Johnson v Nigro
2020 NY Slip Op 34709(U)
March 9, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 17-604171
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 17-604171
CAL. No. 19-00942MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 7-23-19
ADJ. DATE 7-25-19
Mot. Seq. # 002 - MG

DANIELLE JOHNSON,

Plaintiff,

- against -

DOUGLAS C. NIGRO and FRANCINE ALOISIO-NIGRO,

Defendants.

DOUGLAS C. NIGRO and FRANCINE ALOISIO-NIGRO,

Third-Party Plaintiffs,

- against -

JOANNE M. AVIANO

Third-Party Defendant.

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers filed by plaintiff, Danielle Johnson, on June 24, 2019 ; Notice of Cross Motion and supporting papers _; Answering Affidavits and supporting papers ____; Replying Affidavits and supporting papers ___; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability and for summary judgment on defendants' affirmative defenses of comparative fault and assumption of the risk is granted.

This action was commenced by plaintiff Danielle Johnson to recover damages for personal injuries she allegedly sustained on August 3, 2016, when the motor vehicle that she was a passenger in, operated by her mother, nonparty Joanne M. Aviano, collided with a vehicle owned by defendant Francine Aloisio-Nigro and operated by defendant Douglas C. Nigro, on Motor Parkway, near its intersection with Marcus Boulevard, in Hauppauge, New York. The accident allegedly occurred when defendant driver attempted to make a left turn from the eastbound lanes of Motor Parkway into a parking lot, near the intersection of Marcus Boulevard, and struck the vehicle in which plaintiff was a passenger. By order of this Court dated June 17, 2019, the third-party complaint against Joanne M. Aviano was dismissed.

Plaintiff now moves for summary judgment on the issue of defendant driver's liability, and to dismiss defendants' affirmative defense of comparative fault and assumption of the risk. Plaintiff argues that defendant driver violated, inter alia, Vehicle and Traffic Law § 1141 by making a left turn into the path of plaintiff's vehicle, which was traveling with the right-of-way. In support of its motion, plaintiff submits, among other things, transcripts of the deposition testimony of plaintiff, defendant driver, and Joanne M. Aviano. Defendants do not oppose the motion.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Once the moving party demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***New York City Asbestos Litig. v Chevron Corp.***, 33 NY3d 20, 99 NYS3d 734 [2019]; ***Stonehill Capital Mgt., LLC v Bank of the West***, 28 NY3d 439, 45 NYS3d 864 [2016]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (*see* ***Kerolle v Nicholson***, 172 AD3d 1187, 101 NYS3d 387 [2d Dept 2019]; ***Marks v Rieckhoff***, 172 AD3d 847, 101 NYS3d 63[2d Dept 2019]; ***Kaziu v Human Care Servs. for Families & Children, Inc.***,

167 AD3d 588, 90 NYS3d 66 [2d Dept 2018]). Pursuant to Vehicle and Traffic Law § 1141, a vehicle intending to turn left within an intersection or into an alley, private road, or driveway must yield the right-of-way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard (*see* ***Ming-Fai Jon v Wager***, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]; ***Giannone v Urdahl***, 165 AD3d 1062, 86 NYS3d 562 [2d Dept 2018]; ***Lebron v Mensah***, 161 AD3d 972, 76 NYS3d 219 [2d Dept 2018]). Thus, a driver who attempts to make a left turn when it not reasonably safe to do so is in violation of this provision of the Vehicle and Traffic Law (*see* ***Foley v Santucci***, 135 AD3d 813, 23 NYS3d 338 [2d Dept 2016]; ***Krajiniak v Jin Y Trading, Inc.***, 114 AD3d 910, 980 NYS2d 812 [2d Dept 2014]; ***Ducie v Ippolito***, 95 AD3d 1067, 944 NYS2d 275 [2d Dept 2012]). To establish prima facie entitlement to judgment as a matter of law on the issue of negligence, a plaintiff is no longer required to show freedom from comparative fault (***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; *see* ***Liu v Lowe***, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; ***Heard v Schade***, 172 AD3d 1335, 99 NYS3d 666 [2d Dept 2019]; ***Bloechle v Heritage Catering, Ltd.***, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; ***Catanzaro v Edery***, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; ***Marks v Rieckhoff***, *supra*). Although the operator of a vehicle with the right-of-way is entitled to assume that other drivers will obey traffic laws requiring them to yield (*see* ***Richardson v Cablevision Sys. Corp.***, 173 AD3d 1083, 104 NYS3d 655 [2d Dept 2019]; ***Jeong Sook Lee-Son v Doe***, 170 AD3d 973, 96 NYS3d 302 [2d Dept 2019]; ***Enriquez v Joseph***, 169 AD3d 1008, 94 NYS3d 599 [2d Dept 2019]), the driver with the right-of-way also has a duty to keep a proper lookout to avoid collisions with other vehicles (*see* ***Matias v Bello***, 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]; ***Miron v Pappas***, 161 AD3d 1063, 77 NYS3d 163 [2d Dept 2018]; ***Mark v New York City Tr. Auth.***, 150 AD3d 980, 55 NYS3d 128 [2d Dept 2017]). Nonetheless, a driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield the right-of-way is not comparatively negligent for failing to avoid the collision (*see* ***Jeong Sook Lee-Son v Doe***, *supra*; ***Enrique v Joseph***, *supra*; ***Rohn v Aly***, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]).

