Russo v Licata
2017 NY Slip Op 31004(U)
April 11, 2017
Supreme Court, Suffolk County
Docket Number: 00492/2015
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 00492/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 01/12/17
Motion Seq #: 003 MG

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VITO W. RUSSO,

Plaintiff,

-against-

PAUL LICATA,

Defendant.

---x

PLAINTIFF'S ATTORNEY:
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DEFENDANT'S ATTORNEY:
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The Court has considered the following in reaching a determination on the pending motion by plaintiff pursuant to CPLR 3212 seeking summary judgment on liability:

1. Plaintiff's Notice of Motion pursuant to CPLR 3212 for summary judgment dated July 7, 2016; Affirmation in Support of Robert E. Schleier, Jr., Esq. dated July 7, 2016; Exhibits A – H;
2. Defendant's Affirmation in Opposition of Salvatore V. Pullara, Esq. dated July 28, 2016;it is

ORDERED that plaintiff's motion seeking summary judgment pursuant to CPLR 3212 on liability is **GRANTED** for the reasons discussed below.

This matter is before the Court on plaintiff's motion for partial summary judgment on liability. It arises from a motor vehicle accident which occurred on July 25, 2014 on Nesconset Highway a/k/a Route 347 at or near the intersection with Nicolls Road a/k/a County Road 97 in the Town of Brookhaven, County of Suffolk, New York.

Plaintiff Vito Russo ("plaintiff") has brought the instant personal injury action against defendant Paul Licata ("defendant") seeking the recovery of money damages for alleged injuries sustained in the motor vehicle accident premised on defendant's alleged negligence.

Russo commenced this action filing his summons and complaint on January 9, 2015. Defendant joined issue interposing his answer on February 16, 2015. Plaintiff amplified his pleadings with filing of his Verified Bill of Particulars on May 26, 2015. The parties have both

been deposed, plaintiff giving her sworn testimony at an examination before trial held on September 9, 2016. Defendant gave his deposition on February 12, 2016. Counsel for the parties appeared before this Court on July 5, 2016 for the purposes of a pre-motion conference where leave for the instant application was granted.

According to his sworn testimony adduced at deposition, on a clear day with dry road conditions and light to moderate traffic, Russo was on his way home from dinner with his domestic partner and passenger Lucy Desimone, traveling eastbound in the rightmost lane of travel in his red Chevrolet Equinox on Route 347. He stopped for the red traffic light at the intersection with Nicolls Road, and remained at a full and complete stop for approximately 10 to 15 seconds when without warning he was rear-ended by defendant operating his white 2001 Ford E-150 commercial van.

For his part, Licata travelled eastbound on Route 347 on his commute home from work at a residential job site in Commack. Defendant had travelled on Route 347 for approximately 20 to 30 minutes reaching speeds of between 40 to 50 mph, having turned onto the roadway from Jericho Turnpike. At his deposition, Licata conceded under oath that the front portion of his vehicle impacted the rear-end of plaintiff's vehicle, and that the impact was heavy. Defendant at first acknowledged having seen the traffic light and that the light had recently turned red on his approach to the intersection, but later in his testimony recanted and could not recall definitively. Defendant also could not recall whether plaintiff's vehicle was at complete rest prior to impact, or whether he saw plaintiff's vehicle at all before collision.

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of 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, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d

600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

Where a defendant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]).

Where, as here, o prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, *prima facie*, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault (*see* ***Thoma v. Ronai***, 82 NY2d 736, 737; ***Espinoza v. Coca–Cola Bottling Co. of N.Y., Inc.***, 121 AD3d 640, 993 NYS2d 721; ***Gorenkoff v. Nagar***, 120 AD3d 470, 990 NYS2d 604; ***Lu Yuan Yang v. Howsal Cab Corp.***, 106 AD3d 1055, 1055–1056, 966 NYS2d 167; ***Phillip v D & D Carting Co., Inc.***, 136 AD3d 18, 22, 22 NYS3d 75, 78 [2d Dept 2015]).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Tutrani v. County of Suffolk***, 10 NY3d 906, 908; ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 670–671, 974 NYS2d 563; ***Pollard v. Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 846, 942 NYS2d 360; ***Le Grand v Silberstein***, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]). The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Kastritsios v. Marcello***, 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus***, 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su***, 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]). However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini***, 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

A possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (***Shamah v. Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 NYS2d 287; *see* ***Gutierrez v. Trillium USA, LLC***, 111 AD3d at 671, 974 NYS2d 563; ***Robayo v. Aghaabdul,*** 109 AD3d 892, 893, 971 NYS2d 317).

This burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Abbott v Picture Cars E., Inc.***, 78 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 AD3d 707, 782 NYS2d 284 [2d Dept 2004]).

Our courts have held that a movant establishes a *prima facie* entitlement to judgment as a matter of law on the issue of liability, based on an affidavit testimony stating that plaintiff's vehicle was stopped in traffic when it was struck in the rear by the defendants' vehicle, thus shifting the burden to the defendants to come forward with a non-negligent explanation for the accident (***Oguzturk v. Gen. Elec. Co.***, 65 AD3d 1110, 1110, 885 NYS2d 343, 344 [2d Dept 2009]).

In support of his motion, plaintiff and his passenger both have submitted sworn affidavits, in addition to the pleadings and deposition transcripts. The Court notes, as plaintiff has argued, that defendant has failed to execute his transcript, despite it being forwarded for review by plaintiff's counsel on March 10, 2016, more than 60 days prior to plaintiff's making of this motion. Thus, given that defendant has raised no objections, this Court finds that defendant suffers no prejudice from plaintiff's reliance on the transcript in support of his motion, and thus this Court deems they are admissible evidence (*see e.g.* ***Moak v Raynor***, 28 AD3d 900, 904, 814 NYS2d 289, 292 [3d Dept 2006][defendant's refusal or delay in signing or returning his deposition transcript did not prejudice plaintiff as there is statutory direction for use of such a transcript as if it were signed]; CPLR 3116[a]; *accord* ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 967, 838 NYS2d 92, 93 [2d Dept 2007]).

Upon review of all plaintiff's submissions, this Court finds that plaintiff has met his burden as movant for entitlement to summary judgment on liability as she has demonstrated a *prima facie* case of negligence. The Court notes that despite filing an affirmation in opposition to plaintiff's application, defendants make no substantive arguments opposing plaintiff's requested relief, and thus the Court deems this application unopposed. More importantly, having made no substantive arguments, defendants have failed to carry the burden shifted onto them to provide the Court with a non-negligent explanation for the rear-end collision with plaintiff's vehicle which was at a full and complete stop at a red traffic light.

With submission of the deposition transcripts and affidavits, plaintiff has provided the Court with sworn testimony stating in sum and in substance that he was stopped at a red traffic light on Route 347 being the first vehicle behind the traffic light, when without warning he felt a heavy impact to the rear of his vehicle. For unexplained reasons, defendant has offered no affidavit or sworn testimony challenged or seeking to rebut plaintiff's version of the facts explaining the occurrence of the incident. Thus this Court finds that plaintiff as movant has satisfied his *prima facie* burden to establish a case of negligence, entitling him to a presumption of negligence from defendant's rear-end contact, shifting the burden to defendant to proffer a non-negligent explanation for the rear-end contact.

Based upon defendants' lack of any substantive opposition to the pending motion, the Court deems this to be an admission of the facts as asserted by plaintiff. Thus with the absence of any non-negligent explanation for defendant's rear-end collision with plaintiff, plaintiff's motion for partial summary judgment as to liability is hereby granted since defendant has failed to produce any evidence in admissible form sufficient as to the existence of any triable issue of fact requiring trial.

Accordingly it is

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment as to liability as against defendants is **GRANTED** in its entirety; and it is further

ORDERED that plaintiff shall a copy of this decision with notice of entry upon defendants no later than May 19, 2017; and it is further

ORDERED that the parties are hereby directed to appear before the undersigned on **May 31, 2017 at 9:45 am,** for a status conference prepared to discuss with the Court any and all remaining, relevant or material issues subject to pretrial disclosure preventing certification of this matter for trial by jury.

The foregoing constitutes the decision and order of this Court.

Dated: April 11, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**