

Okhrimenko v Albano
2020 NY Slip Op 35269(U)
September 30, 2020
Supreme Court, Westchester County
Docket Number: Index No. 69951/2019
Judge: Sam D. Walker
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To commence the 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
WESTCHESTER COUNTY
P R E S E N T: HON. SAM D. WALKER, J.S.C.**

-----X
RUSLAN OKHRIMENKO,

Plaintiff,

-against-

DECISION & ORDER
Index No. 69951/2019
Seq. 1

FRANK ALBANO and JESSE HERNANDEZ,
Defendants.
-----X

The following papers were read on a motion for summary judgment pursuant to CPLR 3212, on the issue of liability:

- Notice of Motion/Affirmation/Exhibits 1-4
- Affirmation in Opposition
- Reply Affirmation

Upon the foregoing papers it is ordered that the motion is GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Ruslan Okhrimenko, commenced this action to recover damages for alleged serious injuries sustained in a motor vehicle accident that occurred on May 2, 2018, on the southbound Sprain Brook Parkway in Westchester County, New York. The plaintiff alleges that he brought his vehicle to a slow and gradual stop due to traffic conditions on the roadway ahead and after being stopped for approximately thirty seconds, his vehicle was struck in the rear by the vehicle bearing New York License Plate GKD5648, operated by Frank Albano. The plaintiff asserts that the impact was so

sever that his vehicle was pushed into the vehicle ahead of him.

The plaintiff now files the instant motion seeking summary judgment against the defendants pursuant to CPLR 3212 on the issue of liability. In support of his motion, the plaintiff relies upon his attorney's affirmation, his affidavit, the police report and copies of the pleadings.

The defendants, by their attorney, oppose the motion, arguing that the plaintiff and his counsel's papers aver that the driver of the vehicle that struck the plaintiff's vehicle was Frank Albano, but that is incorrect and contradicts the police report, which clearly states that the driver was Jesse Hernandez. The attorney further states that the complaint also states that Frank Albano operated vehicle, which allegation was denied by the defendants in their answer.

In reply, the plaintiff's attorney argues that there defendants have not raised any genuine issue of fact in response to the plaintiff's motion and even assuming that the defendants' claim of mis-designation of the defendants' vehicle operator and owner is true, such is not an issue of material fact requiring denial of the plaintiff's motion.

Discussion

"[T]he 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 demonstrate the absence of any material issues of fact" (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

"A rear-end collision with a stopped or stopping vehicle creates a prima facie

case of negligence with respect to the operator of the moving vehicle, and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (see *Sokolowska v Song*, 123 AD3d 1004 [2d Dept 2014]); see also *Agramonte v City of New York*, 288 AD2d 75, 76 [2001]; *Johnson v Phillips*, 261 AD2d 269, 271 [1999]; *Danza v Longioliere*, 256 AD2d 434, 435 [1998], lv dismissed 93 NY2d 957 [1999]).

In this case, the Court finds that the plaintiff has made out a prima facie showing of his entitlement to summary judgment. The evidence submitted by the plaintiff establishes entitlement to summary judgment as a matter of law, thereby shifting the burden to the defendants to demonstrate the existence of a factual issue requiring a trial (see *Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]) [Rear-end collision is sufficient to create a prima facie case of liability.] If the operator of the striking vehicle fails to rebut this presumption and the inference of negligence, the operator of the stopped vehicle is entitled to summary judgment on the issue of liability (see *Leonard v City of New York*, 273 AD2d 205 [2d Dept 2000]; *Longhito v Klein*, 273 AD2d 281 [2d Dept 2000]; *Velasquez v Quijada*, 269 AD2d 592 [2d Dept 2000]; *Brant v Senatobia Operating Corp.*, 269AD2d 483 [2d Dept 2000]).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546, 546 [2d Dept 1995]), the Court finds that the defendants have failed to rebut the plaintiff's prima facie showing.

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. NY VTL § 1129 (a)

In (*Leal v Wolff*), the Second Department held that "[s]ince the defendant was under a duty to maintain a safe distance between his car and [the plaintiff's] car (see Vehicle and Traffic Law Section 1129[a]), his failure to do so in absence of a non negligent explanation constituted negligence as a matter of law" (*Leal v Wolf*. 224 AD2d 392 [2d Dept 1996]).

Further, "[w]hen the driver of an automobile approaches from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (see *Zweeres v Materi*, 94 AD3d 1111 [2d Dept 2012]). "Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Id.*).

Here, the defendants fail to offer any non-negligent explanation for the accident and the opposition does not create any issues of material fact with regard to liability. Although, the plaintiff's affidavit may have mixed up the driver with the owner of the vehicle, there is no dispute that both the alleged vehicle struck the plaintiff's vehicle while stopped. The plaintiff submitted the certified police report which states that the defendant, Jesse Hernandez, was operating the vehicle and that the defendant, Frank Albano, is the owner of the vehicle. Further, the complaint alleges both alternatives for

the ownership and operator of the vehicle. Further, none of the defendants have submitted affidavits in opposition to the plaintiff's motion for summary judgment.

Furthermore, the need to conduct discovery does not warrant denial of the motion, since the plaintiff who submitted an affidavit, has personal knowledge of the relevant facts of the accident and the defendants did not submit their own affidavits to dispute any of the plaintiff's allegations (*see Niyazov v Bradford*, 13 AD3d 501 [2d Dept 2004]). The defendants failed to demonstrate that discovery would lead to relevant evidence (*Rodriguez v Farrell*, 115 AD3d 929, 931 [2d Dept 2014]).

With regard to dismissal of the defendants' first and second affirmative defenses, the Court also grants such relief. The plaintiff submitted an affidavit and police report as to how the accident occurred, showing no culpability on his part and none of the defendants offered any opposition, thereby, providing no reason to deny that part of the motion.

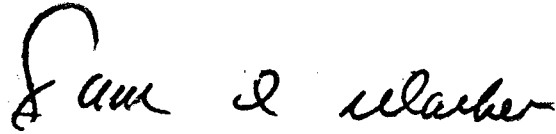
Accordingly, based on all the foregoing, it is

ORDERED that the plaintiff's motion for summary judgment on the issue of liability and dismissal of the defendants' first and second affirmative defenses is GRANTED.

The parties are directed to appear before the Preliminary Conference Part on on a date to be determined.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York
September 30, 2020

A handwritten signature in black ink that reads "Sam D. Walker". The signature is written in a cursive style with a large initial "S".

HON. SAM D. WALKER, J.S.C.