

**Marrero v Fontaine**

2015 NY Slip Op 31653(U)

January 8, 2015

Supreme Court, Bronx County

Docket Number: 303048/14

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX  
PART 04

-----x  
Fernando Marrero

*Plaintiff,*

Index No. 303048/14

-against-

DECISION/ORDER

Howard H. Sherman  
J.S.C.

Roosevelt Fontaine, Jr., and Seniorcare Emergency  
Medical Services, Inc.,

*Defendants*  
-----x

The following papers read on this motion 1-2 noticed on December 17 2014 and duly submitted on the Motion Calendar of that date

	<u>PAPERS NUMBERED</u>	
Notice of Motion -Affirmation in Support and Exhibits A-E	1	

Upon the foregoing papers this motion by plaintiff for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability , submitted without opposition is granted on default and pursuant to CPLR 3212 for the reasons set forth below.

Facts and Procedural Background

In this action plaintiff Fernando Marrero ("Marrero") seeks damages for injuries alleged to have been sustained in a September 4, 2013 rear-end collision that occurred at the intersection of Main Street and 78 Road , in Queens County, New York.

This action was commenced in May 2014, and issue was joined with the service of defendants' answer in August 2014.

Motion

Plaintiff moves for an award of summary judgment on the issue of liability contending that there is no material issue of fact of a non-negligent explanation for the rear-end collision. The motion is supported by the pleadings and the affidavit of the plaintiff-driver. The uncertified copy of the police report tendered in support is inadmissible.

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 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 [1<sup>st</sup> 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 [1<sup>st</sup> 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) " Johannsdottir 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 [1<sup>st</sup> 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 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, 810 N.Y.S.2d 125 [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 [emphasis added]." (Woodley v. Ramirez, *supra* at 452 , citing as authority, Malone v. Morillo, 6 A.D.3d 324, 775 N.Y.S.2d 312 [1<sup>st</sup> Dept. 2004]; Mullen v. Rigor, 8 A.D.3d 104, 778 N.Y.S.2d 168 [1<sup>st</sup> Dept. 2004]; Agramonte v. City of New York, 288 A.D.2d 75, 732 N.Y.S.2d 414; see also, Cabrera v. Rodriguez, 72 A.D.3d

553, 900 N.Y.S.2d 29 [1<sup>st</sup> Dept. 2010]; Chowdhury v. Matos, 118 A.D.3d 488, 987 N.Y.S.2d 132 [1<sup>st</sup> Dept. 2014]).

Upon review of the moving papers and consideration of the applicable law, it is the finding of this court that plaintiff has demonstrated a prima facie case of the causative negligence of the defendant driver in failing to maintain a safe distance behind plaintiff's car that was stopped at a red light at the intersection.

No opposition is interposed .

Accordingly, it is

ORDERED that the motion of the plaintiff be and hereby is granted on default and pursuant to CPLR 3212, and it is further

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

ORDERED that upon the completion of all discovery with respect thereto, and the filing of the Note of Issue, this matter be set down for an assessment of damages to include a determination of the issue of whether plaintiff sustained a serious injury as well as the issue of proximate cause.

This constitutes the decision and order of this court.

Dated: January 8, 2015



Howard H. Sherman