

**Taylor v O'Brien**

2016 NY Slip Op 33181(U)

January 7, 2016

Supreme Court, Nassau County

Docket Number: Index No. 605486/15

Judge: Daniel Palmieri

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**SHORT FORM ORDER**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU**

**P R E S E N T : HON. DANIEL PALMIERI  
J.S.C.**

-----X **TRIAL/IAS PART 20**

**GRACE TAYLOR,**

**Plaintiff,**

**Index No. 605486/15**

**- against -**

**Mot. Seq. #001**

**KERRI OBRIEN,**

**Defendant.**

**Mot. Date: 12-22-15**

**Submit Date: 12-22-15**

-----X

**The following papers have been read on this motion:**

<b>Notice of Motion, dated 11-10-15.....</b>	<b>1</b>
<b>Affirmation in Opposition, dated 12-10-15.....</b>	<b>2</b>
<b>Reply Affirmation, dated 12-10-15.....</b>	<b>3</b>

The plaintiff’s motion for summary judgment pursuant to CPLR §3212 is granted on the issue of liability or fault only.

The granting of summary judgment on the issue of liability or fault, does not include a determination of plaintiff’s claim of serious injury as defined in article 51 of the Insurance Law. *VanNostrand v. Froehlich*, 44 AD3d 54 (2d Dept. 2007); *Abbas v. Cole*, 44 AD3d 31 (2d Dept. 2007); *Zecca v. Riccardelli*, 293 AD2d 31 (2d Dept. 2002).

This case arises out of a motor vehicle accident which took place on December 18, 2014 on westbound on the Northern State Parkway in Nassau County, N.Y.

Plaintiff states she was stopped in heavy traffic for “about five seconds” when struck in the rear by defendant. Defendant has submitted only an affirmation of her attorney who has not offered any excuse or reason why there is no affidavit from someone with knowledge of the event.

It is well settled that an attorney’s affirmation that is not based on personal knowledge or

supported by documentary evidence is of no probative value. *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 (2d Dept. 2006); *Sampson v. Delaney*, 34 AD3d 349 (1<sup>st</sup> Dept. 2006); cf. *Davey v. Dolan*, 46 AD3d 854 (2d Dept. 2007). Here, defendant's attorney does not profess to possess personal knowledge of any facts asserted and has not employed his affirmation as a vehicle to refer to other competent evidence.

It is well settled that summary judgment is a drastic remedy which should not be granted where there is any doubt about the existence of a triable issue of fact. *Bhatti v. Roche*, 140 AD2d 660 (2d Dept. 1988). It is nevertheless an appropriate tool to weed out meritless claims. *Lewis v. Desmond*, 187 AD2d 797 (3d Dept. 1992); *Gray v. Bankers Trust Co. of Albany, N. A.*, 82 AD2d 168 (3d Dept. 1981). Even where there are some issues in dispute in the case which have not been resolved, the existence of such issues will not defeat a summary judgment motion if, even when the facts are construed in the nonmoving party's favor, the moving party would still be entitled to relief. *Brooks v. Blue Cross of Northeastern New York, Inc.*, 190 AD2d 894 (3d Dept. 1993).

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor. CPLR 3212 (b). In negligence cases, there may be more than one proximate cause of the injury-causing occurrence (*Lopez v Reyes-Flores*, 52 AD3d 785 [2d Dept. 2008]), and thus the proponent of the motion must establish freedom from comparative negligence as a matter of law. *Pollack v Margolin*, 84 AD3d 1341 (2d Dept. 2011). Absent this initial showing, the court should deny the motion, without passing on the sufficiency of the opposing papers. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If such a *prima facie* case is made, the burden shifts to the nonmoving party. To defeat the

motion for summary judgment, the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also* *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The nonmoving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). Conclusory allegations are insufficient (*Zuckerman v. City of New York, supra*), and the defending party must do more than merely parrot the language of the pleadings or bill of particulars. There must be evidentiary proof in support of the allegations. *Fleet Credit Corp. v. Harvey Hutter & Co., Inc.*, 207 A.D.2d 380 (2d Dept. 1994); *Toth v. Carver Street Associates*, 191 AD2d 631 (2d Dept. 1993).

On such a motion the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995). The role of the court in deciding a motion for summary judgment is not to resolve issues of fact or to determine matters of credibility, but simply to determine whether such issues of fact requiring a trial exist. *Dyckman v. Barrett*, 187 AD2d 553 (2d Dept. 1992); *Barr v. County of Albany*, 50 NY2d 247, 254 (1980); *James v. Albank*, 307 AD2d 1024 (2d Dept. 2003); *Heller v. Hicks Nurseries, Inc.*, 198 AD2d 330 (2d Dept. 1993). The Court need not, however, ignore the fact that an allegation is patently false or that an issue sought to be raised is merely feigned. *Sexstone v. Amato*, 8 AD3d 1116 (4<sup>th</sup> Dept. 2004). The Court may also search the record and grant summary judgment in favor of a nonmoving party with respect to a cause of action or issue that is the subject of a motion for summary judgment without the necessity of a cross-motion. CPLR 3212(b); *Katz v. Waitkins*, 306 AD2d 442 (2d Dept. 2003).

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence

with respect to the operator of the rearmost vehicle, and the party who was struck from behind may thus establish entitlement to judgment as a matter of law that he/she was not responsible for the accident. *Sehgal v. www.nyairportsbus.com, Inc.*, 100 AD3d 860 (2d Dept. 2012); *Smith v. Seskin*, 49 AD3d 628 (2d Dept. 2008); *Francisco v. Schoepfer*, 30 AD3d 275 (1<sup>st</sup> Dept. 2006); *Velasquez v. Denton Limo Inc.*, 7 AD3d 787 (2d Dept. 2004); *see also Schmidt v. Guenther*, 103 AD3d 1162 (4<sup>th</sup> Dept. 2013). Accordingly, plaintiff has made out a *prima facie* showing that he/she is entitled to summary judgment as to defendant.

Once a *prima facie* showing has been made the burden is on the operator of the moving vehicle to rebut the inference of negligence by providing a non negligent explanation for the collision. *Katz v. Masada II Car & Limo Service, Inc.*, 43 AD3d 876, 877 (2d Dept. 2007).

A driver of a vehicle approaching another vehicle from the rear is required 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. *Vavoulis v. Adler*, 43 AD3d 1154 (2d Dept. 2007); *Velasquez v. Denton Limo Inc.*, 7 AD3d 787 (2d Dept. 2004). The following vehicle is under a duty to maintain a safe distance between his vehicle and the vehicle ahead. Vehicle and Traffic Law section 1129 [a]. *Leal v. Wolff*, 224 AD2d 392 (2d Dept. 2005).

Applying these well-established standards to the case at bar, the Court finds that the plaintiff has made out a claim for summary judgment as to the issue of liability or fault. Defendant has not met her burden of providing a non negligent explanation for the accident. It is not disputed that plaintiff was fully stopped at impact. *Cheow v. Jin*, 121 AD3d 1058 (2d Dept. 2014). *Cf. Spinosa v. Golden Touch Transportation of NY*, 122 AD3d 916 (2d Dept. 2014). *Romero v. AL Haag & Son Plumbing*

*& Heating, Inc.*, 113 AD3d 746 (2d Dept. 2014). Moreover, vehicle stops which are foreseeable under prevailing traffic conditions, even if sudden and frequent must be anticipated by the driver who follows since he/she is under a duty to maintain a safe distance. *Robayo v Aghaabdul*, 109 AD3d 892 (2d Dept. 2013).

The contention of defendant that the motion should be denied because discovery has not been completed is without merit. A motion for summary judgment may be opposed with the claim that facts essential to justify opposition may exist but that such material facts are within the exclusive knowledge and possession of the moving party. CPLR §3212(f). However, the opposing party must make an evidentiary showing supporting this conclusion and not base the need for further discovery on speculation or conjecture. *Firth v. State*, 287 AD2d 771 (3d Dept. 2001); *Urcan v. Cocarelli*, 234 AD2d 537 (2d Dept. 1996). Defendant has not submitted sufficient evidence to support her contention that further discovery will alter the result here.

Although defendant claims that there has been no response to its demands for a bill of particulars a perusal of the demand reveals two thirds of the questions go to the issue of damages which remains open and in contention and at least nine of the 30 questions are answered or addressed in the moving papers.

The Court has not considered the police accident report signed by the investigating officer because although certified, does not give the source of the information and does not state that it is based on the observations of the officer. *See generally, Rodriguez v. Ryder Truck, Inc.*, 91 AD3d 935 (2d Dept. 2012); *Toussaint v. Ferrara Bros. Cement Mixer*, 33 AD3d 991 (2d Dept. 2006); *Liguori v. City of New York*, 250 AD2d 738 (2d Dept. 1998). Although it has been held that an admission of

a party to a police officer may be considered as such (*Guevara v. Zaharakis*, 303 AD2d 555 [2d Dept. 2003]) here as noted above the police report does not give the source of the statement. *Aetna Casualty & Surety Company v Stone*, 170 AD2d 599 (2d Dept. 1991).

All parties shall appear at a preliminary conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on February 25, 2016, at 9:30 a.m., lower level. No adjournments of this conference will be permitted without permission of this Court. All parties are forewarned that failure to attend the conference may result in Judgment by Default, the dismissal of pleadings (see 22 NYCRR 202.27) or monetary sanctions (22 NYCRR 130-2.1 et seq.).

All requests or contentions not specifically addressed are deemed denied.

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: January 7, 2016



HON. DANIEL PALMIERI  
Supreme Court Justice

**Attorneys for Plaintiff**

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**ENTERED**  
JAN 12 2016  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE