Marbury v Weis
2021 NY Slip Op 33761(U)
July 9, 2021
Supreme Court, Westchester County
Docket Number: Index No. 56077/2020
Judge: Alexandra D. Murphy

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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. ALEXANDRA D. MURPHY, J.S.C.

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LINNETT MARBURY,

Plaintiff,

Index No. 56077/2020

– against –

Motion Seq. 1

RUSSELL WEIS,

DECISION & ORDER

Defendant.

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In an action to recover damages for personal injuries as a result of a motor vehicle accident, the plaintiff moves for summary judgment on the issue of liability, pursuant to CPLR § 3212.

Papers Considered **NYSCEF Doc. No. 19-27; 30-31**

1. Notice of Motion/Affirmation of Matthew D. Goodstein, Esq./Exhibits A-F/Statement of Material Facts;
2. Affirmation in Opposition of Robert J. Spence, Esq.;
3. Reply Affirmation of Matthew D. Goodstein, Esq.

Facts and Procedural Background

The plaintiff commenced this action against the defendant to recover damages for personal injuries sustained in a motor vehicle accident that occurred on December 13, 2019 in the Thornwood Town Shopping Center parking lot at 1060 Broadway in Mount Pleasant, New York. The plaintiff was driving in the lane of traffic within the shopping center parking lot. The defendant exited a parking spot and drove to the end of the aisle abutting the through lane. Upon reaching the intersection of the aisle and the through lane, as the defendant made a left onto the through lane, the front passenger side of the defendant's vehicle struck the driver's side of the plaintiff's vehicle.

At an examination before trial, the plaintiff testified that she was driving straight in the right lane of the Thornwood Town Center parking lot. She further testified that she had been driving at a speed of five miles per hour while driving passed the Wells Fargo bank. The plaintiff did not notice any vehicles attempting to turn while she was driving. The plaintiff's vehicle was struck from the left side.

At an examination before trial, the defendant testified that he stopped at the end of a parking aisle that faced the stores with the intention of making a left turn into the center lane of traffic. The defendant looked toward the left, then right, then to the left again and proceeded to make the turn when the accident occurred. He did not notice any vehicles when making the turn.

The plaintiff moves for summary judgment on the issue of liability. The plaintiff argues that she was not negligent and that the defendant was solely responsible for the accident. She contends that the collision was caused solely by the actions of the defendant who turned left into her lane of travel.

In opposition, the defendant argues that the plaintiff failed to establish *prima facie* entitlement to summary judgment on the issue of liability. The defendant asserts that the plaintiff made a left turn without caution and failed to observe the defendant's vehicle. The defendant argues that issues of fact exist and, therefore, summary judgment is not appropriate. Further, the defendant contends that even if summary judgment is granted, the plaintiff's comparative negligence is an issue to be determined at trial.

Discussion

The proponent of a motion for summary judgement must make a *prima facie* showing of entitlement to judgment as a matter, tendering sufficient evidence to eliminate any material issues of fact from the case. (*see Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v. City of New York,* 49 NY2d 557, 562 [1980]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers. (*see Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d at 853).

Once the *prima facie* showing has been made, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*see Alvarez v. Prospect Hosp.,* 68 NY2d 320, 324 [1986]; *see Zuckerman v. City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat a *prima facie* showing of entitlement to summary judgment (*see Zuckerman v. New York*, 49 NY2d at 562).

On a motion for summary judgment, the function of the court "is not to resolve issue[s] of fact or determine matter[s] of credibility, but merely to determine whether such issues exist." (*Kolivas v. Kirchoff*, 14 AD3d 493 [2d Dept 2005]; *see Doyle v. Wieber*, 194 AD3d 785 [2d Dept 2021]). Further, any evidence in a matter of involving summary judgment must be viewed in the light most favorable to the nonmovant. (*Gelstein v. City of New York*, 153 AD3d 604 [2d Dept 2017]).

Vehicle and Traffic Law §1140, entitled "Vehicle approaching or entering an intersection" provides:

> (a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.
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> (b) When two vehicles enter an intersection from different highways at approximately the same time the driver of the vehicle on the left shall yield the right of way to the vehicle on the right.
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> (c) The right of way rules declared in subsections (a) and (b) are modified at through highways and otherwise as stated in this title.

Vehicle and Traffic Law §1143 provides that "the driver of a vehicle about to enter or cross a roadway from any place other than another roadway shall yield the right of way to all vehicles approaching on the roadway to be entered or crossed."

Vehicle and Traffic Law §1162 provides that "no person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety."

Here, the plaintiff demonstrated that the defendant violated Vehicle and Traffic Law §§1140, 1143 and 1162 when the defendant made a left turn into the path of the plaintiff's vehicle and that such violation was a proximate cause of the accident (*see Green v Masterson*, 172 AD3d 826 [2d Dept]). The defendant pulled out of the parking aisle and into moving traffic before it was reasonably safe to do so (*see Candelario v* Gold, 184 AD3d 798, 799 [2d Dept 2020]). Further, the defendant failed to yield the right of way to the plaintiff and in so doing, collided with the plaintiff's vehicle.

"To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a *prima facie* case of the defendant's liability and the absence of his or her own comparative fault." (*Rodriguez v City of New York*, 31 NY3d 312, 324-25 [2018]). However, "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion, where . . . the plaintiff move[s] for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v Nisanov*, 162 AD3d 804, 808 [2d Dept 2018]).

The plaintiff failed to demonstrate that she was not at fault for causing the accident and, therefore, the issue of the plaintiff's comparative negligence will be determined at trial (*see Rodriguez v City*, 31 NY3d at 324-25; *Perez v Persad*, 183 AD3d 771, 772 [2d Dept 2020]).

Accordingly, it is

ORDERED that the plaintiff's motion for summary judgment on the issue of liability, pursuant to CPLR §3212, is GRANTED.

Counsel for all parties are directed to virtually appear in the **Compliance Part** on **July 26, 2021, at 4:30 p.m.** as previously scheduled.

Dated: White Plains, New York
July 9, 2021

HON. ALEXANDRA D. MURPHY, J.S.C.

H: CIVIL ALPHABETICAL MASTER/Marbury v. Weis