Wilson v Shenkman
2020 NY Slip Op 30870(U)
February 25, 2020
Supreme Court, Bronx County
Docket Number: 24172/2019E
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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JEANINE WILSON,

Plaintiff,

- against -

JACQUELINE SHENKMAN, EUOENE SHENKMAN, MELISSA REGNO, AADIL HUSSAIN, TAYLOR RAE PFEIFER and VEHICLE TRUST,

Defendants.

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DECISION AND ORDER

Index No. 24172/2019E

John R. Higgitt, J.

The parties' motions for summary judgment (motion sequences #1 and #2) are consolidated for disposition herein, as they involve common questions of law and facts.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that occurred on May 3, 2018. Defendants Pfeifer and Vehicle Trust ("the Pfeifer defendants") seek summary judgment dismissing the complaint as against them and all cross claims against them on the ground that they are not liable for the accident (motion sequences #1). Defendants Jacqueline Shenkman and Eugene Shenkman ("the Shenkman defendants") also move for summary judgment dismissing the complaint as against them and all cross claims against them on the ground that the they are not liable for the accident (motion sequences #2). For the reasons that follow, the motions are granted.

In support of their motions the Pfeifer defendants and the Shenkman defendants submit the pleadings, the police accident report, defendant Pfeifer's affidavit, and defendant Jacqueline Shenkman's affidavit.

Defendant Pfeifer averred that he was traveling westbound on Northern State Parkway (a Nassau County roadway), when his vehicle was struck in the rear by defendant Regno's vehicle, causing his vehicle to spin and come to rest near the guard rail along the left side of the roadway. Defendant Pfeifer averred that his vehicle made contact with defendant Regno's vehicle and no other

vehicle. According to defendant Pfeifer, immediately before his vehicle was struck in the rear, he heard a collision.

Defendant Jacqueline Shenkman averred that at the time of the accident she was traveling in the second from right lane of the westbound Northern State Parkway when defendant Regno's vehicle suddenly struck the front passenger's side of the Shenkman defendants' vehicle, forcing that vehicle to move into the left lane. Defendant Jacqueline Shenkman further averred that defendant Regno's vehicle then rolled onto the top of the Shenkman defendants' vehicle before rolling back onto the highway, coming to a stop between the middle and left lanes. Defendant Jacqueline Shenkman averred that the Shenkman defendants' vehicle did not strike the rear of another vehicle.

Vehicle and Traffic Law § 1129(a) states that a "driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" (*see Darmento v Pacific Molasses Co.*, 81 NY2d 985, 988 [1993]). Based on the plain language of the statute, a violation is clear when a driver follows another too closely without adequate reason and that conduct results in a collision (*id.*).

Furthermore, Vehicle and Traffic Law § 1128(a) states that a "vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has ascertained that such movement can be made with safety" (*see Delgado v Martinez Family Auto*, 113 AD3d 426, 428 [1st Dept 2014]). A violation of Vehicle and Traffic Law § 1128(a) constitutes negligence per se (*see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]). A party may demonstrate entitlement to summary judgment by showing that the opposing party's vehicle entered their lane of travel when it was not safe to do so (*see Sanchez v Oxcin*, 157 AD3d 561, 564 [1st Dept 2018]). A driver with the right of way is entitled to anticipate that drivers at a stop sign will obey the traffic law requiring them to yield (*see Kann v Maggies Paratransit Corp.*, 63 AD3d 792, 793 [2d Dept 2009]).

The Pfeifer defendants and the Shenkman defendants made a prima facie showings of entitlement to judgment as a matter of law dismissing the complaint as against them and the cross claims against them.

Plaintiff failed to raise a triable issue of fact as to the Pfeifer defendants' or the Shenkman defendants' liability in causing the subject accident. Plaintiff asserts that motion should be denied as premature because the moving defendants sought summary judgment before issued had been joined. Plaintiff asserts that at the time the motions were made only five of the six defendants had served their answers or appeared in the action. However, at the time the motions were made issue was joined by the moving defendants. Furthermore, before these motions were submitted all defendants had answered or appeared in the action.

Plaintiff also argues that the motion is premature because depositions have not been completed. This motion, however, is not premature because "the information as to why [defendant Regno's] vehicle struck the [moving defendants' vehicles] reasonably rests within [plainitff's] own knowledge" (*Rodriguez v Garcia*, 154 AD3d 581, 581 [1st Dept 2017]; *see Castaneda v DO & CO New York Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]). 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]). Plaintiff did not submit an affidavit in opposition to the motions and offered no reason for her failure to do so.

Plaintiff further argues that questions of fact exist precluding summary judgment in favor of the Shenkman defendants. Plaintiff relies on the police accident report to assert that there are questions of fact as to how the accident occurred. Plaintiff relies on her purported statement in the police accident report to the effect that the accident occurred because the Shenkman defendants' vehicle struck the rear of the vehicle occupied by plaintiff (i.e., defendant Regno's vehicle). Plaintiff's unsworn self-serving statement in the police accident report is hearsay and insufficient to

raise a triable issue of fact (*see Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]; *see Rue v Stokes*, 191 AD2d 245 [1st Dept 1993]). Notably, plaintiff failed to submit any admissible evidence (such as an affidavit) to contradict the moving defendants' assertions, relying instead on the inadmissible police report (*see Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255 [1970]).

Accordingly, it is

ORDERED, that the motions of the Pfeifer defendants and the Shenkman defendants are granted, and the complaint as against them and the cross claims against them are dismissed; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendants Pfeifer, Vehicle Trust, Jacqueline Shenkman and Eugene Shenkman dismissing the complaint as against them and the cross claims against them.

The parties are reminded of the May 15, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: February 25, 2020

John R. Higgitt, J.S.C.