Peralta v Scarola
2025 NY Slip Op 35341(U)
February 27, 2025
Supreme Court, Queens County
Docket Number: Index No. 716676/2023
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

----------x IAS PART 20

MARJORIE PERALTA,

Plaintiff,

-against-

DANIEL F. SCAROLA, STEPHANIE RISORTO and KEITH RISORTO,

Defendants.

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Index No.: 716676/2023

Motion Seq. No.: 1

Motion Date: 8.28.2024

Motion Cal. No.: 32

Presently before the Court are two motions. The defendant Daniel F. Scarola ("Scarola") moves for an Order granting him summary judgment. The plaintiff, Marjorie Peralta (the "Plaintiff"), cross-moves for summary judgment against the defendants Keith Risorto ("Keith") and Stephanie Risorto ("Stephanie") (collectively, the "Risorto Defendants").

The Plaintiff commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on February 16, 2023 (the "Accident"). Scarola moves for summary judgment dismissing all claims asserted against him. The Plaintiff cross-moves for summary judgment against the Risorto Defendants on the issue of liability. For the following reasons, both motions are granted.

I. Factual Background and Procedural History

The Accident occurred on the northbound Cross Island Parkway in Queens, New York. Three vehicles were involved in the Accident. The lead vehicle was owned and operated by Scarola. The middle vehicle was owned and operated by Peralta. The rear vehicle was owned by Keith and operated by Stephanie.

In support of his motion, Scarola submits an affidavit wherein he avers that his vehicle had been stopped "for at least 10 seconds" prior to being rear-ended by the Plaintiff's vehicle.

In support of her cross-motion, the Plaintiff submits an affidavit wherein she avers: (1) that her vehicle was "completely stopped for about 5-10 seconds" prior to being rear-ended by the vehicle owned by Keith and operated by Stephanie; and (2) that the subject impact caused her vehicle to rear-end Scarola's vehicle.

In opposition, the Risorto Defendants do not submit an affidavit in opposition, opting instead to rely upon their counsel's affirmation in opposition.

The Court notes that the Plaintiff was granted leave to serve a supplemental summons and amended complaint to name the Risorto Defendants as direct defendants (*see* NYSCEF Doc. No. 43). The amended complaint is therefore the operative complaint in this cause (*see Thompson v Cooper*, 24 AD3d 203 [1st Dept 2005]).

II. Discussion

The "function of summary judgment is issue finding, not issue determination" (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the "drastic" remedy of summary judgment, the movant "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 from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

Vehicle and Traffic Law §1129 [a] states that:

> The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under prevailing conditions to avoid colliding with the other vehicle … To be entitled to summary judgment on the issue of a defendant's liability, a plaintiff does not bear the burden of establishing the absence of his or her own comparative negligence" (*Fischetti v Simonovsky*, 227 AD3d 670, 671 [2d Dept 2024] [internal quotation marks and citations omitted]).

If a party moving for summary judgment establishes entitlement to summary disposition, the burden shifts to the party opposing the motion to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Capuozzo v Miller*, 188 AD3d 1137 [2d Dept 2020]).

A. Scarola's Summary Judgment Motion

Scarola's application for summary judgment dismissing all claims asserted against him is granted. Scarola establishes *prima facie* entitlement to summary disposition through his affidavit,

which demonstrates that his vehicle was stopped when it was struck in the rear by the Plaintiff's vehicle (*see Quintanilla v Mark*, 210 AD3d 713 [2d Dept 2022]; *Modena v M & S Mechanical Services, Inc.*, 181 AD3d 802 [2d Dept 2020]). Scarola's assertion that his stopped vehicle was rear-ended is not disputed by the Plaintiff and the Risorto Defendants. Thus, there are no triable issues of fact on this issue.

B. The Plaintiff's Summary Judgment Motion Against the Risorto Defendants

The Plaintiff's motion for summary judgment on the issue of liability against the Risorto Defendants is also granted. The Plaintiff establishes *prima facie* entitlement to summary disposition through her affidavit, which demonstrates that her vehicle was stopped when it was struck in the rear by the vehicle owned by Keith and operated by Stephanie (*see Quintanilla v Mark*, 210 AD3d 713 [2d Dept 2022]; *Modena v M & S Mechanical Services, Inc.*, 181 AD3d 802 [2d Dept 2020]).

In opposition, the Risorto Defendants fail to raise a triable issue of fact. Here, "[t]he affirmation of … [their] attorney in opposition to plaintiff['s] summary judgment motion … [is] of no probative value" (*Nationwide General Insurance Company v South*, 223 AD3d 411, 411-412 [1st Dept 2024]).

The Risorto Defendants' argument that the motion should be denied as premature because depositions have not been held is without merit. In *Quintanilla v Mark*, 210 AD3d 714-715, the Second Department held as follows with respect to the interplay between a summary judgment motion and open discovery:

> While a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, a party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Here, the defendant's proffered need to conduct depositions did not warrant denial of the motion, since the defendant already had personal knowledge of the relevant facts, and his mere hope or speculation that evidence might be uncovered was insufficient to deny the motion [internal quotation marks, brackets and citations omitted]).

The Risorto Defendants are aware of the relevant facts because Stephanie was the operator of one of the vehicles involved in the Accident.

In any event, "[t]o 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" (*Rodriguez v Gutierrez*, 138 AD3d 964, 968 [2d Dept 2016] [citations omitted]). The Risorto Defendants make no such evidentiary showing.

CPLR § 3212 [g] "… permits a motion court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action. The provision recognizes that, notwithstanding the denial or partial grant, one of several facts may nonetheless appear to be conceded or otherwise definitively resolved by the moving and opposing papers" (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 118 [1st Dept 2016]).

Since the record is devoid of any evidence of culpable conduct by the Plaintiff, the Risorto Defendants' affirmative defenses of comparative negligence, contributory negligence and culpable conduct are dismissed (*see Reyes v Gropper*, 212 AD3d 565 [1st Dept 2023]). As observed, the Plaintiff establishes that her vehicle was struck in the rear and the Risorto Defendants fail to establish through evidence in admissible form a non-negligent explanation for rear-ending the Plaintiff's vehicle.

The remaining opposition arguments advanced by the Risorto Defendants are without merit.

Lastly, the Court notes that although the Plaintiff is accorded summary judgment on the issue of liability, the Risorto Defendants are entitled to discovery on the issue of damages (*see Barr v Raffe*, 96 AD2d 800 [1st Dept 1983]) and that the Plaintiff is not relieved of the burden of establishing that she suffered a serious injury within the meaning of Insurance Law § 5102 [d] (*see Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Scarola's summary judgment motion is granted; and it is further,

ORDERED, that all claims and causes of action asserted against Scarola are dismissed; and it is further,

ORDERED, that the Plaintiff's summary judgment motion directed to the Risorto Defendants is granted; and it is further,

ORDERED, that the Plaintiff is granted summary judgment on the issue of liability against the Risorto Defendants; and it is further,

ORDERED, that the Risorto Defendants' affirmative defenses of comparative negligence, contributory negligence and culpable conduct are dismissed; and it is further,

ORDERED, that Scarola shall serve a copy of this Order with Notice of Entry on the Plaintiff and the Risorto Defendants via NYSCEF by March 27, 2025.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
February 27, 2025

MOJGAN C. LANCMAN, J.S.C.