Rudolph v Rider
2018 NY Slip Op 34260(U)
December 10, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 608194/2018
Judge: Paul J. Baisley, Jr.
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SHORT FORM ORDER **INDEX NO. 608194/2018**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
Hon. Paul J. Baisley, Jr., J.S.C.

JENNIFER RUDOLPH,

Plaintiff,

-against-

SEAN P. RIDER, ELIZABETH BARRETT and TRACY L. DEFIO,

Defendants.

ORIG. RETURN DATE: October 24, 2018
FINAL RETURN DATE: October 24, 2018
MOT. SEQ. #: 001 MotD

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, uploaded August 6, 2018; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers by defendant Defio , uploaded October 17, 2018; by defendants Rider and Barrett, uploaded October 22, 2018; Replying Affidavits and supporting by plaintiff, uploaded October 22, 2018; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff Jennifer Rudolph for summary judgment in her favor on the issue of liability and dismissing defendants' affirmative defenses of comparative negligence and the emergency doctrine is granted in part and denied in part; and it is further

ORDERED that counsel for the parties are directed to appear for a preliminary conference on January 3, 2019 at 10:00 a.m. at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York.

This is an action to recover damages for injuries allegedly sustained by plaintiff Jennifer Rudolph, as a result of a multi-vehicle accident, which occurred on December 27, 2017, on County Road 111, at or near its intersection with Sunrise Highway, in the Town of Brookhaven, New York. It is alleged that the accident occurred when the vehicle owned by defendant Barrett and operated by defendant Rider struck plaintiff's vehicle in the rear. Defendant Defio's vehicle then struck the vehicle operated by Rider in the rear, which was then propelled forward, causing a second impact with the rear of plaintiff's vehicle.

Plaintiff now moves for summary judgment in her favor on the issue of liability on the grounds that defendants Rider and Defio violated vehicle and Traffic Law § 1129. Plaintiff also moves to dismiss defendants' affirmative defenses that any injuries sustained by her were caused by her comparative negligence, and that the vehicle operators were faced with an emergency situation. Plaintiff submits, in support of the motion, copies of the pleadings, an uncertified police report, and her affidavit. The Court notes that the police report was not considered in its determination of the motion, because it is not certified and there is no indication that the responding officer witnessed the accident (*see* CPLR 4518[a]; *Memenza v Cole*, 131 AD3d 1020, 16 NYS3d 287 [2d Dept 2015]). In opposition, defendant Defio argues that further discovery is necessary before summary judgment may be considered. Also in opposition, defendants Rider and Barrett argue that the collision with Defio's vehicle propelled Rider's vehicle into plaintiff's vehicle. Rider and Barrett submit, in opposition, Rider's affidavit and an order of the Supreme Court of the State of New York, Nassau County, dated July 7, 2016.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see 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]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

The presumption of negligence in rear-end cases arises from the duty of the driver of the following vehicle to keep a safe distance and not collide with the traffic ahead (*see* Vehicle and Traffic Law § 1129 [a]; *Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 43 NYS3d 505 [2d Dept 2016]; *Service v McCoy*, 131 AD3d 1038, 16 NYS2d 283 [2d Dept 2015]). A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, and imposes a duty on that driver to proffer a non-negligent explanation for the collision (*see Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]; *Edgerton v City of New York*, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]; *Binkowitz v Kolb*, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]; *Grimm v Bailey*, 105 AD3d 703, 963 NYS2d 277 [2d Dept 2013]). If the driver of the offending vehicle cannot come forward with evidence to rebut the inference of negligence, the driver of the stopped or stopping vehicle is entitled to summary judgment on the issue of liability (*see Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]). Responsibility for a chain-reaction motor vehicle accident presumptively rests with the rearmost driver (*see De La Cruz v Ock Wee Leong*, 16 AD3d 199, 791 NYS2d 102 [1st Dept 2005]; *Mustafaj v Driscoll*, 5 AD3d 138, 773 NYS2d 26 [1st Dept 2004]).

Plaintiff made a prima facie case of entitlement to summary judgment in her favor on the issue of liability through her affidavit (*see Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]; *Tsyganash v Auto Mall Mgt., Inc.*, 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]; *Niyazov v Hunter EMS, Inc.*, 154 AD3d 954, 63 NYS3d 457 [2d Dept 2017]). In her affidavit, plaintiff stated that her vehicle was

completely stopped at a red light for approximately 30 seconds when it was struck from behind by the vehicle operated by defendant Rider. Plaintiff also stated that after this first impact, the vehicle operated by defendant Rider, which was stopped behind her vehicle, was then struck by the Defio vehicle. The impact between the Rider and Defio vehicles caused the Rider vehicle to again collide with the rear of her vehicle.

"When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (*Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825, 826 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543, 545 [2d Dept 2012]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

Plaintiff made a prima facie case of entitlement to summary judgment in her favor dismissing defendants' first affirmative defenses, as her affidavit establishes that she was not comparatively negligent (*see McLaughlin v Lunn*, 137 AD3d 757, 26 NYS3d 338 [2d Dept 2016]). However, plaintiff failed to make a prima facie case of entitlement to summary judgment in her favor dismissing defendants' affirmative defenses invoking the emergency doctrine (*see Pugh v New York City Hous. Auth.*, 159 AD3d 643, 74 NYS3d 522 [1st Dept]). "[T]he existence of an emergency and the reasonableness of a party's response to it will ordinarily present questions of fact" *(Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004]; *see Flores v Metropolitan Transp. Auth., Long Is. Bus*, 122 AD3d 672, 996 NYS2d 184 [2d Dept 2014]). Plaintiff fails to present any evidence demonstrating that defendants were not faced with an emergency situation (*see Alvarez v Prospect Hosp.*, *supra*).

In opposition, defendant Defio submitted an affirmation of her attorney alleging that further discovery is necessary. This affirmation does not fulfill defendant's duty to provide a non-negligent explanation for the collision (*see Zuckerman v City of New York*, *supra*; *Orellana v Maggies Paratransit Corp.*, 138 AD3d 941, 30 NYS3d 224 [2d Dept 2016]). Further, because defendant Defio has personal knowledge of the relevant facts underlying the accident, the purported need to conduct discovery does not warrant denial of the motion (*see Turner v Butler*, 139 AD3d 715, 32 NYS3d 174 [2d Dept 2016]; *Deleg v Vinci*, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; *Monteleone v Jung Pyo Hong*, 79 AD3d 988, 913 NYS2d 755 [2d Dept 2010]). Defendant Defio, therefore, failed to raise any issues of fact regarding a non-negligent explanation for the collision or plaintiff's comparative negligence.

Defendants Rider and Barrett argue that plaintiff failed to meet her prima facie burden, as she failed to establish her lack of comparative negligence. However, a "plaintiff 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, 324-325, 76 NYS3d 898 [2018]; *see Mastricova v Ruderman*, 164 AD3d 1435, 82 NYS3d 546 [2d Dept 2018]; *Qutar v Sumner*, 164 AD3d 1356, 81 NYS3d 751 [2d Dept 2018]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]; *Edgerton v City of New York*, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). Nevertheless, defendants Rider and Barrett raised a triable

issue of fact as to whether Rider was negligent in the operation of his vehicle (*see Kuris v El Sol Constr. Corp.*, 116 Ad3d 675, 983 NYS2d 580 [2d Dept 2014]).

In chain-reaction accidents, the operator of a vehicle which is stopped or coming to a stop and is propelled into the vehicle in front of it, as a result of being struck from behind, is not negligent inasmuch as the operator's actions cannot be said to be the proximate cause of the injuries resulting from the collision (*see Wooldridge-Solano v Dick*, 143 AD3d 698, 39 NYS3d 41 [2d Dept 2016]; *Chuk Hwa Shin v Correale*, 142 AD3d 518, 36 NYS3d 213 [2d Dept 2016]; *Niosi v Jones*, 133 AD3d 578, 19 NYS3d 550 [2d Dept 2015]; *Vargas v Muhammad Akbar*, 123 AD3d 1016, 999 NYS2d 163 [2d Dept 2014]; *Kuris v El Sol Contr. & Constr. Corp.*, 116 AD3d 675, 983 NYS2d 580 [2d Dept 2014]). "Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a non-negligent explanation" (*Woodridge-Solano v Dick*, *supra* at 699, quoting *Ortiz v Haidar*, 68 AD3d 953, 954, 892 NYS2d 122 [2d Dept 2009]). In his affidavit, defendant Rider stated that his vehicle had been stopped for approximately 30 seconds when it was struck in the rear by Defio's vehicle, and that the force of the impact propelled his vehicle into the rear of plaintiff's vehicle. Thus, as the evidence indicates that Rider did not strike plaintiff's vehicle until after his vehicle was propelled forward by the collision with Defio's vehicle, there is a triable issues as to the proximate cause of plaintiff's injuries. Therefore, the portion of plaintiff's motion seeking summary judgment in her favor on the issue of liability is denied. However, defendants Rider and Barrett failed to submit evidence to raise a triable issue of fact regarding plaintiff's comparative negligence (*see Zuckerman v City of New York*, *supra*).

Accordingly, the branch of plaintiff's motion for summary judgment in her favor on the issue of liability is denied, and the branch of the motion to strike defendants' affirmative defenses of comparative negligence and the emergency doctrine is granted in part and denied in part.

Dated: 12/10/18

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