

Lopez v Simone
2020 NY Slip Op 34823(U)
March 26, 2020
Supreme Court, Westchester County
Docket Number: Index No. 66337/2018
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.**

-----X
NAYDETTE W. LOPEZ,

Plaintiff,

DECISION & ORDER
Index No. 66337/2018
Seq# 3

-against-

FRANCESCA L. SIMONE, ROBIN S. STRAUHS and
TILTING TRUST

Defendants.

-----X
FRANCESCA L. SIMONE,

Third-Party Plaintiff,

-against-

ROBIN S. STRAUHS and TILTING TRUST,

Third-Party Defendants.
-----X

The following papers were read and considered in deciding the present motion:

Notice of Motion/Affirmation/Exhibits A-F	1-8
Affirmation in Opposition	9
Reply Affirmation	10

The plaintiff, Naydette W. Lopez (“Lopez”), commenced this action by filing a summons and complaint on October 5, 2018, seeking money damages for alleged injuries sustained on September 19, 2017, as a result of a motor vehicle accident. The defendant, Francesca L. Simone (“Simone”), filed a third-party summons and complaint on May 24, 2019, against third-party defendants, Robin S. Strauhs (“Strauhs”) and Tilting Trust,

The plaintiff then filed a motion seeking to amend the verified complaint pursuant to CPLR 3025[b] and to serve a supplemental summons and amended verified complaint to add third party defendants, Robin S. Strauhs and Titling Trust, as direct defendants and amend the caption accordingly. This Court granted that motion by Decision and Order dated November 25, 2019 and filed December 2, 2019, granting the plaintiff leave to amend the verified complaint and directed the plaintiff to file a supplemental summons and amended verified complaint within twenty days of the filing of the Decision and Order. The plaintiff filed a supplemental summons and an amended complaint on March 4, 2020 and Strauhs and Simone filed amended answers on March 12, 2020 and March 13, 2020 respectively.

The accident involved three vehicles. Simone entered Route 59 from the Palisades Parkway Exit 19 and merged into the middle lane. She was then attempting to merge into the left turn lane, when her vehicle collided with the vehicle operated by Strauhs and owned by Titling Trust, which was traveling in the left lane. Simone's vehicle then spun out across all the lanes and then hit Lopez's vehicle.

Strauhs now files the instant motion for summary judgment, seeking dismissal of the all claims against her¹. Strauhs, by her attorney, argues that she is not liable for the accident because the vehicle that rear ended Lopez's vehicle was driven by Simone, which first struck her vehicle when attempting to change to the left lane from the middle lane and then struck Lopez's vehicle. In support of the motion, Strauhs proffers party depositions, a certified police report, a witness affidavit and copies of the pleadings.

¹The motion was fully submitted prior to this Court's Decision and Order granting the plaintiff leave to amend the complaint to add Strauhs and Titling Trust as direct defendants.

In opposition, Simone, by her attorney, argues that summary judgment must be denied, since there are questions of fact as to whether Strauhs contributed to the happening of the collision between Strauhs' vehicle and Simone's vehicle, which in turn caused the collision between Simone's vehicle and Lopez's vehicle.

The attorney argues that Lopez has no knowledge of how the accident occurred, since she testified that she did not see or hear anything, but just felt an impact to her car. The attorney argues that the witness, Jacqueline Sands ("Sands"), does not state the speed at which Simone's vehicle was traveling and just states that she was traveling at an excess rate of speed. The attorney also contends that Simone's lane switching occurred behind Sands' vehicle and she does not state that she actually saw, either the lane change or the collision and claims that she heard a second collision, not that she saw that collision. The attorney contends that Sands' conclusion that Simone's vehicle was traveling out of control at an excessive rate of speed is assumption or speculation.

The attorney further asserts that the police report is not probative, because the police officer has no personal knowledge of the events, upon which the description in the report is based. The attorney argues that a jury could easily conclude that the collision between the Simone and Strauhs vehicles was either caused by or contributed to by the negligence of Strauhs and whether Strauhs was not aware of her surroundings and failed to observe what was there to be seen.

