

Callaghan v Jeudy

2017 NY Slip Op 31968(U)

August 15, 2017

Supreme Court, Suffolk County

Docket Number: 15505/2015

Judge: William G. Ford

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

COPY

PRESENT:

Motion Submit Date: 04/20/17
Motion Seq #: 001 MG

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

TIMOTHY CALLAGHAN & JUDY
CALLAGHAN,

Plaintiffs,

-against-

ELIZABETH JEUDY & DEVELOPMENTAL
DISABILITIES INSTITUTE, INC.,

Defendants.

PLAINTIFF'S COUNSEL:

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Upon the reading and filing of the following papers on Plaintiff's 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 March 1, 2017 and supporting papers; (2) Defendant's Affirmation in Opposition dated April 6, 2017 and supporting papers; (3) Plaintiff's Reply Affirmation in Further Support dated April 19, 2017; ~~(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 pursuant to CPLR 3212 on liability is granted in accord with the following discussion.

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 or about June 4, 2015 at or near the intersection of Route 454 (Veterans Memorial Highway) and Locust Avenue in the Town of Islip, County of Suffolk, New York.

Plaintiffs Timothy & Judy Callaghan ("plaintiffs" or the "Callaghans") have brought the instant personal injury action against defendants Elizabeth Jeudy and Developmental Disabilities Institute, Inc. ("defendants") seeking the recovery of money damages for alleged injuries sustained in the motor vehicle accident premised on defendant's alleged negligence.

The Callaghans commenced this action filing their summons and complaint on September 2, 2015. Defendants joined issue interposing their answer dated November 16, 2016. Plaintiffs amplified their pleadings with filing of her Verified Bill of Particulars on December 15, 2015. Discovery in this matter has been certified as complete and the matter has been

marked ready for trial as of April 19, 2017, with filing of the Note of Issue on or about February 24, 2017. Plaintiff Timothy Callaghan was deposed and gave sworn testimony at an examination before trial on May 3, 2016. .

At his deposition, Callaghan gave sworn testimony that on June 4, 2015 he was operated his personally owned Hyundai Elantra sedan travelling southeast on Route 454 towards Sunrise Highway in the right lane toward his place of employment, off-hours, to bring his son a slice of pizza for dinner. He stated that during his trip he reached a maximum rate of speed of no more than 30 MPH, and as he reached the intersection with Locust Avenue, he began to decelerate his vehicle due to slowed traffic ahead at the traffic light. He brought his vehicle to a full and complete stop for a duration of as long as 5 seconds, with approximately 10 cars ahead of him when he was rear-ended by defendant operator Elizabeth Jeudy. ¹ Immediately after impact, plaintiff testified that Jeudy apologized to him. Callaghan further testified that his vehicle did not make contact with the vehicle in front of him prior to the rear-end contact. Instead, plaintiff testified that as a result of being rear-ended, he was pushed into the vehicle ahead of him. Plaintiff observed rear-end damage to his vehicle post-accident.

For reasons not appearing on the motion record, defendants neither submitted deposition testimony transcripts or affidavits in opposition the plaintiffs' application for summary judgment.

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*

¹ Plaintiffs contend, and defendants have not objected otherwise, that Jeudy operated her employer's vehicle within the scope of her employment and during her regular working hours.

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]).

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 AD3d 892, 893, 971 NYS2d 317).

This 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]).

Our courts have held 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]).

Upon review of all plaintiff's submissions, this Court finds that plaintiffs have met their burden as movant for entitlement to summary judgment on liability as with the submission of Callaghan's deposition testimony, uncontroverted by any rival sworn testimony from defendants, have demonstrated a *prima facie* case of negligence.

Arguing in support of their application, plaintiffs have successfully demonstrated that Callaghan had slowed his vehicle due to prevailing traffic conditions, with around 10 vehicles ahead of him at an intersection controlled by a traffic light. He further brought his vehicle to a full and complete stop for as long as 5 seconds when he felt rear-end contact. Based upon this, this Court finds that plaintiff as movant has satisfied her *prima facie* burden to establish a case of negligence, entitling her to a presumption of negligence from defendant's rear-end contact, shifting the burden to defendant to proffer a non-negligent explanation for the rear-end contact.

Arguing in opposition to plaintiff's application, defendant has relied on the Suffolk County Police Department's DMV MV 104 accident investigation report as well as property damage photographs to support the proposition that plaintiff first rear-ended the vehicle ahead of him, before Jeudy collided with him. In response and in further support of the motion, plaintiffs have also preemptively argued that Callaghan's deposition testimony constitutes a sworn denial that the initial and primary impact was to the front of his vehicle, prior to the rear-end contact.

Defendants have failed to supply this Court with evidence in admissible form sufficient to raise a triable question of fact to preclude a finding as a matter of law on liability for plaintiff and entry of summary judgment. In the first instance, defendants have relied upon their attorney's affirmation, without reliance upon any sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, to oppose the instant motion. The Second Department has repeatedly cautioned attorneys that opposition to summary judgment consisting solely of an attorney's affirmation, absent any other reliance on sworn testimony from witnesses with personal knowledge is insufficient to raise a triable question of fact precluding entry of judgment as a matter of law (*Huerta v Longo*, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; *Collins v Laro Serv. Sys. of New York, Inc.*, 36 AD3d 746, 746-47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; *Cordova v Vinueza*, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Additionally, defendants' efforts at staving off summary judgment are unsuccessful for their reliance on inadmissible evidence. Within the Second Department, it has been held that uncertified police accident reports submitted by the plaintiff are not admissible (*Nationwide Gen. Ins. Co. v Bates*, 130 AD3d 795, 796, 14 NYS3d 84, 86 [2d Dept 2015]; *Torres v Kalloff*, 128 AD3d 1052, 1052, 8 NYS3d 597, 598 [2d Dept 2015][submission of an uncertified police accident report constitutes inadmissible hearsay]; *Adobebea v Junel*, 114 AD3d 818, 820, 980 NYS2d 564, 567 [2d Dept 2014][police accident report submitted in opposition to the

defendants' motion was inadmissible, as it was not certified as a business record]; *Memenza v. Cole*, 131 AD3d 1020, 1021–22, 16 NYS3d 287, 289 [2d Dept 2015][holding that where police officer had no personal recollection of his accident investigation and was unable to testify as to the source of the information contained in the accident report, report is inadmissible because the source of the information contained therein was unidentifiable and thus unauthenticated: it could not be established whether the source of the information had a duty to make the statement or whether some other hearsay exception applied]; see also *Hazzard v Burrowes*, 95 AD3d 829, 831, 943 NYS2d 213, 214–15 [2d Dept 2012][police accident report was inadmissible, as it was not certified as a business record and the statements by both parties were self-serving, did not fall within any exception to the hearsay rule, and bore upon the ultimate issues of fact to be decided by the jury]).

Further, defendants have failed to demonstrate that any exception to the hearsay rule would apply to allow for consideration of that accident investigation report (see e.g. *Pivetz v Brusco*, 145 AD3d 806, 807, 43 NYS3d 457, 459 [2d Dept 2016][the portion of the uncertified police accident report that contained his admission was admissible]). Nothing in the present record indicates to this Court that either party to this action made any admissions or concessions that should be considered to save from exclusion the report.

Moreover, the Court notes that property damage photographs defendants have cited to are unauthenticated, and neither party has offered any sworn testimony laying any foundation for same. As such, the photograph cannot be considered.

In accord with all of the foregoing, this Court finds and determines that plaintiff's motion for partial summary judgment as to liability is hereby **GRANTED** since defendant has 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 serve a copy of this decision with notice of entry upon defendants no later than September 28, 2017; and it is further

The foregoing constitutes the decision and order of this Court.

Dated: August 15, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

___ FINAL DISPOSITION X NON-FINAL DISPOSITION