Ojeda v Park
2008 NY Slip Op 32978(U)
September 25, 2008
Supreme Court, Queens County
Docket Number: 9158/07
Judge: Patricia P. Satterfield
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Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

---X

PATRICIA OJEDA,

Plaintiff,

-against-

KATHERINE PARK, DIANA PARK and MARY BEJARANO,

Defendants.

---X

Index No: 9158/07
Motion Date: 7/2/08
Motion Cal. No: 17
Motion Seq. No: 3

The following papers numbered 1 to 14 read on this motion by defendant Bejarano, for an order, pursuant to CPLR §2221, granting leave to reargue her prior motion directing summary judgment dismissing the complaint and all cross claims on the basis that no material issue of fact exists regarding her liability.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits....................................	1 - 4
Park Defendants' Affirmation in Opposition-Exhibits............	5 - 7
Reply...	8 - 9
Plaintiff's Affirmation in Opposition-Exhibits........................	10 - 12
Reply...	13 - 14

Upon the foregoing papers, it is hereby order that the motion is decided as follows:

This is an action for personal injuries arising from a motor vehicle accident occurring on April 16, 2004, when the vehicle owned and operated by defendant Mary Bejarano ("Bejarano"), in which plaintiff Patricia Ojeda ("plaintiff") was a passenger, was allegedly struck in the rear by the vehicle owned by defendant Katherine Park and operated by defendant Diane Park ("the Park defendants"), while traveling on the ramp leading to the northbound Cross Island Parkway from Northern Blvd. in Queens, New York. By order of this Court dated January 30, 2008, defendant Bejarano's motion for an order directing summary judgment on the ground that there are no material issue of fact, or in the alternative, dismissing the complaint for lack of jurisdiction, contending that she was never served with the summons and complaint, was granted to the extent that the matter was set down for a traverse hearing to determine whether this Court had jurisdiction over defendant Bejarano. Upon defendant Bejarano's withdrawal of her jurisdictional challenge, the Traverse was cancelled, and defendant Bejarano now renews that branch of her prior motion seeking summary

judgment. Based upon the circumstances presented, the motion to renew or reargue is granted.

It is well established that summary judgment should be granted when there is no doubt as to the absence of triable issues. See, Rotuba Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978); Andre v. Pomeroy, 35 N.Y.2d 361, 364 (1974); Taft v. New York City Tr. Auth., 193 A.D.2d 503, 505 (1st Dept. 1993). As such, the function of the court on the instant motion is issue finding and not issue determination. See, D.B.D. Nominee, Inc., v. 814 10th Ave. Corp., 109 A.D.2d 668, 669 (2nd Dept. 1985). The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. See, Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position. See, Zuckerman v. City of New York, supra.

It is well settled that a "driver of a vehicle approaching another vehicle from the rear is required 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, Vehicle and Traffic Law § 1129[a]; Macauley v. Elrac, Inc., 6 A.D.3d 584, 775 N.Y.S.2d 78; Chepel v. Meyers, 306 A.D.2d 235, 762 N.Y.S.2d 95). A rear-end collision with a stopped vehicle creates a prima facie case of negligence with respect to the moving vehicle, requiring the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident (see, Bustillo v. Matturro, 292 A.D.2d 554, 740 N.Y.S.2d 360; Vecchio v. Hildebrand, 304 A.D.2d 749, 758 N.Y.S.2d 666; Levine v. Taylor, 268 A.D.2d 566, 702 N.Y.S.2d 107)." Vavoulis v. Adler, 43 A.D.3d 1154 (2nd Dept. 2007); see, also, Johnston v. Spoto, 47 A.D.3d 888 (2nd Dept.,2008); McGregor v Manzo, 295 A.D.2d 487 (2nd Dept. 2002); Gambino v City of New York, 205 A.D.2d 583 (2nd Dept.1994); Power v. Hupart, 260 A.D.2d 458 (2nd Dept. 1999). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision 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. Leal v. Wolff, 224 A.D.2d 392 (2nd Dept. 1996). 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. Lopez v. Minot, 258 A.D.2d 564 (2nd Dept. 1999).

Here, defendant Bejarano, in her affidavit submitted on the prior motion, alleged that:

> At the time of the accident, I was on the ramp that leads to the northbound Cross Island Parkway from Northern Boulevard. I proceeded on the ramp and gradually slowed my vehicle as I approached the stop sign located towards the end of the ramp. While I was on the ramp, my vehicle was struck in the rear.

These allegations are sufficient to make the requisite prima facie showing of her entitlement to summary judgment. Once the moving party makes a prima facie showing of entitlement to summary judgment in their favor, it is incumbent upon the opposing party to come forth with evidentiary proof

in admissible form sufficient to demonstrate the existence of triable issues of fact. Chalasani v. State Bank of India, New York Branch, 283 A.D.2d 601 (2nd Dept. 2001); Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980); Pagan v. Advance Storage and Moving, 287 A.D.2d 605 (2001); Gardner v. New York City Transit Authority, 282 A.D.2d 430 (2nd Dept. 2001).

The Park defendants, in opposition, interposed the affirmation of their attorney who lacks personal knowledge of the facts (see Zuckerman v City of New York, supra), and the affidavit of Diana Park, who alleges:

> The Bejarano vehicle had already passed the stop sign at the entrance ramp and was accelerating and moving onto the parkway when the Bejarano vehicle suddenly stopped and my vehicle made contact with the Bejarano vehicle. I do not know why the Bejarano vehicle suddenly stopped. Clearly, the accident with the co-defendant's vehicle and the alleged injuries the plaintiff were caused at least in part by the Bejarano vehicle when she stopped suddenly on the parkway.

