

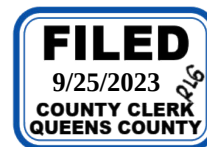
Delgado v Time Warner Entertainment Co. LLP
2023 NY Slip Op 35105(U)
September 25, 2023
Supreme Court, Queens County
Docket Number: Index No. 710017/2018
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35



-----X
NAROLYN MARTINEZ DELGADO

Plaintiff,

-against-

Index No. 710017/18

Mot. Date: 9/19/23

Mot. Seq. 2

TIME WARNER ENTERTAINMENT CO. LLP,
CHARTER COMMUNICATIONS and DHONDUP
TASHISHAR SONAM,

Defendants.

-----X
The following papers were read on this motion by plaintiff for an order, pursuant to CPLR 3212, granting summary judgment in her favor on the issue of liability, and an order pursuant to CPLR 3211 dismissing the affirmative defenses of comparative negligence, contributory negligence and culpable conduct.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 36-42
Ans. Aff.-Memorandum of Law-Exhibit.....	EF 44-48

Upon the foregoing papers, it is ordered that the motion by plaintiff is granted.

This is an action for personal injuries arising out of a two-car motor vehicle accident, that occurred on August 22, 2017, on Hillside Avenue, between Queens Boulevard and the Van Wyck Expressway, in Jamaica, New York.

Plaintiff moves for an order, pursuant to CPLR 3212, granting summary judgment in her favor on the issue of liability, and an order pursuant to CPLR 3211 dismissing the affirmative defenses of comparative negligence, contributory negligence and culpable conduct.

In support of her motion, the plaintiff submits, *inter alia*, her examination before trial (EBT) transcript and the EBT transcript of defendant Dhondup Tanishar Sonam

(defendant) who was operating a vehicle owned by defendant Charter Communications Inc.,

Plaintiff testified that she was traveling in the far right lane of Hillside Avenue, at approximately 20 miles per hour, traveling toward the Van Wyck Expressway, when the defendant, who was traveling in center lane to her immediate left, began to merge from the center lane into the right lane. One or two seconds later, the accident occurred. She testified that the front passenger's side of defendants' vehicle, a small white truck, impacted the front driver's side of her vehicle, pushing it three to four feet to the right.

Defendant testified that he was traveling on Hillside Avenue, in the center lane of travel approaching the Van Wyck Expressway with lanes to his immediate right and left. He testified that he wanted to move into the right lane because it was empty. He testified that before changing lanes, he looked in his passenger's side and rear view mirrors for approximately five (5) to ten (10) seconds to ensure it was safe to change lanes. He testified that he could see twenty feet behind him when he looked in the passenger's side mirror. Observing no vehicles in the right lane, he turned on his directional and initiated his lane change. He was about ten feet from the accident location when he applied his signal. He could not estimate how much time passed from when he put on his directional until the accident occurred. He was turning from the middle lane to the right lane when the accident occurred.

Significantly, he further testified that he did not see the plaintiff's vehicle before the accident. "[A]s I turned right, my light is on the right and then I heard the sound". The plaintiff's vehicle was in the right lane and more than half of his vehicle was in the right lane at the time of the accident.

A plaintiff moving for summary judgment in a negligence action on the issue of the defendants' liability must establish that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the plaintiff's alleged injuries (*see Detoma v Dobson*, 214 AD3d 948, 949 [2d Dept. 2023]). "A plaintiff's comparative fault, or lack thereof, is not a consideration in determining whether the plaintiff has made a prima facie showing on the issue of the defendant's liability" (*Id.*). However, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moves for

summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Poon v Nisanov*, 162 AD3d 804, 808 [2d Dept. 2018]).

"[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se" (*E.B. v Gonzalez*, 208 AD3d 618, 619 [2d Dept. 2020] [internal quotation marks omitted]; *see Orellana v Mendez*, 208 AD3d 888, 889 [2d Dept. 2020]). If one party has established that the other party has committed negligence per se, the burden then falls to the opposing party to submit a nonnegligent explanation for the action" (*Orellana v Mendez*, 208 AD3d at 889).

Vehicle and Traffic Law Section 1128 (a) states: A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Here, the plaintiff has established a *prima facie* entitlement to judgment as a matter of law by submitting evidence that the defendant violated Vehicle and Traffic Law Section 1128 (a) by moving his vehicle from the center lane to the right lane without seeing the plaintiff's vehicle and without ascertaining that this movement could be done safely (*see Peluso v Martinez*, 136 AD3d 769 [2d Dept. 2016]; *Rivera v Corbett*, 69 AD3d 916 [2d Dept. 2010].)

In opposition, the defendant fails to submit a non-negligent explanation for the accident, and thus fails to raise a triable issue of fact. Thus, plaintiff's motion for summary judgment on the issue of liability is granted.

A plaintiff moving to dismiss an affirmative defense bears the burden of establishing that the affirmative defense is without merit as a matter of law (*see Gonzalez v Wingate at Beacon*, 137 AD3d 747 [2d Dept. 2016]). Here, the plaintiff has established that she did not engage in any culpable conduct that contributed to the accident and that the plaintiff, who had the right-of-way and virtually no time to react to the defendant's vehicle coming into her lane, was not at fault in the happening of the accident (*see Peluso v Martinez*, 136 AD3d 769 [2d Dept. 2016]; *Reyes-Diaz v Quest Diagnostic Inc.*, 123 AD3d 790 [2d Dept. 2014]; *Walker v Patrix Trucking NY Corp.*, 115 AD3d 943, 944[2d Dept. 2014]; *Rivera v Corbett*, 69 AD3d 916 [2d Dept. 2010].

Furthermore, "[a]lthough a driver with a right of way also 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 which has failed to yield is not comparatively negligent for failing to avoid the collision” (see *Yelder v Walters*, 64 AD3d 762, 764 [2d Dept. 2009]).

Speculative contentions as to how a driver with the right of way could have avoided the accident are insufficient to raise an issue of fact. (see *Breen v Seibert*, 123 AD3d 963 [2d Dept. 2014]). Since the defendant testified that he did not see the plaintiff’s vehicle before the accident, any arguments regarding alleged speeding are speculative and insufficient to raise a triable issue of fact. (see *Yelder, supra*, 64 AD3d at 765, *Galvis v Ravilla*, 111 AD3d 600 [2d Dept. 2013].) Therefore, the affirmative defenses of comparative negligence, contributory negligence and culpable conduct are dismissed.

Accordingly, based upon the foregoing, it is

ORDERED that the motion by plaintiff is granted; in that: it is

ORDERED that the branch of the motion seeking summary judgment on the issue of liability is granted; and it is further

ORDERED that the branch of the motion to dismiss the defendant’s affirmative defenses of comparative negligence, contributory negligence and culpable conduct is granted; and it is further

ORDERED that any arguments or requests for relief not addressed herein have been considered by the Court and are denied.

Dated: September 25, 2023



TIMOTHY J. DUFFICY, J.S.C.

