

Paz v McNally

2020 NY Slip Op 35065(U)

February 20, 2020

Supreme Court, Orange County

Docket Number: Index No. EF001832-2019

Judge: Steven I. Milligram

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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
HECTOR PAZ

Plaintiff,

-against-

HEATHER MCNALLY

Defendant.
-----X

DECISION AND ORDER
INDEX NO.: EF001832-2019
Motion Date: 2/7/2020
Sequence No.: 1

MILLIGRAM, J.

Upon review of the documents e-filed in connection with plaintiff’s motion, pursuant to CPLR 3212, granting plaintiff summary judgment on the issue of liability against defendant, and striking defendant’s affirmative defenses of plaintiff’s culpable conduct and the Emergency Doctrine; as set forth more fully below, plaintiff’s motion is denied in part and granted in part.

This is an action for personal injuries allegedly sustained by plaintiff as result of an automobile accident that occurred on January 8, 2019, at 5: 30 p.m. Plaintiff was a front seat passenger in a 2012 Toyota operated by a non-party, Christian Vargas, which was travelling eastbound on Route 17m near its intersection with Miller Lane in the Town of Waywayanda. The Toyota vehicle had purportedly stopped to make a left turn into a gas station when it was struck in rear by a 2016 Ford Escape owned and operated by Defendant Heather McNally.

Plaintiff moves for summary judgment, contending that defendant is solely liable for the happening of the accident, and that defendant was not confronted by an emergency, such that she may avoid liability. In support of his motion, plaintiff submitted what can only be viewed as a self-serving conclusory affidavit which in many ways is contradicted by the defendant’s

testimony. For example, while plaintiff describes the roadway as “straight and level,” while defendant characterizes the area as an “incline.” Plaintiff avers that it was “continuously raining or drizzling continuously from noon until the time of the accident.” By way of contrast, defendant testified that it was pouring rain that obstructed visibility. Although plaintiff attests that the headlights and brake lights of the Toyota were “illuminated and working properly,” he fails to indicate how he could possibly know how the brake lights at the rear of the vehicle were properly operating immediately before the impact between the vehicles, and completely fails to assert that the tail lights were properly working.

Defendant testified without contradiction that the speed limit on Route 17m is 45 miles per hour, but she was driving 30-35 miles per hour due to the weather which she described as pouring rain. Defendant testified that as she approached the location where the accident occurred, she did not see any directional signal, brake lights or illuminated taillights coming from the vehicle plaintiff was in. Defendant testified that her vehicle’s windshield wipers were on and that the rain was obstructing her visibility. Defendant testified that while she was uncertain of the exact time, she first saw the Toyota about 5 seconds before the impact between the vehicles. Defendant estimated that when she first saw the Toyota it was less than one car length in front of her. Defendant testified that she “slammed” on her brakes and swerved, going into a ditch on the side of the road after the impact between the vehicles.

“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 to rebut the inference of negligence by providing a non-negligent explanation for the collision” (Rosenblum v Schloss, 175 AD3d 1339, 1341 [2d Dept 2019], quoting Zdenek v Safety Consultants, Inc., 63 AD3d 918, 918 [2d Dept 2009]). The burden then shifts to the operator of

the following vehicle to come forward with a nonnegligent explanation for the accident (see e.g. Costa v Eramo, 76 AD3d 942, 942 [2d Dept 2010]).

Here, the Court finds that there are triable issues of material fact that mandate that plaintiff's motion for summary judgment finding liability on the part of defendant and striking defendant's affirmative defense of the Emergency Doctrine be denied based upon the factual conflicts between the affidavit from plaintiff and the deposition transcript of defendant.¹ In addition, there is sufficient evidence before the court to raise triable issues of fact as to whether the non-party driver of the lead vehicle contributed to the accident (see Costa, 76 AD at 942-943).

However, as defendant has offered no proof of culpable conduct on the part of plaintiff in the happening of the instant accident, where plaintiff was a passenger in a vehicle operated by a non-party, plaintiff is entitled to summary judgment dismissing defendant's affirmative defense of plaintiff's culpable conduct insofar as it pertains to the happening of the accident in question.

Based upon the foregoing, it is hereby

ORDERED that plaintiff's motion for summary judgment finding defendant liable for the happening of the accident and dismissing defendant's affirmative defense of the Emergency Doctrine is denied, and it is hereby further

ORDERED that plaintiff's motion for summary judgment dismissing defendant's affirmative defense of plaintiff's culpable conduct insofar as it pertains to the happening of the accident in question is granted.

The foregoing constitutes the Decision and Order of the Court.

¹ The court notes that the State Trooper who prepared that accident report did not witness the actual accident between the two vehicles, and that no statement contained in that accident report can be directly attributed to the defendant as an admission, as such, the report is inadmissible hearsay, and has not been considered by the Court in determining the instant motion.

Dated: February 20, 2020
Goshen, New York

ENTER:



HON. STEVEN I. MILLIGRAM, J.S.C.