SUPREME COURT OF THE STATE OF NEW YORK **Index No. 101291/2009**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 3**

ELLEN ABRAHAMSEN and
GERARD ABRAHAMSEN

Plaintiffs

against

NELSON NIEVES and
LIFESTYLES FOR THE DISABLED, INC.

Defendants

DECISION & ORDER

HON. JOSEPH J. MALTESE

The following items were considered in the review of the following motion for summary judgment made by the plaintiffs Ms. Ellen Abrahamsen and Mr. Gerard Abrahamsen.

Papers	Numbered
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 plaintiffs move for an order granting them summary judgment on liability only. The plaintiffs' motion is granted.

Facts

This is an action to recover damages for personal injuries allegedly sustained in an automobile accident. On November 10, 2008, two vehicles were proceeded along Richmond Avenue toward an intersection with Forest Hill Road on Staten Island, New York. The lead vehicle was operated by the plaintiff, Ellen Abrahamsen (Ms. Abrahamsen). The defendants' vehicle was a van, following the plaintiff in the same lane of traffic. The van was owned by Lifestyles for the Disabled, Inc. (Lifestyles), and operated by its employee, Nelson Nieves (Mr. Nieves).

The intersection of Richmond Avenue and Forest Hill Road is controlled by a traffic light.

When the plaintiff began to stop her vehicle at Forest Hill Road, all agree the traffic light was yellow in the direction of travel. The precise timing the traffic light turned red is disputed but not material or determinative. The plaintiff had already come to a complete stop when her vehicle was struck in the rear by the defendant's van. The plaintiff's brake lights were functioning. The impact injured the plaintiff and caused damage to her vehicle.

The defendant, asserts that the plaintiff stopped suddenly instead of proceeding through the intersection. Additionally, according to the defendant, there were sandy and bumpy road surface conditions that impeded the van's stopping, thereby causing the collision.

Procedural History

The plaintiff filed a Summons and Verified Complaint on May 29, 2009. An answer was served by the defendants on July 20, 2009. The plaintiff served a Supplemental Verified Bill of Particulars on March 9, 2010. The plaintiff moved for summary judgment on July 30, 2010.

Discussion

This action is founded upon a rear end motor vehicle collision. Plaintiff has moved for summary judgment. Judgment as a matter of law in a motion for summary judgment may only be granted when there are no material facts to be decided at trial.[1] All evidence must be examined in the light most favorable to the non-moving party,[2] and every favorable inference must be granted to the non-movant.[3] Here, there are no material facts to be decided by a fact finder and the plaintiff movant for summary judgment has met its burden without the defendant having met the burden of opposition.

"The driver of a motor vehicle shall not follow another vehicle more closely than is

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[1]New York Civil Practice Law and Rules (CPLR) § 3212 (b).

[2]*Nicklas v. Tedlen Realty* Corp., 305 AD 2d 385, 386 [2d Dept 2003].

[3]*Gray v. N. Y. City Transit Auth.*, 12 AD 3d 638, 639 [2d Dept 2004]

reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."[4] Consequently, a "rear-end collision with a stationery vehicle creates a prima facie case of liability in favor of the operator of the non-moving vehicle unless the operator of the moving vehicle can come forward with an adequate, non-negligent explanation for the accident."[5] The inference of negligence may be rebutted by providing a non-negligent explanation for the collision.[6]

Here, the plaintiff asserts there are no issues of material fact that remain to be determined and that the plaintiff is therefore entitled to summary judgment on liability. The plaintiff states that a rear end collision creates a prima facie case of liability against the defendants. The defendant attempts to rebut the presumption of liability by asserting that the plaintiff suddenly stopped and failed to proceed through the intersection, thereby contributing to the accident. The defendant also attempts to rebut by claiming the road surface itself caused the van to skid into the plaintiff's vehicle. The defendant's rebuttal is insufficient.

The defendant states that the plaintiff abruptly stopping is a defense that is sufficient by itself to raise a triable issue of fact.[7] In some circumstances, an abrupt stop by a moving vehicle without adequate signal may be invoked as a non-negligent explanation for a rear-end collision. "[A] driver also has the duty not to stop or to slow down without proper signaling so as to avoid a collision."[8] When an abrupt stop occurred at a stop sign, the court held that there was a prima

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[4]New York Vehicle and Traffic Law (VTL) § 1129 (a).

[5]*Mundo v City of Yonkers*, 249 AD 2d 522, 523 [2d Dept 1998]; *quoted by Ramrattan v Pondfield Trip Serv.*, 269 AD 2d 513 [2d Dept 2000].

[6]*Volpe v Limoncelli*, 74 AD 3d 795 [2d Dept 2010]; *quoting Klopchin v Masri*, 45 AD 3d 737 [2d Dept 2007].

[7]*Citing among others Johnson v Spotto*, 47 AD 2d 888, 889 [2d Dept 2008].

[8]*Chepel v Meyers*, 306 AD 2d 235, 236-237 [2d Dept 2003]; *quoting Purcell v Axelsen*, 286 AD 2d 379, 380 [2d Dept 2001].

facie case against the driver of the vehicle causing the collision.[9] When a lead vehicle had started to enter a red light at an intersection but stopped, the presumption of negligence was against the vehicle striking the stopped vehicle.[10] Additionally, when lead vehicles stopped at a yellow light, whether or not abruptly, other courts have sustained a presumption of negligence when a following vehicle has collided with the rear end of the lead vehicle.[11] Therefore, the defendant's vehicle striking the plaintiff's vehicle from the rear creates the presumption of a prima facie case of liability.

