Parisi v Lehmler
2020 NY Slip Op 35175(U)
May 14, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 609529/2019
Judge: Paul J. Baisley, Jr.

SHORT FORM ORDER **INDEX NO. 609529/2019**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

TONI PARISI,

Plaintiff,

-against-

REIS OTTO LEHMLER and JEFFREY O. LEHMLER,

Defendants.

ORIG. RETURN DATE: November 6, 2019
FINAL RETURN DATE: December 18, 2019
MOT. SEQ. #: 001 MG

PLTF'S ATTORNEY:
ROSENBERG & GLUCK, LLP
1176 PORTION ROAD
HOLTSVILLE, NEW YORK 11742

DEFTS' ATTORNEY:
ZAKLUKIEWICZ PUZO & MORRISSEY
2701 SUNRISE HIGHWAY, POB 389
ISLIP TERRACE, NEW YORK 11752

Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion and supporting papers filed by plaintiff, on October 1, 2019 ; Affirmation in Opposition and supporting papers filed by defendant, on December 2, 2019; Affirmation In Reply filed by plaintiff, on December 16, 2019 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Toni Parisi for partial summary judgment in her favor on the issue of defendants' liability and to dismiss defendants' first and second affirmative defenses is granted; and it is further

ORDERED that the parties shall appear for a preliminary conference on September 29, 2020, at 10:00 a.m .at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This action was commenced by plaintiff Toni Parisi to recover damages for personal injuries she allegedly sustained on February 16, 2018, when her motor vehicle collided with a vehicle owned by defendant Jeffrey O. Lehmler and operated by defendant Reis Otto Lehmler on Adirondack Drive, at its intersection with Ormond Avenue, in the Town of Brookhaven, New York.

Plaintiff now moves for partial summary judgment in her favor on the issue of negligence, arguing that defendant driver's violation of Vehicle and Traffic Law § 1142 (a) was the sole proximate cause of the accident. Plaintiff also moves to dismiss defendants' first affirmative defense as asserted in their answer, alleging "comparative negligence and assumption of risk," and for an order dismissing defendants' second affirmative defense as asserted in their answer, alleging plaintiff's failure to utilize available seatbelts. In support of her motion, plaintiff submits, inter alia, her own affidavit, a notarized affidavit from nonparty witness, Michael Flaccomio, and a certified copy of an MV-104A police accident report. Defendants oppose the motion, arguing that plaintiff is at fault for the happening of the accident, as she was speeding. Defendants submit the affidavit of Reis Otto Lehmler.

In her affidavit, plaintiff states that on February 18, 2016, she was the seat-belted operator of her motor vehicle traveling northbound on Adirondack Drive approaching its intersection with Ormond Avenue. She states that Adirondack Drive is a two way roadway running north and south, and that at the subject intersection, Adirondack Drive is not controlled by a traffic control device. She further states that Ormond Avenue runs east and west, and is governed by a stop sign in each direction at its intersection with Adirondack Drive. Plaintiff states that as she approached the subject intersection, she was "traveling at a speed of less than 25 miles per hour which was within the posted speed limit." Plaintiff states as she entered the intersection, defendant driver, who was traveling eastbound on Ormond Avenue, traveled into the intersection and struck her vehicle. Plaintiff states that upon observing defendant driver fail to yield, she immediately applied her brakes in an attempt to avoid the collision.

Plaintiff also submits the affidavit of non-party witness Michael Flaccomio. Mr. Flaccomio states that he was operating his vehicle westbound on Ormond Avenue at the time of the collision. He states that at the subject intersection, there is no traffic control device governing the travel lanes of Adirondack Drive, and that a stop sign controls each direction of travel on Ormond Avenue. He states that while he was stopped at the stop sign on Ormond Avenue, he observed plaintiff's vehicle traveling northbound on Adirondack Drive. He states that he observed defendant driver's vehicle across the intersection from him, and that he observed defendant driver fail to stop at the stop sign, enter the intersection, begin to turn left onto Adirondack Drive, and collide with plaintiff's vehicle.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). The moving party has the initial burden of proving entitlement to summary judgment (*id.*). Once the moving party demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]).

A failure to comply with Vehicle and Traffic Law constitutes negligence as a matter of law (see *Kerolle v Nicholson*, 172 AD3d 1187, 101 NYS3d 387 [2d Dept 2019]; *Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63[2d Dept 2019]; *Kaziu v Human Care Servs. for Families & Children, Inc.*, 167 AD3d 588, 90 NYS3d 66 [2d Dept 2018]). Vehicle and Traffic Law § 1142 (a) requires a driver of a motor vehicle approaching a stop sign to stop and to yield the right-of-way to any vehicle that has entered the intersection or that is approaching so closely as to constitute an immediate hazard. As a general matter, a driver who fails to yield the right-of-way after stopping at a stop sign controlling his or her lane of traffic is negligent as a matter of law (*see Shvydkaya v Park Ave BMW Acura Motor Corp.*, 172 AD3d 1130, 100 NYS3d 320

