Rotondo v Rankell

2011 NY Slip Op 33213(U)

December 8, 2011

Sup Ct, Nassau County

Docket Number: 10972/10

Judge: Denise L. Sher

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SCAN

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

TRIAL/IAS PART 32
NASSAU COUNTY

ROSEMARIE ROTONDO,

Plaintiff,

- against -

ROBERT J. RANKELL,

Defendant.

Index No.: 10972/10
Motion Seq. No.: 01
Motion Dates: 11/09/11

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 defendant on the issue of liability. Defendant opposes the motion.

This action arises from a motor vehicle accident which occurred on August 15, 2008, at approximately 5:00 p.m., in the eastbound lanes of the Long Island Expressway, approximately one hundred fifty (150) feet west of Powells Lane (between Exits 39 and 40) in the Village of Old Westbury, County of Nassau, State of New York. The accident involved two vehicles, a 2007 Mercedes Benz 350 Convertible owned and operated by plaintiff and a 2007 BMW owned and operated by defendant. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about June 7, 2010. Issue was joined on or about June

29, 2010.

Briefly, it is plaintiff's contention that the accident occurred when, while driving in "stop and go Friday afternoon traffic," her vehicle was slowing down to stop in said traffic and was struck from behind by defendant's vehicle. Plaintiff asserts that the impact to the rear of her vehicle was very heavy and as a result of said impact, her vehicle "flew into the car in front of" her vehicle. The vehicle in front of plaintiff's vehicle then hit another vehicle that was in front of it.

Plaintiff claims that defendant 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. Plaintiff additionally claims that defendant cannot come up with a non-negligent explanation for striking plaintiff's vehicle in the rear, nor any conduct that would constitute any comparative negligence on plaintiff's part.

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*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980), *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.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *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 stopped 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).

Since 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, the operator is therefore required 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 defendant. Therefore, the burden shifts to defendant to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that defendant has failed to meet his burden to demonstrate an issue of fact which precludes summary judgment. Defendant failed to submit any evidence to establish a non-negligent explanation for striking plaintiff's vehicle in the rear. In opposition, defendant submitted only an Attorney's Affirmation which did not dispute any of plaintiff's factual contentions nor set forth any facts or evidence to refute that defendant was negligent as a matter of law. The Court finds that the undisputed facts on the record establish that defendant's vehicle struck plaintiff's vehicle in the rear when plaintiff's vehicle was stopping in traffic. Defendant has offered no excuse nor a non-negligent explanation for the occurrence of the rear-end collision.

Accordingly, in light of defendant's failure to meet his burden and raise any triable issue of fact, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability is hereby **GRANTED**.

All parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on January 17, 2012, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:

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

Dated: Mineola, New York
December 8, 2011

ENTERED
DEC 09 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE