Cruz v Lanxner-Brull
2015 NY Slip Op 30994(U)
May 11, 2015
Supreme Court, Bronx County
Docket Number: 309194/2012
Judge: Howard H. Sherman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Decision and Order

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Brenda J. Cruz

Plaintiff

Index No. 309194/2012

-against-

Howard H. Sherman
J.S.C.

Miriam Lanxner-Brull

Defendant

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Facts and Procedural Background

Plaintiff seeks recovery for injuries alleged to have been sustained in a two-vehicle rear- end collision that occurred on July 15, 2012 near the intersection of Madison Avenue and 107th Street, New York County New York. At that time plaintiff was the owner and driver of a motor vehicle, which while stopped , was struck in the rear by a motor vehicle owned and then being operated by Miriam Lanxner-Brull (" Lanxner-Brull ")

This action was commenced in November 2012, and issue was joined with the service of defendant's answer in January 2013.

The Note of Issue was filed on March 20, 2015.

Motion

Plaintiff now moves for an order awarding partial summary judgment on the issue of liability arising from the presumption of the causative negligence of the rear-most driver. The motion is supported by copies of the deposition testimony of the parties, and

a copy of the police accident report. [1]

Defendant opposes the motion on the grounds that plaintiff's action of stopping in the middle lane of moving traffic raises an issue of fact as to whether there is a non-negligent explanation for the collision.

In reply, plaintiff argues that there is no issue of fact that her vehicle was stopped for approximately 4-5 seconds prior to impact, and under these circumstances, there is no question that any "abrupt stop" by the lead vehicle either caused or contributed to the accident.

Discussion and Conclusions

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, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as 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

[1] As uncertified, the copy of the police report is inadmissible (see, Coleman v. Maclas, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009]).

Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

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, 670 N.Y.S.2d 543 [2d Dept 1998], quoting *Larkin Trucking Co. V. Lisbon Tire Mart*, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

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, 501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , *rearg.den.* 10 N.Y.3d 885).

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 , 577 N.Y.S.2d 311 [2d Dept. 1991];Meridian Mgt. Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1st Dept. 2010]).

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, 456 N.Y.S.2d 86 [2d 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 [2d Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 , 699 N.Y.S.2d 393 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 AD 3d 276, 788 N.Y.S.2d 337 [1st Dept. 2004]).

In addition, it is settled that a rear end collision with a stopped 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 [1st Dept. 1999]; see also, Vehicle and Traffic Law § 1129 [a]). The driver of a stopped vehicle struck from behind by another vehicle is entitled to summary judgment unless the driver of the following vehicle presents a nonnegligent explanation for the accident, or a nonnegligent reason for his of her failure to maintain a safe distance between his or her car and the lead car (see, Mullen v Rigor, 8 AD3d 104, 778 NYS2d 168 [2004]; Agramonte v City of New York, 288 AD2d 75, 732 NYS2d 414 [2001]).

Upon review of the moving papers and consideration of the applicable law, it is the finding of this court that plaintiff has demonstrated as a matter of law that the accident was

caused by the failure of defendant to maintain a safe distance behind plaintiff's vehicle, and it is the further finding of this court that defendant has failed to demonstrate that any " abrupt stop" under the conditions then prevailing, which were described by Lanxner-Brull as involving obstructions in outer lanes caused by Con Ed work and a merger of traffic into the center lane, raises an issue of fact of a non-negligent explanation for the rear-end collision.

Accordingly, it is

ORDERED that the motion of the plaintiff be and hereby is granted, and it is further

ORDERED that an award of partial summary judgment be entered in favor of plaintiff as against defendant on the issue of liability , and it is further

ORDERED that upon the completion of any outstanding discovery with respect thereto and the filing of the Note of Issue and the payment of all appropriate fees therefor, this matter be set down for an assessment of damages to include the threshold determination of whether plaintiff sustained a serious injury in the subject motor vehicle accident, as well as the issue of proximate cause.

This constitutes the decision and order of this court.

Dated: May 11, 2015

Howard H. Sherman