

**Starkman v Hoffman**

2007 NY Slip Op 30372(U)

March 5, 2007

Supreme Court, Suffolk County

Docket Number: 0027480

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK  
 POST-NOTE MOTION PART - SUFFOLK COUNTY

**PRESENT:**

Hon ROBERT W. DOYLE  
 Justice of the Supreme Court

MOTION DATE 9/1/06  
 ADJ. DATE 10/2/06  
 Mot. Seq. # 001 - MG

-----X			
ROBERT A. STARKMAN,	:	LITE & RUSSELL	
	:	Attorneys for Plaintiff	
Plaintiff,	:	212 Higbie Lane	
	:	West Islip, New York 11795	
- against -	:		
	:	McCABE COLLINS McGEOUGH & FOWLER	
HENRY M. HOFFMAN,	:	Attorneys for Defendant	
	:	346 Westbury Avenue, P.O. Box 9000	
Defendant.	:	Carle Place, New York 11514	
-----X			

Upon the following papers numbered 1 to 11 read on this motion by plaintiff for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 9; Notice of Cross Motion and supporting papers \_\_\_\_\_; Answering Affidavits and supporting papers 10 - 11; Replying Affidavits and supporting papers \_\_\_\_\_; Other \_\_\_\_\_; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that this motion by plaintiff for partial summary judgment on the issue of liability is granted; and it is further

**ORDERED** that upon service of a copy of this order with notice of entry, the Calendar Clerk shall place this motion on the Calendar Control Part calendar for the next available date.

This action arose from a vehicular accident which occurred on August 21, 2004 on Carleton Avenue in the Village of East Islip. The plaintiff now moves for partial summary judgment on the issue of liability. The defendant opposes the motion on the ground that plaintiff has failed to meet his prima facie burden since the defendant's deposition testimony, tendered by the plaintiff in support of his motion, raises a triable issue of fact with respect to the proximate cause of the accident.

The plaintiff submits in support of his motion, inter alia, the affirmation of his attorney, copies of the pleadings, the bill of particulars, the plaintiff's and defendant's deposition testimony, his affidavit, a police accident report (form MV-104A) and a sworn motor vehicle supplement report, dated August 21, 2004. The plaintiff alleges in the complaint that on the day of the accident a motor vehicle operated by

him collided with a vehicle owned and operated by the defendant, Henry M. Hoffman. The plaintiff further alleges that this collision was caused solely by the negligence of the defendant and that he sustained severe personal injuries. The plaintiff avers in his bill of particulars that the accident occurred at approximately 2:05 p.m. in front of 200 Carleton Avenue in East Islip, New York. The plaintiff avers in his affidavit and the motor vehicle reports indicate that prior to the accident the plaintiff was driving in a southbound direction on Carleton Avenue and, as he slowed down to make a right-hand turn in to the parking lot at 200 Carleton Avenue, his vehicle was struck in the rear by the defendant's vehicle.

The plaintiff testified in his deposition that at the time of the accident he worked for Marketing Incorporated, located at 200 Carleton Avenue in East Islip. The weather conditions were clear and sunny. Prior to the accident he had been driving on the Sunrise Highway and got off at the Carleton Avenue exit. After getting off at the exit, he eventually came to a stop sign at Carleton Avenue. He remained at this stop sign for at least 30 seconds, allowing him to look twice to his left. He could see 300 feet to his left and saw the bridge where Carleton Avenue passes over the Sunrise Highway. He did not see any oncoming traffic heading south on Carleton Avenue. After he made a right hand turn onto Carleton Avenue, he drove in a southerly direction approximately 100 feet, at which point he prepared to make a right-hand turn into the driveway leading into the parking lot of Marketing Incorporated. It was at this point that the defendant's vehicle struck the rear of his vehicle.

The plaintiff further testified that immediately prior to the accident he was driving at approximately 20 to 30 miles per hour, his right directional signal was on and his foot was on the gas. He put his directional signal on within 20 to 30 feet after turning right onto Carleton Avenue. Prior to the accident he had no problems with the right-hand directional signal, nor had he consumed any alcoholic beverages. He had not taken any prescription medications prior to the accident nor failed to take medications he was required to take. The impact from the accident caused his vehicle to be pushed into the Marketing Incorporated driveway. The police who had responded to the scene of the accident told him that the defendant had told them that the plaintiff "ran the stop sign" (Motion, Exhibit 4, page 40). The plaintiff also testified that although the police did not state that any one of them had observed the accident, they informed him that they felt that the defendant was completely at fault because they believed that the defendant's version of the events leading to the accident was "physically impossible" (Motion, Exhibit 4, page 44) and because the defendant's vehicle had struck the plaintiff's vehicle in the rear.

