SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU – IAS/TRIAL PART 22
Present: HON. SHARON M.J. GIANELLI, J.S.C.

_____X

ELUVIA VELA,

Plaintiff,

-against-

DAVID NOWINSKY and
CINDI NOWINSKY,

Defendants.

_____X

Index No. 600458/17

Mot. Seq. No. 02

Papers submitted:

Plaintiff's Notice of Motion and Affirmation _____X
Affirmation in Opposition _____X
Reply Affirmation _____X

Motion by Plaintiff Eluvia Vela, seeking an Order pursuant to CPLR § 3212, granting her summary judgment against Defendants on the issue of liability is GRANTED, as stated herein.

Plaintiff commenced this action by filing a Summons and Verified Complaint on or about January 18, 2017 (*see* Plaintiff's Exhibit "A").

Issue was joined by service of Defendants' Verified Answer on or about February 23, 2017.

Underlying Facts

This personal injury action arises out of a motor vehicle accident that occurred on

April 28, 2016 at approximately 12:45 p.m. on Community Drive at its intersection with the westbound service road of the Long Island Expressway, Nassau County, New York. At the time of occurrence, Plaintiff was driving a Toyota RAV 4 when she was struck in the rear by a BMW 535 being driven by David Nowinsky and owned by Cindi Nowinsky.

At her deposition, Plaintiff testified that prior to the accident she observed that traffic light change to yellow and started stopping her vehicle (*see* Plaintiff's EBT at pp.25-29, annexed as Plaintiff's Exhibit "G"). Plaintiff claims that she was stopped at the light, which had turned red, for approximately 10 seconds before her vehicle was hit in the rear by Defendants' vehicle.

Defendant David Nowinsky, testified at his examination before trial on July 12, 2017 and testified that traffic was medium to light at the time of the accident. He intended to make a left turn onto the westbound service road of the Long Island Expressway from Community Drive (*see* Defendant's EBT at p. 20, annexed as Plaintiff's Exhibit "H"). Defendant testified that he observed other vehicles making a left turn onto the westbound service road prior to the accident and that the light could not have been red (*see* Defendant's EBT at pp. 25-26). He did not observe the traffic light. Prior to reaching this intersection, he had crossed the traffic light at the prior intersection on Community Drive at its intersection with the eastbound service road. He estimated that he had been traveling approximately 20 miles per hour before the accident occurred. Defendant testified that he observed the Plaintiff's vehicle stopping abruptly for the traffic light. He observed the Plaintiff's vehicle for about four and a half seconds as it was stopping before the impact. At the time of impact, his foot was on

the brake, but he did not recall for how long as "these things happen very quickly" (*id.* at p. 28).

Analysis

A party moving for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985], *see also Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action (*see Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986], *see also Zuckerman v. City of New York, supra*).

A rear-end collision with a stopped automobile creates a *prima facie* case of negligence against the driver of the moving vehicle (*D'Agostino v. YRC, Inc.*, 120 A.D.3d 1291 [2d Dept. 2014]; *see also Gleason v. Villegas*, 81 A.D.3d 889 [2d Dept. 2011]). A Defendant can overcome the presumption of negligence by providing a non-negligent explanation for the collision (*D'Agostino v. YRC, Inc., supra*; *see also Perez v. Roberts*, 91 A.D.3d 620 [2d Dept. 2012]; *see also Theo v Vasquez*, 136 A.D.3d 795, 796 [2d Dept. 2016]; *Le Grand v Silberstein*, 123 A.D.3d 773, 774 [2d Dept. 2014]; *Cheow v Cheng Lin Jin*, 121 A.D.3d 1058 [2d Dept. 2014]; *Volpe v Limoncelli*, 74 A.D.3d 795[2d Dept. 2010]). "While a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, '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,'" *Theo v Vasquez, supra* at p. 796, quoting *Brothers v Bartling*, 130 A.D.3d 554 [2d Dept. 2015] [internal quotation marks omitted]; *see Volpe v Limoncelli, supra.*

