Pelton v Lacorata
2019 NY Slip Op 34719(U)
December 4, 2019
Supreme Court, Putnam County
Docket Number: Index No. 500914/2019
Judge: Victor G. Grossman
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To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF PUTNAM

---X

MARYANN PELTON and NICHOLAS PELTON,

Plaintiffs,

-against -

TYLER LACORATA and TRACY MCKAY,

Defendants.

---X

DECISION & ORDER

Index No. 500914/2019
Sequence No. 1
Motion Date: 10/16/19

GROSSMAN, J.S.C.

The following papers, numbered 1 to 8, were considered in connection with Plaintiff's Notice of Motion, dated September 19, 2019, for an Order, granting partial summary judgment on the issue of liability against Defendants pursuant to CPLR §3212.

PAPERS	**NUMBERED**
Notice of Motion/Affirmation in Support/Exhs. 1-4	1-6
Affirmation in Opposition	7
Reply Affirmation	8

On October 25, 2017, at approximately 8:00 a.m., Plaintiff Maryann Pelton was involved in an automobile accident with another vehicle, operated by Defendant Tyler Lacorata, and owned by Defendant Tracy McKay. Plaintiff's vehicle was stopped in the right lane of southbound Interstate 684 in Westchester County because of traffic stopped ahead of her when she was struck from the rear by Defendants' automobile. As a result, Ms. Pelton was injured, and her husband, Nicholas Pelton, is seeking loss of consortium.

Plaintiffs commenced this on June 12, 2019. Defendants interposed an Answer on September 3, 2019.

Plaintiffs move for summary judgment on the issue of liability. In support of their motion, Plaintiffs submitted: (1) the Summons and Verified Complaint; (2) Defendants' Answer; (3) the police accident report; and (4) Maryann Pelton's affidavit (Notice of Motion; Exhs. 1-4).

In opposition, Defendants proffer an affirmation from their counsel.

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of facts are raised and cannot be resolved on conflicting affidavits (*see Millerton Agway Coop. Inc. v Briarcliff Farms, Inc.*, 17 NY2d 57, 61 [1966]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). Initially, "the proponent... must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact." However, once a movant makes a sufficient showing, "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.*, 68 NY2d 320, 324 [1986]). Where the moving papers are insufficient, the court need not consider the sufficiency of the opposing papers (*id.*; *see also Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659 [2d Dept 1999]).

"'The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway'" (*Pomerantsev v Kodinsky*, 156 AD3d 656 [2d Dept 2017]), quoting Vehicle and Traffic Law §1129[a]). "Hence, '[a] rear-end collision with a stopped

vehicle creates a prima facie case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision'" (*Pomerantsev, supra*, quoting *Hauser v Adamov*, 74 AD3d 1024, 1025 [2d Dept 2010]); *see also Skura v Wojtlowski*, 165 AD3d 1196, 1198 [2d Dept 2018]).

Here, Plaintiffs submitted Ms. Pelton's affidavit in which she explained that she was traveling southbound on Interstate 684 in Westchester County, that there were no other occupants in her car, and that there were no obstructions on the highway or in her vehicle preventing her from observing traffic (Notice of Motion; Exh. 4 at ¶3). Ms. Pelton stated that she "was in the right lane of southbound Interstate 684 when I came to a complete stop because of traffic stopped in front of me. As my vehicle remained at a complete stop, my vehicle was struck from the rear suddenly and without warning" (Notice of Motion; Exh. 4 at ¶4). Ms. Pelton also stated that "[a]s my vehicle was at a complete stop for stopped traffic ahead of me, there was nothing I could do to avoid the collision" (Notice of Motion; Exh. 4 at ¶5).

In opposition to Plaintiffs' prima facie showing of their entitlement to judgment on liability as a matter of law, Defendants failed to demonstrate the existence of a triable issue of fact. There is no factual evidence proffered in support of their opposition. In fact, Defendants did not even submit their own affidavits. Furthermore, defense counsel's affirmation is worthless and cannot be relied upon to meet Defendants' burden (*see Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Moreover, while Defendants argue that this motion should be denied as premature, it is well settled that "[t]o defeat a motion for summary judgment based on outstanding discovery, it is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery

might lead to relevant evidence or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party" (*Rodriguez v Gutierrez*, 138 AD3d 964, 968 [2d Dept 2016]). "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'" (*Rodriguez v Gutierrez*, *supra*, quoting *Suero-Sosa v Cardona*, 112 AD3d 706, 708 [2d Dept 2013] [internal quotation marks omitted]). Here, Defendants failed to demonstrate how further discovery may reveal or lead to additional relevant evidence.

Plaintiffs are also seeking dismissal of Defendants' affirmative defense of comparative negligence. "Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability * * * the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved fro summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v Nisanov*, 162 AD3d 804, 808 [2d Dept 2018], citing *Rodriguez v City of New York*, 31 NY3d 312, 323-325 [2018]).

Here, as stated above, Ms. Pelton stated that she was struck in the rear while she was completely stopped. Thus, Plaintiffs established a prima facie case that Ms. Pelton was not at fault in the happening of the accident (*Poon v Nisanov*, *supra*, citing *Gonzalez v Alvarez*, 151 AD3d 814, 815 [2d Dept 2017]). In opposition, Defendants failed to raise a triable issue of fact. As such, the Court dismisses the affirmative defense of comparative negligence.

Accordingly, it is hereby

ORDERED that Plaintiffs' motion is granted and partial summary judgment is awarded to Plaintiffs on the issue of liability against Defendants; and it is further

ORDERED that Defendants' affirmative defense of comparative negligence is stricken from Defendants' Answer; and it is further

ORDERED that the parties are to appear before the undersigned on Thursday, December 19, 2019 at 9:30 a.m. for a preliminary conference. No per diem counsel, and no adjournments will be permitted unless good cause shown.

The foregoing constitutes the Decision and Order of the Court.

Dated: Carmel, New York
December 4, 2019

HON. VICTOR G. GROSSMAN, J.S.C.

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