

Guariano v Vaccaro

2009 NY Slip Op 31141(U)

May 18, 2009

Supreme Court, Richmond County

Docket Number: 104384/07

Judge: Joseph J. Maltese

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No. 104384/07
Motion No.:001**

THOMAS GUARIANO,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

**PHYLLIS A. VACCARO and
GREGORY M. SILVERMAN,**

Defendants

The following items were considered in the review of the following motion for summary judgment.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Answering Affidavits	2
Replying Affidavits	3
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

The plaintiff moves pursuant to CPLR § 3212 for an order granting summary judgment to the plaintiff on liability and striking the defendants first, second, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth affirmative defenses contained in the defendants' answer. The defendant withdraws the second, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth and eighteenth affirmative defenses. The plaintiff's motion is granted.

Facts

This is an action for alleged personal injuries sustained in an automobile accident that occurred on or about August 28, 2007 during the early morning hours. The plaintiff alleges that his vehicle was struck from behind by a vehicle owned by Phyllis A. Vaccaro and operated by Gregory M. Silverman at the time of the accident.

The plaintiff testified that he slowly came to a stop at a red light.¹ The plaintiff testified further that his vehicle was struck from behind as he was stopped at the light. the plaintiff testified that he had not heard any skidding of tires or screeching of breaks before the impact.²

During the deposition of Gregory M. Silverman the following exchange took place on the record:

Q. As you're driving down Richmond Avenue and you're approaching the light where the accident occurred did anything obstruct your vision of the roadway ahead of you?

A. No.

Q. Can you tell me how much time elapsed from when you saw his vehicle to when the accident occurred?

A. Seconds.

Q. What I want to know is how much distance separated the front of the car you were driving from the rear of his car when you first saw him ahead of you in the roadway?

A. Twenty feet.

Q. At that point when you first saw him did you observe the entire rear of his car?

A. Yes.

Q. Were any of his outside running lights activated?

A. Not to my knowledge.

Q. You didn't notice them.

¹ Guariano Transcript at 17.

² Id. at 28.

- A. No, I didn't see them.
Q. Did you notice any lights from Mr. Guariano's vehicle?
A. No.

The plaintiff moves for summary judgment on liability and to strike the defendant's fourth affirmative defense. Annexed to the plaintiff's initial moving papers are the examination before trial transcripts of Thomas Guariano and Gregory Silverman. The defendant objects to the use of these transcripts on the ground that they are neither signed nor notarized. In reply the plaintiff acknowledges that he inadvertently failed to annex the signed and notarized deposition transcript of Thomas Guariano. In addition, the plaintiff annexes a letter sent to the defendants on September 18, 2008 enclosing the transcripts of the defendants Phyllis Vaccaro and Gregory Silverman for their signature.

Discussion

This court will consider the transcript of Thomas Guariano's examination before trial, as the inclusion of signed page was an oversight by the plaintiff's attorney. The transcripts from the examinations before trial of the defendants are admissible pursuant to CPLR § 3116. This court will therefore evaluate this motion based on the merits.

A motion for summary judgment must be denied if there are "facts sufficient to require a trial of any issue of fact."³ Granting summary judgment is only appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact. "Moreover, the parties competing contentions must be viewed in a light most favorable to the party opposing the motion."⁴ Summary judgment should not be granted where there is any doubt

³ CPLR §3212[b].

⁴ *Marine Midland Bank, N.A., v. Dino, et al.*, 168 AD2d 610 [2d Dept 1990].

as to the existence of a triable issue or where the existence of an issue is arguable.⁵ As is relevant, summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law.⁶ On a motion for summary judgment, the function of the court is issue finding, and not issue determination.⁷ In making such an inquiry, the proof must be scrutinized carefully in the light most favorable to the party opposing the motion.⁸

In this case the plaintiff argues that he is entitled to summary judgment on liability as a result of his vehicle being struck from behind by a vehicle owned by Phyllis A. Vaccaro and operated by Gregory M. Silverman. An operator of a motor vehicle is negligent as a matter of law when, without the absence of a non-negligent explanation, his vehicle strikes another in the rear.

It is well settled that a rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the moving vehicle, requiring the operator of that vehicle to come forward with a non-negligent explanation for the accident (citation omitted). Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence (citations omitted). Moreover, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or

⁵ *American Home Assurance Co., v. Amerford International Corp.*, 200 AD2d 472 [1st Dept 1994].

⁶ *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Herrin v. Airborne Freight Corp.*, 301 AD2d 500 [2d Dept 2003].

⁷ *Weiner v. Ga-Ro Die Cutting*, 104 AD2d 331 [2d Dept 1984]. *Aff'd* 65 NY2d 732 [1985].

⁸ *Glennon v. Mayo*, 148 AD2d 580 [2d Dept 1989].

her car and the car ahead (see, Vehicle and Traffic Law §1129[a]).⁹

The burden is on a party opposing summary judgment to produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests.¹⁰ Bald conclusory assertions, general allegations of negligence, expressions of hope or unsubstantiated allegations or assertions are all insufficient to defeat a motion for summary judgment.¹¹

In this case the defendant driver, Gregory M. Silverman's indicates that he did not see the outside running lights turned on when his car struck the plaintiff. However, the defendant offers only conclusory statements in an attempt to defeat the plaintiff's summary judgment motion. As such the plaintiff's motion for summary judgment on liability is granted.

The court now turns its attention to the plaintiff's motion to dismiss the defendant's "non-use of a seat belt" defense. While the defendants do not withdraw their affirmative defense relying on the plaintiff's non-use of a seat belt the offer no evidence on which to base this claim. During his examination before trial the plaintiff testified as follows:

- Q. Were you wearing a seat belt at the time of the accident?
 A. Yes, I was.
 Q. What kind of seatbelt was it?
 A. Harness.
 Q. Threepoint did it go from left shoulder across the lap?
 A. Yes.¹²

⁹ *Shamah v. Richmond County Ambulance Service, Inc.* 279 AD2d 564, 719 NYS2d 287 [2nd Dept. 2001] .

¹⁰ *Gilbert Frank Corp. v. Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793 [1988]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980].

¹¹ *Spaulding v. Benenati*, 57 NY2d 418, 456 NYS2d 733 [1982].

¹² Guariano Transcript at 33-34.

The defendants have offered no evidence to rebut the plaintiff's testimony. As such the defendants' fourth affirmative defense—non-use of seat belt is struck from their answer.

Accordingly, it is hereby:

ORDERED, that Thomas Guariano's motion for summary judgment on liability is granted; the Clerk of the Court shall enter judgment in favor of the plaintiff on the issue of liability only; it is further

ORDERED, that Thomas Guariano's motion to strike of the defendants' fourth affirmative defense—non-use of a seatbelt is granted; and it is further

ORDERED, that the parties return to DCM Part 3 on **Monday, June 22, 2009 at 9:30 A.M.** for a Certification Conference.

ENTER,

DATED: May 18, 2009

Joseph J. Maltese
Justice of the Supreme Court