The defendant testified in his deposition that prior to the accident he was driving in a southbound direction on Carleton. As he proceeded over the crest of the Carleton Avenue overpass/bridge over the Sunrise Highway, he observed the plaintiff's vehicle darting out from the Jackson Street entrance onto Carleton Avenue located at the southern end of the overpass. When he first observed the plaintiff's vehicle, he had passed the crest of the overpass and was heading down to where Carleton Avenue flattened out. He believed that the plaintiff's vehicle was very close but could not estimate how far away it was. He also believed that the plaintiff was "rolling out" of Jackson Street (Motion, Exhibit 3, page 12), which caused him to "slam on the brakes" (Motion, Exhibit 3, page 13). After he applied the brakes, his vehicle then skid for approximately 20 feet, where it made contact with the plaintiff's vehicle. This impact then caused the plaintiff's vehicle to be pushed forward to an entrance to a parking lot of a business "just south of Jackson Street" (Motion, Exhibit 3, page 14). The name of that business was "probably" Marketing Incorporated. The defendant also testified that the accident occurred

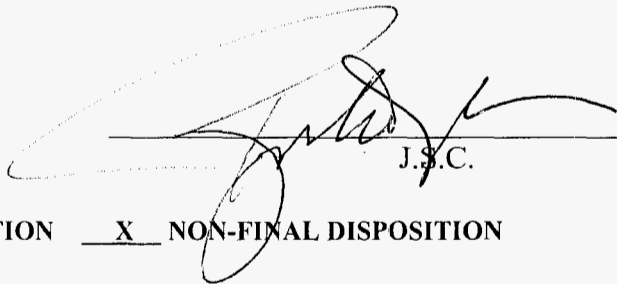
approximately 100 feet south of the intersection of the Jackson Street entrance and Carleton Avenue. He further testified that the accident occurred "just before" the entrance to the Marketing Incorporated parking lot but could not recall the distance from where the accident occurred to the entrance to the parking lot. Finally, the defendant testified that prior to the accident he had no problems with his brakes.

"A rear-end collision with a stopped automobile establishes a prima facie case of negligence on the part of the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to explain how the accident occurred (see, *Gambino v. City of New York*, 205 A.D.2d 583, 613 N.Y.S.2d 417; *Starace v. Inner Circle Qonexions*, 198 A.D.2d 493, 604 N.Y.S.2d 179; *Edney v. Metropolitan Suburban Bus Auth.*, 178 A.D.2d 398, 577 N.Y.S.2d 102; *Benyarko v. Avis Rent A Car Sys.*, 162 A.D.2d 572, 573, 556 N.Y.S.2d 761). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision (see, *Pfaffenbach v. White Plains Express Corp.*, 17 N.Y.2d 132, 135, 269 N.Y.S.2d 115, 216 N.E.2d 324) because 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, an unavoidable skidding on a wet pavement, or some other reasonable cause (see, *Carter v. Castle Elec. Contr. Co.*, 26 A.D.2d 83, 85, 271 N.Y.S.2d 51). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (see, *Starace v. Inner Circle Qonexions*, supra, at 493, 604 N.Y.S.2d 179; *Young v. City of New York*, 113 A.D.2d 833, 834, 493 N.Y.S.2d 585)" (*Leal v Wolff*, 224 AD2d 392, 393, 638 NYS2d 110 [1996]).

Here the plaintiff has met his prima facie burden by demonstrating that the vehicle operated by the defendant struck his car in the rear (*Eybers v Silverman*, NYLJ, Feb 13, 2007, p.34, col 3 [App Div, 2d Dept]). The plaintiff's affidavit, accident motor vehicle reports and his deposition testimony indicate that prior to the accident he was driving in a southbound direction and as he attempted to make a right-hand turn into the entrance of the parking lot of Marketing Incorporated, the plaintiff's vehicle struck his vehicle in the rear. The plaintiff testified in his deposition that prior to the accident he had turned on his right directional signal. Contrary to the defendant's attorney's contention, the defendant's testimony, which offered various inconsistent versions of how and where the accident occurred, did not raise a triable issue of fact as to whether the plaintiff's conduct was a proximate cause of the accident (*Stancil v Supermarkets General*, 16 AD3d 402, 790 NYS2d 552 [2005]).

In opposition to the motion the defendant has submitted only the affirmation of his attorney. Since the defendant's attorney's assertions are not based on his personal knowledge of the circumstances of the accident, his affirmation is insufficient to raise a triable issue of fact (*Schanzer v Johnson Ken-Ro, Inc.*, 109 AD2d 786, 486 NYS2d 296 [1985], *app dis* 66 NY2d 613, 1985 WL 312645 [N.Y.]). Accordingly, since the defendant's evidence in opposition to the motion has failed to rebut the inference of negligence, the plaintiff's motion for partial summary judgment on the issue of liability is granted.

Dated:           MAR 05 2007          

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION