Hazelwood v Kufs
2017 NY Slip Op 33174(U)
December 5, 2017
Supreme Court, Nassau County
Docket Number: 603790/17
Judge: Denise L. Sher

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

BEVERLY HAZELWOOD,

Plaintiff,

- against -

AUSTIN KUFS and JOHN KUFS,

Defendants.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 603790/17
Motion Seq. No.: 01
Motion Date: 09/14/17

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition	2
Reply Affirmation	3

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on July 9, 2015, at approximately 9:10 p.m., on Hempstead Turnpike, at or near its intersection with East Meadow Avenue, East Meadow, County of Nassau, State of New York. The accident involved two (2) vehicles, a 2003 Toyota, owned and operated by plaintiff, and a 2008 Toyota, owned by defendant John Kufs, and operated by defendant Austin Kufs. *See* Plaintiff's Affirmation in Support Exhibit 3. Plaintiff commenced the action with the filing of a Summons and Verified Complaint on or about May 2, 2017. *See* Plaintiff's Affirmation in Support Exhibit 2. Issue was

joined on or about June 27, 2017. *See id.*

Briefly, it is plaintiff's contention that, "[o]n July 09, 2015 I was involved in a motor vehicle accident on Hempstead Turnpike in East Meadow, New York 11554. At the time and place of the accident, I was the seat-belted owner/operator of a 2003 Toyota.... I was traveling eastbound on Hempstead Turnpike when traffic, as well as my vehicle, came to a complete stop for a red light. While completely stopped, suddenly and without warning I was struck from behind by a vehicle operated by defendant Austin M. Kufs. The vehicle operated by defendant Austin M. Kufs was a 2008 Toyota ... owned by John M. Kufs. The impact involved the rear-end of my Toyota and the front-end of defendant Austin M. Kufs' Toyota. From the moment I brought my vehicle to a stop until the time of the accident my vehicle never moved again." *See* Plaintiff's Affirmation in Support Exhibit 1.

Counsel for plaintiff contends that defendant Austin M. Kufs was the negligent party in that he failed to maintain a safe distance behind plaintiff's vehicle, as well as failed his duty to exercise reasonable care under the circumstances to avoid an accident. Counsel for plaintiff additionally claims that defendants cannot come up with a reasonable excuse or a non-negligent explanation for their vehicle striking plaintiff's vehicle in the rear.

In opposition to the motion, counsel for defendants argues, in pertinent part, that, "[i]ndeed while plaintiff, Beverly Hazelwood, has submitted her own affidavit in support of her position, her motion is premature since none of the parties have been provided with the opportunity to depose the (*sic*) Beverly Hazelwood in connection with this lawsuit, or to cross-examine her with respect to her affidavit. In this regard, her self-serving affidavit submitted in support of her motion fails to indicate the weather conditions at the time of the accident, the manner in which she brought her vehicle to a stop for the traffic light, how long she was stopped prior to being struck in the rear and whether her brake lights were operating at the time of the

accidents (*sic*) and whether she observed the Kufs (*sic*) vehicle prior to the impact and took steps to avoid the impact. All these issues have bearing on her liability and preclude the granting of summary judgment in her favor. Further, none of the remaining parties to the litigation have been deposed.... Moreover, there are questions of fact as to whether plaintiff, Beverly Hazelwood, by her actions prior to the accident contributed to the accident."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See* CPLR § 3212 (b); *Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp.*, *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable

issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle and to exercise reasonable care to avoid colliding with the other vehicle pursuant to New York State Vehicle and Traffic Law ("VTL") § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry*, 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

As noted, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, thereby requiring the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006);

McGregor v. Manzo, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See* VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

Plaintiff, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendants. Therefore, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York, supra.*

After applying the law to the facts in this case, the Court finds that defendants have failed to meet their burden to demonstrate an issue of fact which precludes summary judgment. The attorney for defendants has not submitted any evidence to rebut plaintiff's *prima facie* showing of entitlement to judgment as a matter of law.

It cannot be overlooked by the Court that, in opposition, defendants rely solely upon the affirmation of their attorney, who was obviously without personal knowledge of the facts. This does not supply the evidentiary showing necessary to successfully resist the motion. *See* CPLR § 3212(b); *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 413 N.Y.S.2d 141 (1978). An affirmation of counsel is of no evidentiary value or effect. *See Roche v. Hearst Corp.*, 53 N.Y.2d 767, 439 N.Y.S.2d 352 (1981); *Columbia Ribbon & Carton Mfg. Co. v. A-1-A Corp*, 42 N.Y.2d 496, 398 N.Y.S.2d 1004 (1977).

Moreover, the motion for summary judgment was not premature, since defendants failed to offer an evidentiary basis to suggest that the discovery may lead to relevant evidence. Defendants' "hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery was an insufficient basis for denying the motion." *Conte v. Frelen Assoc., LLC*, 51 A.D.3d 620, 858 N.Y.S.2d 258 (2d Dept. 2008). *See also Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 825 N.Y.S.2d 516 (2d Dept. 2006).

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability, is hereby **GRANTED**.

The matter shall go forward on the threshold issue.

It is further ordered that the parties shall appear for a Preliminary Conference on January 22, 2018, at 9:30 a.m., at the Preliminary Conference Desk in the lower level of 100 Supreme Court Drive, Mineola, New York, to schedule all discovery proceedings. A copy of this Order shall be served on all parties and on the DCM Case Coordinator. There will be no adjournments, except by formal application pursuant to 22 NYCRR § 125.

This constitutes the Decision and Order of this Court.

ENTERED

DEC 08 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER:

DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
December 5, 2017