

**Mancusi v Rothman**

2010 NY Slip Op 33575(U)

December 3, 2010

Sup Ct, Richmond County

Docket Number: 104338/08

Judge: Joseph J. Maltese

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

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**Index No. 104338/08  
Motion No.: 4**

**MICHAEL A. MANCUSI and  
SHANNON R. DANIELL**

*Plaintiffs*

*against*

**ELISSA ROTHMAN and  
ELISSA BRODSKY**

*Defendants*

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**DECISION & ORDER**

**HON. JOSEPH J. MALTESE**

The following items were considered in the review of the following motion for Summary Judgment

<u>Papers</u>	<u>Numbered</u>
<b>Notice of Motion and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Exhibits</b>	<b>Attached to Papers</b>
<b>Memorandum of Law</b>	<b>4</b>

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

The plaintiffs Michael A. Mancusi and Shannon R. Daniell move for partial summary judgment finding liability against the defendants Elissa Rothman and Elissa Brodsky. The motion is granted in so far as partial summary judgment is granted to the plaintiffs on the issue of liability.

**Facts**

On June 30, 2008, the plaintiffs were in a stopped vehicle because of a red light at the intersection of Forest Hill Road and Platinum Avenue in Staten Island, New York. The plaintiff Michael A. Mancusi was the driver of the vehicle and the plaintiff Shannon R. Daniell was a passenger therein. A second vehicle hit the plaintiffs' vehicle from the rear. The second vehicle was driven by the defendant Elissa Brodsky and owned by the defendant Elissa Rothman. A Police Accident Report was completed on the day of the accident. In this accident report, a statement was attributed to Elissa Brodsky that "she looked away causing her to rear end [the

plaintiffs' vehicle]”

### **Procedural History**

The plaintiffs' Summons and Complaint was filed on October 24, 2008. Issue was joined on December 23, 2008 when the defendants' served their Answer. The plaintiffs filed a motion for summary judgment on September 9, 2010. Note of Issue has not yet been filed.

### **Discussion**

This is an action founded upon alleged negligence. The plaintiffs allege a vehicle driven by the defendant Elissa Brodsky and owned by the defendant Elissa Rothman struck the rear of the stopped vehicle driven by the plaintiff Michael A. Mancusi in which the plaintiff, Shannon R. Daniell was a passenger. The plaintiffs move for summary judgment as to liability.

The New York Civil Practice Law and Rules (CPLR) states “Any party may move for summary judgment in any action, after issue has been joined; provided that the court may set a date after which no such motion may be made ...”<sup>1</sup> At times, Courts have declined to consider a motion prior to discovery.<sup>2</sup> “Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.”<sup>3</sup> Here, available proofs include affidavits by the plaintiffs, and a Police Accident Report. However, there are no opposing affidavits or other available proofs submitted by the defendants. Accordingly, this motion for summary judgment relies only upon that accident report and the plaintiffs affidavits that were executed by

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<sup>1</sup>CPLR § 3212 (a).

<sup>2</sup>*Adrianis v Fox*, 30 AD 3d 550, 550-551 [2d Dept 2006]; and *Afzal v Bd. of Fire Commissioners of Bellmore Fire District*, 23 AD 3d 507, 507-508 [2d Dept 2005].

<sup>3</sup>CPLR § 3212 (f); *see also Groves v Land's End Housing Co., Inc.*, 80 NY 2d 978 [1992].

“a person with knowledge of the facts.”<sup>4</sup> There has been no representation that other facts exist that cannot now be stated.

“The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.”<sup>5</sup> 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.”<sup>6</sup> Here, the plaintiff Michael A. Mancusi states in an affidavit that the vehicle he was driving had stopped because of traffic. This evidence places a burden of proof on the defendants who must rebut the inference of negligence.<sup>7</sup> The inference of negligence may be rebutted by providing a non-negligent explanation for the collision.<sup>8</sup> Accordingly, the 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. Opposing evidentiary material may include sworn testimony such as the affidavit of the defendant.<sup>9</sup> Here, there is a presumption of negligence by the defendants, and no affidavit or other evidence in acceptable form rebuts the offering of the plaintiffs’ affidavits and the Police Accident Report.

The defendants argue that the Police Accident Report submitted by the plaintiffs is not in the proper form to be considered admissible evidence. Ordinarily, evidence considered in a motion

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<sup>4</sup>CPLR § 3212 (b).

<sup>5</sup>New York Vehicle and Traffic Law § 1129 (a).

<sup>6</sup>*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].

<sup>7</sup>*Connors v Flaherty*, 32 AD 3d 891, 892 [2d Dept 2006].

<sup>8</sup>*Volpe v Limoncelli*, 74 AD 3d 795 [2d Dept 2010]; *quoting Klopchin v Masri*, 45 AD 3d 737 [2d Dept 2007].

<sup>9</sup>*Kachuba v A & G Cleaning Serv.*, 273 AD 2d 277 [2d Dept 2000].

for summary judgment must be in admissible form.<sup>10</sup> Proper form would require certification of a Police record by the head of a department of a municipal corporation.<sup>11</sup> This certification is appended to the plaintiffs' reply affirmation as exhibit B. Thus, other available proof supports the motion for summary judgment.

Here, the Police Accident Report was created by a police officer and attributes an admission against interest to the defendant, Elissa Brodsky. She is reported as stating that she looked away, thereby causing her to rear-end the vehicle driven by Michael A. Mancusi. A Police Accident Report constitutes an "Affidavit of Merit" when presented for consideration in a motion for summary judgment.<sup>12</sup> The Appellate Division, Second Department permits a Police Accident Report to support a prima facie case for summary judgment when the report contains an admission against interest.<sup>13</sup> Therefore, the Police Accident Report is acceptable proof to be considered in this motion for summary judgment.

The defendants' complain that the plaintiffs' motion for summary judgment is defective in that it fails to include copies of all the pleadings. An answer with a Counterclaim was submitted by the defendants. A reply to the Counterclaim was executed by the plaintiffs, but this reply was not included in the supporting proof to the original motion for summary judgment. Any such deficiency is repaired because the reply to the Counterclaim is found in the defendants' Affirmation in Opposition. The plaintiffs' Affirmation in reply also provides the Answer to the Counterclaim. Therefore, in considering this motion for summary judgment, the available proofs include all the pleadings.

Hence, this motion for partial summary judgment is reviewed with all the pleadings, and

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<sup>10</sup>*Grasso v Angerami*, 79 NY 2d 813, 814-815 [1991].

<sup>11</sup>CPLR § 4518 (c).

<sup>12</sup>*Aloi v Firebird Freight Service Corp.*, 251 AD 2d 608, 609 [2d Dept 1998].

<sup>13</sup>*Sulaiman v Thomas*, 54 AD 3d 751, 752 [2d Dept 2008].

with authentication of a Police Accident Report that contains an admission against interest. There is prima facie negligence in light of a rear-end collision of a stopped car. There is no proper rebuttal, because there is no presentation in admissible form of a non-negligent, alternative explanation. Further, no affidavit creates an appearance that other facts exist but cannot be stated. Consequently, partial summary judgment as to liability is granted to the plaintiff.

Accordingly, it is hereby

ORDERED, that the motion for summary judgment is granted to the plaintiffs, Michael A. Mancusi and Shannon R. Daniell, in so far as liability is found against the defendants, Elissa Brodsky and Elissa Rothman; and it is further

ORDERED, that the parties shall return for a pretrial conference on the matter of damages to **DCM part 3, 130 Stuyvesant Place, Third Floor on January 5, 2011.**

ENTER,

DATED: December 3, 2010

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Joseph J. Maltese  
Justice of the Supreme Court