

Ramos v Point Wrecking and Salvage Corp.
2011 NY Slip Op 34139(U)
August 10, 2011
Sup Ct, Bronx County
Docket Number: 302092/09
Judge: Mary Ann Brigantti-Hughes
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AUG 18 2011

SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti-Hughes

-----X
EDUARDO RAMOS,

Plaintiff,

-against-

DECISION / ORDER

Index No. 302092/09

POINT WRECKING AND SALVAGE CORP.,
OSMAN D. HERNANDEZ and JUAN FEBUS
HERNANDEZ,

Defendants.

-----X
The following papers numbered 1 to read on the below motions noticed on **March 3, 2011**
and duly submitted on the Part IA15 Motion calendar of :

<u>Papers Submitted</u>	<u>Numbered</u>
Pl. Notice of Motion, Exhibits	1,2
Def. Affirmation in Opposition, Exhibits	3,4
Pl.'s Affirmation, Memo in Reply	5,6

In an action for damages for personal injuries arising out of a motor vehicle accident, plaintiff Eduardo Ramos (hereinafter "Plaintiff") seeks an order pursuant to *CPLR* 3212 granting summary judgment on the issue of liability against defendants Point Wrecking and Salvage Corp., and Osman Hernandez (hereinafter collectively referred to as "Defendants") and in the alternative summary judgment on the issue of liability against all the defendants. Defendants oppose.

I. Factual and Procedural History

Plaintiff alleges that he sustained injuries as a result of a motor vehicle accident which occurred on January 20, 2009 on the Bronx River Parkway at or near its intersection with Magenta Street, Bronx County, New York. Plaintiff now moves for summary judgment on the issue of liability.

It should be primarily noted that by stipulation dated February 25, 2011 all parties consented to adjourn the instant motion to March 24, 2011. Plaintiff initially argues that the

Court should reject Defendants' opposition papers since they failed to comply with the parties' stipulation of adjournment entered February 25, 2011. It is true the Courts have long enforced and encouraged the fashioning of stipulations as a means of simplifying the resolution of disputes. *Mitchell v. New York Hospital*, 61 N.Y.2d 208, 214 (1984) (citations omitted).

Nevertheless, although Defendants had agreed to serve their opposition papers by March 17, 2011, the stipulation does not state what, if any, repercussions would occur upon non-compliance. As the First Department has held: "[A]ll matters claimed to be the subject of the stipulation must be set out. The court cannot be asked to divine what was in counsel's mind or to seek the intent from other evidence; nor to resolve disputes arising from sources other than the words of the writing." *Columbia Broadcasting System, Inc. v. Roskin Distributors, Inc.*, 31 A.D.2d 22, 24 (1st Dept. 1968) *aff'd* 28 N.Y.2d 559 (1971). Therefore, although Defendants' opposition papers were served after the agreed date, since the stipulation did not provide repercussions for failure to comply, the Court will consider Defendants' opposition papers. Further, since Plaintiff was afforded the opportunity to reply, he cannot show any prejudice as a result of the late service." *O'Callaghan v. Meatto, Russo, Burke & Wallace*, 160 A.D.2d 414, 415 (1st Dept. 1990)

Defendant Juan Febus Hernandez was operating a vehicle with Plaintiff as his passenger at relevant times. He testified at EBT that the accident occurred January 20, 2009 after 7:00 p.m. on the Bronx River Parkway near the Gun Hill Road exit. He testified that he thinks he was traveling northbound on the Bronx River Parkway. He testified that at the time of the accident he was driving a Chrysler Town and Country minivan with the plaintiff as a passenger seated in the passenger seat. The weather was clear and the roads were dry. He testified that his highest rate of speed on the Bronx River Parkway was "maybe 50." When he first got on the Bronx River Parkway he was in the middle lane but eventually he changed into the right lane. Defendant signaled when he changed into the middle lane and slowed down his car to "35 miles per hour" because he was about to use the Gun Hill Road exit. He testified that the accident occurred about two to three minutes before he moved into the right lane. He testified that "30 miles per hour" was his greatest rate of speed on the right lane for that two to three minute period before the accident occurred.

He testified that when the accident occurred he was "approximately 12 cars away" from the Gun Hill Road exit ramp. There were ten cars on the exit ramp and two in the highway making him the third car on the parkway. He testified that when he first saw the two cars ahead of him on the parkway he was 25 yards away and was traveling at "25, 20" rate of speed. He testified that when he first saw the two cars ahead of him on the parkway they were stopped. He testified that his first indication that he was in an accident was when he heard "the sound of screeching wheels" in the right lane. He testified that at the time of the accident his vehicle was at a complete stop for "[l]ike 40 seconds" waiting for the traffic light to turn green. After he heard the screeching sound he felt an impact to the rear of his vehicle. He testified that about "two to three seconds" passed from the moment he heard the screeching tires up until the moment of impact. Due to the impact he sustained damage to the back of his vehicle.

Defendant Osman Hernandez, operator of the rear-hitting vehicle, testified that at the time of the accident the roads were wet because it snowed the night before. He testified the accident occurred at about 6:50 p.m. and it was dark out and he had his headlights on. He testified that he saw the other vehicle involved in the accident before it occurred. When he first saw the other vehicle, he was in the right lane and it was in the middle lane "[a]bout a car space" or "20 feet" in front of his. When he first saw the other vehicle it was traveling "45" and he reduced his rate of speed to "40". He testified that about 30 seconds of time elapsed from when the other vehicle merged into his lane up until the accident occurred. He testified the other vehicle swerved into his lane. He defined "swerved" as merging into his lane as "if he was going to miss the exit." He testified that he did not see the other vehicle's turn indicators on when it swerved into his lane. He testified that the other vehicle was traveling at a rate of speed of "45 to 50" when it swerved into his lane. Due to the wet roadway his vehicle "hydroplaned" ten feet and came into contact with the rear of the other vehicle. He testified it took eight to ten seconds from the moment the other vehicle got into his lane up until the point the accident occurred. He testified that when he came into contact with the other vehicle it made what he describes as a "short stop" and was still moving.

In addition, defendant Osman Hernandez submits as sworn affidavit in which he states that the accident was caused by the other vehicles "unsafe lane change, in failing to signal, in

swerving into my lane directly in front of my vehicle, in slowing and stopping his vehicle abruptly and in apparently striking the vehicle ahead of him”.

II. Standard of Review

“[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. *Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 (2nd Dept. 1964); *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 (3rd Dept. 1988).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000).

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

III. Analysis

“It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident.” *Cabrera v Rodriguez*, 72 A.D.3d 553 (1st Dept. 2010) citing *Tutrani v County of Suffolk*, 10 NY3d 906, 908 (2008); *Agramonte v City of New York*, 288 AD2d 75, 76 (1st Dept. 2001); see also *Dattilo v Best Transp. Inc* 79 A.D.3d 432 (1st Dept. 2010). However, “not every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision. Thus, where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide.” *Gaeta v. Carter*, 6 A.D.3d 576, 577 (2nd Dept. 2004) [citations omitted].

Here, Plaintiff, as the passenger in defendant Juan Febus Hernandez’s vehicle has established his prima facie case of negligence on the part of the defendants. See *Cabrera v Rodriguez*. The burden now shifts to the defendants to provide evidence of a “nonnegligent explanation for the accident, or a nonnegligent reason for her failure to maintain a safe distance between her car and the lead car.” *Mullen v. Rigor*, 8 A.D. 3D 104 (1st Dept. 2004) citing *Jean v Yu*, 288 A.D.2d 62, (1st Dept. 2001); *Mitchell v Gonzalez*, 269 A.D.2d 250, 251 (1st Dept. 2000). Such a “sufficient” explanation has been found where defendant’s vehicle suffered a mechanical failure or skidded on wet pavement *Reid v. Courtesy Bus Co.*, 234 A.D.2d 531 (2nd Dept. 1996), where defendant tried unsuccessfully to brake and turn steering wheel to avoid rear-end hit on icy and snowy roadway *Simpson v. Eastman*, 300 A.D.2d 647 (2nd Dept. 2002), or where the stopping vehicle was, itself, rear-ended and propelled into the stopped vehicle. *Katz v. Masada II Car & Limo Service Inc.*, 43 A.D.3d 876 (2nd Dept. 2007). In some circumstances, the sudden stop of a lead vehicle can constitute a sufficient explanation for a rear-end collision, such as when it fails to make a proper signal *Klopchin v. Masri*, 45 A.D.3d 737 (2nd Dept. 2007) Usually, sudden stops that are coupled with other negligent acts or violations of Vehicle and Traffic Law on the part of the stopped vehicle are sufficient to rebut the presumption of negligence *Id.* see also *Abbott v.*

Picture Cars East, Inc., 78 A.D.3d 869 (2nd Dept 2010) (defendant vehicle made improper lane change then stopped suddenly in front of plaintiff's vehicle). A bare explanation, however, that the plaintiff's vehicle suddenly stopped, is insufficient to rebut the presumption. See *Francisco v. Schoepfer*, 30 A.D.3d 275 (1st Dept. 2006); *Ramirez v. Konstanzer*, 61 A.D.3d 837 (2nd Dept. 2009); *Jumandeo v. Franks*, 56 A.D.3d 614 (2nd Dept. 2008). Indeed, it is well-settled that "[a] driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him to avoid collisions with stopped vehicles, taking into account weather and road conditions." *Malone v. Morillo*, 6 A.D.3d 324 (1st Dept. 2004), quoting *Mitchell v. Gonzalez*, 269 A.D.2d 250 (1st Dept. 2000).

In the case at bar, defendant Osman Hernandez's affidavit clearly states that defendant Juan Febus Hernandez "suddenly, swerved into the right lane, without signaling, less than one car length in front of me." In addition, defendant Osman Hernandez testified that defendant Juan Febus Hernandez was traveling at a rate of speed of "45 to 50" when he entered the right lane from the middle lane 15 feet in front of Osman Hernandez's vehicle, that defendant Juan Febus Hernandez did not have his turn indicators on when he entered the right lane, thereby causing defendant Osman Hernandez to brake and come into contact with the rear of defendant Juan Febus Hernandez's vehicle that was moving about "ten miles per hour" when the accident occurred. Thus, it is clear from the evidence submitted by the defendant Osman Hernandez in opposition to the instant motion he has provided a non-negligent explanation sufficient enough to defeat plaintiff's instant motion. See *Ramos v. Rojas* 37 A.D.3d 291, 292 (1st Dept. 2007); *Klopchin v. Musri*, 45 A.D.3d 737, (2nd Dept. 2007); *Connors v. Flaherty* 32 A.D.3d 891 (2nd Dept. 2006); *Figueroa v. Cadbury Util. Constr. Corp.*, 239 A.D.2d 285 (1st Dep't 1997). Furthermore, "[t]he question of whether the accident occurred as defendant [Osman Hernandez] described it. ...or whether it occurred as [defendant Juan Febus Hernandez] described it, is a classic dispute of fact" and "raises issues of credibility that should be left to a jury." *Ramos v. Rojas* 37 A.D.3d 291, 292 (1st Dept. 2007).


IV. Conclusion

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment pursuant to *CPLR* 3212 is hereby DENIED.

The above constitutes the Decision and Order of this Court.

Dated: August 10, 2011



Hon. Mary Ann Brigantti-Hughes, J.S.C.