

**Hungria v Milano**

2020 NY Slip Op 34960(U)

May 12, 2020

Supreme Court, Rockland County

Docket Number: Index No. 031805/17

Judge: Robert M. Berliner

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT : STATE OF NEW YORK  
COUNTY OF ROCKLAND  
HON. ROBERT M. BERLINER, J.S.C.

To commence the statutory  
time period 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.

-----X

ANGIE R. HUNGRIA,

Plaintiffs,

-against-

RICHARD M. MILANO and ELVIA MILANO,

Defendants.

-----X

RICHARD M. MILANO and ELVIA MILANO,

Third-Party Plaintiffs,

-against-

MARJORIE MAINHART, MILTON OSCAR  
SOTIL-CABANILLAS and JULIO LOAYZA,

Third-Party Defendants.

-----X

MARJORIE A. MAINHART,

Plaintiff,

-against-

JULIO LOAYZA, MILTON OSCAR SOTIL-  
CABANILLAS, RICHARD M. MILANO and  
ELVIA MILANO,

Defendants.

-----X

ANGIE HUNGRIA,

Plaintiff,

-against-

RICHARD MILANO, ELVIA MILANO,  
MARJORIE MAINHART, MILTON OSCAR  
SOTIL-CABANILLAS and JULIO LOAYZA,

Defendants.

-----X

DECISION AND ORDER

**Action No. 1**

Index No.: 031805/17

Motion Sequence # 6

**Action No. 2**

Index No.: 036300/17

**Action No. 3**

Index No.: 032204/18

Motion Sequence #1

These three actions were previously consolidated and joined for discovery and trial by this Court’s Order granted on June 14, 2018 (#73, #93 under Index No. 31805/2017). Pending before the Court are Defendant/Third-Party Defendant Mainhart’s motion for summary judgment on liability seeking a dismissal of all claims and cross-claims against her, and Plaintiff Hungria’s cross-motion for summary judgment on liability against all Defendants. Defendants/Third-Party Defendants, Sotil-Cabanillas and Loayza, join in Mainhart’s motion for summary judgment to the extent it seeks a dismissal of the complaint and third-party complaint on the basis that Plaintiff Hungria’s vehicle was only struck once from behind.

The following papers, numbered 1 to 7 (Index No. 31805/2017), were read in connection with Defendant/Third-Party Defendant Mainhart’s motion (Motion Sequence #6) seeking summary judgment on liability:

Notice of Motion/Affidavit/Affirmation/Exhibits (A-U)/Memorandum of Law.....	1-4
Affirmation in Opposition.....	5
Affirmation in Opposition.....	6
Omnibus Reply Affirmation.....	7

The following papers, numbered 1 to 4 (Index No.: 32204/2018), were read in connection with Plaintiff Hungria’s cross-motion seeking summary judgment (Motion Sequence #1) on liability:

Notice of Cross- Motion/Affirmation/Exhibits (1-5).....	1-2
Affirmation in Opposition.....	3
Affirmation in Opposition.....	4

Upon the foregoing papers, it is ORDERED that these motions are disposed of as follows:

These three actions arise out of two multi-vehicle accidents, which took place on November 11, 2016 in the left center southbound lane on Interstate 87 near MPM 17 in South Nyack, Rockland County, New York. Plaintiff was stopped in stop-and-go traffic when a vehicle owned by Defendant Richard M. Milano and operated by Defendant Elvia Milano struck the rear of Plaintiff’s vehicle,

pushing Plaintiff into another vehicle. Defendant/Third-Party Defendant, Mainhart was operating a vehicle behind Milano, and claims that she brought her vehicle to a stop about a foot from the Milano vehicle. A vehicle owned by Defendant/Third-Party Defendant Loayza and operated by Defendant/Third-Party Defendant Sotil-Cabanillas then struck the Mainhart vehicle causing it to strike the Milano vehicle. Discovery is complete, and notes of issue have been filed. All drivers provided deposition testimony, which was submitted with the pending motions.

