

**Poldino v Wolf**

2019 NY Slip Op 34687(U)

November 1, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 604828-2019

Judge: David T. Reilly

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**SUPREME COURT OF THE STATE OF NEW YORK  
I.A.S. PART 30 SUFFOLK COUNTY**

PRESENT:  
HON. DAVID T. REILLY, JSC

INDEX NO.: 604828-2019

\_\_\_\_\_  
JAMES POLDINO and BARBARA POLDINO,

Plaintiffs,

-against-

EMILY WOLF and DAMIAN WOLF,

Defendants.

Gruenberg Kelly Della  
Attorneys for Plaintiffs  
700 Koehler Avenue  
Ronkonkoma, NY 11779

Law Offices of Jennifer S. Adams  
Attorneys for Defendants  
One Executive Boulevard, Suite 280  
Yonkers, NY 10701

MOTION DATE: 05/23/19  
SUBMITTED: 08/14/19  
MOTION SEQ. NO.: 1  
MOTION: MG

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff dated May 2, 2019 and supporting papers; (2) Defendant's Affirmation in Opposition dated August 7, 2019; and (3) Plaintiff's Reply Affirmation dated August 12, 2019 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

**ORDERED** that plaintiffs' motion seeking an Order granting them partial summary judgment as to the issue of liability pursuant to Civil Practice Law and Rules (CPLR) §3212 is granted.

This action arises from a three-car motor vehicle accident which occurred on July 4, 2017 at approximately 10:55 a.m. on Montauk Highway near the intersection of S. 3<sup>rd</sup> Street in the Village of Lindenhurst, Suffolk County, NY. According to the plaintiff James Poldino, he was traveling in a westerly direction on Montauk Highway when traffic in front of him came to a complete stop. He also brought his vehicle to a full stop when, after approximately five seconds, his vehicle was struck in the rear by a vehicle driven by defendant Emily Wolf and owned by defendant Damian Wolf. James Poldino avers that his vehicle was propelled forward into another vehicle driven by non-party Sonya B. Goodings. The collision allegedly caused the plaintiff James Poldino to suffer serious personal injuries. Plaintiff Barbara Poldino has asserted derivative claims.

Plaintiffs now seek an Order granting them summary judgment as to the issue of liability. They submit, among other things, a copy of the pleadings, James Poldino's affidavit in support and a copy of a certified police accident report.

Defendants have submitted opposition to the motion, consisting only of an affirmation by counsel, wherein they claim that the plaintiffs' motion is premature as they have not yet had the opportunity to depose the plaintiffs. Although defendants also submitted an amended affirmation in opposition which includes an affidavit of defendant Emily Wolf, same was submitted approximately nine days after the instant motion was marked "fully submitted" without any excuse offered for their lateness. As such, in the exercise of discretion, the amended affirmation in opposition and supporting papers were not considered by the Court (*see Rivers v Butterhill Realty*, 145 AD2d 709 [1988]).

It is beyond cavil that the 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 fact (*see Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v. City of New York*, 49 NY2d 557 [1980]). The failure to make such a *prima facie* showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, *supra.*, citing *Zuckerman v. City of New York*, *supra.*).

The law is also well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Benincasa v. Garrubo*, 141 AD2d 636 [1988]). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v. Schefman*, 121 AD2d 295 [1986]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v. Strong Memorial Hospital*, 98 AD2d 976 [1983]).

When a driver approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed, to maintain control of his or her vehicle, and to use reasonable care to avoid colliding with the other vehicle (*see Martinez v. Martinez*, 93 AD3d 767 [2012]). 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 Giangrasso v. Callahan*, 87 AD3d 521 [2011]). 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 [2010]).

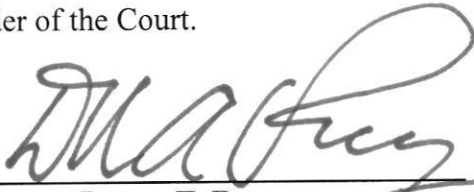
Here, plaintiffs' submissions are sufficient to make a *prima facie* showing of entitlement to summary judgment on the issue of liability (*see Kastritsios v Marcello*, 84 AD3d 1174 [2011]; *Bernier v Torres*, 79 AD3d 776 [2010]). The burden, then, shifted to defendants to offer a non-negligent explanation for the accident sufficient to raise a triable issue of fact (*see Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368 [2006]).

The Court finds that 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 motion (*Kimyagarov v. Nixon Taxi Corp.*, 45 AD3d 736 [2007]). The Court has also examined the defendants' remaining contentions and finds them to be without merit.

Accordingly, the plaintiff's motion is granted.

This shall constitute the decision and Order of the Court.

Dated: November 1, 2019  
Riverhead, New York

  
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DAVID T. REILLY  
JUSTICE OF THE SUPREME COURT

\_\_\_\_\_ FINAL DISPOSITION

X  NON-FINAL DISPOSITION