

Zapata-Guevara v Fischer

2021 NY Slip Op 33714(U)

July 26, 2021

Supreme Court, Orange County

Docket Number: Index No. EF009245-2019

Judge: Robert A. Onofry

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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HOMERO ZAPATA-GUEVARA,
Plaintiff,
-against-

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.

TRACIE LYNN FISCHER, JAMES S. FISCHER, TOM J.
ROSENTHAL,
Defendants.

Index No.: EF009245-2019

DECISION and ORDER

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Motion Date: June 8, 2021

The following papers numbered 1 to 9 were read and considered on a motion by the
Defendants Tracie Lynn Fischer and James S. Fischer, pursuant to CPLR § 3212, for summary
judgment dismissing the complaint and all cross claims insofar as asserted against them.

Notice of Motion- Appelbaum Affirmation- Exhibits A-F 1-3
Affirmation in Opposition- Siegel- Exhibit A 4-5
Opposition- Campbell Affirmation- Exhibit 1 6-7
Reply- Appelbaum Affirmation- Exhibit 1 8-9

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Homero Zapata-Guevara commenced this action to recover damages arising
from a three vehicle accident.

The Plaintiff was the driver of the front-most vehicle; the Defendant Tracie Lynn Fischer
was the driver of the middle vehicle, and the Defendant Tom Rosenthal was the driver of the
rear-most vehicle. The Defendant James S. Fischer is the owner of the vehicle being driven by
Tracie Lynn Fischer.

The Fischers move for summary judgment dismissing the complaint and all cross claims insofar as asserted against them.

The motion is granted.

Factual/Procedural Background

At an examination before trial, the Plaintiff testified as follows.

On November 30, 2016, he was driving his vehicle (a Honda Accord) in the Town of New Windsor at around 7:45 a.m. The weather was “a little cloudy” and traffic was light. He did not remember whether the roads were wet.

Just prior to the accident, he was driving on Union Avenue, which is two lanes wide.

A vehicle had stopped on the roadway in front of him to make a left turn.

He came to a complete stop behind the turning vehicle.

A (second) vehicle came up behind him and stopped.

A third vehicle then came up and struck the second car, pushing it into his.

He felt two impacts.

He described the above events to the responding police officer.

At an examination before trial, the Defendant Thomas Rosenthal testified as follows.

The road where the accident occurred “was on a hill. A steep hill.” The accident occurred on the downgrade.

Prior to the collision, he could see a vehicle “stopped in the middle of a hill.” He first saw the other vehicle when he was starting down the hill. He was then about 300 feet away. The vehicle’s brake lights were illuminated. When he first applied his brakes, he was driving about

thirty miles an hour.

Concerning the happening of the accident, he testified as follows:

Q. When you first saw the other vehicles stopped in front of you, what did you do?

A. Hit my brakes.

Q. Was it a panic kind of stop? Did you hit your brakes hard or was it a gradual stop?

A. No. I pumped them and I started hydroplaning.

Q. Can you describe for me, how was the weather that day?

A. It was raining. The roads were wet.

Q. Were your windshield wipers on?

A. Yes.

Q. Were your lights on?

A. Yes.

Q. So, from the moment that you started pumping and pressing on the brake until the collision, approximately how much time expired?

A. I'd say like five minutes, three minutes. Could have been faster. I was freaking out because I was sliding.

Q. When the contact occurred with the vehicle in front of you, did your vehicle remain in the lane?

A. Yes.

Q. What about the other vehicles, did they remain in the lane after the contact?

A. Yes, they remained in the lane.

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He "bumped" the vehicle in front of him with a "medium" level of impact.

There was “absolutely” no damage to the vehicle in front of him. However, his vehicle was “basically totaled.”

As a result of contact, the vehicle in front of him did not move forward. Nor did it strike another vehicle.

He told the responding police officer that “[w]ater was coming over the road, [he] hit the brakes and [he] hydroplaned into the back of her car.”

He was ticketed at the scene for following too closely.

At an examination before trial, the Defendant Tracie Lynn Fischer testified as follows.

At the time of the accident, she was driving a Subaru Forester owned by her father (James Fischer).

When she came up over a little hill on the road where the accident occurred, she could see a vehicle stopped in front of her. The vehicle had its left turn signal engaged.

She slowed gradually and came to a complete stop “maybe 10 feet” behind the vehicle.

While stopped, she looked in her rear view mirror and saw a car coming up behind her. The driver had an “oh, no face.” However, she had no where to go to avoid the collision.

The vehicle coming up behind her struck her vehicle and pushed it into a vehicle in front of her. “It was a big hit. Like it jolted me. Like, you know, like I don't know how to explain it but I guess like a hard, it was a hard hit.”

The Fischers move for summary judgment.

The Fischers argue that, based on the testimony *supra*, it is clear that Tracie Lynn Fischer was not negligent in the happening of the accident.

In opposition to the motion, the Defendant Tom Rosenthal submits an affirmation from

counsel, Jeffrey Siegel.

Siegel argues that the first issue to decide is whether Rosenthal's actions were reasonable in light of the road conditions. Here, he notes, Rosenthal testified that he did not panic or slam on his brakes, but pumped them. Thus, he argues, "[i]t cannot be expected that he would expect his vehicle would hydroplane. As such, a question of fact exists."

Second, he asserts, Rosenthal claimed that the impact was "minor," which "is an issue to be determined as well with regard to the severity of the accident itself. As such, an issue of fact exists."

In sum, he argues, Rosenthal has raised triable issues of fact as to the liability of Fischer.

