

Brennin v Zecca

2020 NY Slip Op 35187(U)

August 17, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 622405/18

Judge: Carmen Victoria St. George

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**SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY**

PRESENT:

Hon. Carmen Victoria St. George
Justice of the Supreme Court

x

BRITTNEE BRENNIN,

**Index No.
622405/18**

Plaintiffs,

**Motion Seq:
001 Mot D
002 MG
Decision/Order**

-against-

**JACQUELINE ZECCA, NUQUAN MATHIS and
TRINA WALLACE,**

Defendants.

x

The following electronically filed papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	15-21; 30-38
Answering Papers.....	22, 24; 27-28; 42-43
Reply.....	23; 40-41; 45
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	32

Plaintiff was the passenger in the vehicle driven by defendant Mathis and owned by defendant Wallace. Defendant Zecca owned and operated the other vehicle involved in the subject motor vehicle accident giving rise to this action.

Plaintiff seeks summary judgment against the defendants on the issue of liability and dismissal of defendants' affirmative defenses alleging culpable conduct (Motion Sequence 001). Mathis/Wallace and Zecca oppose plaintiff's motion.

Mathis and Wallace seek summary judgment dismissal of the complaint and all cross-claims (Motion Sequence 002). Plaintiff opposes Motion Sequence 002, but Zecca has not submitted any opposition to Motion Sequence 002.

Motion Sequences 001 and 002 are consolidated for determination herein.

The Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (*Andre v.*

Pomeroy, 35 NY2d 361[1974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (*Cauthers v. Brite Ideas, LLC*, 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party (*Makaj v. Metropolitan Transportation Authority*, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must tender sufficient evidence to demonstrate the absence any material issue of fact (*Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 [1985]). Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*) "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 Hospital*, 68 NY2d 320, 324 [1986]).

Mathis/Wallace Summary Judgment Motion (Sequence 002)

In support of their motion, these defendants submit the pleadings, plaintiff's affidavit, Mathis' affidavit, and a police accident report. The police accident report, although certified, is incomplete because it is not accompanied by the key code sheet; therefore, it will not be considered. Also, it is undisputed that the responding officer did not witness the happening of the subject accident; therefore, since the accident report does not contain any admissions or declarations against interest by either party to this action, it is not otherwise admissible to establish how the subject accident occurred (*see Thrower v. Smith*, 62 AD2d 907, 912 [2d Dept 1978]; *see also Shehab v. Powers*, 150 AD3d 918 [2d Dept 2017]; *Benedikt v. Certified Lumber Corporation*, 60 AD3d 798 [2d Dept 2009]; *Niyazov v. Bradfor*, 13 AD3d 501 [2d Dept 2004]).

Plaintiff's and Nuquan Mathis' affidavits each establish that the subject accident occurred on March 24, 2018 at approximately 1:45 p.m., at the intersection of Broadway and Holly Street in Mastic, New York. Based upon their respective affidavits, it is also established that the Mathis/Wallace vehicle was traveling southbound on Broadway at its intersection with Holly Street at the time of the accident. There is no traffic control device governing traffic on Broadway at that intersection; however, there are stop signs controlling traffic on Holly Street at that intersection. According to these affidavits, defendant Zecca was traveling eastbound on Holly Street, and as the Mathis/Wallace vehicle entered the intersection, the front of the Zecca vehicle collided with the front passenger-side quarter panel of the Mathis/Wallace vehicle. Both plaintiff and Mathis attest that Zecca failed to stop at the stop sign controlling her direction of travel.

Mr. Mathis attests that the front of the vehicle he was operating at the time of the accident had already entered the intersection when he saw Zecca's vehicle for the first time. He observed her vehicle pass the stop sign controlling her direction of travel. According to his affidavit, he assumed she would stop at the stop sign, but she did not. Approximately one second after he saw Zecca's vehicle, Mr. Mathis honked his horn and turned his vehicle to the left, but he could not avoid the collision.

Plaintiff's affidavit, sworn to on February 14, 2020, likewise asserts that defendant Zecca "went through the stop sign without stopping and collided with the vehicle in which [plaintiff] was a passenger." She also states that Mr. Mathis was driving the Wallace vehicle at the time of the accident, that she did not control that vehicle, and that she did not instruct Mr. Mathis as to the operation and control of the vehicle.

Zecca's answer, which is not verified by the defendant, asserts two cross-claims against Mathis and Wallace sounding in contribution and negligence. Because it is not verified by defendant Zecca, and there are no specific allegations of fact asserted therein, the cross-claims do not constitute evidence.

Based upon the affidavits of the plaintiff and Mathis establishing that defendant Zecca failed to stop at a stop sign controlling her direction of travel, the Mathis and Wallace defendants have established their *prima facie* entitlement to summary judgment as a matter of law by demonstrating that Zecca failed to yield the right-of-way to Mathis, and that this was the sole proximate cause of the accident (*Duran v. Simon*, 83 AD3d 654 [2d Dept 2011]). Defendant Zecca's failure to yield the right of way to Mathis who approached the same intersection from another street without a traffic control device is violative of Vehicle and Traffic Law § 1142 and, thus, Zecca is guilty of negligence as a matter of law (*see Harris v. Linares*, 106 AD3d 873 [2d Dept 2013]; *Gallagher v McCurty*, 85 AD3d 1109 [2d Dept 2011]; *Vainer v DiSalvo*, 79 AD3d 1023 [2d Dept 2010]). Moreover, Mathis further established, *prima facie*, that he could not have avoided the collision because he did not have sufficient time to react to the plaintiff's failure to yield the right of way (*see Ducie v Ippolito*, 95 AD3d 1067, 1068 [2d Dept 2012]; *Socci v Levy*, 90 AD3d 1020 [2d Dept 2011]), and Mathis was entitled to anticipate that Zecca would obey the traffic laws that required her to yield to the Mathis/Wallace vehicle (*Loch v. Garber*, 69 AD3d 814 [2d Dept 2010]).

