

Niblo v Madsen

2020 NY Slip Op 35037(U)

December 15, 2020

Supreme Court, Orange County

Docket Number: Index No. EF003983-2019

Judge: Sandra B. Sciortino

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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
COUNTY OF ORANGE

-----X
MARYANN NIBLO,

Plaintiff,

DECISION AND ORDER

INDEX NO.: EF003983-2019

Motion Date: 11/10/2020

Sequence No. 1

-against-

**DANIEL W. MADSEN and DUTCHESS
OVERHEAD DOORS, LLC,**
Defendants.

-----X
SCIORTINO, J.

The following papers numbered 1 to 10 were considered in connection with the application of plaintiff for summary judgment on the issue of liability only:

<u>PAPERS</u>	<u>NUMBERED</u>
Notice of Motion (Seq. #1)/Affirmation (Delancey)/ Exhibits 1 - 6	1 - 8
Affirmation in Opposition(Schultz)	9
Affirmation in Reply (Delancey)	10

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on September 26, 2016 on Pulaski Turnpike, at the intersection of Cross Road, Village of Goshen. Plaintiff's vehicle was struck by a vehicle operated by defendant Madsen and owned by defendant Dutchess Overhead Doors, LLC (hereinafter "Dutchess"). Plaintiff commenced this action by filing a Summons and Complaint (Exhibit 1) on or about May 17, 2019. Defendant served a Verified Answer with Affirmative Defenses and demands on or about July 5, 2019. (Exhibit 2) Plaintiff

thereafter served a Verified Bill of Particulars dated July 31, 2019. (Exhibit 3)

The Examination Before Trial of plaintiff was held on January 6, 2020. (Exhibit 5 to moving papers) The Examination Before Trial of defendant was held on February 27, 2020. (Exhibit 6) Note of Issue has not been filed.

Plaintiff's Deposition Testimony

On September 26, 2016, plaintiff was traveling north on Pulaski Turnpike. Plaintiff slowed down as she approached a stop sign at the intersection with Cross Road and signaled to turn left. Plaintiff came to a stop at the stop sign and allowed a truck to proceed through the intersection coming from the opposite direction. Before plaintiff was able to proceed, plaintiff's vehicle was struck in the rear by a vehicle operated by defendant Madsen.

Defendant's Deposition Testimony

Defendant was proceeding behind the plaintiff on Pulaski Turnpike. Defendant testified that, "all of a sudden, I realized that her vehicle was slowing down and I applied my brakes to slow down, and we hit." Defendant testified that at least ten seconds elapsed from the time he saw plaintiff's vehicle slowing down to the time the vehicles made contact. He did not see plaintiff's brake lights, nor did he see her turn signal prior to the impact.

Plaintiff's Motion for Partial Summary Judgment

By Notice of Motion filed on October 12, 2020, plaintiff moves for summary judgment on the issue of liability asserting that a rear-end collision establishes a *prima facie* case of negligence on the part of defendant.

Plaintiff argues that, based on the defendant's deposition testimony, defendant Madsen was aware of plaintiff's vehicle slowing down for at least ten seconds. The Vehicle & Traffic Law

requires a driver to maintain a safe distance between his vehicle and the vehicle in front of him. (McKinney's Veh. & Traffic Law §1129) Defendants have failed to offer a non-negligent explanation, and defendants' purported non-negligent explanation, that Madsen did not observe plaintiff's brake lights or turn signal, is insufficient to raise a triable issue of fact.

Opposition

In opposition to plaintiff's motion, defendants argue that there is a triable issue of fact as to whether plaintiff's actions caused or contributed to the motor vehicle collision. Defendant Madsen testified that plaintiff's vehicle stopped suddenly and he did not observe any brake lights or left-hand turn signal that would indicate that the plaintiff was stopping. Therefore, defendants argue, a valid non-negligent explanation for the rear-end collision sufficient to deny a motion for summary judgment has been put forth.

Plaintiff's Reply

In reply, plaintiff essentially argues that defendants have failed to raise a triable issue of fact precluding summary judgment on the issue of liability for violating Vehicle and Traffic Law Section 1129(a).

Discussion

For the reasons which follow, plaintiff's motion is granted.

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather,

the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]) The Court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995])

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 moving vehicle, in the absence of any negligence on the part of the plaintiff. (*Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004]; *Trombetta v. Cathone*, 59 AD3d 526 [2d Dept 2009]) A driver of an automobile is charged with the duty to maintain a reasonably safe rate of speed and control over his vehicle and to exercise reasonable care to avoid a collision. A driver has a duty to see what should be seen. (*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) Vehicle and Traffic Law Section 1129(a) provides, "The 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 conditions of the highway.

In the matter at bar, plaintiff established *prima facie* entitlement to summary judgment. The parties' deposition testimony establishes that plaintiff's vehicle was struck from behind by defendant's vehicle. Such testimony is sufficient to establish plaintiff's claim. Such a showing requires defendant to come forward with a non-negligent explanation for the accident. (*Velazquez, citing Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2d Dept 2001]) If the operator of the trailing vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the lead vehicle is entitled to summary judgment on liability. (*Cortes v. Whelan*, 83 AD3d 763 [2d Dept 2011])

Here, defendants' testimony that there was a sudden stop by plaintiff's vehicle and Madsen did not observe plaintiff's brake lights or turn signal is insufficient to rebut the *prima facie* showing. (*Trombetta*, 59 AD3d at 527; *Lampkin v. Chan*, 68 AD3d 727 [2d Dept 2009]) Defendants' opposition has failed to rebut the inference of negligence by providing a non-negligent explanation for the collision. (*Cortes*, 83 AD3d at 763)

Conclusion

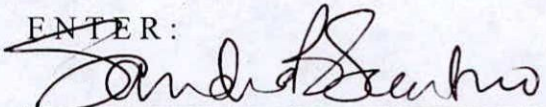
On the basis of the foregoing, it is

ORDERED that plaintiff's application for partial summary judgment on liability is granted.

The parties shall appear for a virtual conference on February 9, 2021 at 9:30 a.m. A Microsoft Teams link will be provided prior to the conference.

This decision shall constitute the order of the Court.

Dated: December 15, 2020
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*