

<b>Galluccio v Fitzgerald</b>
2011 NY Slip Op 32504(U)
September 16, 2011
Sup Ct, Nassau County
Docket Number: 17784/10
Judge: Denise L. Sher
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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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ANNE-MARIE GALLUCCIO,  
  
Plaintiff,  
  
- against -  
  
BRIDGET FITZGERALD and WILLIAM FITZGERALD,  
  
Defendants.

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TRIAL/IAS PART 32  
NASSAU COUNTY  
  
Index No.: 17784/10  
Motion Seq. No.: 01  
Motion Dates: 08/15/11

**The following papers have been read on this motion:**

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits</u>	<u>1</u>
<u>Affirmation in Opposition and Exhibits</u>	<u>2</u>
<u>Reply Affirmation</u>	<u>3</u>

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

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability upon the ground that there are no triable issues of fact and directing an immediate Inquest on damages. Defendants oppose the motion.

This action arises from a motor vehicle accident which occurred on June 12, 2008, at approximately 3:30 p.m., on Main Street at or near its intersection with Motor Avenue, Farmingdale, New York. The accident involved two vehicles, a 2006 Ford owned and operated by plaintiff and a 2005 Infiniti owned by defendant William Fitzgerald and operated by defendant Bridget Fitzgerald. Plaintiff commenced the action by the filing and service of a Summons and Verified Complaint on or about September 17, 2010. Issue was joined on or

about December 21, 2010.

Briefly, it is plaintiff's contention that the accident occurred when her vehicle was stopped at a railroad crossing at the aforementioned intersection and was struck in the rear by the defendants' vehicle. Plaintiff states that, prior to the impact from defendants' vehicle, her vehicle had come to a complete stop behind a school bus, which, in accordance with the law, had stopped before crossing over a railroad track. Plaintiff contends that, prior to the impact, her vehicle was stopped for at least five seconds. Plaintiff submits that, on the date of the accident, visibility was clear and the subject roadway was dry and straight and that there was heavy traffic at the time of the accident.

Plaintiff claims that defendant Bridget Fitzgerald was the negligent party in that she failed to maintain a safe distance behind plaintiff's vehicle, as well as failed her duty to exercise reasonable care under the circumstances to avoid an accident. Plaintiff additionally claims that defendants cannot come up with a non-negligent explanation for striking plaintiff's vehicle in the rear. Plaintiff submits that, at her Examination Before Trial ("EBT"), defendant Bridget Fitzgerald testified that, at the time of the accident, her foot slipped off the brake and hit the gas and that is when her vehicle collided with plaintiff's vehicle. Defendant Bridget Fitzgerald further testified that plaintiff did not do anything to cause the subject accident. *See* Plaintiff's Affirmation in Support Exhibit C.

In opposition to plaintiff's motion, defendants argue that the deposition testimony in this matter raises triable issues of fact and suggests the possibility that plaintiff may have stopped short before defendants' vehicle impacted plaintiff's vehicle. Defendants base this argument on plaintiff's EBT testimony where she stated that she was stopped for no more than five seconds before impact and that her vehicle stopped behind a school bus which had stopped at the railroad track, but that there were no flashing lights at said train tracks indicating that a train was

coming nor were the train tracks' gates down. Defendants argue that "[p]laintiff's testimony gives evidence that the bus stopped unexpectedly at the train tracks causing the plaintiff to stop short behind the bus." Defendants additionally argue that "defendant's foot slipped off the brake and hit the gas while defendant was stopping her vehicle behind the plaintiff's vehicle....Clearly, the defendant was faced with an emergency situation where her foot slipped off of the brakes while stopping her vehicle behind plaintiff. Such unforeseen, unexpected circumstance of her foot slipping off the brake gives rise to an emergency situation and as such, a jury could conclude, given all of the circumstances, that her actions were not negligent."

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427

N.Y.S.2d 595 (1980), *supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century- Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957), *supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1<sup>st</sup> Dept. 1985). The evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

When the driver of an automobile approaches another automobile from the rear, he or she is bound 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 pursuant to New York State Vehicle and Traffic Law (“VTL”) § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a stopped vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry*, 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

Of course, in a rear-end collision, the frontmost driver has the duty not to stop suddenly or slow down without proper signaling, pursuant to VTL § 1163, so as to avoid a collision. *See Gaeta v. Carter*, 6 A.D.2d 576, 775 N.Y.S.2d 86 (2d Dept. 2004); *Purcell v. Axelsen*, 286 A.D.2d 379, 729 N.Y.S.2d 495 (2d Dept. 2001).