The burden now shifts to the non-moving parties to demonstrate that there is a triable issue of fact sufficient to defeat the Mathis/Wallace motion.

As noted, defendant Zecca has not submitted any opposition to this motion. By failing to controvert the statements made in the affidavits submitted in support of the instant summary judgment motion, those statements are deemed admitted by defendant Zecca (*Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539 [1975]; *McNamee v. City of New Rochelle*, 29 AD3d 544 [2d Dept 2006]; *Bell Atlantic Yellow Pages Co. v. Padded Wagon, Inc.*, 292 AD2d 317 [1st Dept 2002]; *Schneider Fuel Oil, Inc. v. DeGennaro*, 238 AD2d 495 [2d Dept 1997]). Accordingly, defendant Zecca has failed to raise a triable issue of fact sufficient to defeat Motion Sequence 002.

In opposition to Motion Sequence 002, plaintiff submits the same February 14, 2020 affidavit as was submitted by Mathis and Wallace in support of their motion. Plaintiff's affidavit fails to allege any acts of negligence committed by Mathis with respect to the operation of the Wallace vehicle at the time of the accident. Plaintiff's counsel's statement that "Mr. Mathis. . .the driver of the host vehicle, failed to perceive the events unfolding before him" (Affirmation, ¶ 6) is completely unsupported by plaintiff's affidavit, and since this statement is made by counsel,

it does not constitute evidence. Thus, plaintiff's opposition is insufficient to defeat Motion Sequence 002 (*Luke v. McFadden*, 119 AD3d 533 [2d Dept 2014]).

Defendant Zecca and the plaintiff have each failed to raise triable issues of fact sufficient to defeat the Mathis/Wallace summary judgment motion. Motion Sequence 002 is granted and the complaint and all cross-claims as alleged against defendants Mathis and Wallace are dismissed.

Plaintiff's Summary Judgment Motion (Sequence 001)

In support of her motion, the plaintiff submits the pleadings, her February 14, 2020 affidavit, and a police accident report. The police accident report will not be considered by this Court for the same reasons that this Court determined not to consider it *vis a vis* the Mathis/Wallace motion.

That branch of plaintiff's motion seeking summary judgment on the issue of liability as against defendants Mathis and Wallace is denied for the same reasons set forth by this Court in its determination to grant the Mathis/Wallace motion (Sequence 002). Simply stated, the plaintiff has failed to submit any evidence of negligence committed by defendant Mathis in the operation of the Wallace vehicle; thus, plaintiff has failed to establish her *prima facie* entitlement to summary judgment on liability with regard to Mathis and Wallace. Furthermore, in view of the dismissal of the complaint against Mathis and Wallace, plaintiff's request for dismissal of their affirmative defenses alleging culpable conduct on her part is denied as moot.

The Court now addresses plaintiff's motion with respect to the remaining defendant, Jacqueline Zecca.

"Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (internal citation omitted), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Higashi v. M&R Scarsdale Restaurant, LLC*, 176 AD3d 788 [2d Dept 2019]; *Wray v. Galella*, 172 AD3d 1446, 1447 [2d Dept 2019]; *Poon v. Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]).

Plaintiff's affidavit establishes her status as an innocent passenger in the host vehicle since she has demonstrated that she did not engage in any culpable conduct that contributed to the accident in any way (*Medina v. Rodriguez*, 92 AD3d 850 [2d Dept 2012]). Accordingly, the First Affirmative Defense alleged in defendant Zecca's answer attributing damages and injuries in whole or in part to plaintiff's culpable conduct is hereby dismissed.

While "[t]he right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers" (*Medina, supra*; see also *CPLR § 3212 [g]*), based upon this Court's determination of Motion Sequence 002, the only remaining defendant is Jacqueline Zecca.

Plaintiff's affidavit is sufficient to establish her *prima facie* entitlement to summary judgment as a matter of law against Zecca based upon her assertions that defendant Zecca failed to stop at stop sign controlling her direction of travel, thereby causing the collision with the Mathis/Wallace vehicle in which plaintiff was seated (*Harris, supra; Gallagher, supra; Duran, supra; Vainer, supra*).

In opposition, defendant Zecca submits only the affirmation of counsel, which is not evidence. The Court does not find persuasive defendant's suggestion that the instant motion is premature. Although depositions have not yet been held, and Zecca's counsel states that discovery is in "its initial stages," the purported need to conduct discovery does not warrant denial of the motion in this case. Jacqueline Zecca has personal knowledge of the relevant facts; therefore, the fact that depositions have not yet been conducted, does not excuse her failure to submit an affidavit in opposition to the instant motion offering her version of the happening of the accident (*see Emil Norsic & Son v. L.P. Transportation, Inc.*, 30 AD3d 368 [2d Dept 2006]; *Rainford v. Han*, 18 AD3d 638 [2d Dept 2005]). Thus, defendant Zecca has failed to raise a triable issue of fact sufficient to defeat plaintiff's motion.

Summary judgment is granted to plaintiff as against defendant Zecca on the issue of liability only (Motion Sequence 001).

Motion Sequence 002 is granted and the complaint and all cross-claims against defendants Mathis and Wallace are hereby dismissed.

The foregoing constitutes the Decision and Order of this Court.

Dated: August 17, 2020
Riverhead, NY


CARMEN VICTORIA ST. GEORGE, J.S.C.

FINAL DISPOSITION [] NON-FINAL DISPOSITION [X]