Salmon v Mickelson

2020 NY Slip Op 35054(U)

October 8, 2020

Supreme Court, Dutchess County

Docket Number: Index No. 2019-50030

Judge: Hal B. Greenwald

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This opinion is uncorrected and not selected for official publication.

atSUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:
Hon. HAL B. GREENWALD
Justice.

SUPREME COURT: DUTCHESS COUNTY

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TRICIA SALMON,

Plaintiff,

-against-

DEANNA MICKELSON and
RICHARD MICKELSON,

Defendant

---x

DECISION AND ORDER
Index No. 2019-50030
Motion Seq. No. 1

The following documents were reviewed and considered by the Court in reaching the within Decision and Order.

NYSCEF Doc. Nos. 12-24

This action concerns a motor vehicle accident that occurred on February 25, 2017 at the intersection of state route 38 and state route 44/55 in the Town of Poughkeepsie, Dutchess County. The matter was commenced by the filing of a Summons and Verified Complaint on January 4, 2019 by Plaintiff TRICIA SALMON (SALMON). Defendants DEANNA MICKELSON and RICHARD MICKELSON (MICKELSON) filed their Answer on January 31, 2019. Discovery ensued. The instant Motion for Summary Judgment filed on July 7, 2020 by Plaintiff seeks a finding of liability against MICKELSON. Opposition was filed on July 27, 2020 and a Reply on August 4, 2020.

SUMMARY JUDGMENT

As set forth in *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957], summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of triable issues of fact. (*See Rotuba Extruders, Inc. v. Ceppos*, 46 N.Y.2d 223 [1978] *Di Menna & Sons v. City of New York*, 301 N. Y. 118 [1950]; *Greenberg v. Bar Steel Constr. Corp.*, 22 N.Y.2d 210[1968]; *Barrett v. Jacobs*, 255 N.Y. 520 [1931]). Specifically, automobile accident cases do not generally lend themselves to disposition under summary judgment rules as the question of negligence is essentially one of fact. (*Andre v. Pomeroy*, 35 N.Y.2d 361, 362 [(1974]; *see Schneider v. Miecznikowski*, 16 A D 2d 177 [4TH Dep't, 1962]; *Barker v. Savage*, 45 N.Y.191[1871]; *Salomone v. Yellow Taxi Corp.*, 242 N.Y. 251[1926]).

When a court decides a motion for summary judgment: "…issue-finding not issue-determination is the key to the procedure. If and when the court reaches the conclusion that a genuine and substantial issue of fact is presented, such determination requires the denial of the application for summary judgment." (*Esteve v. Abad*, 271 A.D. 725 [1st Dep't, 1947]).

Generally, the basis for determining summary judgment is that: "[T]he proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material fact." (*Pullman v. Silverman*, 28 N.Y.3d 1060, 1062 (2016), *quoting Alvarez v. Prospect Hosp.,* 68 N.Y.2d 320, 324 [1986]). Further as stated in *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853 (1985) "Bare conclusory assertions... " are insufficient to cause the court to grant summary judgment.

For a summary judgment motion to be denied, the one opposing the motion must demonstrate the existence of facts that have a probative value that indicates there is an unresolved material issue. (*See e.g. Piedmont Hotel Co. v. A.E. Nettleton Co.,* 263 N.Y. 25, 188 N.E. 145 [1933]). If the opposition can show there are questionable issue of fact that require a trial of the action, than summary judgment must be denied. In determining a motion for summary judgement, the court must look at the proof being offered in the light most favorable to the nonmoving party and then deny the motion when there is :….even arguably any doubt as to the existence of a triable issue'. (*Baker v. Briarcliff School Dist.*, 205 A.D.2d 652,661 -62 [2d Dept. 1994]).

BOTH THE MOTION AND OPPOSITION ARE
BASED UPON AN ATTORNEY AFFIRMATION

Plaintiff SALMON's Motion for Summary Judgment is based upon her attorney's affirmation (NYSCEF Doc. No. 13) which is being used as a device to introduce deposition testimony of both parties to the litigation. Plaintiff SALMON's deposition was taken October 24, 2019 and her deposition testimony is unsigned. Defendant DEANNA MICKELSON appeared for her deposition on the next day and her deposition is also not signed. Both deposition transcripts were annexed to the affirmation of Melanie-Ann Delancey, Esq., in support of SALMON's instant motion.

