

**Rosado v Antonio**

2007 NY Slip Op 33780(U)

November 20, 2007

Supreme Court, Suffolk County

Docket Number: 0029643/2006

Judge: Joseph Farneti

Republished from New York State Unified Court System's E-Courts Service.  
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 29643/2006

SUPREME COURT - STATE OF NEW YORK  
I.A.S. TERM, PART 37 - SUFFOLK COUNTY

PRESENT:

**HON. JOSEPH FARNETI**  
**Acting Justice Supreme Court**

---

 SANTOS ROSADO,

Plaintiff,

-against-

LESSEP ANTONIO, GIOVANNI CAPUTO,  
 JOSEPH SEDA and HENDRICKSON FLEET  
 SERVICES, INC.,

Defendants.

---

ORIG. RETURN DATE: JUNE 7, 2007  
 FINAL SUBMISSION DATE: AUGUST 23, 2007  
 MTN. SEQ. #: 001  
 MOTION: MD

**PLTF'S/PET'S ATTORNEY:**

ADAM L. SHAPIRO & ASSOCIATES, P.C.  
 70-20 AUSTIN STREET - SUITE 111  
 FOREST HILLS, NEW YORK 11375  
 718-830-0700

**ATTORNEYS FOR LESSEP ANTONIO AND  
 HENDRICKSON FLEET SERVICES, INC.:**

HAMMILL, O'BRIEN, CROUTIER,  
 DEMPSEY & PENDER, P.C.  
 6851 JERICHO TURNPIKE - SUITE 250  
 P.O. BOX 1306  
 SYOSSET, NEW YORK 11791  
 516-746-0707

**ATTORNEYS FOR GIOVANNI CAPUTO:**

NASHAK, FRANK, GOERLICH,  
 BAUM & PAPE  
 1979 MARCUS AVENUE - SUITE 220  
 LAKE SUCCESS, NEW YORK 11042  
 516-326-4848

Upon the following papers numbered 1 to 7 read on this motion \_\_\_\_\_  
 FOR SUMMARY JUDGMENT \_\_\_\_\_.

Notice of Motion and supporting papers 1-3; Affirmation in Opposition and supporting papers 4, 5; Affirmation in Opposition and supporting papers 6; Reply Affirmation and supporting papers 7; it is,

**ORDERED** that this motion by defendant, GIOVANNI CAPUTO ("CAPUTO"), for an Order, pursuant to CPLR 3212, granting summary judgment in favor of CAPUTO dismissing plaintiff's complaint and all cross-claims asserted against CAPUTO, is hereby **DENIED** for the reasons set forth hereinafter. The

Court has received an affirmation of counsel for co-defendants LESSEP ANTONIO and HENDRICKSON FLEET SERVICES, INC. ("ANTONIO and HENDRICKSON"), and an affirmation of counsel for plaintiff SANTOS ROSADO in opposition to the instant application.

This action arises out of a motor vehicle accident that occurred on June 9, 2006 involving a series of rear-end collisions. Plaintiff alleges that while he was a passenger in a vehicle operated by defendant JOSEPH SEDA ("SEDA") on Route 111 at or near its intersection with Chestnut Street, in Brentwood, New York, the vehicle was struck in the rear by a vehicle owned and operated by defendants ANTONIO and HENDRICKSON. Plaintiff alleges that the impact caused the vehicle in which he was riding to come in contact with the vehicle in front of it, which was owned and operated by defendant CAPUTO.

CAPUTO now moves for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against CAPUTO. CAPUTO has submitted, among other things, an affidavit of CAPUTO wherein he avers that he was stopped "for at least 10 seconds" behind a vehicle attempting to make a left turn when he was hit in the rear by the vehicle owned and operated by SEDA. CAPUTO informs the Court that SEDA has failed to appear and answer in this action. Based upon the foregoing, CAPUTO argues that as this was a rear-end collision, there exists a presumption of liability on the operators of the rear vehicles, and that he was not negligent or the proximate cause of the accident.

In opposition, ANTONIO and HENDRICKSON have submitted, among other things, an affidavit of LESSEP ANTONIO wherein he avers that the vehicle driven by CAPUTO stopped suddenly, causing the vehicle in front of him, the SEDA vehicle, to collide with it. As a result, ANTONIO was unable to stop his vehicle in time, thereby colliding with the the SEDA vehicle. ANTONIO further avers that he did not see brake or signal lights in operation on either vehicle prior to the collision. Accordingly, ANTONIO and HENDRICKSON allege that questions of fact exist which preclude the granting of summary judgment to CAPUTO. Moreover, ANTONIO and HENDRICKSON allege that the depositions of the parties have yet to be conducted, and as such, CAPUTO's application is premature.

Plaintiff has submitted an affirmation of counsel which adopts the opposition submitted by ANTONIO and HENDRICKSON, with the distinction that plaintiff alleges the SEDA vehicle was at a complete stop when it was struck in

the rear by the ANTONIO vehicle. However, the Court finds that counsel's affirmation, made without personal knowledge of the facts, is without any evidentiary value in the context of a summary judgment motion (see *S. J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338 [1974]; *Moran v Man-Dell Food Stores, Inc.*, 293 AD2d 723 [2002]; *Hoffman v Eastern Long Island Transp. Enter.*, 266 AD2d 509 [1999]; *Cataldo v Waldbaum, Inc.*, 244 AD2d 446 [1997]).

On a motion for summary judgment, the test to be applied is whether or not triable issues of fact exist or whether on the proof submitted a court may grant judgment to a party as a matter of law (CPLR 3212[b]; *Andre v Pomeroy*, 35 NY2d 361 [1974]; *Akseizer v Kramer*, 265 AD2d 356 [1999]). It has been held that "the remedy of summary judgment is a drastic one, which should not be granted where there is any doubt as to the existence of a triable issue . . . or where the issue is even arguable" (*Gibson v American Export Isbrandtsen Lines*, 125 AD2d 65 [1987] [citations omitted]; see also *Andre v Pomeroy*, 35 NY2d 361, *supra*; *Henderson v New York*, 178 AD2d 129 [1991]). It is well-settled that a proponent of a motion for summary judgment 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 (*Dempster v Overview Equities, Inc.*, 4 AD3d 495 [2004]; *Washington v Community Mut. Sav. Bank*, 308 AD2d 444 [2003]; *Tessier v N.Y. City Health and Hosps. Corp.*, 177 AD2d 626 [1991]). Once this showing has been made, 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 (*Gong v Joni*, 294 AD2d 648 [2002]; *Romano v St. Vincent's Med. Ctr.*, 178 AD2d 467 [1991]; *Commrs. of the State Ins. Fund v Photocircuits Corp.*, 2 Misc 3d 300 [Sup Ct, NY County 2003]). It should be noted that courts have repeatedly held that negligence claims should not be resolved at the summary judgment stage (see e.g. *Kahane v Marriott Hotel Corp.*, 249 AD2d 164 [1998]; *Rivers v Atomic Exterminating Corp.*, 210 AD2d 134 [1994]; *Chahales v Garber*, 195 AD2d 585 [1993]; *In re World Trade Ctr. Bombing Litig.*, 3 Misc 3d 440 [Sup Ct, NY County 2004]).

It is well-settled that a rear-end collision with a stopped vehicle creates a *prima facie* case of liability with respect to the operator of the rear vehicle, requiring a non-negligent explanation for the collision (see *Briceno v Milbry*, 16 AD3d 448 [2005]; *Niyazov v Bradford*, 13 AD3d 501 [2004]; *Russ v Investech Sec.*, 6 AD3d 602 [2004]). Here, CAPUTO alleges that he was lawfully stopped when his vehicle was hit in the rear by the SEDA vehicle. However, the

Court finds that questions of fact exist which preclude the granting of summary judgment to CAPUTO. Although CAPUTO alleges that he was lawfully stopped when his vehicle was struck in the rear by the SEDA vehicle, ANTONIO has alleged that CAPUTO came to an unexpected, sudden stop. That allegation, coupled with the allegation that CAPUTO's brake and signal lights were not lit at the time, raises questions of fact as to CAPUTO's possible negligence in the operation of his vehicle that preclude summary judgment in his favor (see *Quezada v Aquino*, 38 AD3d 873 [2007]; *John v Leyba*, 38 AD3d 496 [2007]; *Carhuaano v J&R Hacking*, 28 AD3d 413 [2006]; *Brodie v Global Asset Recovery, Inc.*, 12 AD3d 390 [2004]; *Lumley v General Mills*, 240 AD2d 201 [1997]). Accordingly, this application is **DENIED**.

The foregoing constitutes the decision and Order of the Court.

Dated: November 20, 2007

  
\_\_\_\_\_  
HON. JOSEPH FARNETI  
Acting Justice Supreme Court