

**Colletta v Paladino**

2013 NY Slip Op 32501(U)

October 15, 2013

Supreme Court, Queens County

Docket Number: 7159/2012

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

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JANINE COLLETTA, Index No.: 7159/2012  
Plaintiff, Motion Date: 09/24/2013  
- against - Motion No. 49  
Motion Seq. 1

JOSEPH PALADINO,  
Defendant.

- - - - - x

The following papers numbered 1 to 9 were read on this motion by plaintiff, JANINE COLLETTA, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting this matter down for a trial on damages only:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo of Law.....	1 - 6
Defendant's Affirmation in Opposition.....	7 - 9

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In this negligence action, the plaintiff, Janine Colletta, seeks to recover damages for personal injuries she allegedly sustained as a result of a motor vehicle accident that occurred on October 9, 2010, between her vehicle and the vehicle owned and operated by defendant, Joseph Paladino. At the time of the accident, plaintiff was operating her vehicle northbound on Woodhaven Boulevard near the intersection with 91<sup>st</sup> Avenue in Queens County. Plaintiff claims that her vehicle was stopped for a red traffic signal when it was struck in the rear by the defendant's vehicle. The plaintiff allegedly sustained multiple herniated discs of the cervical and thoracic spine as a result of the impact.

The plaintiff commenced this action by filing a summons and complaint on April 4, 2012. Issue was joined by service of defendant's verified answer dated August 30, 2012. A note of issue was filed on April 23, 2013. The matter is presently calendared in the Trial Scheduling Part for November 25, 2013. Plaintiff now moves for an order pursuant to CPLR 3212(b), granting partial summary judgment on the issue of liability and setting this matter down for a trial on damages only.

In support of the motion, the plaintiff submits an affirmation from counsel, Richard Schechner, Esq., a copy of the pleadings, copies of the transcripts of the examination before trial of plaintiff, Janine Colletta and defendant, Joseph Paladino, an uncertified copy of the police accident report (MV-104), photographs depicting the damage to the subject vehicles; and an affidavit from the plaintiff.

In her examination before trial taken on January 7, 2013, plaintiff Janine Colletta, age 29, a medical assistant, testified that she was involved in a motor vehicle accident on October 9, 2010. At the time of the accident she was operating her father's Nissan Altima traveling toward her home with three passengers, her sister, her niece and her step-brother. She states that she was traveling on Woodhaven Boulevard and was stopped for five seconds at a red traffic signal at the intersection of 91<sup>st</sup> Avenue when her vehicle was struck in the rear by the vehicle operated by the defendant. The impact pushed her vehicle 10 or 15 feet into the intersection. After exiting her vehicle she observed that the rear bumper was off her car and the right side of her vehicle was damaged. When the police arrived at the scene she told them that she was driving northbound on Woodhaven Boulevard, stopped at a red traffic signal and was struck in the rear by the defendant's vehicle. She left the scene in an ambulance that transported her to the emergency room at Jamaica Hospital.

Defendant, Joseph Paladino, testified on January 29, 2013 that on the date of the accident he was coming from his home and traveling with his brother to St. John's Cemetery in Queens County. He was traveling westbound on Woodhaven Boulevard. As he approached 91<sup>st</sup> Street he observed the plaintiff's vehicle slowing down with its brake lights on. He states that as he approached plaintiff's vehicle he hit his brakes and swerved his vehicle to the right towards the middle lane to try and avoid hitting the plaintiff's vehicle. When asked why he was not able to just come to a complete stop behind the plaintiff's vehicle he replied, "I was too close to her - two car lengths and I couldn't -- I couldn't stop. I just hit her on the corner of the rear of

her car when I swayed. Another six inches and I wouldn't have hit her." He stated that if he had kept his steering wheel straight he would have hit her car straight on in the rear. Defendant also testified that he was traveling at a rate of 30 or 35 miles per hour when he impacted the plaintiff's vehicle. He stated that he does not know if there is a traffic signal at the intersection of 91<sup>st</sup> Street. He doesn't remember what he told the police at the scene as to how the accident occurred.

In her affidavit, plaintiff reiterates that she came to a stop for a traffic light at the intersection of Woodhaven and 91<sup>st</sup> Avenue. At the time she had been traveling in the north bound direction of Woodhaven Boulevard in the left lane. She states that suddenly and without warning her vehicle was struck in the rear by another vehicle while she was stopped at the red traffic signal.

The police accident report submitted by the plaintiff describes the accident as follows:

"At t/p/o driver of veh #1(plaintiff) states that she was stopped at a red light when veh #2 rear ended her. Driver of veh #2(defendant) states he did not realize veh #1 stopped and attempted to swerve out of the way but rear ended Veh #1"

The photographs submitted by the plaintiff depicts the damage to the right rear of her vehicle and the front of the defendant's vehicle.

Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant in that defendant's vehicle was traveling too closely in violation of VTL § 1129 and the defendant driver failed to safely stop his vehicle prior to rear-ending the plaintiffs' vehicle. Counsel asserts that the defendant's version of how the accident occurred constitutes an admission of negligence in that he observed the plaintiff's vehicle with its brake lights on, stopped in the roadway, that he was too close, that he attempted to brake and swerve out of the way but he could not stop in time and struck the plaintiff's vehicle at a rate of 30 - 35 miles per hour. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment as to liability because the defendant driver was solely responsible for causing the accident while the plaintiff driver was free from culpable conduct.

In opposition to the motion, defendant's counsel, Michelle F. Vlosky, Esq., states that the question of whether the defendant's conduct amounts to negligence is a question of fact for the trier of fact.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his position (see Zuckerman v. City of New York, 49 NY2d 557[1980]).

"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" (Macauley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Kertesz v Jason Transp. Corp., 102 AD3d 658 [2d Dept. 2013]; Ramos v TC Paratransit, 96 AD3d 924 [2d Dept. 2012]; Pollard v Independent Beauty & Barber Supply Co., 94 AD3d 845 [2d Dept. 2012]; Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]).

Here, plaintiff testified that her vehicle was at a complete stop at a red traffic signal when it was suddenly struck from behind by defendants' vehicle. Thus, the plaintiff satisfied her prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability (see Robayo v Aghaabdul, 971 NYS2d 317[2d Dept. 2013]; Sayyed v Murray, 109 AD3d 464 [2d Dept. 2013]; Prosen v Mabella, 107 AD3d 870 [2d Dept. 2013]; Xian Hong Pan v Buglione, 101 AD3d 706 [2d Dept. 2012]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether that negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]). This Court finds that the defendant, who testified that he observed the plaintiff's brake lights on, saw that plaintiff's vehicle was stopped or slowing down in front of him but struck plaintiff's vehicle because he was following too closely and could not swerve out of the way, failed to provide evidence as to a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Grimm v Bailey, 105 AD3d 703 [2d Dept. 2013]; Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Cavitch v Mateo, 58 AD3d 592 [2d Dept. 2009]; Garner v Chevalier Transp. Corp., 58 AD3d 802 [2d Dept. 2009]; Kimyaqarov v Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]).

As the evidence in the record demonstrates that the defendant failed to provide a non-negligent explanation for the collision and as no triable issues of fact have been put forth as to whether plaintiff driver may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, JANINE COLLETTA, shall have partial summary judgment on the issue of liability against the defendant JOSEPH PALADINO and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that this case remains on the trial calendar of the Trial Scheduling Part on November 25, 2013 for a trial on damages.

Dated: October 15, 2013  
Long Island City, N.Y.

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ROBERT J. MCDONALD  
J.S.C.