As noted, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, thereby requiring the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1<sup>st</sup> Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. *See VTL § 1129(a); Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1<sup>st</sup> Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *See Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

In the context of a rear end collision, a claim that the driver of the lead vehicle made a sudden stop, stranding alone, is insufficient to rebut the presumption of negligence. *See Campbell v. City of Yonkers*, 37 A.D.3d 750, 833 N.Y.S.2d 101 (2d Dept. 2007); *Ayach v. Ghazal*, 25 A.D.3d 742, 808 N.Y.S.2d 759 (2d Dept. 2006); *Rainford v. Han*, 18 A.D.3d 638, 795 N.Y.S.2d 645 (2d Dept. 2005).

As noted, conclusory assertions that the driver of the lead vehicle made a sudden

unexpected stop is, without more, insufficient to rebut the presumption of negligence. *See Vecchio v. Hildebrand*, 304 A.D.2d 749, 758 N.Y.S.2d 666 (2d Dept. 2003); *McGregor v. Manzo*, *supra*; *Dileo v. Greenstein*, 281 A.D.2d 586, 722 N.Y.S.2d (2d Dept. 2001); *Shamah v Richmond County Ambulance Services, Inc.*, *supra*.

The Appellate Division, Second Department, has held that the explanation that the stopped vehicle came to a sudden stop, standing alone, is insufficient to rebut the inference of negligence. *See Geschwind v Hoffman*, 285 A.D.2d 448, 727 N.Y.S.2d 155 (2d Dept. 2001).

Plaintiff, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendants. Therefore, the burden shifts to defendants to demonstrate an issue of fact which precludes summary judgment. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 427 N.Y.S.2d 595 (1980).

After applying the law to the facts in this case, the Court finds that defendants have failed to meet their burden to demonstrate an issue of fact which precludes summary judgment. Defendants failed to submit any evidence to establish a non-negligent explanation for striking plaintiff's vehicle in the rear. Defendants argument that the school bus stopped at the railroad tracks despite there being no train coming and that the tracks' gates were not down is of no merit as a school bus is required by law to come to a complete stop before crossing over a railroad track. Furthermore, defendants have completely misapplied the emergency doctrine as it does not pertain to the any of the facts alleged in the instant matter. Consequently, that argument is also devoid of merit.

The Court also notes that the certified Police Accident Report submitted by plaintiff as an Exhibit in their moving papers qualifies as an exception to the hearsay rule since it was an admissions of a party/an admission against interest. *See Vaden v. Rose*, 4 A.D.3d 468, 771 N.Y.S.2d 670 (2d Dept. 2004); *Kemenyash v. McGoey*, 306 A.D.2d 516, 762 N.Y.S.2d 629 (2d Dept. 2003); *Guevara v. Zaharakis*, 303 A.D.2d 555, 756 N.Y.S.2d 465 (2d Dept. 2003)

The Court finds that the undisputed facts on the record establish that defendants' vehicle

struck plaintiff's vehicle in the rear when it was stopped behind the school bus at the railroad tracks, that defendant Bridget Fitzgerald, herself, admitted that plaintiff did not contribute in any way to the happening of the accident and defendants have offered no excuse or non-negligent explanation for the occurrence of the rear-end collision.

Accordingly, in light of defendants' failure to meet their burden and raise any triable issue of fact, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendants on the issue of liability and directing an immediate Inquest on damages is hereby **GRANTED**.

Pursuant to the So-Ordered Stipulation entered into by plaintiff's counsel on March 31, 2011, the instant action is to be jointly tried on damages only with the matter of *Anne-Marie Galluccio v. Eric Milgrim*, Index Number 22746/08. See Defendants' Affirmation in Opposition Exhibit B. Accordingly, all parties shall appear for a Pre-Trial Conference in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on October 25, 2011, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

**ENTER:**



**DENISE L. SHER, A.J.S.C.**

Dated: Mineola, New York  
September 16, 2011

**ENTERED**  
**SEP 20 2011**  
**NASSAU COUNTY**  
**COUNTY CLERK'S OFFICE**