

Damis v Barrella

2011 NY Slip Op 33515(U)

December 15, 2011

Supreme Court, Nassau County

Docket Number: 1061/10

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

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

SHELA DAMIS and JOSEPH G. DAMIS,

Plaintiffs,

- against -

FRANK A. BARRELLA, III, FRANK BARRELLA, JR.,
FRANCES M. BARRELLA and
PATRICIA A. GOLDSTEIN,

Defendants.

TRIAL/IAS PART 32
NASSAU COUNTY

Index No.: 1061/10
Motion Seq. No.: 02
Motion Date: 12/02/11

The following papers have been read on this motion:

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Support	2

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

Counsel for plaintiff on the Counterclaim, Joseph G. Damis, moves, pursuant to CPLR § 3212, for an order granting plaintiff on the Counterclaim, Joseph G. Damis, summary judgment dismissing the Counterclaim on the basis that he did not breach any duty owed to defendant Patricia A. Goldstein (“Goldstein”). Counsel for plaintiffs in the main action filed an Affirmation in Support of the instant motion. No opposition was submitted by defendants.

This action arises from a motor vehicle accident which occurred on October 23, 2008, at approximately 8:00 p.m. The accident involved a 2008 G6 Pontiac owned by plaintiff Shela Damis, in which she was a passenger, and operated by plaintiff Joseph G. Damis, a 2008 Audi

owned and operated by defendant Goldstein and a 2000 Chrysler Concord owned by defendant Frank Barrella, Jr. and operated by defendant Frances M. Barrella. Said accident took place at or near the intersection of Merrick Road and Grand Avenue, Baldwin, County of Nassau, State of New York. Plaintiffs commenced the action by the filing and service of a Summons and an Amended Verified Complaint on or about December 31, 2009. *See* Plaintiffs' Affirmation in Support Exhibit A. On or about February 23, 2010, an Answer with Counterclaim was filed by defendant Goldstein. *See* Plaintiffs' Affirmation in Support Exhibit B. On or about February 7, 2011, a Second Answer with Counterclaim was filed by defendant Goldstein. *See* Plaintiffs' Affirmation in Support Exhibit C. On or about May 6, 2011, a Reply to the Counterclaim was served on behalf of the plaintiff on the Counterclaim, Joseph G. Damis. *See* Plaintiffs' Affirmation in Support Exhibit D.

Briefly, this is an action commenced to recover damages for personal injuries allegedly sustained by plaintiffs as a result of the aforementioned accident which occurred when plaintiffs' vehicle was struck in the rear in a three-vehicle chain collision. Plaintiffs submit that, according to the Examination Before Trial ("EBT") testimony of defendant Frances M. Barrella, she was operating her automobile on Merrick Road at the intersection with Grand Avenue when she brought her vehicle to a stop at a red traffic light on Merrick Road. She added that her vehicle was behind defendant Goldstein's vehicle. She testified that, after the traffic light controlling traffic in her direction turned green, she took her foot off of the brake and her vehicle struck the rear portion of defendant Goldstein's vehicle. *See* Plaintiffs' Affirmation in Support Exhibit E.

Plaintiffs further submit that, according to the EBT testimony of defendant Goldstein, she was operating her automobile on Merrick Road at the intersection with Grand Avenue when she brought her vehicle to a stop at a red traffic light on Merrick Road. She added that her vehicle was behind plaintiffs' vehicle. Her vehicle was stopped for a few seconds when the vehicle

driven by defendant Frances M. Barrella struck her vehicle in the rear. As a result of this impact, her vehicle made contact with the rear of plaintiffs' vehicle.

Plaintiffs both testified at their EBTs that their vehicle was stopped for approximately fifteen to twenty seconds at a red traffic light on Merrick Road at its intersection with Grand Avenue when the rear impact to their vehicle occurred. Plaintiff Joseph G. Damis further testified that, when he looked through his rearview mirror immediately after the accident, he observed that the driver of the Audi was talking on a cell phone.

Plaintiffs submit that the EBT testimony of the parties establishes that plaintiff on the Counterclaim, Joseph G. Damis, did not breach any duty owed to defendant Patricia A. Goldstein and that said testimony establishes that he was not negligent for the happening of the accident. Plaintiffs' vehicle was stopped at a red traffic light when it was struck in the rear.

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 on the Counterclaim, Joseph G. Damis, in his motion, has demonstrated *prima facie* entitlement to summary judgment dismissing the Counterclaim on the basis that he did not breach any duty owed to defendant Goldstein. Therefore, the burden shifts to the defendants 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).

As previously stated, none of the defendants submitted any opposition to the instant motion and therefore have failed to meet their burden to demonstrate an issue of fact which

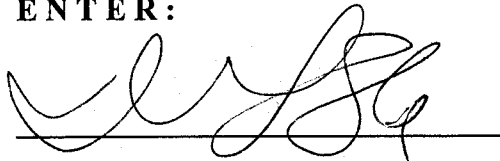
precludes summary judgment.

Accordingly, in light of defendants' failure to meet their burden and raise any triable issue of fact, plaintiff on the Counterclaim Joseph G. Damis' motion, pursuant to CPLR § 3212, for an order granting him summary judgment dismissing the Counterclaim against him on the basis that he did not breach any duty owed to defendant Goldstein 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 February 8, 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 15, 2011

ENTFRED
DEC 20 2011
NASSAU COUNTY
COUNTY CLERK'S OFFICE