SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
PART 4

----------x

Dennis Polanco

Index No.306995-2011

Plaintiff

-against-

Decision and Order

Vincent's Limousine Service of New York, Inc. and Jeffry Malonda a/k/a Jeffrey Malonda

Defendants

----------x

FACTS AND PROCEDURAL HISTORY

Plaintiff Dennis Polanco seeks recovery for personal injuries allegedly sustained on February 4, 2010 when , while stopped for a red light at East 59th Street and Second Avenue , New York County, New York , his vehicle was impacted from the rear by a vehicle operated by defendant Jeffry Malonda a/k/a Jeffrey Malonda ("Malonda"). .

This action was commenced in August 2011 , and issue was joined in the same month with the service of the answer of defendant Car Rentals , Inc. (" Car Rentals"). [1] The co-defendants' answer was served in September 2011.

The Note of Issue was filed on January 29, 2013.

Motion

Plaintiff now moves for an award of summary judgment on the issue of liability contending that there is no evidence to raise a material issue of fact that the accident was caused by other than the culpable conduct of defendant in failing to maintain a safe distance between his vehicle and that of the plaintiff.

In support of the motion plaintiff submits his affidavit and a copy of the transcript of the deposition testimony of the defendant driver.

Defendants oppose the motion contending that there are issues of fact as to the plaintiff-driver's comparative negligence in abruptly stopping that preclude an award of dispositive relief.

In addition, defendants maintain that the issue of causation of plaintiff's injuries has not been demonstrated , and they submit as a exhibit , the letter of a biomedical engineer expert addressed to counsel for defendants concerning an analysis of the injury mechanism of the subject accident [Exhibit B]. The expert's submission is inadmissible as tendered , as is the unsworn/unaffirmed report of a 06/21/12 IME [Exhibit C].

Discussion

It is by now 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 , tendering

sufficient evidence to demonstrate the absence of a material issues of fact. Zuckerman v. City of New York, 49 N.Y.2d 557 [1980] To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957]. Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition. Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735 [2008] Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185 AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003]). Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 [1st Dept. 1991].

While summary judgment is "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (Wilson v. Sponable, 81 AD2d 1, 5; Siegel, Practice Commentaries, McKinney's Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) " Johnannsdottir v. Kohn, 90 AD2d 842 [1st Dept. 1982] , such a motion will be granted "where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party." (Morowitz v. Naughton , 150 AD2d 536 [1st Dept. 1989[; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 Ad3d 276 [1st Dept. 2004]).

In addition, it is well settled that a rear end collision with a vehicle establishes a *prima facie* case of negligence against the rearmost driver (see, Woodley v. Ramirez, 25 Ad3d 451 [1st Dept. 2006], as the "rule is that a driver must maintain a safe distance between his vehicle and the one in front of him ....." (Johnson v. Phillips, 261 AD2d 269,271, 690 N.Y.S.2d 545 [1st Dept. 1999]; see also, Vehicle and Traffic Law § 1129 [a])

In the case of a rear-end collision, summary judgment on liability would properly lie " unless the driver of the following vehicle presents a nonnegligent explanation for the accident, or a nonnegligent reason for his failure to maintain a safe distance between his car and the lead car [and] [a] claim that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of non-negligence on the part of the lead vehicle."

(Woodley v. Ramirez, 25 A.D.3d 451 at 452 ; 810 N.Y.S.2d 125 [1st Dept. 2006]; see also, Francisco v. Schoepfer, 30 A.D.3d 275, 817 N.Y.S.2d 52 [1st Dept. 2006] ;Brown v. Smalls, 104 A.D.3d 459, 961 N.Y.S.2d 104 [1st Dept. 2013]; Santana v. Tic-Tak Limo Corp., 106 A.D.3d 572; 966 N.Y.S. 2d 30 [1st Dept. 2013]).

Conclusions

Upon review of the record as afforded all favorable inferences in favor of the non-moving parties , it is the finding of this court that plaintiff has sustained his burden to prove as a matter of law that the underlying rear-end collision was caused solely by the failure of the defendant driver to maintain a safe distance between his vehicle and that of the plaintiff's stopped vehicle .

To rebut the presumption of negligence thus established, it is incumbent upon defendants to come forward with a non-negligent explanation for the collision or for the failure to maintain a safe distance.

Defendants have failed to do so as any claim of an abrupt stop under the circumstances of the prevailing slow-moving traffic[2] conditions controlled by traffic agents, is insufficient to provide a non-negligent explanation for defendant driver's inability to maintain a safe distance from plaintiff's vehicle.

---

[2]Defendant testified that he was traveling at 5 miles per hour [MALONDA EBT: 31].

Accordingly, it is ORDERED that the motion of plaintiff for an award of summary judgment on the issue of liability as against the defendants be and hereby is granted pursuant to CPLR 3212 and it is ORDERED that

summary judgment be entered in favor of plaintiff as against defendants on the issue of liability , and it is ORDERED that

upon the completion of all outstanding discovery, if any, with respect thereto, this matter be set down for an assessment of damages , including the threshold determination of whether plaintiff sustained a serious injury in the underlying motor vehicle accident as well as the issue of proximate cause.

This constitutes the decision and order of this court.

Dated : July 3, 2013

Howard H. Sherman