

Colacicco v Fuentes
2021 NY Slip Op 33751(U)
August 5, 2021
Supreme Court, Orange County
Docket Number: Index No. EF002741-2019
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

-----X
FALLON L. COLACICCO,

Plaintiff,

-against-

MAURICIO RUIZ FUENTES,

Defendant.

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.

Index No. EF002741-2019
Motion Date: August 5, 2021
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The following papers numbered 1 to 5 were read on Plaintiff's motion for partial summary judgment on liability:

Notice of Motion - Affirmation / Exhibits - Affidavit	1-3
Affirmation in Opposition	4
Reply Affirmation / Exhibit	5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is a personal injury action arising out of an accident that occurred at about 12:20 p.m. on July 17, 2016 at the intersection of Water Street and Washington Street in the City of Newburgh, New York. The evidence shows that Defendant, traveling northbound on Water Street in excess of the speed limit, entered the intersection without stopping at a posted stop sign and struck Plaintiff's vehicle on the rear passenger side as it was proceeding eastbound on Washington Street through the intersection. Defendant failed to appear for his deposition in

accordance with the Court's directives, and has neither testified nor submitted an affidavit in opposition to Plaintiff's motion for partial summary judgment.

A. Defendant Was Negligent As A Matter Of Law

Vehicle and Traffic Law ("VTL") §1172(a) provides in pertinent part:

...every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection...and the right to proceed shall be subject to the provisions of section 1142.

VTL §1142(a) provides in pertinent part:

...every driver of a vehicle approaching a stop sign shall stop as required by section 1172 and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.

The failure of a motorist to stop at a posted stop sign and yield the right of way in violation of the Vehicle and Traffic Law constitutes negligence as a matter of law. *See, Miller v. County of Suffolk*, 163 AD3d 954, 956-957 (2d Dept. 2018); *Murchison v. Incognoli*, 5 AD3d 271 (1st Dept. 2004); *Weiser v. Dalbo*, 184 AD2d 935 (3d Dept. 1992); *Pahler v. Daggett*, 170 AD2d 750, 751-752 (3d Dept. 1991); *Olsen v. Baker*, 112 AD2d 510, 511 (3d Dept.), *lv. denied* 66 NY2d 604 (1985); 1A NY PJI 3d 2:80, at 518-519 (2021).

Plaintiff established *prima facie* that Defendant was negligent as a matter of law by proceeding through the stop sign and failing to yield the right of way to Plaintiff's vehicle in violation of VTL §§ 1172(a) and 1142(a). Defendant in opposition has failed to demonstrate the existence of any triable issue of fact. Therefore, Plaintiff is awarded partial summary judgment on the issue of Defendant's liability.

B. Plaintiff Was Not Contributorily Negligent

Since there may be more than one proximate cause of a motor vehicle accident, Defendant's negligent failure to yield the right-of-way does not preclude as a matter of law a finding that negligence on Plaintiff's part also contributed to the accident. *See, Romano v. 202 Corp.*, 305 AD2d 576, 577 (2d Dept. 2003). *See also, Gezelter v. Pecora*, 129 AD3d 1021, 1023 (2d Dept. 2015); *Arias v. Tiao*, 123 AD3d 857, 859 (2d Dept. 2014); *Espiritu v. Shuttle Express Coach, Inc.*, 115 AD3d 787, 789 (2d Dept. 2014). Although a driver with the right of way is entitled to anticipate that the other vehicle will obey the traffic laws requiring it to yield (*see, Miller v. County of Suffolk, supra*, 163 AD3d at 956-957; 1A NY PJI 3d 2:80, at 518-519), she may nevertheless be found to have contributed to the happening of the accident if she did not use reasonable care to avoid it. *See, Rabenstein v. Suffolk County Dept. of Public Works*, 131 AD3d 1145 (2d Dept. 2015); *Gezelter v. Pecora, supra*; *Arias v. Tiao, supra*; *Romano v. 202 Corp., supra*.

However, as the Second Department has repeatedly observed, “[a]lthough a driver with the right-of-way has a duty to use reasonable care to avoid a collision,...a driver with the right-of-way who has only seconds to react to a vehicle that has failed to yield is not comparatively negligent for failing to avoid the collision.” *See, Enriquez v. Joseph, supra*, 169 AD3d at 1009; *Yu Mei Liu v. Weihong Liu*, 163 AD3d 611, 612 (2d Dept. 2018); *Shashaty v. Gavitt*, 158 AD3d 830, 831 (2d Dept. 2018); *Giwa v. Bloom*, 154 AD3d 921, 921-922 (2d Dept. 2017); *Fuertes v. City of New York, supra*; *Smith v. Omanes*, 123 AD3d 691 (2d Dept. 2014); *Bennett v. Granata*, 118 AD3d 652, 653 (2d Dept. 2014); *Barbato v. Maloney*, 94 AD3d 1028, 1030 (2d Dept. 2012); *Socci v. Levy*, 90 AD3d 1020, 1021 (2d Dept. 2011).

Here, Plaintiff established without contradiction that she was traveling within the speed limit, and attempted by accelerating to avoid contact with Defendant's oncoming vehicle when she realized it was not stopping for the stop sign, but was nevertheless struck on the rear passenger side of her vehicle. Inasmuch as Plaintiff had only seconds to react, the failure of her evasive measures does not render her comparatively negligent. Since Defendant in opposition has failed to demonstrate the existence of any triable issue of fact on that score, Plaintiff is entitled to the dismissal of Defendant's affirmative defenses asserting Plaintiff's contributory and comparative negligence.

It is therefore

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of Defendant's liability is granted, and the Fifth and Eleventh affirmative defenses in Defendant's Answer are hereby dismissed.

The foregoing constitutes the decision and order of the Court.

Dated: August 5, _____, 2021
Goshen, New York

ENTER



HON. CATHERINE M. BARTLETT, A.J.S.C.
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE