Sims v Oberhausen
2019 NY Slip Op 34680(U)
November 1, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 604065/2019
Judge: Paul J. Baisley, Jr.

SHORT FORM ORDER **INDEX NO. 604065/2019**

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

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

CALEB B. SIMS and ROBERT A. VIOLA,

Plaintiffs,

-against-

PATRICIA A. OBERHAUSEN, DONNA A. BARBER, and KRISTA N. MUYTERS,

Defendants.

ORIG. RETURN DATE: August 20, 2019
FINAL RETURN DATE: September 20, 2019
MOT. SEQ. #: 001 MotD
MOT. SEQ. #: 002 XMG

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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 plaintiffs, dated July 10, 2019; Notice of Cross Motion and supporting papers by defendant Krista Muyters, dated August 15, 2019; Answering Affidavits and supporting papers by defendant Patricia Oberhausen, dated August 5, 2019; by defendant Krista Muyters, dated August 6, 2019; by defendant Donna Barber, dated August 13, 2019; by defendant Patricia Oberhausen, dated August 19, 2019; Replying Affidavits and supporting papers by defendant Krista Muyters, August 23, 2019; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiffs for summary judgment in their favor on the issue of defendants' negligence and for a determination as to their comparative fault is granted to the extent set forth therein, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Krista Muyters for summary judgment dismissing the complaint and cross claims against her is granted; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference at 10:00 a.m. on December 4, 2019, 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 plaintiffs Caleb Sims and Robert Viola, as a result of a multi-vehicle accident, which occurred on June 19, 2018, on the Long Island Expressway (Expressway), in the Town of Smithtown, New York. The accidentally allegedly occurred when the vehicle owned and operated by defendant Patricia Oberhausen struck the rear of the vehicle owned and operated by defendant Krista Muyters, which was then propelled forward into the vehicle owned and operated by Sims, in which Viola was a passenger. It is alleged that Oberhausen's vehicle also struck the rear of the vehicle owned and operated by defendant Donna Barber, and that Barber attempted to avoid the collision, but failed to do so, by moving her vehicle to the left, causing her vehicle to strike the center median of the Expressway.

Plaintiffs now move for summary judgment on the issue of defendants' negligence and for a determination as to their comparative fault, contending that plaintiff driver's vehicle was struck in the rear by Muyters' vehicle. In support of their motion, plaintiffs submit, among other things, an affidavit of plaintiff passenger, in which he contends that he was a passenger in plaintiff driver's vehicle when it was struck in the rear by Muyters' vehicle.

In opposition to plaintiffs' motion for summary judgment, Oberhausen argues, inter alia, that the motion is premature because the parties have not been deposed. Barber opposes plaintiffs' motion, arguing that she did not cause the subject accident, and submits her affidavit. Muyters opposes plaintiffs' motion for summary judgment on the grounds that she did not operate her vehicle in a negligent manner, and that she is free from comparative fault. Muyters submits her affidavit in support of her opposition.

Muyters cross-moves for summary judgment dismissing the complaint and cross claims against her on the same grounds asserted in her opposition to plaintiffs' motion for summary judgment. She contends that her vehicle was slowing down for traffic when it was struck in the rear by Oberhausen's vehicle, which caused Muyters' vehicle to be propelled forward into plaintiffs' vehicle. In support of her cross motion, she submits her affidavit and the affidavits of Barber and plaintiff passenger. Oberhausen opposes the cross motion, arguing that triable issues of fact remain as to Muyters' negligence.

In her affidavit, Muyters alleges that her vehicle was in the process of slowing down for traffic, when it was struck in the rear by Oberhausen's vehicle, and that impact caused her vehicle to propel forward into the rear of plaintiffs' vehicle. She states that when her vehicle was struck by Oberhausen's vehicle, her vehicle's rate of speed did not exceed 15 miles per hour, and her vehicle was approximately 10 feet away from plaintiffs' vehicle. She further states that she did not hear any horns, brakes, or screeching tires at the time of the subject accident.

In Barber's affidavit, she alleges that there was heavy traffic at the time of the collision, and that her vehicle was struck in the rear by Oberhausen's vehicle. She contends that she observed Oberhausen's vehicle in her rear-view mirror prior to the impact, and that she attempted to avoid the collision by moving her vehicle to the left, out of its path, but did not have sufficient warning or time to do so. She further states

Schwabenbauer, 124 AD3d 574, 1 NYS3d 276 [2d Dept 2015]; *Gallo v Jairath*, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]; *Rodriguez v Farrell*, 115 AD3d 929, 983 NYS2d 68 [2d Dept 2014]).

