

Kovacs v Zawada

2020 NY Slip Op 35221(U)

May 5, 2020

Supreme Court, Westchester County

Docket Number: Index No. 61865/2019

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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
WESTCHESTER COUNTY
P R E S E N T: HON. SAM D. WALKER, J.S.C.**

-----X
ILONA KOVACS,

Plaintiff,

-against-

DECISION & ORDER
Index No. 61865/2019
Seq. 1 & 2

STANLEY ZAWADA, AARON BAZEMORE, ANTHONY SIMMONS, SUSAN JUGGERNAUTH, and STEPHANY MOHRING

Defendants.
-----X

The following papers were read on motions for summary judgment pursuant to CPLR 3212:

Notice of Motion/Affirmation/Affidavit/Exhibits A-D
Affirmation in Opposition/Exhibits A-B
Reply Affirmation
Affirmation in Opposition/Exhibits A-D
Affirmation in Opposition/Exhibit A
Affirmation in Opposition
Reply Affirmations

Notice of Motion/Affirmation/Exhibits A-B
Affirmation in Opposition & In Reply
Reply Affirmation
Affirmation in Opposition/Exhibit A
Affirmation in Opposition/Exhibits A-E

Upon the foregoing papers it is ordered that the first motion is granted in part and denied in part and the second motion is denied.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Ilona Kovacs (“Kovacs”), commenced this action to recover damages

for alleged serious injuries sustained in a motor vehicle accident that occurred on September 27, 2016, on Interstate 95 at or about milepost 8.8 in Westchester County, New York. Kovacs was a front seat passenger in the vehicle operated by Stanley Zawada ("Zawada"), which was traveling in the left southbound lane of the three lane highway on the I95, when that vehicle was struck in the rear by a vehicle owned by the defendant, Anthony Simmons ("Simmons") and operated by the defendant, Aaron Bazemore ("Bazemore"). Kovacs alleges that, subsequent to the collision, the Zawada vehicle remained stopped for approximately ten to fifteen minute, because it was unable to be driven, when that vehicle was once again struck in the rear by the Bazemore/Simmons vehicle, allegedly due to that vehicle being struck by the vehicles operated by Susan Juggernaut ("Juggernaut") and Stephany Mohring ("Mohring").

Kovacs now files the instant motion seeking summary judgment against the defendants pursuant to CPLR 3212 on the issue of liability. In support of the motion, Kovacs argues that she was a passenger of a vehicle that was stopped at a traffic light, which was hit in the rear by the defendants' vehicle and there is no non-negligent explanation for the defendants' failure to exercise reasonable care in the operation their vehicles, as they were obligated by law to see what there was to be seen and to keep a safe distance between their vehicle and the vehicle in which she was a passenger.

Juggernaut opposes the motion and files her own motion for summary judgment, arguing that her vehicle was safely within the center lane when it was struck in the rear and forced into contact with the vehicle in the left lane. Juggernaut argues that there are issues of fact as to whether the plaintiff should have directed Zawada to move his vehicle to a place of safety before the second and foreseeable accident and contends that Juggernaut was the victim of a hit in the rear caused by the foreseeable conditions.

In reply, Kovacs states that Juggernaut's affidavit is in stark contrast to the police report and seems implausible. She asserts that, nevertheless, it is undisputed that Kovacs was an innocent passenger and is entitled to summary judgment on the issue of liability, since she need only show that she is free from liability.

Bazemore and Simmons also oppose both motions, arguing that negligence on their part in the first collision, was not the proximate cause of the second collision and the

drivers in the second collision are also negligent and responsible for the plaintiff's injuries. They argue that Kovacs fails to provide evidence that Bazemore and Simmons were totally liable for her injuries, since there were two separate accidents. They further argue that Kovacs should be concerned with the allocation of fault between the parties and a question of fact remains as to which vehicle actually impacted their vehicle in the second impact, causing their vehicle to strike the vehicle in which Kovacs was a passenger.

Bazemore and Simmons also assert that Kovacs' affidavit, which states that Bazemore's vehicle was propelled into the vehicle in which she was a passenger due to being struck again by Juggernaut and Mohring's vehicles, is inconsistent with the certified police accident report with regards to the second impact, because according to the report, the Juggernaut vehicle was struck by the Mohring vehicle.

They further assert that Juggernaut's affidavit appears to have been signed and notarized in the State of Florida, but is not accompanied by a certificate of conformity, pursuant to CPLR 2309. The defendants state that if the Court considers Juggernaut's affidavit, there are still issues of fact and Bazemore/Simmons did not violate New York & Traffic Law §§ 1180 and 1129, with regard to the second accident.

