Schurmann v Lincoln
2018 NY Slip Op 34135(U)
November 7, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 620791/2016
Judge: Paul J. Baisley, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

4Short Form Order

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

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

----------X

TINA L. SCHURMANN,

Plaintiff,

-against-

DONNA G. LINCOLN and ABRAHAM LINCOLN, JR.,

Defendants.

----------X

INDEX NO.: 620791/2016
CALENDAR NO.: 002312018MV
MOTION DATE: 4/19/18
MOTION SEQ. NO.: 001 MG

PLAINTIFF'S ATTORNEYS:
Cavalier & Associates, P.C.
144-1 Remington Boulevard
Ronkonkoma, New York 11779

DEFENDANTS' ATTORNEYS:
Cheven, Keely & Hatzis, Esqs.
40 Wall Street, 12th Floor
New York, New York 10005

Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by defendant, dated March 14, 2018; Notice of Cross Motion and supporting papers____; Answering Affidavits and supporting papers by plaintiff, dated March 29, 2018; Replying Affidavits and supporting papers by defendant, dated April 9, 2018 ; Other ___; it is,

ORDERED that the motion (motion sequence no. 001) of plaintiff Tina Schurmann for summary judgment on the issue of liability is granted.

Plaintiff Tina Schurmann commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on December 29, 2013. The accident allegedly occurred when a vehicle owned by defendant Donna Lincoln and operated by defendant Abraham Lincoln, Jr. (hereinafter "Lincoln"), struck the rear of plaintiff's vehicle.

Plaintiff now moves for an order granting summary judgment in her favor on the issue of liability on the ground that defendant's vehicle struck the rear of her vehicle as it was on the roadway. In support of the motion, plaintiff submits copies of the pleadings, the motor vehicle accident report, and the parties' deposition testimony. Defendants oppose the motion, arguing that they are absolved of liability under the emergency doctrine and that issues of fact exist which warrant denial of the motion. In opposition, defendants submit a copy of the accident report and Lincoln's testimony. In response, plaintiff argues that the emergency doctrine is inapplicable here due to defendants' failure to cite an affirmative defense of emergency in their answering papers and because the facts do not warrant such defense.

Plaintiff testified at her deposition that at the time of the subject accident, she was driving her vehicle approximately 20 mph eastbound on Motor Parkway in Commack. She testified that it was raining heavily and that she did not hear any sounds immediately before the impact indicating an accident was about to occur. Plaintiff testified that her foot was on the gas pedal

when defendants' vehicle collided with the rear of her vehicle and that the force of the impact caused her vehicle to move approximately 50 feet. She testified that after the initial impact defendants' vehicle again made contact with the rear of her vehicle. Plaintiff testified that her car came to rest on the side of the road and that a woman who witnessed the accident came to check on her and called 911. She testified that as she sat in her vehicle she saw the driver of the vehicle that hit hers run away from the scene. Plaintiff further testified that the witness spoke with her at the accident scene and relayed how she witnessed the manner in which defendants' vehicle sped by as she drove on the road. She testified that the witness told her that it appeared defendants' vehicle hit a puddle, lost control and then hit plaintiff's vehicle. The accident report contains a sworn statement of Susan Murphy, who witnessed the accident and called the police on plaintiff's behalf.

Lincoln testified at his deposition that he was operating his mother's vehicle eastbound in the left lane on Motor Parkway, Commack on the accident date. He testified that he moved into the right lane on Motor Parkway and operated his vehicle at approximately 40 or 45 mph. Lincoln testified that when he saw plaintiff's vehicle ahead of him, it was going a little slower and approximately one minute later plaintiff's vehicle changed from the left lane into the right lane ahead of his vehicle. He testified that immediately before his vehicle made contact with plaintiff's vehicle, he observed brake lights on plaintiff's vehicle, observed that it stopped suddenly, and that it was at that point his vehicle made contact with her vehicle. Lincoln testified that his vehicle made contact with the rear middle of plaintiff's vehicle, which continued to move after the impact. He further testified that approximately six hours after the accident, the police spoke with him at his home where he was issued multiple tickets. Lincoln testified that one of the tickets was for driving with a suspended license and that the tickets were resolved in court when he entered a guilty plea.

The party moving for summary judgment must make a *prima facie* case of entitlement to judgment as a matter of law, offering sufficient evidence in an admissible form, to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The movant's failure to make this *prima facie* showing requires denial of the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). When the moving party makes this showing, the burden shifts to the opposing party to produce evidentiary proof that establishes the existence of a material issues of fact (*Alvarez, supra; Zuckerman, supra).*

Vehicle and Traffic Law §1129 (a) provides that, "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." A driver has a duty to maintain control of his vehicle so that when approaching another vehicle from the rear, the driver is bound to maintain a reasonably safe rate of speed, and to use reasonable care to

avoid colliding with the other vehicle (*see Tutrani v County of Suffolk*, 64 AD3d 53, 878 NYS2d 412 [2d Dept 2009]; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; *Chepal v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]). Thus, the occurrence of a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*see Hauser v Adamov*, 74 AD3d 1024, 904 NYS2d 102 [2d Dept 2010]; *Arias v Rosario*, 52 AD3d 551, 860 NYS2d 168 [2d Dept 2008]; *Leal v Wolff*, 224 AD2d 392, 638 NYS2d 110 [2d Dept 1996]). 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 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; *Moran v Singh*, 10 AD3d 707, 782 NYS2d 284 [2d Dept 2004]; *Barile v Lazzarini*, 222 AD2d 635, 635 NYS2d 694 [2d Dept 1995]). When operating a vehicle, sudden stops "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" (*see Volpe v Limoncelli*, 74 AD3d 795, 796, 902 NYS2d 152 [2d Dept 2010]).

Under the emergency doctrine, a person faced with a sudden and unexpected circumstance not of his or her own making, which leaves little or no time for contemplation or deliberate judgment, will not be held liable if he or she reacts as a reasonable person would react when faced with a similar situation (*see Rivera v New York City Tr. Auth.*, 77 NY2d 322, 567 NYS2d 629 [1991]; *Freder v Costello Indus., Inc.*, 162 AD3d 984, 80 NYS3d 371 [2d Dept 2018]; *Jablonksi v Jakaitis*, 85 AD3d 969, 926 NYS2d 137 [2d Dept 2011]). The emergency doctrine, however, does not automatically absolve a driver from liability for his or her own conduct (*see Ferrer v Harris*, 55 NY2d 285, 449 NYS2d 162 [1982]). Where the driver's own actions created the emergency, such as failing to "maintain a safe distance between his or her vehicle and the vehicle in front of him or her," then the emergency doctrine will not apply (*see Freder v Costello Industries*, *supra* at 986; *Shehab v Powers*, 150 AD3d 918; 54 NYS3d 103 [2d Dept 2017]). Also, where adverse weather conditions such as rain, sleet or snow are foreseeable, the emergency doctrine is not available as a defense (*see Caristo v Sanzone*, *supra*; *Marsicano v Dealer Storage Corp.*, 8 AD3d 451, 779 NYS2d 102 [2d Dept 2004]).

Here, plaintiff's submissions are sufficient to make a *prima facie* showing of entitlement to summary judgment on the issue of liability (*see Kastritsios v Marcello*, 84 AD3d 1174, 923 NYS2d 863 [2d Dept 2011]; *Bernier v Torres*, 79 AD3d 776, 913 NYS2d 299 [2d Dept 2010]; *Mandel v Benn*, 67 AD3d 746, 889 NYS2d 81 [2d Dept 2009]). The burden, then, shifted to defendants to offer a non-negligent explanation for the accident sufficient to raise a triable issue of fact (*see Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368, 815 NYS2d 736 [2d Dept 2006]; *Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2d Dept 2005]). Given Lincoln's admitted knowledge of the weather, the slower speed of plaintiff's vehicle and the road

conditions, plaintiff's vehicle stopping on the wet roadway cannot be deemed a sudden and unexpected emergency (*see Caristo v Sanzone*, *supra*; *Marsicano v Dealer Storage Corp, supra*). Instead, Lincoln should reasonably have anticipated and been prepared to deal with the situation with which he was confronted (*see Volpe v Limoncelli*, 74 AD3d 795, 902 NYS2d 152; *Faul v Reilly*, 29 AD3d 626, 816 NYS2d 502 [2d Dept 2006]; *Pincus v Cohen*, 198 AD2d 405, 604 NYS2d 139 [2d Dept 1993]). Accordingly, plaintiffs' motion for summary judgment against defendants on the issue of liability is granted.

Dated: November 7, 2018

J.S.C.