

Evans v Gargan
2024 NY Slip Op 35263(U)
May 3, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 622494/2023
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX NO. 622494/2023

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Thomas F. Whelan, J.S.C.

HEATHERMARIE A. EVANS,

Plaintiff,

- against -

LAURA JEANNE GARGAN,

Defendant.

ORIG. RETURN DATE: January 5, 2024

FINAL RETURN: February 5, 2024

MOT. SEQ. #: 001 MG

PLTF'S ATTORNEY:ABRAMS, GORELICK, FRIEDMAN &
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700 KOEHLER AVENUE

RONKONKOMA, NEW YORK 11779

Upon the following e-filed papers read on this motion for partial summary judgment: Notice of Motion and supporting papers by plaintiff, dated December 15, 2023; Answering Affidavits and supporting papers by defendant, dated January 22, 2024; Replying Affidavits and supporting papers by plaintiff, dated January 26, 2024; it is

ORDERED that the motion by plaintiff for, inter alia, partial summary judgment in her favor on the issue of defendant's liability is granted; and it is further

ORDERED that a preliminary conference will be held on May 23, 2024.

This action was commenced by plaintiff Heathermarie A. Evans to recover damages for injuries she allegedly sustained on March 23, 2023, when the motor vehicle she was operating in the Town of Smithtown, New York, collided with a vehicle owned and operated by defendant Laura Jeanne Gargan.

Plaintiff now moves for summary judgment in her favor, arguing that defendant's actions were the sole proximate cause of her alleged injuries. Plaintiff also seeks an order striking defendant's affirmative defenses of comparative negligence and the emergency doctrine. In support of her motion, plaintiff submits, among other things, her own affidavit, and a certified copy of an MV-104A police accident report.

In her affidavit, plaintiff states that on the date in question she was operating a motor vehicle eastbound on Route 25A/Main Street "without any traffic control devices" governing her direction of travel. She indicates that a motor vehicle owned and operated by defendant "suddenly and without warning pulled out from a driveway in between two business (sic) near 148 Main Street." Plaintiff avers that she "only saw the defendant for a split second prior to impact and did not have time to take any evasive maneuvers."

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A party moving for summary judgment “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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (see *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (see *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

A plaintiff “is no longer required to show freedom from comparative fault in establishing his or her prima facie case” (*Ashby v Estate of Encarnacion*, 178 AD3d 763, 765, 111 NYS3d 894 [2d Dept 2019]; see *Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (see *Brodney v Picinic*, 172 AD3d 673, 99 NYS3d 399 [2d Dept 2019]). Vehicle & 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.” Furthermore, an operator of a motor vehicle has a “common-law duty to see that which [he or she] should have seen through the proper use of [his or her] senses” (*Botero v Erraez*, 289 AD2d 274, 275, 734 NYS2d 565 [2d Dept 2001]; see also *Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]). “Although a driver with a right-of-way also has a duty to use reasonable care to avoid a collision, it has been recognized that 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” (*Yelder v Walters*, 64 AD3d 762, 764, 883 NYS2d 290 [2d Dept 2009] [internal citations omitted]). In addition, even though “a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff’s comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff seeks summary judgment dismissing an affirmative defense alleging comparative negligence” (*Maliakel v Morio*, 185 AD3d 1018, 1019, 129 NYS3d 99 [2d Dept 2020]).

When moving to dismiss or strike an affirmative defense, “the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law[, and in] reviewing a motion to dismiss an affirmative defense, [the court] must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference” (*Greco v Christoffersen*, 70 AD3d 769, 771, 896 NYS2d 363 [2d Dept 2010] [internal citations and quotation marks omitted]; see *Bank of New York v Penalver*, 125 AD3d 796, 1 NYS3d 825 [2d Dept 2015]; *Pugh v New York City Hous. Auth.*, 159 AD3d 643, 74 NYS3d 522 [1st Dept 2018]). “If there is any doubt as to the availability of a defense, it should not be dismissed” (*Federici v Metropolis Night Club, Inc.*,

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48 AD3d 741, 743, 853 NYS2d 160 [2d Dept 2008]). “The emergency doctrine provides that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context” (*Pappas v New York City Tr. Auth.*, 208 AD3d 890, 891, 174 NYS3d 728 [2d Dept 2022] [internal quotation marks and citation omitted]).

Here, plaintiff established a prima facie case of entitlement to summary judgment in her favor on the issue of defendant’s negligence (*see Harvey v White*, 169 AD3d 884, 92 NYS3d 676 [2d Dept 2019]); *see generally Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). She demonstrated that she was operating her motor vehicle with the right of way when defendant’s vehicle attempted a right turn, entering her lane of travel and causing a collision. Further, plaintiff demonstrated, prima facie, that she had insufficient time to take evasive action and, thus, was not comparatively negligent in failing to avoid colliding with defendant’s turning vehicle. In addition, plaintiff established, prima facie, that defendant did not face “sudden and unexpected circumstance which leaves little or no time for thought,” given plaintiff’s testimony that defendant’s previously-stopped motor vehicle executed a right turn into plaintiff’s lane of travel. The burden then shifts to defendant to raise a triable issue (*see generally Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13).

In opposition, submitting, among other things, her own affidavit, defendant argues that plaintiff’s motion is premature and that she has not eliminated all triable issues. In such affidavit, defendant states that at approximately 1:30 p.m. on the subject date she was operating her motor vehicle “at or near” 148 Main Street, Kings Park, New York, “making a right on the roadway on [sic] Main Street from a driveway within the [sic] speed between 0 to 10 miles per hour.” She indicates that it was raining and the roads were wet. Defendant describes Main Street as having a 30 mile-per-hour speed limit in the subject location, and being comprised of “one lane in each direction, separated by a double yellow line.” Defendant avers that prior to entering the roadway of Main Street, she activated her right turn signal and “looked to the roadway both to [her] right and left for approaching cars.” Deeming it safe to proceed, she “slowly entered the roadway on Main Street when [she] was suddenly and without warning hit to [sic] the driver’s front side on [her] vehicle by a vehicle coming from [her] left on Main Street, which [she] later learned was . . . operated by the plaintiff.” Defendant states that she never saw plaintiff’s vehicle approaching, but that “the front passenger side of the plaintiff’s vehicle hit [her] vehicle on the driver’s front side.” Defendant indicates that the collision caused her vehicle to hit a third vehicle parked on Main Street to her right, and caused plaintiff’s vehicle to collide with a fourth parked vehicle.

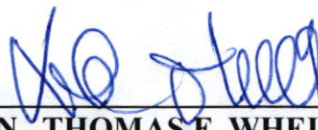
Defendant’s arguments are unavailing. “To defeat a motion for summary judgment based on outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party” (*Reeves v Wilson*, 214 AD3d 1013, 1014, 186 NYS3d 329 [2d Dept 2023] [citations omitted]). Here, defendant’s affidavit is devoid of a non-negligent excuse for the collision, any evidence of plaintiff’s negligence, and any facts demonstrating “how further discovery may reveal or lead to additional relevant evidence” (*id.*). Thus, it fails to raise a triable issue. Accordingly, plaintiff’s motion for partial summary judgment on the issue

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of defendant's negligence, and for an order striking defendant's affirmative defenses of comparative negligence and the emergency doctrine, is granted.

Dated:

5/01/24



HON. THOMAS F. WHELAN, J.S.C.