Mohring also opposes the motions, arguing that both motions are premature, since no depositions have been held and the Juggernaut and Mohring affidavits raise material issues of fact. Mohring also contends that Kovacs affidavit also raises material issues of fact and is self serving. Mohring states that Kovacs' affidavit contains numerous deficiencies and omissions, including the fact that she fails to identify herself as the owner of the vehicle in which she was a passenger and fails to provide any information as to the maintenance and repair of her vehicle prior to the accident; she fails to explain why her vehicle remained stopped in the left lane of I-95 after the first impact; she fails to address whether she used a reasonable opportunity to reposition her vehicle or have Zawada reposition the vehicle and avoid the subsequent collision; she fails to describe her surroundings immediately prior to the alleged accident; she fails to provide details as to her attempts to exit the vehicle to find a place of safety after the first impact with the Bazemore/Simmons vehicle; and she fails to describe if she took any evasive actions to avoid the impacts.

Zawada opposes Kovacs' motion, arguing that it is clear from the plaintiff's own affidavit that Zawada did nothing wrong, since it is devoid of any allegations that Zawada was negligent in the operation of his vehicle and caused or contributed to the accident, which is the subject of this action. In fact, Kovacs' affidavit confirms that Zawada's vehicle was struck from behind through no fault of his own, because it was disabled and inoperable. Therefore, Kovacs has not established a prima facie entitlement to judgment as a matter of law on the issue of liability against Zawada.

In reply to the other defendants' opposition papers, Kovacs states that the defendants have all failed to meet their burden of proof, in that, Zawada's opposition is five days late, Bazemore and Simmons failed to provide an affidavit from someone with personal knowledge, Mohring's affidavit states that she came into contact with Juggernaut's vehicle, and Juggernaut's affidavit is wholly inconsistent with the certified police report and with the plaintiff's affidavit. Kovacs reiterates that she is an innocent passenger who should not be restricted by any potential comparative negligence among the drivers of the other vehicles.

Kovacs further argues that it is clear that the defendants violated Vehicle and Traffic law §§ 1129 and 1180, since the police report makes it clear that Bazemore, Juggernaut and Mohring were all traveling too closely, as per the police report.

Mohring also files a reply to the Bazemore/Simmons opposition, arguing that, while Mohring concurs that the plaintiff's motion for summary judgment on the issue of liability, as to Mohring, should be denied, that part of Bazemore/Simmons' affirmation arguing that Mohring was a proximate cause of the second accident and that the Mohring is responsible for the plaintiff's alleged injuries, is baseless and fails to rely on admissible evidence. Bazemore/Simmons fails to proffer an affidavit and have already been found liable by the Court in the companion case commenced by Zawada.

In reply to her motion for summary judgment, Mohring argues that Kovacs has offered no competent evidence in opposition to the motion and there has been no evidence that Juggernaut caused any of the impacts to the vehicle in which Kovacs was sitting. Juggernaut asserts that Kovacs' affidavit only speaks to contact by vehicles and does not address causation, which is important in light of the explanation provided by Juggernaut

that she was struck and pushed into the vehicle. She further asserts that the police report is not evidence, since the officer was not a witness on the scene at the time of the accident and there is no reference to any competent hearsay exception to qualify the contents and conclusions of the officer. Juggernaut further asserts that the affidavit offered in support of the motion, provides a tenable non-negligent explanation for the happening of the collision involving her vehicle.

Discussion

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"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 that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (see *Sokolowska v Song*, 123 AD3d 1004 [2d Dept 2014]); see also *Agramonte v City of New York*, 288 AD2d 75, 76 [2001]; *Johnson v Phillips*, 261 AD2d 269, 271 [1999]; *Danza v Longieliere*, 256 AD2d 434, 435 [1998], lv dismissed 93 NY2d 957 [1999]).

New York Vehicle and Traffic Law § 1129 states in pertinent part that:

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 condition of the highway. NY VTL § 1129 (a)

In (*Leal v Wolff*), the Second Department held that "[s]ince the defendant was under a duty to maintain a safe distance between his car and [the plaintiff's] car (see Vehicle and Traffic Law Section 1129[a]), his failure to do so in absence of a non negligent explanation constituted negligence as a matter of law" (*Leal v Wolf*. 224 AD2d 392 [2d Dept 1996]).

Further, “[w]hen the driver of an automobile approaches from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle” (see *Zweeres v Materi*, 94 AD3d 1111 [2d Dept 2012]). “Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident” (*Id.*).

In this case, Kovacs has made out a prima facie showing of her entitlement to summary judgment as to the defendants Bazemore, Simmons, Juggernaut and Mohring. The evidence submitted by Kovacs establishes entitlement to summary judgment as a matter of law, thereby shifting the burden to the defendants to demonstrate the existence of a factual issue requiring a trial (see *Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]) [Rear-end collision is sufficient to create a prima facie case of liability.] If the operator of the striking vehicle fails to rebut this presumption and the inference of negligence, the operator of the stopped vehicle is entitled to summary judgment on the issue of liability (see *Leonard v City of New York*, 273 AD2d 205 [2d Dept 2000]; *Longhito v Klein*, 273 AD2d 281 [2d Dept 2000]; *Velasquez v Quijada*, 269 AD2d 592 [2d Dept 2000]; *Brant v Senatobia Operating Corp.*, 269AD2d 483 [2d Dept 2000]).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546, 546 [2d Dept 1995]), the Court finds that the defendants have failed to rebut the plaintiff’s prima facie showing.

Here, the defendants failed to offer any non-negligent explanation for the accident with regard to Kovacs and their oppositions do not create any issues of fact with regard to liability (*Blasso v Parente*, 79 AD3d 923, 925 [2d Dept 2010]). Kovacs states that the vehicle in which she was a passenger was struck in the rear, remained stopped as it was unable to be driven, and approximately ten to fifteen minutes later, it was struck again when that same vehicle was propelled into it by the Juggernaut and Mohring vehicles. Both Juggernaut and Mohring state in their affidavits that they observed the stopped vehicles ahead of them and changed lanes to avoid the vehicles.

Furthermore, the need to conduct discovery does not warrant denial of the motion,

since the plaintiff and the defendants who submitted affidavits, have personal knowledge of the relevant facts of the accident and they did not “demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiff” (*see also Rodriguez vFarrell*, 115 AD3d 929, 931 [2d Dept 2014]).

Additionally, upon establishing his or her freedom from fault, the right of an innocent passenger to an award of summary judgment on the issue of liability against one driver is not barred or restricted by potential issues of comparative fault as between that driver and the driver of another vehicle involved in the accident” (*Id.*). The Court finds no merit in the arguments made by Mohring’s opposition as to the deficiencies or omissions in Kovacs’ affidavit. Kovacs’ ownership of the vehicle has nothing to do with the liability of the defendants’ in striking the vehicle in which she was a passenger. As a passenger, she was not obligated to try to stop the collision or get out of the vehicle especially since she may have been injured, she also was not required to try to reposition the vehicle or explain why the vehicle remained stopped. Neither Bazemore, Simmons, Juggernaut nor Mohring provided a non-negligent explanation for the collisions.

With regard to Zawada, although his opposition was not timely filed, Kovacs did not provide the Court with any evidence to show that Zawada was negligent in causing the accident and that anything he did or did not do was the proximate cause or contributed to the accident. Therefore, Kovacs’ motion for summary judgment as to Zawada is denied.

With regard to Juggernaut’s summary judgment motion, the Court denies that application, finding that there are issues of fact with regard to the second impact. Juggernaut states that she was operating her vehicle in the left lane, when she noticed traffic ahead slowing, so she slowed her vehicle to the speed of traffic, and moved her vehicle over to the center lane. After her vehicle was within the center lane for about five seconds, she came upon the two vehicles stopped in the left lane and her car was about to pass them, when her vehicle was struck from behind and pushed into the left lane, where it was forced into the stopped vehicle in the left lane and that vehicle was in turn forced into the care ahead. Mohring’s affidavit states that she observed two vehicles that were stopped in the left lane, she slowed her vehicle down and proceeded to merge into

the middle lane. While she was traveling in the middle lane, she observed Juggernaut's vehicle in the left lane coming into contact with the rear of the vehicle located directly in front of it and as a result of that impact, the rear of Juggernaut's vehicle came into the middle lane.

Therefore, both Juggernaut and Mohring submitted affidavits with differing versions of how the second impact occurred, creating material issues of fact. "It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact" (*Vega v Restani Const. Corp.*, 18 NY3d 499, 504 [2012]). Since this Court did not grant Juggernaut's motion and Mohring did not seek affirmative relief, it is not necessary to address the validity of Juggernaut's affidavit, with regard to CPLR 2309.

Accordingly, based on the foregoing, it is

ORDERED that the plaintiff, Ilona Kovacs' motion for summary judgment on the issue of liability is granted as to the defendants, Aaron Bazemore, Anthony Simmons, Susuan Juggernaut and Stephany Mohring; and it is further

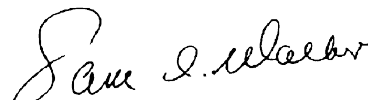
ORDERED that the plaintiff, Ilona Kovacs' motion for summary judgment on the issue of liability is denied as to the defendant, Stanley Zawada; and it is further

ORDERED that Susan Juggernaut's motion for summary judgment dismissing the action, is denied.

The parties are directed to appear before the Preliminary Conference Part on a date to be later determined.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
May 5, 2020



HON. SAM D. WALKER, J.S.C.