Wilson v Rosado
2020 NY Slip Op 35649(U)
April 21, 2020
Supreme Court, Bronx County
Docket Number: Index No.: 30994/2017E
Judge: Mary Ann Brigantti
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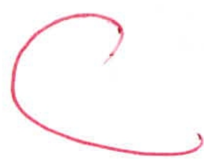

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART __15___

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LILETH A. WILSON

Index №. 30994/2017E

-against-

Hon. MARY ANN BRIGANTTI

CLEMENTE ROSADO, et al.

Justice Supreme Court

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The following papers numbered 1 to ______5____ were read on this motion (Seq. No. __001_____) for ____**SUMMARY JUDGMENT**_______ noticed on ___________________.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).	1,2
Answering Affidavit and Exhibits	No(s).	3,4,
Replying Affidavit and Exhibits	No(s).	5

Upon the foregoing papers, the defendant Clemente Rosado ("Rosado") moves for summary judgment, dismissing the complaint of the plaintiff Lileth A. Wilson ("Plaintiff") and any cross-claims asserted against him pursuant to CPLR 3212. Plaintiff opposes the motion.

This matter arises out of an alleged motor vehicle accident that occurred between a vehicle operated by Rosado and another vehicle operated by co-defendant Wilson. Plaintiff was a passenger in the Wilson vehicle.

In a sworn statement, Rosado states that at the time of this accident he was driving on Hunts Point Avenue in the Bronx, which was a two-way street wide enough for two lanes of moving traffic in either direction and parking on both sides. He was driving westbound approaching the intersection with Seneca Avenue – a two-way street for north and southbound traffic, wide enough for one lane of moving traffic in either direction with parking on both sides. Rosado states that as he was traveling on Hunts Point Avenue, a vehicle traveling eastbound made a left turn in front of him, attempting to turn onto Seneca Avenue. The turning vehicle failed to yield to his vehicle. Rosado states that he tried to apply his brakes but the front bumper of his car made contact with the passenger side front fender, between the front bumper and the passenger front door, of the other vehicle. Rosado states that he was traveling at 15 miles per hour so he was able to stop without causing serious damage to either vehicle.

Rosado also submits an uncertified police accident report which constitutes inadmissible hearsay this it cannot be considered (*Fay v. Vargas*, 67 A.D.3d 568 [1st Dept. 2009]).

[*1]

In opposition to the motion, Plaintiff submits an affidavit stating that at the time of this accident she was a rear-seated passenger in a vehicle driven by her then husband Wilson. Plaintiff states that she spoke with her mother – a front-seated passenger – who told her that she did not see the other vehicle approaching before Wilson attempted a left turn from Hunts Point Avenue onto Seneca Avenue. Plaintiff herself did not see any approaching vehicles before Wilson began his turn. She did recall that before the accident, Wilson had pulled into the left lane and came to a complete stop for 20 seconds with the turn signal activated. She states that she could see Wilson looking straight ahead and to his left before attempting the left hand turn. He then proceeded to turn left onto Seneca Avenue. Before the turn was completed, Plaintiff felt a heavy impact to the passenger side of her vehicle, causing it to spin to the left.

Plaintiff argues that Rosado failed to carry his initial summary judgment burden, and moreover, the motion must be denied as premature since court-ordered discovery has yet to take place.

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 N.Y.2d 851, [1985]; *Sillman v. Twentieth Century–Fox Film Corp*., 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*id., see also Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC*., 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

In this matter, Rosado's statement establishes that the Plaintiff/Wilson vehicle made a left turn in front of Rosado, allegedly causing Rosado to strike the front-passenger side of the Plaintiff/Wilson vehicle. Vehicle and Traffic Law ("VTL")§ 1141 states in pertinent part "[t]he driver of a vehicle intending to turn to the left within an intersection... shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard." It is well settled that a violation of VTL § 1141 constitutes negligence (see *Katikireddy v Espinal*, 137 AD3d 866 [1st Dept

[*2]

2016]; *Covington v Kumar*, 67 AD3d 463 [1st Dept 2009]; *Mathewson v Bender* 259 AD2d 673 [2d Dept 1999]). However, it is equally settled that even a driver with the right of way has a duty to use reasonable care to avoid colliding with another vehicle that is already in an intersection (*Nevarez v. S.R.M. Management Corp.*, 58 A.D.3d 295. 298 [1st Dept. 2008]). In *Cadeau v Gregorio* (104 AD3d 464, 464-65 [1st Dept 2013]), for example, the court determined that the defendant "made a prima facie showing that she was not negligent by submitting evidence that, within ['f]raction of seconds' of seeing it in the left-turn lane on the opposite side of the intersection, the vehicle operated by defendant... made a left turn across the path of her oncoming vehicle and that she applied her brakes '[v]ery hard' but could not avoid the collision."

In this case, Rosado alleged that the other vehicle did not yield to him when attempting the left turn onto Seneca Avenue, however he did not elaborate further as to, for example, when he first saw the other vehicle or how much time elapsed from the time he first saw that vehicle until the moment of the impact. Rosado thus failed to eliminate all issues of fact as to his lack of comparative fault or otherwise establish that this accident was unavoidable (see *Buffa v. Carr*, 148 A.D.3d 606 [1st Dept. 2017]; *Espinal v. Volunteers of Am.-Greater N.Y. Inc.*, 121 A.D.3d 558 [1st Dept. 2014]).

In addition, depositions in this case have yet to go forward and co-defendant Wilson – the driver of Plaintiff's vehicle – did not submit an affidavit in opposition to the motion. Plaintiff states that she was a rear-seated passenger at the time of this accident, and from her vantage point she did not see any approaching vehicles before her vehicle attempted to turn left. She further states that her vehicle was stopped for 20 seconds before attempting to turn left. Before completing the turn, her vehicle sustained a heavy impact to its passenger side, causing it to spin and ultimately face the opposite direction. This description of the impact differs from that of Rosado, who claims that he was traveling at 15 miles per hour and was able to stop his vehicle without causing serious damage to either vehicle. Accordingly, assuming *arguendo* that Rosado carried his initial burden, Plaintiff's affidavit is sufficient to show that the motion is premature. Under CPLR 3212(f), "[s]hould it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion." In this case Plaintiff should be afforded the opportunity to, among other things, depose movant Rosado to determine what he observed prior to the accident before Rosado is entitled to summary judgment (*see, e.g., Figueroa v. City of New York*, 126 A.D.3d 438 [1st Dept. 2015]).

[*3]

Accordingly, it is hereby

ORDERED, that Rosado's motion for summary judgment is denied without prejudice, with leave to renew following the completion of discovery.

This constitutes the Decision and Order of this Court.

Dated: 4/21/20 **Hon.** Mary Ann Brigantti **J.S.C.**

1. CHECK ONE.. ☐ CASE DISPOSED IN ITS ENTIRETY ☐ CASE STILL ACTIVE
2. MOTION IS.. ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE.................... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

[*4]