Plaintiff has established her prima facie entitlement to summary judgment on the issue of liability by demonstrating that defendant driver was negligent, as he violated Vehicle and Traffic Law § 1141 (*see* ***Brodney v Picinic***, 172 AD3d 673, 99 NYS3d 399 [2d Dept 2019]; ***Ming-Fai Jon v Wager***, *supra*; ***Giannone v Urdahl***, *supra*; ***Yu Mei Liu v Weihong Liu***, 163 AD3d 611, 81 NYS3d 75 [2d Dept 2018]; ***Smith v Fuentes***, 158 AD3d 731, 68 NYS3d 739 [2d Dept 2018]). Plaintiff testified that she was the front seat passenger in a vehicle operated by her mother, Joanne M. Aviano. She testified they were traveling westbound on Motor Parkway, approaching its intersection with Marcus Boulevard. She testified that defendant driver's vehicle turned into their path of travel. Further, defendant driver testified that he was traveling eastbound on Motor Parkway and that he was in the designated left-turn lane. He testified that he intended to enter a parking lot on the north side of Motor Park way, that he turned left, crossing the westbound lanes of Motor Parkway, and collided with plaintiff's vehicle. Defendant testified that he did not see plaintiff's vehicle prior to the collision. Plaintiff has also established her prima facie entitlement to summary judgment as to defendant Francine Aloisio-Nigro. Vehicle and Traffic Law § 388 provides that an owner of a motor vehicle is vicariously liable for the negligence of those whom the owner allows to drive his or her vehicle (*see* ***Country-Wide Ins. Co. v National R.R. Passenger Corp.***, 6 NY3d 172, 811 NYS2d 302 [2006]; ***Jung v Glover***, 169 AD3d 782, 93 NYS3d 390 [2d Dept 2019]).

Plaintiff having established prima facie entitlement to summary judgment, the burden now shifts to defendants to submit evidentiary proof in admissible form which raises a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*; ***Yu Mei Liu v Weihong Liu***, *supra*). Defendants fail to oppose the motion which, in effect, is a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (*see* ***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***114 Woodbury Realty, LLC v 10 Bethpage Rd., LLC***, 178 AD3d 757, 114 NYS3d 100 [2d Dept 2019]).

As to the branch of plaintiff's motion seeking to dismiss defendants' affirmative defense of comparative fault and assumption of the risk, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (*see* ***Bank of N.Y. v Penalver***, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; ***South Point, Inc. v Redman***, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see* ***Greco v Christoffersen***, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

With regard to defendants' affirmative defense of culpable conduct and assumption of the risk, plaintiff has established that she was merely riding as a passenger in her mother's vehicle when it was involved in a collision. Additionally, this Court's prior order settled the issue of defendants' liability for the happening of the accident. In that motion, Joanne M. Aviano established that defendant driver was the sole proximate cause of the accident. Therefore, plaintiff has established prima facie entitlement to dismissal of defendants' affirmative defense of culpable conduct and assumption of the risk. As plaintiff's motion was unopposed, defendants failed to raise a triable issue of fact as to their negligence (*see* ***Alvarez v Prospect Hosp.***, *supra*; *see also* ***Kuehne & Nagel v Baiden***, *supra*).

Accordingly, the unopposed motion by plaintiff for partial summary judgment as to defendants' liability and for summary judgment dismissing defendants' affirmative defense of culpable conduct and assumption of the risk is granted.

Dated: March 9, 2020
Riverhead, New York

WILLIAM G. FORD J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**