

<b>Reilly v Nam Nim Kim</b>
2021 NY Slip Op 33499(U)
January 4, 2021
Supreme Court, Rockland County
Docket Number: Index No. 032378/2019
Judge: Sherri L. Eisenpress
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ROCKLAND

-----X  
ROSEMARIE REILLY,

*Plaintiff,*

-against-

NAM NIM KIM and BONNEY KARICKAKUZHYYIL  
BEJOICE,

*Defendants.*

-----X  
*Sherri L. Eisenpress, A.J.S.C.*

**DECISION & ORDER**

Index No.: 032378/2019

(Motion # 1)

The following papers, numbered 1-5, were considered in connection with Plaintiff's Notice of Motion for an Order, pursuant to Civil Practice Law and Rules § 3212, granting partial summary judgment in favor of Plaintiff on the issue of liability against Defendants Kim and Bejoice; striking defendants' affirmative defenses to the extent they allege plaintiff is at fault for the happening of this accident; remanding this matter to trial to apportion fault as between defendants Kim and Bejoice and determining the amount of damages suffered; and striking the testimony of Defendant Kim to the extent that it is preposterous:

**PAPERS**

**NUMBERED**

NOTICE OF MOTION/AFFIRMATION IN SUPPORT/EXHIBITS A-K	1-2
AFFIRMATION IN OPPOSITION OF DEFENDANT BEJOICE/AFFIDAVIT OF DEFENDANT BEJOICE/EXHIBITS A-C	3-4
AFFIRMATION IN PARTIAL OPPOSITION OF DEFENDANT KIM	5

Upon a careful and detailed review of the foregoing papers, the Court now rules as follows:

This personal injury action arises out of a three-car accident which took place on April 4, 2018, and was commenced by Plaintiff on May 1, 2019 through the NYSCEF

system. Defendant Nam Nim Kim ("Kim") served an answer with cross-claims on June 6, 2019. Issue was joined as to Defendant Bonney Karickakuzhiyil Bejoice ("Bejoice") with the service of an Answer with cross-claims on June 11, 2019.

At the time of the accident, it is undisputed that Plaintiff's vehicle, which was traveling westbound on Randi Lane in the Town of Clarkstown, came to a stop at a stop sign located at the intersection of Route 303. The Kim vehicle was traveling eastbound on Hilltop Road and the Bejoice vehicle was traveling northbound on Route 303. Kim testified that she fully crossed the intersection and was already located on Randi Lane when she claims the Bejoice vehicle veered onto the shoulder and slammed into her vehicle. She claims the Bejoice vehicle did not have its headlights on. Defendant Bejoice submits an affidavit in opposition to the motion in which he avers that he was traveling at a speed on no more than 40-45 hours per mile with his headlights on, and that as he entered the intersection of Hilltop Road/Randi Lane and Route 303, the Kim vehicle suddenly drove into the intersection at a high rate of speed; struck the driver's side of his door, which then propelled him into Plaintiff's vehicle. The Court notes that the diagram in the police accident depicts the collision as taking place within the subject intersection.

Plaintiff moves for summary judgment in her favor as to liability; striking defendants' affirmative defenses to the extent they allege plaintiff is at fault for the happening of this accident; remanding this matter to trial to apportion fault as between defendants Kim and Bejoice and determining the amount of damages suffered; and striking the testimony of Defendant Kim to the extent that it is "preposterous." In support of her motion she submits an unsigned Examination Under Oath of Plaintiff which does not include a certification from a court reporter, a police accident report and the examination before trial transcript of Defendant Kim.

Plaintiff argues that Defendant Bejoice is negligent as a matter of law for

violating Vehicle and Traffic Law § 1180(a) in that he was driving at a speed greater than was reasonable and prudent under the conditions. Additionally, Plaintiff argues that he is liable as a matter of law for violating VTL § 375(2)(a)(1) which requires the use of headlights after dark. Plaintiff argues that Defendant Kim's testimony is "preposterous" as a matter of law. She contends that Defendant Kim violated VTL § 1142(a) which required her to yield the right of way to an approaching vehicle (the Bejoice vehicle) since she had a stop sign. In addition to seeking summary judgment against Defendants, Plaintiff argues that because it is undisputed that she was stopped at a stop sign, she is not comparatively negligent with respect to the subject accident.

In opposition to the motion, Defendants argue that Plaintiff's motion must be denied as she failed to offer any evidence of Defendants' negligence in admissible form, including the incomplete unsworn copy of Plaintiff's Examination Under Oath transcript and an unsworn copy of the police accident report. Additionally, Defendant Bejoice offers his affidavit demonstrating triable issues of fact as to his speed at the time of the occurrence and whether his headlights were on at the time. Defendant Kim argues that her testimony is not preposterous as a matter of law and that it is the proper function of a jury to assess credibility. Kim asserts that her testimony which must be accepted as true on a motion for summary judgment raises triable issues of fact as to her liability for the accident.

