Sim v Great Oaks Mech. Inc
2022 NY Slip Op 35051(U)
February 28, 2022
Supreme Court, Queens County
Docket Number: Index No. 702698/21
Judge: Carmen R. Velasquez
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

----------x,
ISUM SIM, Index No.: 702698/21

Plaintiff, Motion
Date: December 6, 2021

-against-

GREAT OAKS MECHANICAL INC, ET AL., m# 1

Defendants.
----------x

The following papers numbered EF 10-28 read on this motion by the plaintiff for summary judgment on the issue of liability, dismissing the first and second affirmative defenses of culpable conduct and failure to wear a seat belt and for a special trial preference.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.....	EF 10-22
Affirmation in Opposition - Exhibits	EF 23-27
Replying Affirmation.....	EF 28

Upon the foregoing papers it is ordered that this motion by the plaintiff is decided as follows:

Plaintiff allegedly sustained serious injuries when she was involved in an automobile accident with defendants' vehicle on July 1, 2020 on East Grassy Sprain Road in Yonkers, New York. Plaintiff alleges that the accident occurred when the defendants' vehicle exited a parking lot and struck the plaintiff's vehicle, which was traveling northbound on East Grassy Sprain Road. Plaintiff subsequently commenced the instant action to recover damages for negligence. Plaintiff now moves for summary judgment on the issue of liability and to dismiss the first and second affirmative defenses of culpable conduct and failure to wear a seat belt. Plaintiff also moves for a special trial preference.

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 demonstrate the absence of any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a 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 material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].)

Further, Vehicle and Traffic Law § 1143 provides that "[t]he 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." In addition, Vehicle and Traffic Law § 1173 provides that "[t]he driver of a vehicle emerging from an alley, driveway, private road or building shall stop such vehicle immediately prior to driving onto a sidewalk extending across any alleyway, building entrance, road or driveway, or in the event there is no sidewalk, shall stop at the point nearest the roadway to be entered where the driver has a view of approaching traffic thereon."

Plaintiff made a prima facie showing of her entitlement to judgment as a matter of law. In her affidavit, plaintiff avers that she was traveling northbound on East Grassy Sprain Road at a speed of 25-30 miles per hour, which was within the speed limit. According to the plaintiff, defendants' vehicle was moving from a parking lot towards the East Grassy Sprain Road entrance/exit driveway. She avers that she anticipated that defendants' vehicle would stop before entering the road, and that she would pass defendants' stopped vehicle without any problem. Plaintiff states that defendants' vehicle did not stop and made a left turn directly in front of her vehicle, intending to proceed south on East Grassy Sprain Road. Plaintiff avers that she only had a second or two to respond and she applied her brakes and steered her vehicle to the right. However, plaintiff states that the left front of her vehicle came into contact with the center and rear of the driver's side of the defendants' vehicle, causing her to sustain serious injuries. Plaintiff also states that there was nothing she could have done to avoid the accident. Thus, the affidavit establishes that the defendant driver was negligent by pulling out of a parking lot in front of plaintiff's vehicle and failing to yield the right of way. (*see Harvey v White*, 169 AD3d 884, 885 [2d Dept 2019]; *Ricciardi v Nelson*, 142 AD3d 492, 493 [2d Dept 2016].)

In opposition, defendants submit the affidavit of the operator of their vehicle, Fausto A. Quirozlazo. Defendant avers that as he was leaving the driveway, he activated his left turn signal, stopped the vehicle on the driveway and looked to the left and right two or three times to check to see if any vehicles were approaching. Defendant states that he had an unobstructed view of the road, and there were no vehicles approaching from any direction. Defendant avers that after ensuring that it was safe to make the left turn, he proceeded into the roadway. According to the defendant, he was traveling approximately five miles per hour when the impact occurred to the middle of his van. He further avers that as he was making the left turn, he saw plaintiff's vehicle coming towards him at a fast speed and was unable to avoid an impact. However, it is well settled that a driver is negligent where he fails to see that which was there to be seen through the proper use of his senses. (*Brandt v Zahner*, 110 AD3d 752, 752 [2d Dept 2013]; *Lu Yuan Yang v Howsal Cab Corp.*, 106 AD3d 1055, 1056 [2d Dept 2013].) The defendant's conclusory assertion that plaintiff was speeding is insufficient to raise a triable issue of fact. (*Mateiasevici v Daccordo*, 34 AD3d 651, 652 [2d Dept 2006]; *McNamara v Fishkowitz*, 18 AD3d 721, 722 [2d Dept 2005].) Plaintiff had the right of way and was entitled to assume that the defendant would obey the traffic laws that required him to yield. (*Caputo v Brown*, 196 AD3d 456 [2d Dept 2021]; *Cruz v DiSalvo*, 188 AD3d 986, 987 [2d Dept 2020].)

Further, contrary to defendants' assertion, in a negligence action, to be entitled to partial summary judgment on the issue of liability, a plaintiff does not bear the burden of establishing the absence of her own comparative fault. (*Rodriguez v City of New York*, 31 NY3d 312 [2018].)

Defendant also contends that the motion should be denied because it is premature inasmuch as discovery has not been completed. Such contention is without merit. The hope and speculation that evidence may be uncovered during discovery is an insufficient basis to deny the motion for summary judgment. (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]; *Essex Ins. Co. v Carpentry*, 74 AD3d 733, 734 [2d Dept 2010]; *Conte v Frelen Assocs., LLC*, 51 AD3d 620, 621 [2d Dept 2008].)

The branch of the motion to dismiss the first affirmative defense of culpable conduct is granted. As explained above, based upon the facts herein, there is no evidence that plaintiff caused or contributed to the subject accident. With respect to the second affirmative defense, which alleges failure to wear a seat belt, plaintiff avers in her affidavit that she was using a seat belt at the time of the subject accident.

The court will now address the branch of the motion for a special trial preference. CPLR 3403(a)(4) provides for a Special Trial Preference upon the application of a party who has reached the age of 70. (*Andersen v Park Ctr. Assocs.*, 250 AD2d 473, 475 [1st Dept 1998].) In the case at bar, plaintiff avers in her affidavit that she was born in 1950, which makes her over the age of 70. In addition, plaintiff submits a copy of her driver's license, which states her year of birth as 1950. Defendants have not opposed this branch of the motion

Accordingly, the branch of this motion by plaintiff for summary judgment on the issue of liability is granted, and an assessment of damages against the defendants shall be held at the time the case is called for trial.

The branch of this motion by plaintiff to dismiss certain affirmative defenses is granted, and the first and second affirmative defenses, alleging culpable conduct and failure to wear a seat belt, respectively, are dismissed.

The branch of the motion for a Special Preference is granted, without opposition.

Dated: February 28, 2022

CARMEN R. VELASQUEZ, J.S.C.