In this action, the plaintiff's brake lights functioned, thus giving signal to the van's operator that the leading vehicle was stopping. As an independent signal of stopping, the traffic light was already yellow before the impact. Whether the light turned red immediately before, at the time of, or after the impact is not material to this evaluation. If the light were red before the impact, the defendant had a definitive indication to stop immediately before striking the plaintiff's vehicle. Even if the light were not red until after the impact, when a facing traffic signal is yellow, a vehicle "may cautiously enter the intersection ... however, said traffic is thereby warned that the related green arrow movement is being terminated or that a red indication will be exhibited immediately thereafter."[12] A United States District Court decision applying New York State law emphasized that a vehicle may cautiously enter an intersection with a yellow signal but it is not obligated to do so.[13] Further, the yellow traffic light is a warning that a red light will be immediately following.[14] Hence, if the traffic light at the time of impact was yellow, the plaintiff

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[9] *Johnson v Spotto*, 47 AD 3d at 889.

[10] *Volpe v Limoncelli*, 74 AD 3d at 795.

[11] *Hakakian v McCabe*, 38 AD 3d 493 [2d Dept 2007]; *and David v New York City Bd. of Ed.*, 19 AD 3d 639 [2d Dept 2007].

[12] VTL § 1111 (b) 2.

[13] *Salus v Sivan*, 534 F. Supp. 2d 430, 431 [S.D.N.Y. 2008].

[14] *Salus v Sivan,* 534 F. Supp. at 431.

might properly have chosen to stop, or might not depending upon the plaintiff's judgment and discretion.[15] If the traffic light at or before the time of impact was already red, the plaintiff was required to stop and not proceed through the intersection because New York City, the locus of the collision, is a city of more than one million population and a full stop is required without proceeding until the light turns green.[16] Therefore, in addition to the signal displayed by the plaintiff's brake lights, the operator of the van had an additional independent signal from the traffic light that the plaintiff might either choose to stop, or was obliged to stop. Consequently, the plaintiff's stopping of the leading vehicle, even if abruptly done, does not relieve the defendant of the presumption of negligence raised by his impacting the plaintiff in a rear-end collision.

A driver of a rear vehicle in a rear-end collision bears a presumption of negligence unless there is a non-negligent reason for the collision offered in evidentiary form. The evidentiary form may include sworn testimony.[17] This "imposes a duty of explanation on the driver."[18] The emergency doctrine encompasses unforeseeable emergencies causing an accident. An unforeseen emergency may relieve the presumption of negligence in a rear end collision.[19] Varied explanations may be possible. However, where a roadway surface was wet, it was considered a foreseeable traffic condition and inadequate to rebut an inference of negligence.[20] If a driver was or should have been aware of road conditions, then the emergency doctrine does not apply.[21] In

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[15]VTL § 1111 (b) 2.

[16]VTL § 1111 (d) 2 a; and VTL § 1111 (d) 2 c.

[17]*Kachuba v A & G Cleaning Serv.*, 273 AD 2d 277 [2d Dept 2000].

[18]*Connors v Flaherty*, 32 AD 3d 891, 892 [2d Dept 2006].

[19]*Campenella v Moore*, 266 AD 2d 423. 424 [2d Dept 1999].

[20]*Shamah v Richmond County Ambulance Serv.*, 279 AD 2d 564, 565 [2d Dept 2001].

[21]*Pincus v Cohen*, 198 AD 2d 405, 406 [2d Dept 1993].

one action, evidence was introduced that invisible road ice may have been the cause of a rear-end collision, and that evidence was adequate to defeat a request for summary judgment.[22] Non-negligent explanations may also include mechanical failure, unavoidable skidding, or other reasonable causes.[23]

Here, the explanation offered by the defendant was adverse roadway conditions. The defendant cites the presence of sand on the road surface and bumps in the roadway impairing the van's ability to stop. According to the defendant, the combination of sand and a bumpy roadway caused the van to skid. The plaintiff has elicited from the defendant that the defendant had driven the road before the accident. There is no representation that the roadway was altered from the prior experience of the van's driver. Therefore, the conditions at the time and place of the accident should have been anticipated by the defendant. Since the defendant's experience with sand on this road surface precludes surprise or unexpected emergency roadway conditions, the emergency doctrine is inapplicable. The van's driver was required to know of road conditions having traversed the road before, and in the absence of a representation of any change to the roadway impossible to anticipate, bears the responsibility of driving in accord with road conditions.[24] No cogent, non-negligent explanations for the accident have been presented by the defendant. The emergency doctrine does not apply here. There are no issues of fact to be decided. The defendant has not met the burden of rebuttal of the presumption of a prima facie case against the defendant.

In the absence of valid rebuttal to the presumption of a prima facie case of liability, summary judgment as to liability is granted to the plaintiff.

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[22]*DeLouise v S.K.I. Wholesale Beer Corp.*, 2010 NY Slip Op 5984, 2 [2d Dept 2010].

[23]*Tuebner v Cardinal Health 414, Inc.*, 2010 NY Slip Op 32157U, 6 [Supr. Ct. Nassau Cty. 2010]; *quoting DeLouise v S.K.I. Wholesale Beer Corp.*, 2010 NY Slip Op 5984 at 2.

[24]*Pincus v Cohen*, 198 AD 2d at 406.

Accordingly, it is hereby:

ORDERED, that the motion for summary judgment on liability made by the plaintiffs, Ellen Abrahamsen and Gerard Abrahamsen, against the defendants, Nelson Nieves and Lifestyles for the Disabled, Inc. is granted; and it is further

ORDERED, that the parties shall return to DCM part 3 for a pretrial conference pertaining to damages on **Monday, October 18, 2010 at 9:30 AM**.

ENTER,

DATED: September 24, 2010

Joseph J. Maltese
Justice of the Supreme Court