When a driver approaches another vehicle from the rear, that driver must maintain a reasonably safe rate of speed and control over his or her vehicle, and exercise reasonable care to avoid colliding with the other vehicle (*see* Vehicle and Traffic Law § 1129[a]). This rule imposes upon drivers the duty to be aware of traffic conditions, including vehicle stoppages (*see Pappas v. Opitz*, 262 A.D.2d 471 [2d Dept. 1999]). It has been applied even where the front vehicle stops suddenly (*see LeGrand v. Silberstein*, 123 A.D.3d 773 [2d Dept. 2014]; *Mascitti v. Greene*, 250 A.D.2d 821 [2d Dept. 1998]; *Leal v. Wolff*, 224 A.D.2d 392 [2d Dept. 1996]).

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it, (*Sillman v Twentieth Century Fox Films Corp.*, 3 N.Y.2d 395, 404). A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant (*Alvarez v Prospect Hosp., supra*; *Winegrad v New York Univ. Med. Ctr., supra*; *Fox v Wyeth Labs., Inc.*, 129 A.D.2d 611 [2d Dept. 1987]; *Royal v Brooklyn Union Gas Co.*, 122 A.D.2d 132 [2d Dept. 1986]). Here, Plaintiff has made an adequate *prima facie* showing of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form

(*Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 N.Y.2d 1065). Conclusory statements are insufficient (*Sofsky v Rosenberg*, 163 A.D.2d 240, *aff'd* 76 N.Y.2d 927; *Zuckerman v City of New York*, 49 N.Y.2d 422; *Jim-Mar Corp. v Aquatic Constr., Ltd.*, 195 A.D.2d 868 [3d Dept. 1993]).

Issue finding, rather than issue determination, is the key to summary judgment (*In re Cuttitto Family Trust*, 10 A.D.3d 656 [2d Dept. 2004]; *Greco v Posillico*, 290 A.D.2d 532 [2d Dept. 2002]; *Gniewek v Consolidated Edison Co.*, 271A.D.2d 643 [2d Dept. 2000]. The Court should refrain from making credibility determinations (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 N.Y.2d 338, 341 [1974]; *Surdo v Albany Collision Supply, Inc.*, 8 A.D.3d 655 [2d Dept. 2004]), and the papers should be scrutinized in the light most favorable to the party opposing the motion (*Glover v City of New York*, 298 A.D.2d 428 [2d Dept. 2002]).

Here, in opposition to this application, Defendant relies upon his deposition testimony which reveals that: he was aware there was a traffic light at the intersection; he did not observe it before the impact but assumed it was not red; that he observed Plaintiff's vehicle stopping for four and a half seconds before the impact; and that he struck Plaintiff's vehicle in the rear; he had been traveling at approximately 20 miles per hour before the impact; he did not recall seeing Plaintiff's brake lights; and he testified that the weather conditions were good stating "it was a beautiful day out." Defendant has failed to provide a non-negligent reason under the facts presented to defeat Plaintiff's *prima facie case*.
"A conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient in and of itself, to provide a nonnegligent

explanation (*Gutierrez v. Trillium, USA, LLC*, 111 A.D.3d 669 [2d Dept. 2013] citing *Kastritsios v. Marcell*, 84 A.D.3d 1174 [2d Dept. 2011]; *see also Grimm v. Bailey*, 105 A.D.3d 703 [2d Dept. 2013]; *Hurley v. Cavitolo*, 239 A.D.2d 559 [2d Dept. 1997]).

Accordingly, it is hereby

ORDERED, that Plaintiff's motion seeking an order pursuant to CPLR § 3212, granting her summary judgment on the issue of liability is **GRANTED**.

All requests not specifically addressed herein are denied.

This constitutes the Decision and Order of the Court.

DATED: September 11, 2018
Mineola, New York

HON. SHARON M.J. GIANELLI,
Justice of the Supreme Court

ENTERED
SEP 12 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE