

Pellegrino v Moskal
2018 NY Slip Op 34241(U)
December 11, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 603560/2017
Judge: William G. Ford
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SHORT FORM ORDER

INDEX NO.: 603560/2017

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

PRESENT:

**HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT**

JOSEPH W. PELLEGRINO,

Plaintiff,

-against-

**TAYLOR N. MOSKAL & FRANK M.
MOSKAL,**

Defendants.

**Motion Submit Date: 03/01/18
Mot Seq 001 MG**

**PLAINTIFF'S COUNSEL:
Constantino & Constantino LLP
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Copiague, New York 11726**

**DEFENDANT'S COUNSEL:
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1055 Franklin Ave., Ste 204
Garden City, New York 11530**

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

ORDERED that plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendant is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry on counsel for all parties by overnight mail, return receipt requested forthwith.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Plaintiff brought this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on August 22, 2014 on State Route 414 at or near its intersection with Fall Street in Seneca Falls, New York.

This action commenced with plaintiff electronically filing a summons and complaint against defendants seeking recovery of damages for alleged personal injury premised on their alleged negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries on February 24, 2017. Defendants joined issue filing an answer to the complaint April 6, 2017. Discovery in this matter is ongoing. Presently before the Court is plaintiff's opposed motion for partial summary judgment on liability against the defendants, which is resolved as follows.

In support of the application, plaintiff submits a copy of the pleadings, plaintiff's

affidavit in support and certified and uncertified copies of the police accident investigation report.

Testifying in support of the application for judgment as a matter of law on liability, plaintiff states that on August 22, 2014 he operated a 2011 Harley Davidson motorcycle on State Route 414 at or near its intersection with Fall Street in Seneca Falls, New York. He further testifies that he brought his motorcycle to a stop at the red light controlling the intersection and was stopped in traffic for approximately 30 seconds when he was rear-ended by a 2011 Honda vehicle operated by defendant Taylor Moskal. Because of the rear-end collision, plaintiff states that he was pushed into the intersection.

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]).

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 (*Sayed 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]).

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]; see also *McLaughlin v Lunn*, 137 AD3d 757, 758, 26 NYS3d 338, 339 [2d Dept 2016]) plaintiff established *prima facie* entitlement to judgment as a matter of law on submission of affidavit providing that while completely stopped behind three other vehicles for 5 to 10 seconds at a red light at an intersection, her vehicle was hit in the rear by the defendants' vehicle, sufficient to raise an inference of with respect to the operator of the defendants' vehicle)].

DISCUSSION

Having reviewed his moving papers, the Court finds that plaintiff has met his *prima facie* burden for entitlement to summary judgment on liability based on the submission of her sworn deposition testimony which demonstrates a *prima facie* case of negligence against the defendant. Thus, the burden has shifted to defendants to come forward with a non-negligent explanation for the incident.

Defendants have submitted opposition to plaintiff's motion by way of counsel's affirmation. Within that affirmation, defendants principally argue that plaintiff's motion is a drastic remedy and that credibility assessments or questions of fact preclude judgment as a matter of law for plaintiff on liability at this time.

I. No Triable Issue of Fact Precludes Entry of Summary Judgment for Plaintiff

Defendants oppose plaintiff's motion for summary judgment arguing the existence of

triable questions of fact. However, this opposition exists solely in the form of counsel's affirmation, argument which in and of itself does not constitute competent or admissible evidence. Nowhere in defendant's opposition is any affidavit from defendants or any other tangible piece of evidence supplied. Thus, defendants fail to carry their shifted burden of rebutting plaintiff's *prima facie* case of negligence against them by competent or admissible proof raising a triable question of fact meriting a liability trial and precluding judgment as a matter of law on liability for the plaintiff.

The law in this regard is settled. Defendants' reliance on their attorney's affirmation, without further submission of sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, is insufficient to establish triable issues of fact warranting denial of summary judgment. The Second Department has repeatedly cautioned counsel on this point (*Huerta v Longo*, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; *Collins v Laro Serv. Sys. of New York, Inc.*, 36 AD3d 746, 746-47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; *Cordova v Vinuesa*, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Lastly, defense counsel argues against consideration of the police accident investigation contending it constitutes inadmissible hearsay as an uncertified document, not meeting the business records exception to the hearsay rule. Having reviewed plaintiff's moving papers, despite having included two separate copies, it is clear that the second copy, Exhibit B, is a certified document and thus is self-authenticating and may be considered. However, to the extent that the parties' statements concerning the cause of the collision constitute self-serving hearsay, and that the investigating officer was not a direct eyewitness to the occurrence, they shall not be considered as hearsay-within-hearsay.

The Second Department has previously stated as much holding that "[p]ursuant 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]" (*Memenza v Cole*, 131 AD3d 1020, 1021-22, 16 NYS3d 287, 289 [2d Dept 2015]; accord *Shehab v Powers*, 150 AD3d 918, 919, 54 NYS3d 104, 106 [2d Dept 2017][information in 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", however also holding that information in a police accident report is inadmissible where the information came from witnesses not engaged in the police business in the course of which the memorandum was made, and the information does not qualify under any other hearsay exception]).

Here, the police reports states that defendant advised the investigating officer that "she took her eyes off the road and did not see [plaintiff's motorcycle] stop in front of her, prior to the rear-end collision. Clearly, this constitutes an admission against defendant's interest made directly to the investigating officer who responded to the collision scene pursuant to his official

business duties. Thus, the report is considered a relevant and material evidence in support of plaintiff's application for judgment as a matter of law for liability.

Even without the report, the balance of plaintiff's affidavit testimony suffices permitting plaintiff has to meet the *prima facie* burden for entitlement to summary judgment on liability for a case of negligence against defendants. Further, in opposition to the motion, defendants have failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the rear-end collision here, necessitating a trial on their liability. Accordingly, this Court **grants** plaintiff partial summary judgment on liability against defendants under CPLR 3212.

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