As a general proposition, "when a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and use reasonable care to avoid colliding with the other vehicle (citations omitted)" [Power v. Hupart, 260 A.D.2d 458 (2nd Dept. 1999)], "...and his failure to do so in the absence of a reasonable, non-negligent explanation constitute[s] negligence as a matter of law [see, Silberman v. Surrey Cadillac Limousine Serv., 109 A.D.2d 833, 486 N.Y.S.2d 357 (2nd Dept. 1985)]." Lopez v. Minot, 258 A.D.2d 564, 565 (2nd Dept. 1999). The Park defendants' suggestion that defendant Bejarano was in someway negligent is of no moment. "A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence (citations omitted)." Arias v. Rosario, 52 A.D.3d 551 (2nd Dept. 2008); Mendiolaza v. Novinski, 268 A.D.2d 46 (2d Dept. 2000). As was stated in Johnston v. Spoto, supra [47 A.D.3d 888}:

> The plaintiffs established a prima facie case for summary judgment by tendering the affidavit of Marvin Johnston, who stated that he had been at a complete stop at a stop sign at the end of the exit ramp when he was struck in the rear by the defendant's vehicle. The defendant's assertion that the Johnston vehicle stopped short was insufficient to raise a triable issue of fact (see Reed v. New York City Transit Authority, 299 A.D.2d 330, 749 N.Y.S.2d 91; Barberena v. Budd Enterprises, Ltd., 299 A.D.2d 305, 749 N.Y.S.2d 147; McGregor v. Manzo, 295 A.D.2d 487, 744 N.Y.S.2d 467).

Defendant Park "was obligated to take 'appropriate precautions, including maintaining a safe distance' (David v. New York City Bd. of Educ., 19 A.D.3d 639, 639, 797 N.Y.S.2d 294; see Malone v. Morillo, 6 A.D.3d 324, 775 N.Y.S.2d 312)." Harrington v. Kern, 52 A.D.3d 473 (2nd Dept. 2008). See, Lundy v. Llatin, 51 A.D.3d 877, 878 (2nd Dept. 2008)["The defendants' bare claim

that the plaintiffs' vehicle abruptly slowed down or stopped, without more, under the circumstances of this case, was insufficient to raise a triable issue of fact as to whether the plaintiff driver was negligent, and, if so, whether such negligence was a proximate cause of the accident]. See, also Ortega v City of New York, 281 A.D.2d 466 (2nd Dept. 2001); Benyarko v Avis Rent A Car System, Inc., 162 A.D.2d 572 (2nd Dept.1990).

With respect to the Park defendants' argument of prematurity, it is recognized that "CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated . . . [or] 'where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant.'" Juseinoski v. New York Hosp. Medical Center of Queens, 29 A.D.3d 636, 637 (2nd Dept. 2006). However, where, as here, "'a] party . . . claims ignorance of critical facts to defeat a motion for summary judgment. . . [the party] must first demonstrate that the ignorance is unavoidable and that reasonable attempts were made to discover the facts which would give rise to a triable issue' (Cruz v. Otis El. Co., 238 A.D.2d 540, 656 N.Y.S.2d 688)." Sasson v. Setina Mfg. Co., Inc., 26 A.D.3d 487 (2nd Dept. 2006). What must be offered is "an evidentiary basis to show that discovery may lead to relevant evidence (citations omitted) and that facts essential to justify opposition to the motion were exclusively within the knowledge and control" of the moving opposing party. Gasis v. City of New York, 35 A.D.3d 533 (2nd Dept. 2006). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Id., Sasson v. Setina Mfg. Co., Inc., supra; Associates Commercial Corp. v. Nationwide Mut. Ins. Co., 298 A.D.2d 537 (2nd Dept. 2002). As the record is devoid of an evidentiary basis demonstrating that further discovery would elicit any evidence supporting defendants' position, there is no basis for denial of the motion on this ground.

With respect to plaintiff's opposition to the motion, she sets forth in her affidavit, that was sworn to October 10, 2007:

> On April 16, 2004, at about 8:00 pm, I was a rear seat passenger in a vehicle being driven by defendant Mary Bejarano traveling Northbound on a ramp intersecting with Northern Boulevard in Queens. While our vehicle was merging onto Northern Boulevard, defendant Mary Bejarano was in a hurry and suddenly applied the brakes for the approaching stop sign at the end of the ramp. Mary Bejarano was not paying attention and slowed abruptly which caused the vehicle directly behind us to collide into the back of the car I was riding in and then after our car came to a complete stop, the same vehicle hit us again.

Plaintiff's conclusory assertion is at best speculative, as it is unsupported by any evidence and highlights that plaintiff was not even aware of which roadway the accident occurred. See, e.g.. Batts v. Page, 51 A.D.3d 833 (2nd Dept. 2008). "Such generalized, conclusory, and speculative assertions with no independent factual basis are insufficient to defeat a motion for summary judgment (citations omitted)." Pirie v. Krasinski, 18 A.D.3d 848 (2nd Dept. 2005); Rebecchi v. Whitmore, 172 A.D.2d

600 (2nd Dept. 1991).

Accordingly, defendant Bejarano's motion is granted for summary judgment in her favor and dismissing the complaint and all cross claims, and the complaint and cross claims asserted against her hereby are dismissed.

Dated: September 25, 2008

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J.S.C.