertheless, this disparity is immaterial because under either "version" of the accident, Defendant is presumptively liable for striking Plaintiff in the rear. While there Plaintiff and Defendant conflict as to whether Plaintiff was stopped or moving at the time of the impact, this also fails to warrant denial of the motion since a rear-end collision "with a stopped *or stopping vehicle* establishes a prima facie case of negligence on the part of the driver of the rear vehicle" (*Cabrera*, 72 A.D.3d 553 [emphasis added]).

Defendant argues that the motion must be denied, and summary judgment in his favor is warranted because Plaintiff was negligent in merging when it was not safe to do so. However, there is simply no testimony or evidence on this record that this accident was caused by an improper or unsafe merge. Plaintiff did not testify that she switched lanes or attempted to switch lanes before the accident, and Defendant did not allege that such an event occurred. Defendant even acknowledged that he was traveling in the lone traffic lane that went in his direction at the time of the accident (Def. EBT at 16). Defendant also does not explain how Plaintiff's failure to see Defendant's vehicle before this rear-end collision renders her liable for the accident. In addition, as noted *supra*, Defendant's statement in the uncertified police report that Plaintiff came to a sudden stop is not supported by his deposition testimony. In any event, Defendant never alleged that he was maintaining a proper following distance behind the lead vehicle, and his admission that he did not remember seeing Plaintiff's allegedly stopped vehicle prior to the collision, despite having an unobstructed view of traffic ahead of him, demonstrates that he failed to see what there was to be seen, and any alleged sudden stop is not a non-negligent reason for the rear-end collision (*Giap*, 159 A.D.3d 484).

Finally, the Court notes that Plaintiff was not required to demonstrate, *prima facie*, her absence of comparative fault in order to be awarded summary judgment on the issue of Defendant's liability (*Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018]).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendant's liability is granted, and an assessment of damages is to occur at trial, and it is further,

ORDERED, that Defendant's motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: 11/21/19

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