[2d Dept 2019]; *Enriquez v Joseph*, 169 AD3d 1008, 94 NYS3d 599 [2d Dept 2019]; *Hunt v New York City Tr. Auth.*, 166 AD3d 735, 87 NYS3d 563 [2d Dept 2018]). Where there is evidence that the driver failed to yield, whether a driver stopped at the stop sign is not a dispositive issue of fact (*see Butt v Lockwood*, 173 AD3d 962, 103 NYS3d 134 [2d Dept 2019]; *Fuertes v City of New York*, 146 AD3d 936, 45 NYS3d 562 [2d Dept 2017]; *Lara v Faulisi*, 142 AD3d 1052, 39 NYS3d 172 [2d Dept 2016]). Although the operator of a vehicle with the right-of-way is entitled to assume that other drivers will obey traffic laws requiring them to yield (*see Jeong Sook Lee-Son v Doe*, 170 AD3d 973, 96 NYS3d 302 [2d Dept 2019]; *Enriquez v Joseph*, *supra*), the driver with the right-of-way also has a duty to keep a proper lookout to avoid collisions with other vehicles (*see Matias v Bello*, 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]; *Miron v Pappas*, 161 AD3d 1063, 77 NYS3d 163 [2d Dept 2018]; *Mark v New York City Tr. Auth.*, 150 AD3d 980, 55 NYS3d 128 [2d Dept 2017]). Nonetheless, a driver with the right-of-way who only has seconds to react to a vehicle which has failed to yield the right-of-way is not comparatively negligent for failing to avoid the collision (*see Jeong Sook Lee-Son v Doe*, *supra*; *Enrique v Joseph*, *supra*; *Rohn v Aly*, 167 AD3d 1054, 91 NYS3d 256 [2d Dept 2018]).

To establish prima facie entitlement to judgment as a matter of law on the issue of negligence, a plaintiff is no longer required to show freedom from comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *see Liu v Lowe*, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; *Heard v Schade*, 172 AD3d 1335, 99 NYS3d 666 [2d Dept 2019]; *Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; *Catanzaro v Edery*, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; *Marks v Rieckhoff*, *supra*). The issue of a plaintiff's comparative negligence may, however, be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Wray v Galella*, 172 AD3d 1446, 101 NYS3d 401 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Plaintiff has established prima facie entitlement to summary judgment by demonstrating that defendant driver was negligent in violating Vehicle and Traffic Law § 1142 (a) by failing to yield the right-of-way when plaintiff's vehicle was lawfully proceeding through the intersection, and that defendant driver's negligence was the sole proximate cause of the accident (*see Butt v Lockwood*, *supra*; *Kaziu v Human Care Servs. for Families & Children, Inc.*, *supra*; *Kraynova v Lowy*, 166 AD3d 600, 87 NYS3d 653 [2d Dept 2018]; *Mastricova v Ruderman*, 164 AD3d 1435, 82 NYS3d 86 [2d Dept 2018]). Whether defendant driver stopped at the stop sign before proceeding into the intersection is not dispositive, as he did not have the right of way to proceed (*see Kraynova v Lowy*, *supra*; *Ming-Fai Jon v Wager*, 165 AD3d 1253, 87 NYS3d 82 [2d Dept 2018]).

Plaintiff having established her entitlement to judgment as a matter of law on the issue of liability, the burden now shifts to defendants to submit evidentiary proof in admissible form to raise a triable issue of fact (*see Zuckerman v City of New York*, *supra*). Defendants have failed to raise a triable issue of fact as to her liability. In opposition, defendants attempt to raise an issue of fact as to plaintiff's comparative negligence, suggesting that she was traveling at an excessive rate of speed. However, in light of defendant driver's admission that he did not see plaintiff's vehicle until her car was 15 to 20 yards away, his allegation that she was speeding is speculative and, thus, insufficient to defeat summary judgment (*see Falcone v Ibarra*, 67 AD3d 858, 889 NYS2d 238 [2d Dept 2009]; *Yelder v Walters*, 64 AD3d 762, 883 NYS2d 290 [2d Dept 2009]). The defendant driver's affidavit also establishes that he violated Vehicle and Traffic Law

§ 1142 (a), by failing to yield the right of way to the plaintiff driver, who was, at a minimum, approaching the intersection so closely as to constitute an immediate hazard (*see Wolf v Cruickshank*, 144 AD3d 1144, 41 NYS3d 754 [2d Dept 2016]; *Szczotka v Adler*, 291 AD2d 444, 737 NYS2d 121 [2d Dept 2002]).

With respect to the branch of plaintiffs' motion seeking to dismiss defendants' affirmative defenses of comparative negligence and failure to use a seatbelt, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law (*see Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]). As previously indicated, plaintiff's submissions establish that she was traveling with the right-of-way on Adirondack Drive, when she was struck by defendant driver, who failed to yield the right-of-way. In opposition, defendants fail to raise a triable issue of fact as to whether plaintiff was comparatively at fault in the happening of the accident (*see Wray v Galella*, *supra*; *Poon v Nisanov*, *supra*). Therefore, plaintiff's application to dismiss defendants' affirmative defense of comparative negligence is granted.

As to plaintiff's application to dismiss defendants' affirmative defense of failure use of seatbelt, plaintiff has established, prima facie, entitlement to dismissal as plaintiff states in her affidavit that she was wearing her seatbelt at the time of the collision. In opposition, defendants argue that more discovery is needed. However, summary judgment may not be avoided based on a claim that discovery is needed "unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence" (*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535, 536, 906 NYS2d 331 [2d Dept 2010], quoting *Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614, 615, 684 NYS2d 286 [2d Dept 1999]; *see Wienfeld v HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 [2d Dept 2017]). Here, there is no evidentiary basis suggesting discovery "might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant" (*Skura v Wojtlowski*, 165 AD3d 1196, 1200, 87 NYS3d 100 [2d Dept 2018], quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041, 13 NYS3d 139 [2d Dept 2015]). As such, defendants have failed to raise a triable issue of fact with respect to plaintiff's use of a seatbelt.

Accordingly, the branch of plaintiff's motion for summary judgment in her favor on the issue of liability is granted, and the branch of the motion to strike defendants' affirmative defenses of comparative negligence and failure to use a seatbelt is granted.

Dated: May 14, 2020

Paul J. Baisley, Jr.

HON. PAUL J. BAISLEY, JR., J.S.C.