In opposition to the motion, the Plaintiff submits an affirmation from counsel, Courtney Campbell.

Campbell argues that the accident at issue is not a "chain reaction" accident, as characterized by the Defendants, "but rather two distinct collisions."

Campbell argues that "there exist genuine issues of material fact regarding the happening of the subject accident, from which a reasonable jury could infer that Tracie Lynn Fischer was negligent in allowing her vehicle to come into contact with the Plaintiff's vehicle twice. Tracie Lynn Fischer rear-ended the Plaintiff's vehicle, and was then herself rear-ended by Defendant Rosenthal, causing her vehicle to impact the Plaintiff's vehicle a second time."

That is, "a reasonable jury could infer that Tracie Lynn Fischer took her foot off the brake in order to move up and give the approaching Rosenthal vehicle more room to stop, and in doing so rear ended the Plaintiff's vehicle. Immediately after this occurred, Rosenthal, unable to stop his vehicle, rear-ended Fischer's vehicle, accounting for the second impact the Plaintiff felt."

In further opposition to the motion, the Plaintiff submits his own affidavit.

The Plaintiff avers that, while he was stopped, he “felt two separate impacts to the rear of [his] vehicle. The impacts happened very quickly. He asserts: “I understand that Defendant Fischer testified that her vehicle only hit my vehicle once. That’s not what I remember, because I remember two separate impacts to the back of my vehicle.”

In reply, the Defendant submits an affirmation from counsel, Joel Appelbaum.

Appelbaum argues that a careful analysis of the Plaintiff’s testimony does not support the conclusion argued by the Plaintiff. That is, the Plaintiff testified that both his vehicle and Fischer’s vehicle were stopped when Fischer’s vehicle was struck and driven into his vehicle. Appelbaum notes that the following colloquys occurred at the Plaintiff’s examination before trial:

Q: Was the first time that your car was hit when the third car came up and hit the second car? (there was an objection)

A: Yes.

Q: Was the second time your car was hit when the second car hit your car?

A: Yes.

* * *

Q: Did you speak to the police officer?

A: Yes.

Q: Did you tell the police officer that you were stopped in traffic at the time of the accident?

A: Yes.

Q: Did you tell the officer that the car in back of you came up behind you and stopped?

A: Yes.

Q: Did you tell the officer that the third car came up and hit the second car?

A: Yes.

* * *

Q: Did you see the small colored SUV before the impact occurred?

A: Yes. I had seen it because it was behind me.

Q: About how long before the accident did you see the small SUV?

A: It was seconds.

Q: Was the small light-colored SUV stopped or moving when you saw it?

A: It was stopped.

In sum, Appelbaum argues, according to all of the testimony, the Fischer vehicle drove up behind the Plaintiff's vehicle and came to a stop before the accident happened.

Discussion/Legal Analysis

A party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept. 2011].

Relevant to the case at bar, a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle,

requiring that operator to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence. *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 A.D.3d 754 [2nd Dept. 2017]; *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. A non-negligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017].

However, while a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead.

Tumminello v. City of New York, 148 A.D.3d 1084 [2nd Dept. 2017].

Further, evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation for a rear-end collision. *Weiss v. Arunsi*, 184 A.D.3d 606 [2nd Dept. 2020]. Thus, in a chain collision accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle. *Bardizbanian v. Bhuiyan*, 181 A.D.3d 772 [2nd Dept. 2020].

To prevail on a motion for summary judgment on the issue of liability in a negligence case, the movant need no longer demonstrate that he or she was free from comparative fault. *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501 [2nd Dept. 2019].

Here, the Fischers proffered competent evidence in admissible form sufficient to

demonstrate, *prima facie*, that Tracie Lynn Fischer was not negligent in the happening of the accident. Rather, that she was the middle vehicle in a chain reaction collision that was pushed into the Plaintiff's vehicle.

In opposition, the Defendant Rosenthal failed to raise a triable issue of fact about the negligence or comparative fault of Tracie Lynn Fischer. Indeed, none of the arguments raised by Rosenthal go to the negligence of Tracie Lynn Fischer in the happening of the accident.

Similarly, the Plaintiff failed to raise a triable issue of fact about the negligence or comparative fault of Tracie Lynn Fischer in the happening of the accident. Contrary to the Plaintiff's contention, on the record presented, a reasonable jury could not infer that Tracie Lynn Fischer lifted her foot off of her brake pedal and struck the Plaintiff's vehicle before being struck by Rosenthal's vehicle. Rather, that would be sheer speculation.

Accordingly, and for the reasons cited herein, it is hereby,

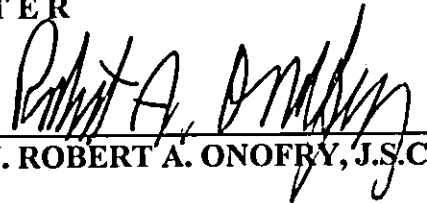
ORDERED, that the motion is granted, and the complaint and all cross claims are dismissed as against Tracie Lynn Fischer and James S. Fischer; and it is further,

ORDERED, that the remaining parties are directed to appear for a status conference on Tuesday, September 7, 2021, at 1:30 p.m., at the Orange County Supreme Court, Court room #3, 285 Main Street, Goshen, New York, if the Courts are open to the public at that time. If not, the conference will be conducted virtually, at a time to be designated by the Court.

The foregoing constitutes the decision and order of the court.

Dated: July 26, 2021
Goshen, New York

ENTER


HON. ROBERT A. ONOFRY, J.S.C.

VIA NYSCEF

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