

Castelli v Mustello

2020 NY Slip Op 35361(U)

December 16, 2020

Supreme Court, Orange County

Docket Number: Index No. EF005002-2020

Judge: Sandra B. Sciortino

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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
ANA CASTELLI SR.,

Plaintiff,

-against-

MARGARET A. MUSTELLO,

Defendant.
-----X

SCIORTINO, J.

DECISION AND ORDER

INDEX NO.: EF005002-2020

Motion Date: 11/20/2020

Sequence No. 1

The following papers numbered 1 to 8 were considered in connection with the application of plaintiff for summary judgment on the issue of liability only:

PAPERS

NUMBERED

Notice of Motion/Affirmation (Thonus)/Exhibits 1 - 4

1 - 6

Affirmation in Opposition(Golisano)/Exhibit A

7

Affirmation in Reply (Thonus)

8

Background and Procedural History

This personal injury action arises out of a motor vehicle accident that took place on February 26, 2018 on the eastbound exit ramp of I-84, Town of Fishkill, County of Dutchess. Plaintiff was operating a vehicle which was struck in the rear by a vehicle operated by defendant. Plaintiff commenced this action by filing a Summons and Complaint (Exhibit 1) on or about September 8, 2020. Defendant served a Verified Answer with Affirmative Defenses and combined demands on or about October 6, 2020. (Exhibit 2)

Examinations before trial have not been held. Note of Issue has not been filed.

Plaintiff's Motion for Partial Summary Judgment

By Notice of Motion filed on October 22, 2020, plaintiff moves for summary judgment on the issue of liability. She claims entitlement to summary judgment on liability as the claim arises from the rear-end collision. As such, a *prima facie* case of negligence on the part of defendant is established.

Plaintiff, through her affidavit, avers that, on February 26, 2018, she was traveling on the eastbound exit ramp of I-84. Plaintiff stopped at a red light controlling the intersection. Plaintiff remained stopped at the red light for approximately fifteen (15) seconds when her vehicle was struck in the rear by defendant's vehicle.

Plaintiff attaches the police accident report of Robert Olives. The report indicates that the defendant "said she looked down for a moment and when she looked back up she couldn't stop in time." (Exhibit 3) Plaintiff counsel infers that the police investigation found that the defendant's inattention and distraction were contributing factors to the accident.

Plaintiff argues that, based on plaintiff's affidavit and the police accident report, she has demonstrated her entitlement to summary judgment on the issue of liability, as defendant failed to maintain a safe distance between her vehicle and the vehicle in front of her. (McKinney's Veh. & Traffic Law §1129)

Opposition

In opposition to plaintiff's motion, defendant argues the motion is premature as depositions have not yet taken place. Defendant, through her affidavit, avers that she came to a complete stop at the red light. After the stop, "[she] was in search of a rest room when [her] foot slipped off the brake and [her] motor vehicle rolled into the vehicle in front of [hers]." (Exhibit

A) Therefore, defendant argues, a valid non-negligent explanation for the rear-end collision sufficient to deny a motion for summary judgment has been put forth.

Defendant argues the amended police report is inadmissible, as the original report is not provided. It also contains inadmissible hearsay.

Plaintiff's Reply

In reply, plaintiff essentially argues that defendants have failed to raise a triable issue of fact precluding summary judgment on the issue of liability for violating Vehicle and Traffic Law Section 1129(a). The defendant's opposition is essentially an admission as to defendant's negligence.

Discussion

For the reasons which follow, plaintiff's motion is granted.

Summary judgment is a drastic remedy and is appropriate only when there is a clear demonstration of the absence of any triable issue of fact. (*Piccirillo v. Piccirillo*, 156 AD2d 748 [2d Dept 1989], citing *Andre v. Pomeroy*, 35 NY2d 361 [1974]) The function of the Court on such a motion is issue finding, and not issue determination. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]) The Court is not to engage in the weighing of evidence; rather, the Court's function is to determine whether "by no rational process could the trier of facts find for the non-moving party." (*Jastrzebski v. N. Shore Sch. Dist.*, 232 AD2d 677, 678 [2d Dept 1996]) The Court is obliged to draw all reasonable inferences in favor of the non-moving party. (*Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 [2d Dept 1995])

A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the moving vehicle, in the absence of any negligence on

the part of the plaintiff. (*Velazquez v. Denton Limo, Inc.*, 7 AD3d 787 [2d Dept 2004]; *Trombetta v. Cathone*, 59 AD3d 526 [2d Dept 2009]) A driver of an automobile is charged with the duty to maintain a reasonably safe rate of speed and control over his vehicle and to exercise reasonable care to avoid a collision. (*Filippazzo v. Santiago*, 277 AD2d 419 [2d Dept 2000]) The Vehicle and Traffic Law Section 1129(a) provides, “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 conditions of the highway.”

In the matter at bar, plaintiff proffers an uncertified police report in support of her summary judgment motion. An uncertified police report which a party affirmatively proffers in support of a motion for summary judgment is inadmissible hearsay. (*Yassin v. Blackman*, 188 AD3d 62, 66 [2d Dept 2020])

However, even without the police accident report, the plaintiff established her *prima facie* entitlement to judgment as a matter of law on the issue of liability through her own affidavit. Such a showing requires defendant to come forward with a non-negligent explanation for the accident. (*Velazquez, citing Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2d Dept 2001]) If the operator of the trailing vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the lead vehicle is entitled to summary judgment on liability. (*Cortes v. Whelan*, 83 AD3d 763 [2d Dept 2011])

Here, defendant’s affidavit submitted in opposition in which she states that “[she] was in search of a rest room when [her] foot slipped off the brake and [her] motor vehicle rolled into the vehicle in front of [hers],” is insufficient to rebut the *prima facie* showing. (*Trombetta*, 59 AD3d at 527; *Lampkin v. Chan*, 68 AD3d 727 [2d Dept 2009]) Defendant’s opposition has failed to

rebut the inference of negligence by providing a non-negligent explanation for the collision.

(*Cortes*, 83 AD3d at 763)

Conclusion

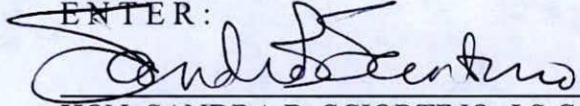
On the basis of the foregoing, it is

ORDERED that plaintiff's application for partial summary judgment on liability is granted.

The parties shall appear for a virtual conference on February 11, 2021 at 1:30 p.m. A Microsoft Teams link will be provided prior to the conference.

This decision shall constitute the order of the Court.

Dated: December 16, 2020
Goshen, New York

ENTER:

HON. SANDRA B. SCIORTINO, J.S.C.

To: *Counsel of Record via NYSCEF*