

**Martin v Hirsch**

2015 NY Slip Op 33000(U)

June 7, 2015

Supreme Court, Westchester County

Docket Number: Index No. 69263/15

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under CPLR 5513 (a), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
JEANETTE MARTIN,

Plaintiff,

-against-

STEVEN HIRSCH,

Defendant.

-----X  
EVERETT, J.

Index No. 69263/15  
Motion Sequence No. 001  
Decision and Order

The following papers were read on the motion:

- Notice of Motion/Aff in Supp/Memorandum of Law/Exhibits A-D
- Aff in Opp/Exhibits A-C
- Reply Aff

Upon the forgoing papers, the motion is granted.

Plaintiff Jeanette Martin (Martin) moves for an order, pursuant to CPLR 3212, granting summary judgment against defendant Steven Hirsch (Hirsch) on the issue of liability and directing an immediate trial on damages. Hirsch opposes the motion.

The following facts are taken from the parties' pleadings, motion papers, affidavits and documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on November 11, 2015, to recover damages for injuries she allegedly sustained in an automobile accident which occurred on July 10, 2015. In her complaint, plaintiff alleges that, at approximately 12:30 p.m., while driving northbound on the FDR Drive near the 96<sup>th</sup> Street exit in Manhattan, the vehicle she was operating was struck from

behind by a vehicle being driven by Hirsch. Issue was joined by service of defendant's answer on or about December 17, 2015. Less than a week after the parties entered into a so-ordered preliminary conference order, plaintiff served the instant motion for summary judgment.

The gravamen of her motion is that negligence should be inferred against Hirsch, because the happening of the rear-end automobile collision itself constitutes proof that he failed to maintain a safe distance between his vehicle and hers.

As the proponent of the motion for summary judgment, Martin must tender evidentiary proof in admissible form sufficient to warrant the court to direct judgment in her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]). Should plaintiff make the requisite showing, the burden would shift to defendant to produce evidentiary proof in admissible form sufficient to require a trial on one or more issues of fact (*id.*).

With respect to collisions between moving vehicles, or between a moving vehicle and a stopped vehicle, it is well settled that, “[w]hen 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” (*Taing v Drewery*, 100 AD3d 740, 741 [2d Dept 2012]). Furthermore, “vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead” (*Robayo v Aghaabdul*, 109 AD3d 892, 893 [2d Dept 2013] [internal quotation marks and citation omitted]). It is also well settled law that “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence

with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*id.*).

Finally, Vehicle and Traffic Law § 1129 provides, at subsection (a), that “[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway.”

Here, Martin submits her sworn affidavit attesting to the facts surrounding the accident (notice of motion, exhibit D). In it, Martin states, in relevant part:

“3. I was involved in a motor vehicle accident on July 10, 2015 at approximately 12:30 p.m. The accident occurred while I was traveling north bound on the FDR Drive near its intersection with East 96<sup>th</sup> Street, in the County of New York, State of New York.

\* \* \*

5. . . . At the above-referenced time and location, while travelling [sic] north bound on the FDR Drive near its intersection with East 96<sup>th</sup> Street . . . I brought my vehicle to a complete stop as a result of traffic at that location.

7. [misnumbered] At the above-referenced time and location, a 2013 Honda motor vehicle . . . owned and operated by defendant STEVEN HIRSCH, while traveling behind me on the FDR Drive near its intersection with East 96<sup>th</sup> Street . . . rear ended by motor vehicle.

8. At the time of the accident, my vehicle had come to a complete stop for at least ten (10) seconds with my right foot on the brake as a result of the traffic in that location.

9. The entire front of the Defendant’s vehicle struck the entire rear of my vehicle”

(*id.*). Martin also submits a copy of the New York City Police Accident Report (*id.* exhibit A) generated after the subject automobile accident (Police Report). The Police Report, which identifies Martin’s vehicle as “vehicle 1,” and Hirsch’s vehicle as “vehicle 2,” contains the following accident description:

“[a]t the time and place of occurrence driver of vehicle one states she was

driving straight ahead when all of a sudden vehicle two rear ended her vehicle causing property damage. Driver of vehicle number two states he was driving straight ahead when vehicle one suddenly slowed. Driver of vehicle one [sic] further states he did not have enough time to stop and struck vehicle number one”

(*id.*).

By this evidence, Martin has satisfied her prima facie burden of establishing negligence (liability) on the part of Hirsch as a matter of law, and the burden shifts to Hirsch to come forward with a nonnegligent explanation for the collision (*Robayo v Aghaabdul*, 109 AD3d at 893).

To this end, Hirsch points out that, according to the Police Report, generated at or about the time of the accident, Martin informed the police officer at the scene that she was “driving straight ahead” when Hirsch rear-ended her vehicle, while her more recent affidavit states that her car was in a stopped position when Hirsch rear-ended her vehicle. Given that there have been no depositions, and Hirsch has not had an opportunity to question Martin about this apparent contradiction or to discern whether there exist any facts “essential to justify opposition,” it is his position that it would be inappropriate to grant the motion at this juncture (CPLR 3212 [f]).

Contrary to Hirsch’s assertion, Martin’s motion is ripe for decision and summary judgment on the issue of liability is granted. As to negligence and liability, New York case law draws little distinction between motor vehicle accidents which occur when the front vehicle is moving forward or when the front vehicle is in a stopped position at the time his or her vehicle is struck from behind. As stated above, “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent

explanation for the collision” (*Robayo v Aghaabdul*, 109 AD3d at 893; *see also Taing v Drewery*, 100 AD3d at 741). Accordingly, the discrepancy,<sup>1</sup> is not fatal to Martin’s motion, as the question as to whether she was driving straight, slowing down or was in a stopped position at the moment of impact does not constitute a nonnegligent explanation for the rear-end collision. This is because none of these possible situations provides a nonnegligent explanation for Hirsch’s failure to maintain a reasonably safe distance, under the prevailing traffic conditions, between his vehicle and the vehicle directly in front of him.

Hirsch has failed to submit evidentiary facts or materials to rebut plaintiff’s prima facie showing. His conjecture and expressions of hope that facts might exist, but cannot now be stated, is insufficient to forestall summary judgement (*Zuckerman v City of New York*, 49 NY2d at 562; *Johnson v Richardson*, 120 AD3d 767, 768 [2d Dept 2014]).

Accordingly, it appearing to the Court that plaintiff Jeanette Martin is entitled to judgment as to liability, and that the triable issues of fact arising on plaintiff’s motion for summary judgment relate to the amount of damages to which plaintiff is entitled, it is

ORDERED that the motion for summary judgment is granted with regard to liability; and it is further

ORDERED that the parties are directed to appear with counsel in the Hon. Richard J. Daronco Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, at the Compliance Conference Part, Courtroom 800, on Friday, June 24, 2016, at

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<sup>1</sup> Defendant may explore this issue during Martin’s deposition, as the circumstances surrounding precisely how the accident occurred may impact the trial on damages.

9:30 a.m., to make all necessary changes to the preliminary conference order to ensure adequate disclosure prior to a trial on damages.

This constitutes the decision and order of the Court.

Dated: White Plains, New York  
June 7, 2015



HON. DAVID F. EVERETT, A.J.S.C.

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