Fayez-Olabi v Forrester
2017 NY Slip Op 31967(U)
August 9, 2017
Supreme Court, Suffolk County
Docket Number: 12237/2015
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 12237/2015**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Mot Conf Date: 11/06/16
Mot Submit Date: 03/23/17
Mot Seq #: 001 MG

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DIVINE FAYEZ-OLABI, SR.,

Plaintiff,

-against-

WILLIAM FORRESTER, COUNTY OF SUFFOLK & SUFFOLK COUNTY DEPARTMENT OF PUBLIC WORKS,

Defendant.

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PLAINTIFF'S ATTORNEY:
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DEFENDANTS' ATTORNEY:
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Upon the reading and filing of the following papers on Defendant's unopposed motion seeking partial summary judgment as to liability pursuant to CPLR 3212 in this matter: (1) Plaintiff's Notice of Motion and Affirmation in Support dated January 4, 2017 and supporting papers~~; (and after hearing counsels' oral arguments in support of and opposed to the motion);~~ and now it is

ORDERED that plaintiff's motion seeking summary judgment with regards to liability pursuant to CPLR 3212 is granted as discussed below.

This matter is before the Court on plaintiff's motion for partial summary judgment on liability. It arises from a motor vehicle accident which occurred on October 23, 2014 at or near the intersection of Montauk Highway and Venetia Boulevard in the County of Suffolk, New York.

Plaintiff Divine Fayez-Olabi, Sr. ("plaintiff") has brought the instant personal injury action against defendants William Forrester, the County of Suffolk and the Suffolk County Department of Public Works ("defendants") seeking the recovery of money damages for alleged injuries sustained in the motor vehicle accident premised on defendant's alleged negligence.

Plaintiff commenced this action filing her summons and complaint on July 16, 2015. Prior to filing, in satisfaction of a statutory condition precedent, plaintiff put defendants on notice of his claim within filing a Notice of Claim dated December 15, 2014. Defendant joined issue interposing his answer. Discovery in the action is well underway and the parties have

submitted to pretrial examinations under oath.

Plaintiff appeared at and was produced for a municipal hearing pursuant to General Municipal Law § 50-h on April 1, 2015 and gave sworn testimony. At that hearing, plaintiff testified that he was a passenger travelling eastbound on Montauk Highway in a 2002 Ford Explorer owned by his co-worker Nicholas Fowler, on the way to McDonald's in Lindenhurst on their lunch break. Traffic was described as fair. While travelling in the left lane and slowing to a full and complete stop due to the vehicle ahead slowing and stopping to make a left hand turn, they were rear-ended by a white Ford SUV operated by defendant William Forrester. Immediately after impact, plaintiff testified that Forrester admitted to him in conversation that he did not see them. Plaintiff described the rear-end contact as heavy, and he observed damage to the rear of Fowler' vehicle including a broken rear windshield.

At his deposition also held on October 5, 2016, defendant Forrester testified that he is a retired Suffolk County Department of Public Works ("DPW") employee who was so employed at the date and time of the subject automobile accident. He operated a Ford Escape SUV in dry and clear weather travelling eastbound on Montauk Highway at or near the intersection with Venetian Boulevard in the left lane behind the plaintiff. He further testified that he first noticed plaintiff's vehicle when it was coming to a stop, briefly observing its brake lights before colliding with it and making rear-end contact. Forrester conceded under oath that the front of his vehicle impacted the rear of plaintiff's vehicle, resulting in front end damage to his hood, bumper and radiator, while plaintiff suffered rear-end damage including a blow out of the back windshield. Forrester believed that plaintiff stopped suddenly decelerating from approximately 20 MPH to a stop, due to vehicles stopping ahead.

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of 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 any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman,*** *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

Where, as here, to prevail on a motion for summary judgment on the issue of liability, a plaintiff must establish, *prima facie*, not only that the opposing party was negligent, but also that the plaintiff was free from comparative fault (*see* ***Thoma v. Ronai***, 82 NY2d 736, 737; ***Espinoza v. Coca–Cola Bottling Co. of N.Y., Inc.***, 121 AD3d 640, 993 NYS2d 721; ***Gorenkoff v. Nagar***, 120 AD3d 470, 990 NYS2d 604; ***Lu Yuan Yang v. Howsal Cab Corp.***, 106 AD3d 1055, 1055–1056, 966 NYS2d 167; ***Phillip v D & D Carting Co., Inc.***, 136 AD3d 18, 22, 22 NYS3d 75, 78 [2d Dept 2015]).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see* ***Tutrani v. County of Suffolk***, 10 NY3d 906, 908; ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 670–671, 974 NYS2d 563; ***Pollard v. Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 846, 942 NYS2d 360; ***Le Grand v Silberstein***, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]). The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Kastritsios v. Marcello***, 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus***, 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su***, 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]; However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini***, 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

Particularly apropos to the case at hand, the Second Department has clearly held that defendant's contention, made in opposition to the plaintiff's motion for summary judgment, that the plaintiff proceeded once the traffic light turned green but then suddenly stopped, does not by itself rebut the inference of negligence by providing a non-negligent explanation for the collision (***Ramirez v Konstanzer***, 61 AD3d 837, 837–38, 878 NYS2d 381, 382 [2d Dept 2009]).

However, while it is true that a possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "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" (***Shamah v. Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 NYS2d 287; *see* ***Gutierrez v. Trillium USA, LLC***, 111 AD3d at 671, 974 NYS2d 563; ***Robayo v. Aghaabdul,*** 109 A.D.3d 892, 893, 971 NYS2d 317 [2d Dept

2013]; ***Le Grand v Silberstein***, 123 AD3d 773, 775, 999 NYS2d 96, 96- 98 [2d Dept 2014]).

Thus, " [a] conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation" (***Bros. v Bartling***, 130 AD3d 554, 556, 13 NYS3d 202, 203–04 [2d Dept 2015]). The burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Abbott v Picture Cars E., Inc.***, 78 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 AD3d 489, 904 NYS2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 AD3d 707, 782 NYS2d 284 [2d Dept 2004]).

Accordingly, New York courts hold that a movant establishes a *prima facie* entitlement to judgment as a matter of law on the issue of liability, based on an affidavit testimony stating that plaintiff's vehicle was stopped in traffic when it was struck in the rear by the defendants' vehicle, thus shifting the burden to the defendants to come forward with a non-negligent explanation for the accident (***Oguzturk v. Gen. Elec. Co.***, 65 AD3d 1110, 1110, 885 NYS2d 343, 344 [2d Dept 2009]).

Where a defendant fails to oppose a motion for summary judgment, there is, in effect, a concession that no question of fact exists, and the facts as alleged in the moving papers may be deemed admitted (***Kuehne & Nagel v Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]).

The Court notes, as plaintiff has argued, that defendant has failed to execute his transcript, despite it being forwarded for review by plaintiff's counsel on October 24, 2016, more than 60 days prior to plaintiff's making of this motion. Thus, given that defendant has raised no objections, this Court finds that defendant suffers no prejudice from plaintiff's reliance on the transcript in support of his motion, and thus this Court deems they are admissible evidence (*see e.g.* ***Moak v Raynor***, 28 AD3d 900, 904, 814 NYS2d 289, 292 [3d Dept 2006][defendant's refusal or delay in signing or returning his deposition transcript did not prejudice plaintiff as there is statutory direction for use of such a transcript as if it were signed]; CPLR 3116[a]; *accord* ***Tine v Courtview Owners Corp.***, 40 AD3d 966, 967, 838 NYS2d 92, 93 [2d Dept 2007]).

Applying all of the above to the facts and hand, and upon review of all the moving papers and annexed exhibits submitted in reliance, this Court finds that plaintiff has met his burden as movant for entitlement to summary judgment on liability as she has demonstrated a *prima facie* case of negligence. Correspondingly, based upon defendants' lack of any substantive opposition to the pending motion, the Court deems this to be an admission of the facts as asserted by plaintiff. Thus with the absence of any non-negligent explanation for defendant's rear-end collision with plaintiff, plaintiff's motion for partial summary judgment as to liability is hereby granted. Therefore, defendants have failed to produce any evidence in admissible form sufficient as to the existence of any triable issue of fact requiring trial.

Accordingly it is

ORDERED that plaintiff's motion pursuant to CPLR 3212 for summary judgment as to liability as against defendants is **granted** in its entirety; and it is further

ORDERED that plaintiff shall a copy of this decision with notice of entry upon defendants no later than September 29, 2017; and it is further

The foregoing constitutes the decision and order of this Court.

Dated: August 9, 2017
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**