The proponent of a summary judgment motion must establish his or her claim or defense sufficient to warrant a court directing judgment in its favor as a matter of law, tendering sufficient evidence to demonstrate the lack of material issues of fact. Giuffrida v. Citibank Corp., et al., 100 N.Y.2d 72, 760 N.Y.S.2d 397 (2003), citing Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986). The failure to do so requires a denial of the motion without regard to the sufficiency of the opposing papers. Lacagnino v. Gonzalez, 306 A.D.2d 250, 760 N.Y.S.2d 533 (2d Dept. 2003). However, once such a showing has been

made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form demonstrating material questions of fact requiring trial. Gonzalez v. 98 Mag Leasing Corp., 95 N.Y.2d 124, 711 N.Y.S.2d 131 (2000), citing Alvarez, supra, and Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 508 N.Y.S.2d 923 (1985). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue. Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980), 427 N.Y.S.2d 595.

A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. Balladares v. City of New York, 177 A.D.3d 942, 943, 114 N.Y.S.3d 448 (2d Dept. 2019). "To be entitled to partial summary judgment a plaintiff does not bear the ...burden of establishing...the absence of his or her own comparative fault. Id. Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence. Id.; Poon v. Nasanov, 162 A.D.3d 804, 808, 79 N.Y.S.3d 227 (2d Dept. 2018).

"There is a significant distinction between granting a plaintiff summary judgment on her lack of culpable conduct on liability and granting a plaintiff summary judgment on a defendant's negligence." Oluwatayo v. Dulinayan, 142 A.D.3d 113, 118, 35 N.Y.S.3d 84 (1<sup>st</sup> Dept. 2016). The Court explained:

A grant of partial summary judgment against a defendant on liability in a negligence case is the equivalent of finding that the defendant owed the plaintiff a duty of care, the defendant breached that duty by its negligence, and such breach proximately caused the plaintiff injury. In contrast, a grant of

partial summary judgment on the issue of plaintiff's lack of fault or culpability is a much narrower finding. Such a finding merely establishes as a matter of law that the plaintiff is free from any negligence, as would be the case of an innocent passenger or driver. Id.

In Oluwatayo, the Court rejected plaintiff's reasoning that defendants' conflicting versions of the accident fail to raise an issue of fact because neither defendant's account places any liability on the part of plaintiff and noted that plaintiff's argument conflates his claim of freedom from culpability with defendants' alleged negligence. Id. at 117.

In the instant matter, Plaintiff has failed to meet her burden on summary judgment that defendants were negligent as a matter of law through the submission of evidence in admissible form. Plaintiff's examination under oath is not executed nor does it contain a certification from a court reporter. Even if the evidence had been in admissible form, triable issues of fact are raised as to each defendants' negligence based upon their divergent versions of the subject occurrence. "Given that issues of fact exist as to which vehicle was responsible for the accident, it is not appropriate to grant plaintiff summary judgment on the issue of liability as against any defendant." Buffa v. Carr, 148 A.D.3d 606, 50 N.Y.S.3d 352 (1<sup>st</sup> Dept. 2017). A determination as to which defendant(s) are at fault and to what degree is properly remitted to a jury.

However, the Court does find that Plaintiff has established her entitlement to summary judgment as to the lack of her comparative negligence and the dismissal of Defendants' affirmative defenses regarding Plaintiff's culpable conduct. Defendants do not contest that at the time of the subject occurrence, Plaintiff's vehicle was stopped at the stop sign. As such, none of her actions could have contributed to the subject occurrence.

Accordingly, it is hereby

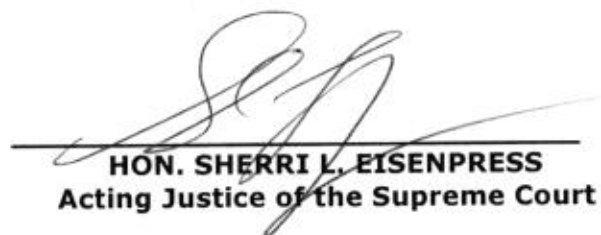
**ORDERED** that Plaintiff's Notice of Motion for Summary Judgment as to liability against Defendants is DENIED; and it is further

**ORDERED** that Plaintiff is entitled to summary judgment on the issue of Plaintiff's lack of culpable conduct or fault and Defendants' affirmative defenses are stricken to the extent they allege plaintiff is at fault for the happening of this accident; and it is further

**ORDERED** that counsel for the parties shall appear for a Compliance Conference on **January 7, 2021 at 9:40 a.m.** via Microsoft Teams.

The foregoing constitutes the Decision and Order of this Court on Motion # 1.

Dated: New City, New York  
January 4, 2021



**HON. SHERRI L. EISENPRESS**  
**Acting Justice of the Supreme Court**

To: All parties (via NYSCEF)