

Fernandez v Trolio

2020 NY Slip Op 35677(U)

August 27, 2020

Supreme Court, Bronx County

Docket Number: Index No. 29244/2018E

Judge: Veronica G. Hummel

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 31

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FERNANDEZ, JENIQUE

Index No. 0029244/2018

-against-

Hon. VERONICA G. HUMMEL

TROLIO JR., FRANK

Acting Justice Supreme Court

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The following papers were read on this motion (Seq. No. 1) for SUMMARY JUDGMENT noticed on June 26, 2020 and submitted June 26, 2020.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 15-21
Affirmation in Opposition and Exhibits	NYSCEF Doc. #22-24
Affirmation in Reply	NYSCEF Doc. # 26

Upon the foregoing papers, it is ordered that this motion by plaintiff JENIQUE FERNANDEZ (plaintiff) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendant FRANK TROLIO, JR. (defendant) and dismissing defendant’s counterclaim is decided in accordance with the memorandum decision/order of even date.

Dated: August 27, 2020

Hon. VGH
VERONICA G. HUMMEL, A.J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX - IAS PART 31

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 JENIQUE FERNANDEZ and RAFAEL GUERRERO,
 Plaintiffs,

Index No. 29244/2018E
DECISION and ORDER
 Mot. Seq. 1

-against-

FRANK TROLIO, JR.,
 Defendant.

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Veronica G. Hummel, A.J.S.C.:

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed in NYSCEF as submitted by the parties regarding plaintiff JENIQUE FERNANDEZ's motion (plaintiff) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendant FRANK TROLIO, JR. (defendant) and dismissing defendant's counterclaim.

This action arises out of a motor vehicle accident that occurred on March 16, 2017 on East Gun Hill Road, Bronx, N.Y. (the Accident). Plaintiff contends that defendant double-parked his vehicle and then backed up his car and collided with plaintiff's vehicle. Defendant counterclaims in the amended answer that plaintiff's injuries "were caused in whole or in part by the culpable conduct of plaintiff [and therefore] defendant is or will be entitled to have judgment over against said plaintiff in whole or in part as to any sum awarded" to plaintiff against defendant. [NYSCEF No. 9]. Plaintiff now moves for an order granting partial summary judgment as to liability and dismissing the counterclaim. Defendant opposes the motion.

The 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 eliminate any material issues of fact . . ." (*Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227 [1st Dept (2006)]). A plaintiff in a negligence action moving for summary judgment on the issue of liability must therefore establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and

29244/2018E

that the defendant's negligence was a proximate cause of the alleged injuries (*Fernandez v Ortiz*, 183 AD3d 443 [1st Dept 2020]; see *Rodriguez v City of New York*, 31 NY3d 312 [2018]).

In a case involving a vehicle backing-up into another vehicle, a plaintiff makes a *prima facie* showing of entitlement to summary judgment on liability and a counterclaim by offering evidence that defendant driver was negligent as a matter of law in backing up into plaintiff's stopped car without taking adequate precautions (*Drummond v Perez*, 146 AD3d 645 [1st Dept 2017]; *Ortiz v Lynch*, 105 AD3d 584 [1st Dept 2013]; *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339, 340 [1st Dept 2004]; see also *Portalatin v City of New York*, 165 AD3d 1302 [2d Dept 2018]). Violation of the Vehicle and Traffic Law ("VTL") constitutes negligence *per se* (*Drummond v Perez, supra*; see *Davis v Turner*, 132 AD3d 603 [1st Dept 2015]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]). VTL 1211 places a duty upon motorists to not back up their vehicle unless such movement can be made with safety and without interfering with other traffic (*Drummond v Perez, supra*; *Portalatin v City of New York, supra*).

In support of the motion, plaintiff attaches her and defendant's depositions and the police report of the incident. Plaintiff testified that she brought her vehicle to a stop behind defendant's double-parked vehicle, believing that he was stopped at the light. Approximately thirty seconds later, the light turned green and defendant's vehicle began to move backwards. Upon seeing defendant's vehicle moving toward her, plaintiff testified that she beeped her horn three times in attempt to get defendant's attention. Plaintiff testified that defendant did not slow down his vehicle and ultimately struck plaintiff's vehicle, which was stationary.

Defendant testified that he was double-parked with flashers on. He testified that he put his car's transmission in reverse, so that he could proceed backwards to speak to individuals that were walking away. While he checked his rearview and side-view mirrors, he did not see plaintiff's vehicle. He did not check his back-up camera feed while driving backwards. As the car moved backwards, defendant looked through the front window, over his shoulder and out the passenger and driver side window. He acknowledged that the Accident occurred while he was proceeding in reverse and his first indication that the collision had happened was when he felt the impact with plaintiff's vehicle.

29244/2018E

In addition, the submitted police report notes that defendant agreed with plaintiff's version of the facts and thereby acknowledged that he hit plaintiff's vehicle while backing up. This constitutes a party admission (*see Thompson v Coca-Cola Bottling Co.*, 170 AD3d 588 [1st Dept 2019]; *Liburd v Lulgjuraj*, 156 AD3d 532 [1st Dept 2017]), that defendant does not deny making (*see Estate of Mirjani v De Vito*, 135 AD3d 616 [1st Dept 2016]).

Based on the testimonies and police report, plaintiff has made a *prima facie* showing entitlement to summary judgment as a matter of law on the issue of liability for the happening of the subject accident, as well as to establish *prima facie* entitlement to dismissal of the counterclaim (*Ortiz v Lynch*, *supra*; *Garcia v Verizon New York, Inc.*, *supra*; *see Elihu v Nicoleau*, 173 AD3d 578 [1st Dept 2019]; *see also Oluwatayo v Dulinayan*, *supra*). The burden shifts to defendant to raise an issue of fact.

In opposition, defendant fails to raise an issue of fact warranting the denial of the motion. Defendant fails to proffer any evidence to contest plaintiff's showing of the cause of the Accident, and in fact agrees with plaintiff's version of the facts. Defendant's broad allegation that he took the correct precautions when putting the car in reverse does not create a triable issue of fact, particularly as he concedes that he was double-parked, driving backwards to speak to pedestrians, never looked at the back-up camera, and never saw plaintiff's car, which was right behind him. Defendant does not argue that plaintiff was comparatively negligent nor is there any evidence to support such a claim (*see Drummond v Perez*, *supra*; *Ortiz v Lynch*, *supra*; *Garcia v Verizon N.Y., Inc.*, *supra*). Thus, defendant fails to generate a question of fact both as to his liability for the Accident and as to plaintiff's freedom from comparative fault for the happening of the accident (*see Drummond v Perez*, *supra*; *Ortiz v Lynch*, *supra*; *Plaut v Allright Parking Management, Inc.*, 18 AD3d 396 [1st Dept 2005]). As defendant is liable for the Accident, defendant's negligence was a substantial factor in causing the Accident, and plaintiff is free from comparative fault, plaintiff's motion for summary judgment on the issue of liability and dismissing the counterclaim is appropriately granted.

29244/2018E

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief is requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

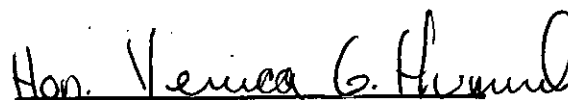
ORDERED that the motion of plaintiff JENIQUE FERNANDEZ motion [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability against defendant FRANK TROLIO (defendant) and dismissing defendant's counterclaim is granted.

The parties are reminded of the compliance conference scheduled in this matter for October 13, 2020 at 9:30 a.m.

This constitutes the decision and order of the Court.

Dated: August 27, 2020

ENTER:



Veronica G. Hummel, A.J.S.C.