

**Buccellato v Grella**

2007 NY Slip Op 31468(U)

May 31, 2007

Supreme Court, Suffolk County

Docket Number: 0028239/2004

Judge: Robert W. Doyle

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Buccellato v Grella  
Index No. 04-28239  
Page No. 2

Maria Grella was the operator of the third vehicle and Robert Fitzgibbon was the operator of the fourth vehicle.

Defendant Grella seeks an order granting summary judgment dismissing the complaint and cross claims arguing she bears no liability for the happening of the accident. Both plaintiff and co-defendant Fitzgibbon oppose the motion.

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v N.Y.U. Medical Center*, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v N.Y.U. Medical Center, supra*). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must “show facts sufficient to require a trial of any issue of fact” (CPLR 3212[b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must present facts sufficient to require a trial of any issue of fact by producing evidentiary proof in admissible form (*Joseph P. Day Realty Corp. v Aeroxon Prods.*, 148 AD2d 499, 538 NYS2d 843 [2<sup>nd</sup> Dept 1979]) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2<sup>nd</sup> Dept 1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the court to direct a judgment in favor of the movant as a matter of law (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]).

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2<sup>nd</sup> Dept 2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [2<sup>nd</sup> Dept 1999]; *see also*, Vehicle and Traffic Law § 1129[a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see, Rainford v Han*, 18 AD3d 638, 795 NYS2d 645 [2<sup>nd</sup> Dept 2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2<sup>nd</sup> Dept 2005]; *Power v Hupart, supra*).

With regard to the motion for summary judgment on the issue of liability for the subject accident, the parties rely primarily upon the deposition testimony given by each of them. While the copies of the deposition transcript of plaintiff and defendant Fitzgibbon submitted to the Court are unsigned and unsworn and therefore not in admissible form, no party has objected to their use on the instant motions and the Court will consider them.

At her examination before trial (moving defendant's exhibit D), plaintiff Maria Buccellato testified at the time of the accident she was driving a Mitsubishi, SUV, which she owned. She was traveling south bound in the left lane on William Floyd Parkway and brought her car to an easy stop at the intersection where the traffic light was red for cars traveling in her direction. There was one vehicle in front of her which had also come to a stop. When the traffic light turned green, she took her foot off the brake, but did not apply the gas because a white pickup truck turned in front of the car in front of her, causing the car in front of her to come to an easy stop. She put her foot on the brake. Her car did not travel forward. As she looked in her rear view mirror she saw a Jeep coming at her in her travel lane at a fast rate of speed. She felt a hard impact to the rear of her vehicle, causing her vehicle to move forward, causing a light impact between her car and the car in front of her. She did not hear any sound of any other accidents behind her, or the sound of screeching brakes after her vehicle was struck.

Maria Capobianco (Grella) testified at her examination before trial (moving defendant's exhibit E) that she was driving a black Jeep Wrangler at the time of the accident. She saw the traffic light was red and came to a complete stop behind plaintiff's vehicle. When the traffic light turned green, she took her foot off the brake and then applied it very quickly because the car in front of her applied the brake. Her car was then struck from behind by a black truck, which caused her car to be pushed forward and come into contact with the vehicle in front of her. She described the impact to the rear of her vehicle as heavy. She described the impact to the front of her vehicle as heavy when it struck plaintiff's vehicle in the rear.

Defendant Fitzgibbon testified at his examination before trial (moving defendant's exhibit F) that at the time of the accident he was operating a black 1997 Chevy pickup. His was the fourth vehicle in line. He was traveling southbound on William Floyd Parkway. He first observed the traffic light when he was about five hundred feet from it. The light was red and then turned green. He was traveling in the left lane of traffic, having just changed lanes, and saw the traffic start to move. He saw the brake lights on the Jeep Wrangler which was stopping. He was traveling about thirty to thirty five miles an hour when the front end of his vehicle struck the rear of the Jeep Wrangler, which then struck the Mitsubishi in front of it. Prior to the accident, he did not sound his horn, or turn his wheel. He states he applied his brakes heavy.

Here, the adduced evidence establishes that the vehicle operated by plaintiff Buccellato was stopped, and the vehicle operated by defendant Capobianco (Grella) had stopped, started moving forward and was stopping again when defendant Fitzgibbon's vehicle struck the Grella vehicle in the rear, causing her to strike plaintiff's vehicle in front of her. Defendant Grella has therefore demonstrated prima facie entitlement to summary judgment as a matter of law on the issue of liability.

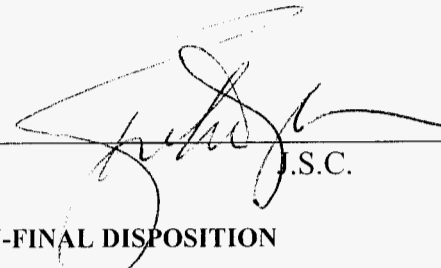
Plaintiff Deborah Buccellato opposes the motion of defendant Maria Grella, arguing that when she looked into her rear view mirror after stopping, and releasing the brake and starting to move forward, she observed a Jeep traveling at a very fast rate of speed directly behind her when she was struck hard by the Jeep. She testified there was only one impact to the rear of her vehicle, and she did not keep the Grella vehicle under observation after she first observed it traveling behind her. Therefore, she can only speculate as to defendant Grella's speed prior to impact and whether or not Grella had stopped behind her. Therefore, plaintiff has failed to raise any material factual issues to preclude an order granting summary judgment.

Buccellato v Grella  
Index No. 04-28239  
Page No. 4

Defendant Fitzgibbon testified that the Grella vehicle was traveling maybe fifteen miles an hour when he saw the Jeep moving and then came into contact with it. He testified that he struck the Grella vehicle in the rear, which then struck the Mitsubishi. Therefore, Grella had not struck plaintiff's vehicle prior to the impact by Fitzgibbon. Based upon the foregoing, defendant Fitzgibbon, who has opposed the instant motion, has not raised any factual issues to preclude an order granting summary judgment. In fact, he has not come forward with a reasonable explanation for the happening of the accident.

Accordingly, motion (001) by defendant Maria Grella for an order granting summary judgment is granted and the complaint and cross claims asserted against her are dismissed. The action is severed and shall continue against the remaining defendant.

Dated:           MAY 31 2007          

  
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J.S.C.

           FINAL DISPOSITION   X   NON-FINAL DISPOSITION