Faber v Mulford
2019 NY Slip Op 34332(U)
September 5, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 602414/2017
Judge: Linda Kevins

SHORT FORM ORDER

INDEX No. 602414/2017
CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:
Hon. LINDA KEVINS
Justice of the Supreme Court

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ALAN G. FABER,

Plaintiff,

-against-

DECISION AND ORDER
MOTION Seq. # 001 - MG

DAWN B. MULFORD,

Defendant.
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The following papers have been read on this Motion by Plaintiff:

Notice of Motion, Affirmation, Affidavit & Exhibits 1
Affirmation in Opposition 2
Reply Affirmation 3

Upon the foregoing papers, it is Ordered that this Motion is decided as follows:

Plaintiff seeks an Order granting summary judgment pursuant to CPLR 3212 in favor of Plaintiff on the issue of liability. Defendant opposes such application.

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained in a multi-vehicle accident that occurred on August 16, 2016, on the eastbound merging lane to the Long Island Expressway approximately 1000 feet east of Willis Avenue, Roslyn, Town of Hempstead, County of Nassau, State of New York. The accident allegedly occurred when a vehicle owned and operated by Defendant Dawn Mulford struck the rear of the vehicle Plaintiff was operating. Issue has been joined.

Plaintiff now moves for an order granting Summary Judgment in his favor on the issue of liability. In support of the motion, Plaintiff submits copies of the pleadings, Bill of Particulars, Response to Combined Demands, Demand for Medical Reports and Photographs. Defendants have submitted an Affidavit in Opposition.

The proponent of a Summary Judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). 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*, 289 AD2d 557 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487 [2d Dept 1987]).

It is well settled that a driver has a duty to maintain control of their 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 [2d Dept 2009]; *Gaeta v Carter*, 6 AD3d 576 [2d Dept 2004]; *Chepal v Meyers*, 306 AD2d 235 [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 [2d Dept 2010]; *Arias v Rosario*, 52 AD3d 551 [2d Dept 2008]; *Leal v Wolff*, 224 AD2d 392 [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 [2d Dept 2010]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489 [2d Dept 2010]; *Moran v Singh*, 10 AD3d 707 [2d Dept 2004]; *Barile v Lazzarini*, 222 AD2d 635 [2d Dept 1995]).

Plaintiff by affidavit alleges, that he, as the owner and operator of a 2014 Ford Taurus, was involved in a motor vehicle accident which occurred on August 16, 2016 at 8:20 p.m. on the eastbound merging lane to the Long Island Expressway, approximately 1000 feet east of Wills Ave., Roslyn, N.Y.. On this date and time the roads were dry, and the sky was overcast. The eastbound Long Island Expressway at the foregoing location consists of an access ramp leading to a merging lane for the Expressway, three lanes of traffic and an HOV lane. Plaintiff further states a concrete retaining wall was to his right.

Plaintiff alleges that while he was in the merging lane and traveling eastbound the vehicle in front of his began to slow down due to traffic conditions and that, as he was slowing his vehicle down in response, he observed the vehicle owned and operated by Defendant approaching the rear of his vehicle at a high rate of speed, colliding with Plaintiff's vehicle. As a consequence of the collision, Plaintiff's vehicle was propelled forward but did not make contact with the vehicle in front of his which had already merged onto the right eastbound lane of the Expressway.

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 [2d Dept 2011]; *Bernier v Torres*, 79 AD3d 776 [2d Dept 2010]; *Mandel v Benn*, 67 AD3d 746 [2d Dept 2009]). The burden, then, shifted to Defendant 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 [2d Dept 2006]; *Rainford v Han*, 18 AD3d 638 [2d Dept 2005]).

With respect to Defendant's burden, "where a defendant fails to submit either his/her own affidavit, or that of another person with personal knowledge, in opposition to a motion for summary judgment on the issue of liability, the defendant has failed to raise a triable issue of fact, and a complete determination of the liability of both parties is appropriate." *Russo v Dement*, 61 Misc 3d 855 [Sup Ct 2018]. "'[A] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence' (*Lopez v. Dobbins*, 164 A.D.3d 776, 777, 79 N.Y.S.3d 566; *see Arslan v. Costello*, 164 A.D.3d 1408, 1409, 84 N.Y.S.3d 229)." *Morgan v Flippen*, 173 AD3d 735 [2d Dept 2019]. Here, Defendant in opposition, raises no triable issue of fact. Defendant, by attorney affirmation, sets forth conclusory and unsubstantiated allegations which fail to provide evidence providing a reason for Defendant's conduct or raise an issue of fact whether Plaintiff was comparatively at fault. *Id.* (*citing Lopez v Dobbins*, 164 AD3d 776 [2d Dept 2018]). Thus, defendants have not met their burden.

With respect to Defendant's contention that Plaintiff's motion is premature because depositions have not yet been conducted to establish whether Plaintiff has any comparative negligence, this issue is insufficient to deny the instant motion since "[t]o be entitled to partial summary judgment 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 [2018]" [T]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v WS Distrib., Inc.*, 34 AD3d 759 [2d Dept 2006]).

In opposition, Defendant has not provided a non-negligent explanation for failure to avoid impact with the rear of Plaintiff's vehicle. Accordingly, the Plaintiff's Motion for Summary Judgment in favor of Plaintiff on the issue of liability is granted.

Accordingly, it is hereby

ORDERED, that Plaintiff's Motion for partial Summary Judgment on the issue of liability is **GRANTED**; and it is further

ORDERED, that all Parties' Counsel and if no counsel then the Parties, are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, on **Tuesday, OCTOBER 8, 2019, at 9:30 A.M.,** for a conference; and it is further

ORDERED, that non-appearance will not be countenanced by the Court and may subject

the non-appearing Party to one or more of the sanctions pursuant to 22 NYCRR §§ 202.27 and 130-2; and it is further

ORDERED, that at the call of the calendar, if any Party does not appear or proceed or announce their readiness to proceed, the Court shall consider an Order pursuant to **22 NYCRR § 202.27 as follows: (a) if the Plaintiff appears but the Defendant does not, the Court shall consider granting judgment by default and order an inquest; (b) if the defendant appears but the Plaintiff does not, the Court shall consider a dismissal of the action and order a severance of counterclaims; and (c) if no Party appears, the Court shall make such order as appears just**; and it is further

ORDERED, that the Parties and their Counsel, if any, comply with Part 29 Court Rules, https://www.nycourts.gov/courts/10jd/suffolk/SC_Part_Rules/Kevins.pdf; and it is further

ORDERED, that Plaintiff(s) is/are directed to immediately serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk; and it is further

ORDERED, that upon Entry of this Order by the Suffolk County Clerk, Plaintiff(s) is/are directed to serve, forthwith, a copy of this Order with Notice of Entry upon all parties and to promptly file the Affidavit(s) of Service with the Clerk of the Court.

Any requested relief not specifically granted herein is hereby DENIED.

This constitutes the Decision and Order of this Court.

Dated: September 5, 2019
Riverhead, New York

HON. LINDA KEVINS
J.S.C.

_____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**