All drivers confirmed the road was dry and it was a clear day, and bumper-to-bumper traffic. Plaintiff recalled being stopped and then being struck from behind once. Defendant Milano admitted that she struck Plaintiff's vehicle in the rear, but alleges that after that accident, Milano was struck multiple times from behind causing her to "ram" into Plaintiff's vehicle more than once, describing it as "ping pong back and forth." Defendant/Third-Party Mainhart alleges she was able to stop her vehicle a foot behind Milano and did not contact Milano's vehicle until after she was struck from behind by Defendant/Third-Party Sotil-Cabanillas. Mainhart alleges that after she applied her brakes, her Subaru automatic braking system engaged, stopping the vehicle with a feeling like holding horses and coming to a stop. Defendant/Third-Party Defendant Sotil-Cabanillas admitted Defendant Mainhart was stopped when he struck Mainhart, but claims that when he saw the Mainhart vehicle stopped, it was shaking, leading him to believe that Mainhart had struck the vehicle in front of her prior to him striking Mainhart. Sotil-Cabanillas admitted that he did not see Mainhart's vehicle strike Milano's vehicle before he struck Mainhart.

Defendant/Third-Party Defendant Mainhart now seeks summary judgment as to liability and Plaintiff cross-moves seeking summary judgment as to liability.

Summary judgment is a drastic remedy. "As we have stated frequently, the proponent of a

summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986][internal citations omitted]). “Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant.” (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]).

Defendant/Third-Party Mainhart has submitted the pleadings, deposition transcripts of the drivers and two police reports in support of her motion. There is no evidence as to the source of the information in the reports. “[P]olice reports have consistently been held inadmissible where the information contained in the report came from witnesses not engaged in the police business in the course of which the memorandum was made.” (*Holliday v Hundson Armored Car & Courier Serv., Inc.*, 301 AD3d 392, 396 [1<sup>st</sup> Dept 2003]). Therefore, the Court has not considered the police reports submitted.

“A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident.” (*Arias v Rosario*, 52 AD3d 551, 552 [2d Dept 2008]). “However,[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be

awarded judgment as a matter of law.” (*D'Agostino v YRC, Inc.*, 120 AD3d 1291, 1292 [2d Dept 2014])[internal citations and quotations omitted]).

“It is not the court's function on a motion for summary judgment to assess credibility, or to engage in the weighing of evidence. Issue finding, rather than issue determination, is the court's proper function on such a motion. Thus, a motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility.” (*Chimbo v Bolivar*, 142 AD3d 994, 945 [2d Dept 2016] [internal citations and quotations omitted]).

“There can be more than one proximate cause of a motor vehicle accident and, thus, the proponent of a summary judgment motion has the burden of establishing freedom from comparative fault as a matter of law.” (*Ruggiero v Lentini*, 123 AD3d 998, 999 [2d Dept 2014])[citations omitted]). In support of the summary judgment motion, Defendant/Third-Party Defendant Mainhart submitted deposition transcripts of the parties, which presented conflicting versions of material facts regarding the happening of the accident. Under these circumstances, Mainhart has failed to establish a prima facie entitlement to judgment as a matter of law on the issue of comparative fault. (*Incle v Byrne-Lowell*, 115 AD3d 709 [2d Dept 2014]).

There is a question of fact regarding whether Mainhart was able to bring her vehicle to a stop without striking Milano before she was struck by Sotil-Cabanillas and a question of fact regarding whether Plaintiff was struck from the rear more than one time. Therefore, Defendant/Third-Party Defendant Mainhart's motion for summary judgment is denied.

Plaintiff's moving papers establish its prima facie entitlement to summary judgment as to liability against the Milano defendants. It is undisputed that the Milano vehicle rear-ended Plaintiff.

The Milano defendants did not oppose any of the pending motions. However, as set forth above, there is a question of fact regarding whether Plaintiff was struck from the rear more than one time. Therefore, Plaintiff's cross-motion for summary judgment against all other defendants is denied.

Based upon the foregoing, it is

ORDERED, that Defendant/Third-Party Defendant Mainhart's motion for summary judgment on liability is denied; and it is further

ORDERED that Plaintiff is hereby awarded summary judgment as to liability against Defendants Richard M. Milano and Elvia Milano; and it is further


ORDERED that Plaintiff's cross-motion for summary judgment as to liability against Defendants Mainhart, Sotil-Cabanillas and Loayza is denied.

The parties are advised that a status conference has been scheduled for a status conference for **9:30 a.m. on June 16, 2020.**

The foregoing constitutes the Decision and Order of the Court.

Dated: New City, New York  
May 12, 2020

E N T E R

  
HON. ROBERT M. BERLINER, J.S.C.

To:  
Counsel of Record via NYSCEF