Perschbach v Daw
2020 NY Slip Op 35104(U)
January 10, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 613675/2019
Judge: Paul J. Baisley, Jr.

SHORT FORM ORDER **INDEX NO. 613675/2019**

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

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

EDWARD PERSCHBACH,

Plaintiff,

-against-

GEORGE W. DAW and ROBERT A. DOUGLAS,

Defendants.

ORIG. RETURN DATE: November 8, 2019
FINAL RETURN DATE: November 22, 2019
MOT. SEQ. #: 001 MotD

ORIG. RETURN DATE: November 22, 2019
FINAL RETURN DATE: November 22, 2019
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 plaintiff, dated October 7, 2019; Notice of Cross Motion and supporting papers by defendant Robert Douglas, dated November 13, 2019; Answering Affidavits and supporting papers defendant George Daw, dated November 13, 2019; defendant George Daw, dated November 14, 2019; Replying Affidavits and supporting papers by defendant Robert Douglas, dated November 18, 2019; by plaintiff, dated November 21, 2019; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by plaintiff for, inter alia, summary judgment in his favor on the issue of defendants' negligence and for an order striking defendants' affirmative defense of comparative negligence is granted to the extent set forth therein, and is otherwise denied; and it is further

ORDERED that the cross motion by defendant Robert Douglas for summary judgment dismissing the complaint against him is granted; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference at 10:00 a.m. on January 27, 2020, 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 plaintiff Edward Perschbach as a result of a multi-vehicle accident, which occurred on March 27, 2017, on westbound Route 495, at or

near its intersection with Exit 57, in Islip, New York. The accident allegedly occurred when a vehicle owned and operated by defendant George Daw struck a vehicle owned and operated by defendant Robert Douglas in the rear, which was then propelled forward into plaintiff's vehicle.

Plaintiff now moves for summary judgment in his favor on the issue of defendants' negligence and for an order striking defendants' affirmative defense of comparative negligence. He contends that his vehicle was stopped for traffic for at least 60 seconds when it was struck in the rear by Douglas' vehicle. He also contends that Douglas' vehicle was struck in the rear by Daw's vehicle at the time of the accident. In support of his motion, plaintiff submits, among other things, his affidavit. In opposition to plaintiff's motion, Daw agues that triable issues of fact exist as to which party was at fault in the happening of the collision, and that his motion is premature because the parties have yet to be deposed.

Douglas cross-moves for summary judgment dismissing the complaint against him. He contends that his stopped vehicle was struck in the rear by Daw's vehicle, and that the force of the impact propelled his vehicle into plaintiff's vehicle. By his cross motion, Douglas opposes plaintiff's motion on the same grounds. In support of his cross motion, Douglas submits, among other things, his affidavit. Daw opposes the cross motion, contending that triable issues of fact remain as to the surrounding circumstances of the accident preclude the award of summary judgment at this time, and that the cross motion is premature because the parties have yet to be deposed.

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 Matter of New York City Asbestos Litig.*, 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]; *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 M.M. T. v Relyea*, ___ AD3d ___, 2019 NY Slip Op 08591 [2d Dept 2019]; *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]). 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*, 176 AD3d 788, 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]). A motor vehicle accident can have more than one proximate cause (*see M.M. T. v Relyea*, *supra*; *Elkholy v Dawkins*, 175 AD3d 1487, 109 NYS3d 392 [2d Dept 2019]; *Richardson v Cablevision Sys. Corp.*, *supra*). Further, the issue of comparative fault is generally a question for the fact finder to determine (*see Richardson v Cablevision Sys. Corp.*, *supra*; *Vuksanaj v Abbott*, 159 AD3d 1031, 73 NYS3d 224 [2d Dept 2018]; *Ortiz v Welna*, 152 AD3d 709, 58 NYS3d 556 [2d Dept 2017]).

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.*, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; *Schmertzler v Lease Plan U.S.A., Inc.*, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]; *McLaughlin v Lunn*, 137 AD3d 757, 26 NYS3d 338 [2d Dept 2016]). 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, and thereby requires that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Ordonez v Lee*, ___ AD3d ___, 2019 NY Slip Op 08199 [2d Dept 2019]; *Gelo v Meehan*, ___ AD3d ___, 2019 NY Slip Op 08175 [2d Dept 2019]; *Morgan v Flippen*, 173 AD3d 735, 102 NYS3d 108 [2d Dept 2019]). A non-negligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the leading vehicle, an unavoidable skidding on wet pavement, or any other reasonable cause (*see Grant v Carrasco*, 165 AD3d 631, 84 NYS3d 235 [2d Dept 2018]; *Tumminello v City of New York*, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]; *Orcel v Haber*, 140 AD3d 937, 33 NYS3d 429 [2d Dept 2016]). However, a driver who follows another vehicle must anticipate that the leading vehicle may stop, even suddenly, based on prevailing traffic conditions (*see Catanzaro v Edery*, *supra*; *Buchanan v Keller*, 169 AD3d 989, 991 NYS3d 252 [2d Dept 2019]; *Annan v New York State Off. of Mental Health*, 165 AD3d 1020, 87 NYS3d 70 [2d Dept 2018]). 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 properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle (*see Gonzalez v Goudiaby*, ___ AD3d___, 2019 NY Slip Op 07929 [2d Dept 2019]; *Mihalatos v Barnett*, 175 AD3d 492, 106 NYS3d 165 [2d Dept 2019]; *Skura v Wojtlowski*, 165 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]]). 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]).

Douglas established his prima facie entitlement to summary dismissing the complaint against him. In support of his cross motion Douglas submitted his affidavit which demonstrated, prima facie, that his stopped vehicle was propelled forward into the rear of plaintiff's vehicle after it was struck in the rear by Daw's vehicle, and that he was not at fault in the happening of the accident (*see Arellano v Richards*, 162 AD3d 967, 79 NYS3d 288 [2d Dept 2018]; *Skura v Wojtlowski*, *supra*; *Wooldridge-Solano v Dick*, 143 AD3d 698, 39 NYS3d 41 [2d Dept 2016]). In his affidavit, Douglas avers that his vehicle was stopped when it was struck in the rear by Daw's vehicle. He also avers that the force of that impact propelled his vehicle into plaintiff's vehicle. The opposing parties failed to raise a triable issue of fact as to whether Douglas was

at fault in the happening of the accident (*see Arellano v Richards*, *supra*; *Skura v Wojtlowski*, *supra*; *Wooldridge-Solano v Dick*, *supra*).

Plaintiff established his prima facie entitlement to summary judgment on the issue of Daw's negligence by demonstrating, prima facie, that Daw's vehicle struck the rear of Douglas' 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 plaintiff's affidavit, he avers that his vehicle was stopped for traffic for at least 60 seconds when it was struck in the rear by Douglas' vehicle, which was struck in the rear by Daw's vehicle. Plaintiff's submissions were also sufficient to establish his prima facie entitlement for an order striking Daw's affirmative defense of comparative negligence (*see Morales v Amar*, 145 AD3d 1000, 44 NYS3d 184, 2016 [2d Dept 2016]; *De Castillo v Sormeley*, 140 AD3d 918, 32 NYS3d 654 [2d Dept 2016]; *Strickland v Tirino*, 99 AD3d 888, 952 NYS2d 599 [2d Dept 2012]). Plaintiff demonstrated, prima facie, that he was not at fault in the happening of the accident (*see Morales v Amar*, 145 AD3d 1000, 44 NYS3d 184, 2016 [2d Dept 2016]; *De Castillo v Sormeley*, 140 AD3d 918, 32 NYS3d 654 [2d Dept 2016]; *Strickland v Tirino*, 99 AD3d 888, 952 NYS2d 599 [2d Dept 2012]). In opposition, Daw failed to raise a triable issue of fact, as he did not submit evidence either denying plaintiff's allegations or proffering a non-negligent explanation for the collision (*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*, 131 AD3d 1038, 16 NYS3d 283 [2d Dept 2015]).

The Court notes that contrary to Daw's contention, neither the motion by plaintiff nor the cross motion by Douglas is premature. Daw 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 plaintiff or Douglas (*see* CPLR 3212[f]; *Gonzalez v Goudiaby*,___ AD3d ___, 2019 NY Slip Op 07929 [2d Dept 2019]; *Gaston v Vertsberger*, 176 AD3d 919, 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 summary judgment (*see Jobson v SM Livery, Inc.*, 175 AD3d 1510, 109 NYS3d 376 [2d Dept 2019]; *Batashvili v Veliz-Palacios*, 173 AD3d 983, 104 NYS3d 661 [2d Dept 2019]; *Figueroa v MTLR Corp.*, 157 AD3d 861, 69 NYS3d 359 [2d Dept 2018]).

Accordingly, the motion by plaintiff is granted in part and denied in part, and the cross motion by Douglas is granted.

Dated: 1/10/20

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