CPLR 3116 speaks to the signing of depositions and provides that the witness is to sign the deposition, but if the witness fails to do so and return the signed deposition within sixty days, "…it may be used as fully as though signed." It appears that neither Plaintiff, nor a Defendant signed their respective deposition transcripts, but that the unsigned transcripts may properly be utilized as attached to counsel's affirmation.

Additionally, the MICKELSON Defendants oppose the Summary Judgment and offered the Affirmation in Opposition by Brent S. Golisano, Esq. with attached photos of both the Plaintiff and defendant's vehicles and references to the deposition testimony of the parties.

Typically, a motion for summary judgment is supported by an individual with personal knowledge of the alleged facts. However, as stated in *Burgdorf v. Kasper*, 83 A.D.3d 1553 (4th Dep't, 2011), and the case at hand, the attorney affirmation is proper "as the vehicle for the

submission of acceptable attachments [that] provide 'evidentiary proof in admissible form,' " such as the parties' depositions (*Zuckerman,* 49 N.Y.2d 557 [1980]; *see, Matter of Perceptron, Inc. [Vogelsong],* 34 A.D.3d 1215 [4th Dep't, 2006]; *Grossberg Tudanger Adv. v. Weinreb,* 177 A.D.2d 377 [1st Dep't, 1991]).

This would also be true for a party opposing a motion for summary judgment where the attorney affirmation annexes deposition testimony and other evidence instead of relying on affidavits of fact based upon personal knowledge (*see, Olan v. Farrell Lines,* 64 N.Y.2d 1092, [1982]; *City of New York v. First Natl. Ins. Co. of Am.,* 79 A.D.3d 789 [2nd Dep't, 2010]; *Enriquez v. B & D Dev., Inc.,* 63 A.D.3d 780 [2nd Dep't, 2009]). Similar holding was made in *Roos v. King Constr.*, 179 A.D.3d 857 (Sup. Ct. Nassau, 2020). Accordingly, the instant motion for summary judgment and its opposition are both properly supported by an attorney affirmation with attached deposition testimony, as well as additional attached documentation.

THE PLAINTIFF SALMON's MOTION FOR SUMMARY JUDGMENT SEEKS LIABILTY

SALMON§ essentially bases her motion on an alleged violation of VTL §1141 and a proposed finding of *per se* negligence. The relevant statute Vehicle and Traffic Law §1141 states:

> *The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall 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.*

The deposition testimony of the Plaintiff SALMON establishes she was traveling north on route 38, while Defendant DEANNA MICKELSON was traveling south on the same route. However, MICKELSON intended to turn left onto route 44/55, known as the Arterial. At the intersection which had a traffic light, MICKELSON turned left in front of SALMON and the crash occurred. Plaintiff claims the light was green and she was not going to turn but was going to continue straight. MICKELSON testified there was a left turn lane, from which she intended to make the left turn from route 38 onto route 44/55 and that the light also was green. The front of SALMON's vehicle hit the rear passenger side of DEANNA MICKELSON's car.

SALMON's counsel cited several cases in support of her motion all dealing with a failure to yield the right-of-way. In *Monteleone v. Jung Pyo Hong*, 79 A.D.3d 988 (2nd Dep't, 2010) the plaintiff was granted summary judgment on liability where it was established that defendant's vehicle failed to stop at a red traffic signal and struck plaintiff's vehicle. The opposition failed to raise a triable issue of fact. The failure to yield the right-of-way and violating a stop sign was the subject of *Mohammad v. Ning*, 72 A.D.3d 913 (2nd Dep't, 2010) and the plaintiff was granted summary judgment on liability and affirmed by the appellate court. Not yielding the right-of-way by a party who was entering the roadway from a parking lots caused the accident in *Andkhoie v. Thomas*, 2012 N.Y. Slip Op. 350592(U)(Trial Order)(Sup. Ct. Nassau, 2012). Entering from a driveway, and not yielding the right-of-way was the proximate cause of the accident in the matter entitled *Lallemand v. Cook*, 23 A.D.3d 533 (2nd Dep't, 2005).

The appellate division reversed the lower court and granted the defendant summary judgment and dismissed the complaint in *Palomo v Pozzi*, 57 A.D.3d 498 (2nd Dep't, 2008). In *Palomo* the defendant demonstrated his entitlement to summary judgment by establishing that the plaintiff violated V&TL 1141 and attempted a left turn across traffic into defendant's car. The court stated: *The defendant was entitled to anticipate that the plaintiff would obey the traffic laws which required her* [defendant] *to yield (see Aristizabal v Aristizabal, 37 AD3d at 504; Jacino v Sugerman, 10 AD3d 593, 595 [2004]).* This is somewhat the converse of the facts at hand, where it is the **Plaintiff SALMON** who is entitled to anticipate that the **Defendant MICKELSON** would obey the traffic laws which required her to yield. (emphasis added), and not make the left turn in front of her. Plaintiff SALMON has made out a *prima facie* case for the granting of summary judgment as to Defendant's liability for the underlying accident.

DEFENDANT MICKELSON OPPOSES SUMMARY JUDGMENT

Defendant MICKELSON's position is that there are triable issues of fact as to whether Plaintiff had a responsibility to keep a proper lookout and view what can be seen through the reasonable use of her senses, to avoid the collision. MICKELSON proposes also that SALMON's comparative negligence contributed to the crash. Further it is claimed that the Certified Police Report is hearsay and does not constitute admissible evidence.

A review of the deposition transcripts themselves, not just the portions selected by either counsel, as well as a reading of the Certified Police Report indicates to the court that the parties were traveling in opposite directions on route 38 and MICKELSON was in the process of making a left turn from a left turn lane on route 38 southbound onto route 44/55 in front of SALMON who was driving north on route 38.

MICKELSON cites several cases where deposition testimony is conflicting and critical to the case. In *Elamin v. Roberts Express*, 290 A.D.2d 291 (1st Dep't, 2002) the conflicting testimony was whether the car stopped first or whether plaintiff was struck crossing the street. The issue of the timing of a bailment when a car given to a parking attendant rolled into the plaintiff was the issue in *Sanchez v. Finke*, 288 A.D.2d 122 (1st Dep't, 2001) The plaintiff's testimony that the defendant's van was already in the intersection when it hit plaintiff's vehicle was the crux of the matter in *Winner v. Star Cruiser Transp. Inc.* 95 A.D.3d 1109 (2nd Dep't, 2012). The deposition testimony herein was essentially the same MICKELSON made a left turn in front of SALMON who was traveling straight through the intersection.

The issue of comparative fault was the thrust of MICKELSON citing the next set of cases. *Allen v. Echols* 88 A.D.3d 926 (2nd Dep't, 2011) (conflict as to how, where and why accident occurred, summary judgment to dismiss denied); *Pollack v. Margolin*, 84 A.D.3d 1341 (2nd Dep't, 2011) the appellate division stated: "…the proponent of a summary judgment motion has the burden of establishing freedom from comparative negligence as a matter of law" and denied the defendants motion to dismiss; Next in *Bonilla v. Calabria*, 80 A.D.3d 720 (2nd Dep't, 2011) the court denies plaintiff's motion for liability citing conflicting deposition testimony concerning the accident; similar holding as to comparative fault in *Todd v. Godek*, 71 A.D.3d 872 (2nd Dep't, 2010).

Continuing in a similar vein, MICKELSON cited additional cases dealing with conflicting testimony and comparative negligence. *Boodlall v. Herrera*, 90 A.D.3d 590 (2nd Dep't, 2011); *Gardella v. Esposio Foods*, 80 A.D.3d 660 (2nd Dep't, 2011) dealt with a faulty, bare insufficient plaintiff's affidavit; In *Demandt v. Rochevet*. 43 A.D.3d 568 (2nd Dep't, 2007) defendant failed to show it was comparatively negligent in failing to keep a lookout; *Burghardt v. Cmaylo*, 40 A.D.3d 568 (2nd Dep't, 2007) concerned conflicting deposition testimony about how the accident happened; In *Scibelli v. Hopchick*, 27 A.D.3d 720 the court denied summary judgment on liability because plaintiff's freedom from comparative negligence was not established.

A final case cited for comparative fault was *Sperling v. Akesson*, 104 A.D.3d 840 (2nd Dep't, 2013). Here plaintiff was traveling southbound and started to make a left turn in front of the northbound traveling defendant. However, plaintiff stopped before finishing the left turn due to a pedestrian crossing the street and the front on defendant's car hit the rear passenger side of plaintiff's car. An issue was whether defendant should have continued into the intersection when plaintiff's car was still protruding in it trying to finish the left turn. This was not a rear end collision under V&T Law 1129(a). Again, the issue promoted by MICKELSON was whether plaintiff was free from comparative negligence.

MICKELSON also proposes that the Certified Police Report is not admissible evidence and should not be used. Cases cited by Defendant were *Kajoshaj* cited as *Kayashi v. Greenspan*, 88 A.D.2d 538 (1st Dep't, 1982) and *Murray v. Donlan* 77 A.D.2d 337 (2nd Dept, 1980). In *Greenspan*, it was not the police report that was hearsay, it was the court's concern that the officer would testify about hearsay said to him at the accident scene. In *Murray*, the question was whether the police report could be admissible to establish the cause of the accident. In the instant matter, the police report could be admissible to demonstrate the direction of travel and the location of the contact between the vehicles.

SALMON'S REPLY

Plaintiff's counsel claims that Defendant incorrectly argues that SALMON must show her own "freedom from comparative fault" in order to be granted summary judgment. In support of this claim, Plaintiff cites to the seminal case of *Rodriguez v. City of New York* 31 N.Y.2d 312 (2018) (note that the cases cited by Defendant in her opposition all predate *Rodriguez*). Plaintiff proposes that she has met her burden of demonstrating a *prima facie* case for summary judgment on liability due to Defendant's violation of V&T law 1141 and "…plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability *and* the absence of his or her own comparative fault." (emphasis in the original) *Rodriguez* at 324-25.

SALMON also cites several cases in support of the above holding. Where there was a rear end crash as part of a three car accident, the appellate court granted plaintiff's motion for summary judgment on liability in *Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 A.D.3d 1033 (2nd Dep't, 2018). The court stated: A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case (*see Rodriguez.*). Plaintiff was granted summary judgment on liability in *Simon v. Rent-A-Center., Inc.*, 180 A.D.3d 1100 (2nd Dep't, 2020) once a prima facie case is established, there is no need to reconcile issues of comparative negligence.

Another rear end collision was the subject in *Perez v. Persad*, 183 A.D.3d 771 (2nd Dep't 2020) and liability was found.

The remaining issue was the use of certified police reports as admissible evidence. Plaintiff claims Defendant's position is outdated and cites several cases. In *Nsiah-Ababio v. Hunter*78 A.D.3d 672 (2nd Dep't, 2010) in a motor vehicle accident case, the defendant made an admission that was memorialized in a police report which was admissible. Another defendant made an admission that he fell asleep while driving which admission was contained in a police accident report in *Scott v. Kass*. 48 A.D.3d 785 (2nd Dep't, 2008) and supported defendant's claim to dismiss. A pedestrian was injured in *Sulaiman v.* Thomas 54 A.D.3d 751 (2nd Dep't, 2008) when a defendant suddenly turned into the street that plaintiff was crossing and the police report contained a statement from defendant that he did not see the plaintiff. Lastly, in another Second Department case from 2008, *Voskin v. Lemel*, 52 A.D.3d 503, the police report contained the defendant's admission that he did not see the plaintiff and struck him. In the matter before the court the Certified Police Report contained a statement from Defendant, the operator of V1, "…that she thought her light was green, but stated "I might have made a mistake'." The Certified Police Report herein containing the aforesaid Defendant's statement is admissible.

By reason of all the foregoing it is

ORDERED, that the Motion by Plaintiff TRICIA SALMON seeking partial Summary Judgment against Defendants DEANNA MICKELSON and RICHARD MICKELSON on the issue of liability is **granted**; and it is further

ORDERED, that parties and counsel shall appear for a virtual status conference on **December 15, 2020 at 2:30 P.M**. An email providing both the virtual link to participate as well as a telephone number will be forthcoming, please ensure this Court has email addresses for all parties.

The foregoing constitutes the decision and order of this court.

Date: October 8, 2020
Poughkeepsie, New York

ENTER:

HON. HAL B. GREENWALD, J.S.C.

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Pursuant to CPLR Section 5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.

When submitting motion papers to Judge Greenwald's Chambers, please do not submit any copies. Submit only the original papers.