In reply, Strauhs' attorney argues that there is no evidence or witnesses to support Simone's claim that Strauhs shares liability in the accident. The attorney states that Sands' affidavit clearly states that she observed Simone's vehicle enter the roadway, swerve to the middle lane behind her vehicle and strike a vehicle in the left lane. The attorney

contends that, although the police officer did not have personal knowledge of the accident, he did observe the scene and based his report on the facts provided to him by the parties involved, which was also corroborated by all the parties' testimony. Lastly, the attorney argues that Simone clearly failed to observe Strauhs' vehicle, while abruptly switching lanes.

Discussion

A party moving for summary judgment bears the initial burden of affirmatively demonstrating its entitlement to summary judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986])). To demonstrate its entitlement to relief, the moving party must come forward with evidentiary proof that establishes the absence of any material issues of fact, (*see McDonald v Mauss*, 38 AD3d 727, 728 [2d Dept 2007]). Once the moving party has established its prima facie entitlement to summary judgment, the burden shifts to the opposing party to submit evidentiary proof in admissible form to establish material issues of fact (*see Alvarez*, 68 NY2d at 324; *Winegrad*, 64 NY2d at 853).

New York Vehicle and Traffic Law § 1128, states in pertinent part that:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(a) 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 first ascertained that such movement can be made with safety (NY VTL § 1128[a]).

A driver is entitled to judgment as a matter of law on the issue of liability if he or she demonstrates that the sole proximate cause of an accident was the other driver's violation

of the vehicle traffic law (see *Gause v Martinez*, 91 AD3d 595, 596 [2d Dept 2012]). However, there may be more than one proximate cause of an accident and the proponent of a summary judgment motion bears the burden of establishing freedom from comparative negligence as a matter of law (*Id*), since a driver with a right-of-way also has a duty to use reasonable care to avoid a collision (see *Attl v Spetler*, 137 AD3d 1176, 1176 [2d Dept 2016]). Nevertheless, “a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision” (*Id*); see also *Smith v. Omanes*, 123 AD3d 691, 691 [2d Dept 2014]).

The depositions of the parties confirm that Simone’s vehicle entered into the left lane in which Strauhs’ vehicle was traveling, in violation of VTL § 1128. The evidence submitted by Strauhs establishes entitlement to summary judgment as a matter of law, thereby shifting the burden to Simone to demonstrate the existence of a factual issue requiring a trial (see *Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]).

The Court finds that Simone has failed to demonstrate that factual issues exist and that Strauhs contributed to the accident. Simone was obligated to make sure that the left lane was clear before attempting to enter it. Despite her claiming that she kept looking, she obviously failed to observe Strauhs’ vehicle because she did not complete the lane change before colliding with Simone’s vehicle. Simone testified that she did not have time to avoid the collision and did not see Strauhs’ vehicle attempting to enter the left lane before her vehicle was struck.

Further, the witness, Sands, stated in her affidavit, that she observed Simone’s vehicle enter the right lane and then swerve across the middle lane and strike Strauhs’

vehicle, which was traveling in the left lane. Her not actually observing the second collision is not important to her observation of the first collision and Simone's liability. While the Court agrees that the police report is not probative because the officer did not observe the accident and the report does not provide the parties' statements, the report is not necessary to grant summary judgment, since, the parties' deposition testimony and Sands' affidavit are sufficient.

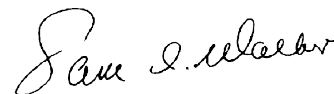
Accordingly, upon the foregoing, it is

ORDERED that the motion is granted; and it is further

ORDERED that the third-party complaint is dismissed.

The following constitutes the Decision and Order of this Court.

Dated: White Plains, New York
March 26, 2020



HON. SAM D. WALKER