A driver of an automobile approaching another automobile from the rear 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 Bloechle v Heritage Catering, Ltd.*, *supra*; *Schmertzler v Lease Plan U.S.A., Inc.*, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]; *Gallo v Jairath*, *supra*; *see also* Vehicle and Traffic Law § 1129[a]). A rear-end collision establishes a prima facie case of negligence on the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Batashvili v Veliz-Palacios*, 170 AD3d 791, 96 NYS3d 146 [2d Dept 2019]; *Russell v J.L. Femia Landscape Servs., Inc.*, 161 AD3d 1119, 77 NYS3d 121 [2d Dept 2018]; *Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 43 NYS3d 505 [2d Dept 2016]). Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation (*see Mihalatos v Barnett*, 175 AD3d 492, 106 NYS3d 165 [2d Dept 2019]; *Pomerantsev v Kodinsky*, 156 AD3d 656, 64 NYS3d 567 [2d Dept 2017]; *Williams v Sala*, 152 AD3d 729, 59 NYS3d 108 [2d Dept 2017]). In a chain-collision accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that his or her vehicle was struck from behind by the rear vehicle and propelled into the lead vehicle (*see Skura v Wojtlowski*, 165 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]; *Niosi v Jones*, 133 AD3d 578, 19 NYS3d 550 [2d Dept 2015]; *Kuris v El Sol Contr. & Constr. Corp.*, 116 AD3d 675, 983 NYS2d 580 [2d Dept 2014]). Further, in a chain-reaction collision, responsibility presumptively rests with the rearmost driver (*see Chang v Rodriguez*, 57 AD3d 295, 869 NYS2d 427 [1st Dept 2008]; *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]).

Defendant Muyters established prima facie entitlement to summary dismissing the complaint and cross claims against. Muyters' submissions demonstrated, prima facie, that her stopping vehicle was propelled forward into the rear of plaintiffs' vehicle after her vehicle was struck in the rear by Oberhausen's vehicle, and that she was not at fault in the happening of subject the accident (*see Skura v Wojtlowski*, *supra*; *Pomerantsev v Kodinsky*, *supra*; *Napolitano v Galletta*, 85 AD3d 881, 925 NYS2d 163 [2d Dept 2011]; *Ortiz v Haidar*, 68 AD3d 953, 892 NYS2d 122 [2d Dept 2009]; *Katz v Masada II Car & Limo Serv., Inc.*, 43 AD3d 876, 841 NYS2d 370 [2d Dept 2007]). In her affidavit, Muyters contends that her vehicle was in the process of stopping for traffic, traveling at a rate of speed of no more than 15 miles per hour, and that it was approximately 10 feet away from plaintiff driver's vehicle, when it was struck in the rear by Oberhausen's vehicle. In opposition, the opposing parties failed to raise a triable issue of fact (*see Pomerantsev v Kodinsky*, *supra*; *Ortiz v Haidar*, *supra*; *Katz v Masada II Car & Limo Serv., Inc.*, *supra*).

With regard to plaintiffs' motion for summary judgment, they established their prima facie entitlement to summary judgment on the issue of defendant Oberhausen's negligence by demonstrating, prima facie, that her vehicle struck the rear of Muyters' vehicle, which thereby caused the subject chain-reaction accident (*see Warner v Kain*, 162 AD3d 1384, 79 NYS3d 362 [3d Dept 2018]; *Gustke v Nickerson*, 159 AD3d 1573, 72 NYS3d 733 [4th Dept 2018], *lv denied* 162 AD3d 1604, 74 NYS3d 923 [4th Dept 2018]; *lv dismissed and denied* 32 NY3d 1048, 88 NYS3d 403 [2018]). In her verified answer, Oberhausen admits that her vehicle made contact with the rear of Muyters' vehicle. Facts admitted in a party's pleadings

that her vehicle was propelled forward, and to the left, into the cement center median of the Expressway, and that the front of her vehicle never came into contact with another vehicle. Her vehicle allegedly came to a rest facing the center median, more than 200 feet behind the other vehicles involved in the subject accident.

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, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr., supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp., supra*; *Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make a prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr., supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Vega v Restani Constr. Corp., supra*).

Although a plaintiff is no longer required to show freedom from comparative fault to establish his or her prima facie entitlement to judgment as a matter of law on the issue of negligence (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *see Liu v Lowe*, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; *Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; *Catanzaro v Edery*, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; *Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]), a defendant moving for summary judgment in a negligence action has the burden of demonstrating, prima facie, that he or she was not at fault in the happening of subject collision (*see Richardson v Cablevision Sys. Corp.*, 173 AD3d 1083, 104 NYS3d 655 [2d Dept 2019]; *Green v Masterson*, 172 AD3d 826, 98 NYS3d 443 [2d Dept 2019]; *Miron v Pappas*, 161 AD3d 1063, 77 NYS3d 163 [2d Dept 2018]). The issue of a plaintiff's comparative negligence may, however, be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Higashi v M & R Scarsdale Rest., LLC*, ___ AD3d ___, 2019 NY Slip Op 07240 [2d Dept 2019]; *Wray v Galella*, 172 AD3d 1446, 101 NYS3d 401 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). Here, the Court deems the plaintiffs' application for a declaration that they are free from comparative negligence, in effect, as a request for summary judgment dismissing defendants' affirmative defense of comparative negligence. As a motor vehicle accident can have more than one proximate cause (*see Richardson v Cablevision Sys. Corp., supra*; *Enriquez v Joseph*, 169 AD3d 1008, 94 NYS3d 599 [2d Dept 2019]; *Matias v Bello*, 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]), the issue of comparative fault is generally a question for the fact finder to determine (*see Vuksanaj v Abbott*, 159 AD3d 1031, 73 NYS3d 224 [2d Dept 2018]; *Ortiz v Welna*, 152 AD3d 709, 58 NYS3d 556 [2d Dept 2017]; *Twizer v Lavi*, 140 AD3d 736, 33 NYS3d 351 [2d Dept 2016]). Further, a nonculpable passenger's right to summary judgment on the issue of liability is not restricted by possible issues of comparative fault between the drivers involved in the subject collision (*see Choi v*

constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made (*see DeSouza v Khan*, 128 AD3d 756, 11 NYS3d 168 [2d Dept 2015]; *Zegarowicz v Ripatti*, 77 AD3d 650, 911 NYS2d 69 [2d Dept 2010]). Plaintiffs' submissions were also sufficient to establish, prima facie, that plaintiff driver was not at fault in the happening of the accident (*see Service v McCoy*, 131 AD3d 1038, 16 NYS3d 283 [2d Dept 2015]; *Strickland v Tirino*, 99 AD3d 888, 952 NYS2d 599 [2d Dept 2012]), and that Viola was merely an innocent passenger and did not contribute to the happening of the accident (*see Mata v Road Masters Leasing Corp.*, 128 AD3d 780, 10 NYS3d 124 [2d Dept 2015]; *Choi v Schwabenbauer*, *supra*; *Rodriguez v Farrell*, *supra*).

In opposition, Oberhausen failed to raise a triable issue with respect to her negligence (*see Montalvo v Cedeno*, 170 AD3d 1166, 96 NYS3d 638 [2d Dept 2019]; *Binkowitz v Kolb*, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]; *Service v McCoy*, *supra*), or with respect to plaintiff driver's comparative fault (*see Smith v Fuentes*, 158 AD3d 731, 68 NYS3d 739 [2d Dept 2018]; *Service v McCoy*, *supra*; *Rose v Paulino*, 123 AD3d 899, 999 NYS2d 141 [2d Dept 2014]). Contrary to Oberhausen's contention, plaintiffs' motion was not premature, as she failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of plaintiffs (*see* CPLR 3212[f]; *Gaston v Vertsberger*, ___ AD3d ___, 2019 NY Slip Op 07384 [2d Dept 2019]; *Harrinarain v Sisters of St. Joseph*, 173 AD3d 983, 104 NYS3d 661 [2d Dept 2019]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the plaintiffs' motion (*see Batashvili v Veliz-Palacios*, *supra*; *Figueroa v MTLR Corp.*, 157 AD3d 861, 69 NYS3d 359 [2d Dept 2018]; *Niyazov v Hunter EMS, Inc.*, 154 AD3d 954, 63 NYS3d 457 [2d Dept 2017]).

As to defendant Barber, plaintiffs failed to establish their prima facie entitlement to summary judgement on the issue of her negligence (*see Derieux v Apollo N.Y. City Ambulette, Inc.*, 131 AD3d 504, 14 NYS3d 712 [2d Dept 2015]; *Gallo v Jairath*, *supra*; *Wilson v Wei Cheng*, 98 AD3d 971, 950 NYS2d 574 [2d Dept 2012]). Plaintiffs failed to submit evidence regarding her alleged negligence in causing or contributing to the accident (*see Derieux v Apollo N.Y. City Ambulette, Inc.*, *supra*; *Gallo v Jairath*, *supra*). Therefore, the Court need not consider the adequacy of the papers submitted in opposition to that branch of plaintiffs' motion (*see Winegrad v New York Univ. Med. Ctr.*, *supra*).

Accordingly, plaintiffs' motion for summary judgment in their favor as to defendants' negligence and for a determination as to their comparative fault is granted to the extent set forth therein, and is otherwise denied, and the cross motion for summary judgment dismissing the complaint and cross claims against her is granted.

Dated: 11/1/19

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