Dixon v Molina
2018 NY Slip Op 33193(U)
December 11, 2018
Supreme Court, Suffolk County
Docket Number: 07235/2016
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 07235/2016**

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

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 07/26/18
Mot SCH: 06/05/18
Mot Seq 006 MD

---x

MARGARET TIFFANY DIXON, as Administrator of the Estate of Alicia Joyner, Deceased,

Plaintiff,

-against-

V.M. FUENTES MOLINA, SALVATOR FUENTES, A. CAPELLAN-BELTRE & NELLIE C. DURAN,

Defendants.

---x

PLAINTIFF'S COUNSEL:
Vladimir & Associates, PLLC
2137 Deer Park Ave.
Deer Park, New York 11729

DEFENDANTS' COUNSEL:
DeSena & Sweeney, LLP
1500 Lakeland Ave.
Bohemia, New York 11717

Kelly Rode Kelly, LLP
330 Old Country Rd, Ste 305
Mineola, New York 11501

On defendant's motion for summary judgment on liability pursuant to CPLR 3212, the following was considered: Notice of Motion & Affirmation in Support and supporting papers; Affirmations in Opposition; Reply Affirmation in Further Support and upon due deliberation and full consideration, it is

ORDERED defendant Capellan-Beltre's motion pursuant to CPLR 3212 for summary judgment on liability is **denied** as follows; and it is further

ORDERED that counsel for movant serve a copy of this decision and order with notice of entry on counsel for all parties by overnight mail forthwith.

BACKGROUND

Plaintiff's decedent Alicia Joyner commenced this motor vehicle collision negligence personal injury action filing a summons and complaint on July 26, 2016. Defendants have all joined issue and defendants have cross-claimed against and amongst each other. By the complaint, plaintiff seeks recovery of money damages for alleged serious personal injury predicated on defendants' negligence as its proximate cause. The matter arises from a three-car motor vehicle collision involving the parties which occurred on December 3, 2015 at approximately 8:10 a.m. on Great Neck Road near East Avon Drive in Babylon, Suffolk County, New York.

Defendant-movant seeks a judgment as a matter of law determining her free from liability

in the matter, and moves the Court according relying upon the pleadings, an uncertified copy of the police accident investigation report, and her affidavit. Both plaintiff and co-defendant Fuentes Molina oppose that application.

Testifying by affidavit, movant claims that prior to the incident, she was operating a 1998 Toyota vehicle on Great Neck Road in Babylon, stopped in traffic with her foot on the brake pedal for approximately 5 seconds when she was rear-ended by a vehicle operated by co-defendant Fuentes Molina. Movant further asserts that because of the primary rear-end collision with co-defendant, that her vehicle was pushed into the rear-end of plaintiff's vehicle, causing a secondary rear-end collision for which plaintiff has presently sued. Lastly, movant testifies that her brake lights were operational at the time of the incident.

Arguing in opposition to the motion first is co-defendant Fuentes Molina who also offers an affidavit. Therein she testifies that she operated her vehicle travelling southbound on Great Neck Road approaching East Avon Drive and was approximately 50 feet from the intersection, when she observed heavy traffic build up with vehicles travelling at approximately 10-15 mph. She further states that she was between 10 to 20 feet behind the vehicle ahead of her operated by co-defendant and movant, when she observed it come to a sudden stop. Despite deploying her brake, Fuentes Molina explained that her vehicle collided with the vehicle in front of her, but characterizes the contact as minimal at approximately 0-5 mph. Because of the sudden stop, defendant opposes summary judgment on liability on two separate grounds. First, defendant argues the motion is premature since no party depositions have been held and thus substantive discovery concerning a nonnegligent explanation for the rear-end collision has yet to be completed. Secondly, defendant opposes the motion contending a triable question of fact concerning the sudden stop exists precluding a *prima facie* case for liability in movant's favor.

Plaintiff also opposes the motion relying on the same grounds espoused by Fuentes Molina.

DISCUSSION

Standard of Review

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]).

Substantive Law on Motor Vehicle Negligence

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (***Mulhern v Gregory***, 161 AD3d 881, 883, 75 NYS3d 592, 594 [2d Dept 2018]; ***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]; ***Whelan v Sutherland***, 128 AD3d 1055, 1056, 9 NYS3d 639, 640 [2d Dept 2015]; ***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; ***Perez v Roberts***, 91 AD3d 620, 621, 936 NYS2d 259, 260 [2d Dept 2012]; ***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* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; ***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]).

"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 vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Williams v Spencer-Hall***, 113 AD3d 759, 760, 979 NYS2d 157, 159 [2d Dept 2014]). a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of

negligence by providing a nonnegligent explanation for the collision (***Sayyed v Murray***, 109 AD3d 464, 464, 970 NYS2d 279, 281 [2d Dept 2013]).

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" (***Tumminello v City of New York***, 148 AD3d 1084, 1085, 49 NYS3d 739, 741 [2d Dept 2017]; ***Shamah v. Richmond County Ambulance Serv.***, 279 A.D.2d 564, 565, 719 N.Y.S.2d 287; *see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; ***Robayo v. Aghaabdul,*** 109 A.D.3d 892, 893, 971 N.Y.S.2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g.* ***Romero v Al Haag & Son Plumbing & Heating, Inc.***, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014][even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff's vehicle under Vehicle and Traffic Law § 1129[a], defendant's deposition testimony relied upon by plaintiff, itself raised a triable issue of fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord* ***Fernandez v Babylon Mun. Solid Waste***, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; ***Sokolowska v Song***, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

Thus, the 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 A.D.3d 869, 911 N.Y.S.2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 A.D.3d 489, 904 N.Y.S.2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2d Dept 2004]).

Most important, the New York Court of Appeals has recently clarified plaintiff-movant's burden on a motion such as that *sub judice*. The Court has reaffirmed and reminded motion courts that "a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case, holding that plaintiff-movant seeking partial summary judgment on liability in a motor vehicle accident litigation "[t]o be entitled to partial summary judgment, … does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." (***Rodriguez v City of New York***, 31 NY3d 312, 324–25 [2018]; ***Edgerton v City of New York***, 160 AD3d 809, - - - NYS3d - - - [2d Dept 2018]).

I. The Police Report is Inadmissible Evidence

As an initial matter, to the extent that movant relies on the uncertified police accident investigation report, that evidence is in inadmissible form and will not be considered by this Court, nor will it form the basis of any determination in movant's favor. The Second Department has clearly held that conclusory statements as to how the accident occurred

constitute inadmissible hearsay contained in police accident reports (*see* ***Cheul Soo Kang v. Violante***, 60 A.D.3d 991, 992, 877 N.Y.S.2d 354; ***Quaglio v. Tomaselli***, 99 A.D.2d 487, 488, 470 N.Y.S.2d 427; ***Sanchez v. Steenson***, 101 AD3d 982, 983, 957 NYS2d 239, 240 [2d Dept 2012]).

Further, the Appellate Division has artfully summarized the state of evidentiary law concerning police accident reports thusly:

> Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties ... If information contained in a police accident report was not based upon the police officer's personal observations, it may nevertheless be admissible as a business record "if the person giving the police officer the information contained in the report was under a business duty to relate the facts to him [or her]" ... .
>
> [However] If the person giving the police officer the information was not under a business duty to give the statement to the police officer, such information "may be proved by a business record only if the statement qualifies [under some other] hearsay exception, such as an admission" ....
>
> In other words, "each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" ... "The proponent of hearsay evidence must establish the applicability of a hearsay-rule exception"

Memenza v. Cole, 131 AD3d 1020, 1021–22, 16 NYS3d 287, 289 [2d Dept 2015][holding that where police officer had no personal recollection of his accident investigation and was unable to testify as to the source of the information contained in the accident report, report is inadmissible because the source of the information contained therein was unidentifiable and thus unauthenticated: it could not be established whether the source of the information had a duty to make the statement or whether some other hearsay exception applied]; *see also* ***Hazzard v Burrowes***, 95 AD3d 829, 831, 943 NYS2d 213, 214–15 [2d Dept 2012][police accident report was inadmissible, as it was not certified as a business record and the statements by both parties were self-serving, did not fall within any exception to the hearsay rule, and bore upon the ultimate issues of fact to be decided by the jury]; ***Noakes v. Rosa***, 54 AD3d 317, 318, 862 NYS2d 573; ***Casey v. Tierno***, 127 AD2d 727, 728, 512 NYS2d 123).

Here, since movant has failed to offer a certified copy of the report it is not admissible because it is not self-authenticating and otherwise fails to meet the required elements of the business records exception. Moreover, as the opposition notes, none of the operators gave statements to the investigating officer, so its use is of questionable value, particularly in an instance presented such as here where the officer did not obtain and record direct, personal or firsthand eyewitness observations of the occurrence.

II. Triable Issues of Fact Preclude Judgment as a Matter of Law

The motion is also problematic for different reasons. The courts have precluded summary judgment where discovery is incomplete ruling that such a motion may be premature (*see e.g.* ***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 (2d Dept 2006) holding that a motion court properly denies a partial liability summary judgment motion as premature where at least one party's deposition was still outstanding and the parties had previously stipulated to hold that deposition only seven days after the motion was made. Put differently, defendant's argument is that they have been unfairly deprived the opportunity to fully probe whether plaintiff bore any contributing or comparative fault in the resulting rear-end collision, not having the benefit of party depositions (*see* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

However, the Second Department is clear that defendant's mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g.* ***Rodriguez v Farrell***, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; ***Medina v Rodriguez***, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; ***Hill v Ackall***, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]). This is even more so in the wake of recently decided matter in the Court of Appeals making painstakingly clear that New York plaintiffs no longer bear the burden of establishing freedom from comparative fault to be entitled to partial summary judgment on liability (*see e.g.* ***Rodriguez supra.***).

A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." ***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo***., 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment"]). The non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***Family–Friendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226, 227-28 [2d Dept 2014]).

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a

reasonable opportunity for disclosure prior to the making of the motion" (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

CONCLUSION

Here, defendant has offered more than mere hope and speculation in support of the contention that the application is premature. Instead, defendant notes that a *bona fide* dispute exists between defendant operators on whether a sudden stop precipitated the rear-end collisions at issue. At the present moment, no party has been deposed and thus the Court and the parties are without a benefit of all facts concerning potential liability defenses to plaintiff's action. While plaintiff is correct that both defendant operators have given affidavit testimony, given the sharply contrasting descriptions of the occurrence, this Court determines that triable issues of fact predominate, weighing against awarding judgment as a matter of law to any party. Thus, the motion is **denied** as premature under CPLR 3212(f).

The foregoing constitutes the decision and order of this Court.

Dated: December 11, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**