Femister v Riccio
2018 NY Slip Op 30458(U)
March 9, 2018
Supreme Court, Suffolk County
Docket Number: 09619/2015
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 09619/2015**

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

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Submit Date: 10/26/17
Motion Seq 001 Mot D

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CAROLINE FEMISTER,

Plaintiff,

-against-

MARIA RICCIO & JOSEPH HILL,

Defendants.

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PLAINTIFF'S COUNSEL:
Law Office of Frank A. Cetero, Esq.
By: Joseph Scalia, Esq.
248 Higbie Lane
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DEFENDANT'S COUNSEL:
Russo & Tambasco Esqs.
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Upon the reading and filing of the following papers on Plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 & relief pursuant to CPLR 3124 to compel discovery or in the alternative CPLR 3126 to strike pleadings in this matter: (1) Plaintiff's Notice of Motion and Affirmation in Support dated September 18, 2017 and supporting papers; (2) Defendant's Affirmation in Opposition dated October 13, 2017 and supporting papers; (3) Plaintiff's Reply Affirmation in Further Support dated October 20 ,2017and now it is

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

ORDERED that plaintiff's motion pursuant to CPLR 3126 to strike defendant's answer for willful and contumacious refusal to provide discovery is **denied in part** to the extent provided below; and it is further

ORDERED that plaintiff's motion pursuant to CPLR 3124 to compel defendant's production and appearance at an examination before trial, and to otherwise provide discovery, is **conditionally granted** to the extent provided below; 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 the defendant by overnight mail.

This motion for partial summary judgment on liability arises from a motor vehicle accident. The collision occurred on September 10, 2013 at or near the exit ramp and entrance to the service road for Exit 44, Route 27 (Sunrise Highway) in the County of Suffolk.

Plaintiff Caroline Femister ("plaintiff" or "movant") brought this personal injury action against defendants Maria Riccio and Joseph Hill ("defendants") seeking money damages for

alleged injuries sustained in the motor vehicle accident.

The action commenced with plaintiff's filing of her summons and complaint on June 1, 2015. Defendants joined issue filing their answer dated August 21, 2015. Plaintiffs amplified her pleadings filing and supplementing her Verified Bill of Particulars on November 11, 2015, August 25, 2016 and August 14, 2017. Discovery in the matter commenced with the Preliminary Conference held on March 8, 2016, directing the parties to be deposed on June 10, 2016. The matter has also appeared on this Court's discovery compliance conference calendar at least ten times, with the next appearance scheduled for March 29, 2018.
Plaintiff gave sworn testimony at an examination before trial on August 25, 2016.

In support of her application seeking partial summary judgment on liability, plaintiff has supplied the Court with a copy of the pleadings, her deposition transcript, an uncertified police accident investigation report, the Preliminary Conference Order, and notices to defendant seeking to schedule his examination before trial.

At her deposition, plaintiff testified that on September 10, 2013, on a dry clear day with clear visibility, she was operating her 2003 white Hyundai Sonata four-door sedan, travelling eastbound on Sunrise Highway in the right-most lane having reached a speed of no higher than 50 MPH. She was heading from jury duty and the Central Islip courthouse with an intended destination of the Home Depot store in Bay Shore, New York. She exited the highway at Exit 44 and was gradually slowing her vehicle as she sought to enter the highway service road, when she felt a heavy impact to the rear of her vehicle. On impact, plaintiff further testified that her vehicle was sent out of control into a spin whereupon she collided with and impacted two other motor vehicles and the concrete median. Post collision, plaintiff testified that she observed that her trunk was pushed in and immediately prior to impact observed the front of defendant's vehicle contacting the rear of her vehicle.

Plaintiff argues that to date, despite having scheduled defendant's deposition on six prior occasions, defendant has not appeared and given testimony at an examination before trial. Thus, in addition to her application for summary judgment, plaintiff also moves for an order pursuant to CPLR 3126 striking defendant's answer for willful and contumacious conduct in violation of this Court's prior discovery orders, or in the alternative an order compelling defendant to appear at deposition and to provide discovery pursuant to CPLR 3124.

I. Summary Judgment

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]).

Where, as here, to prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, *prima facie*, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault (*see* ***Thoma v. Ronai,*** 82 NY2d 736, 737; ***Espinoza v. Coca–Cola Bottling Co. of N.Y., Inc.,*** 121 AD3d 640, 993 NYS2d 721; ***Gorenkoff v. Nagar,*** 120 AD3d 470, 990 NYS2d 604; ***Lu Yuan Yang v. Howsal Cab Corp.,*** 106 AD3d 1055, 1055–1056, 966 NYS2d 167; ***Phillip v D & D Carting Co., Inc.***, 136 AD3d 18, 22, 22 NYS3d 75, 78 [2d Dept 2015]).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***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; ***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* ***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]).

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" (***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 A.D.3d at 671, 974 N.Y.S.2d 563; ***Robayo v. Aghaabdul,*** 109 A.D.3d 892, 893, 971 N.Y.S.2d 317).

This 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]).

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]).

Upon review of all plaintiff's submissions, this Court finds that plaintiffs have met their burden for entitlement to summary judgment on liability based on the submission of Callaghan's deposition testimony, uncontroverted by any sworn testimony from defendants, and has established a *prima facie* case of negligence.

While defendants have opposed plaintiff's motion for summary judgment, that opposition fails to supply this Court with evidence in admissible form sufficient to raise a triable question of fact to preclude a finding as a matter of law on liability for plaintiff and entry of summary judgment. In the first instance, defendants have relied upon their attorney's affirmation, without reliance upon any sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, to oppose the instant motion. The Second Department has repeatedly counsel attorneys that opposition to summary judgment consisting solely of an attorney's affirmation, absent any other reliance on sworn testimony from witnesses with personal knowledge is insufficient to raise a triable question of fact precluding entry of judgment as a matter of law (***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 Vinueza***, 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]).

In accord with all of the foregoing, this Court finds and determines that plaintiff's motion for partial summary judgment as to liability is hereby **granted** since defendant has failed to produce any evidence in admissible form sufficient as to the existence of any triable issue of fact requiring trial.

II. Failure to Provide Discovery

It is well settled that a trial court is vested with broad discretion to supervise the discovery process, and its determinations in that respect will not be disturbed in the absence of

demonstrated abuse (*see* ***United Airlines v. Ogden New York Servs.***, 305 AD2d 239, 240, 761 NYS2d 16; ***Cho v. 401–403 57th St. Realty Corp.***, 300 AD2d 174, 176, 752 NYS2d 55***); Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker***, 1 AD3d 223, 224, 767 NYS2d 228 [1st Dept. 2003]).

Case law within this jurisdiction clearly holds that a motion court, such as this Court, improvidently exercises its discretion in conditionally granting a motion pursuant to CPLR 3126 to strike the defendants' answer where movant's submitted affirmation of good faith failed to comport with the requirements of 22 NYCRR 202.7, failing to refer to any "communications between the parties evincing a diligent effort to resolve the dispute, or indicating good cause why no such communications occurred" (***Murphy v County of Suffolk***, 115 AD3d 820, 820, 982 NYS2d 380 [2d Dept 2014]; ***Mironer v City of New York***, 79 AD3d 1106, 1107, 915 NYS2d 279, 280 [2d Dept 2010]).

Generally speaking, the Second Department has previously determined that plaintiff's failure to provide the Court with the required affirmation of a good faith effort to resolve the discovery dispute could by itself support denial of plaintiff's motion (***Barnes v NYNEX, Inc.***, 274 AD2d 368, 368, 711 NYS2d 893, (Mem)–894 [2d Dept 2000][holding Supreme Court properly denied the plaintiffs motion to compel the defendant to produce certain documents]; ***Deutsch v Grunwald***, 110 AD3d 949, 950, 973 NYS2d 335, 336 [2d Dept 2013][finding that Supreme Court should have denied that branch of the plaintiffs motion which was to strike the answer and counterclaim of the where plaintiff's submission of the affirmation of good faith did not satisfy 22 NYCRR 202.7 for its failure to refer to any communications between the parties that would evince a diligent effort by the plaintiff to resolve the present discovery dispute]; *see also* 22 NYCRR 202.7).

Here, plaintiff has also satisfactorily demonstrated that defendant has, for unexplained reasons, refused to comply with this Court's prior directives to provide routine discovery in his motor vehicle accident litigation.1 However, the presently assembled the motion record clearly demonstrates that plaintiff has failed to provide the Court with an Affirmation of Good Faith as required by 22 NYCRR 202.7 on discovery applications. Thus, plaintiff has failed to carry her burden of demonstrating any substantive communications between counsel at resolving this discovery dispute, before commencing motion practice. Plaintiff does provide the Court with correspondence seeking to schedule defendant's deposition.

Nevertheless, given the Court's prior orders, this Court will not excuse defendant's unexplained and unexcused absences and refusals to cooperation in this litigation. Thus, rather than deny this motion for procedural defects, this Court sees a different, reasonable path to the resolution of the parties' present discovery dispute.

The determination whether to strike a pleading for failure to comply with court-ordered disclosure lies within the sound discretion of the trial court. Public policy strongly favors the resolution of actions on the merits whenever possible' " and " '[t]he striking of a party's pleading

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1 The Court also notes that while defendants have opposed plaintiff's application for summary judgment, nowhere in counsel's affirmation is any argument made concerning that branch of plaintiff's motion concerning striking of the pleadings or to otherwise compel discovery. Thus, this Court considers plaintiff's application as wholly uncontested in this regard.

is a drastic remedy only warranted where there has been a clear showing that the failure to comply with discovery demands was willful and contumacious.' " On an application seeking striking of a party's pleading for refusal to comply with a court's discovery order, movant bears the burden of making a "clear showing" that the failure to comply was willful and contumacious (***Singer v Riskin***, 137 AD3d 999, 1001, 27 NYS3d 209, 211–12 [2d Dept 2016][internal citations omitted]).

The Second Department has previously determined that defendant's nonappearance at a ordered examination before trial standing alone is insufficient to support or warrant granting plaintiff's motion to preclude testimony at trial or to strike a party's pleading (*see* ***Robinson v Rollins Leasing Corp.***, 288 AD2d 367, 367–68, 734 NYS2d 83, 84 [2d Dept 2001][Supreme Court improvidently exercised its discretion in conditionally precluding defendant from producing evidence at trial, rather than conditionally striking her answer]).

Here, the Court determines that given that this motion by plaintiff for an order striking the answer of the defendants is **granted in part and denied in part** as follows:

It is

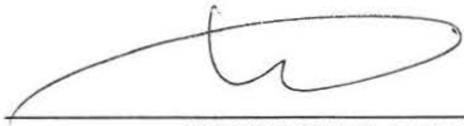
ORDERED that defendant Joseph Hill shall appear at an examination before trial to be held at a location of plaintiff's choosing **on or before April 20, 2018 at 10:00 a.m.**; and it is further

ORDERED that no further or other depositions in this matter, if any, shall be adjourned by counsel **absent leave of this Court on good cause shown**; and it is further

ORDERED that should any party deposition not occur as outlined above, counsel for that party shall have leave to renew an application pursuant to CPLR 3214 and/or CPLR 3126 for appropriate relief.

The foregoing constitutes the decision and order of this Court.

Dated: March 9, 2018
Riverhead, New York



WILLIAM G. FORD, J.S.C.

______ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**