Fleet v Morris
2017 NY Slip Op 33390(U)
August 2, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 616660/2016
Judge: Paul J. Baisley, Jr.
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SHORT FORM ORDER E-FILE **INDEX NO. 616660/2016**

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

RICHARD FLEET,

Plaintiff,

-against-

MICHAEL MORRIS,

Defendant.

ORIG. RETURN DATE: April 27, 2017
FINAL RETURN DATE: May 25, 2017
MOT. SEQ. # 001 - MD

PLTF'S ATTORNEY:
MICHAEL F. PERROTTA, ESQ.
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HUNTINGTON, NY 11743

DEFT'S ATTORNEY:
DI PIPPO LAW GROUP LLC
401 FRANKLIN AVENUE, STE 208
GARDEN CITY, NY 11530

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated March 22, 2017, and supporting papers; (2) Affirmations in Opposition by the defendant, dated May 4, 201 and May 10, 2017, and supporting papers (including memorandum of law dated May 10, 2017; (3) Reply Affirmation by the plaintiff, dated May 24, 2017, and supporting papers; (~~and after hearing counsels' oral arguments in support of and opposed to the motion~~); it is,

ORDERED that the motion by the plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the defendant's liability is denied; and it is further

ORDERED that the parties are directed to appear for a preliminary conference pursuant to 22 NYCRR 202.8 (f) on August 29, 2017 at the Supreme Court, DCM Part, One Court Street, Riverhead, New York at 10:00 a.m.

The plaintiff commenced this e-filed action to recover damages for personal injuries allegedly sustained by him in a motor vehicle accident that occurred on June 8, 2016 on Deer Park Avenue at its intersection with Woods Road in Babylon, New York. The accident allegedly happened when the vehicle operated by the plaintiff was hit in the rear after it had stopped due to traffic conditions.

The plaintiff now moves for partial summary judgment as to the defendant's liability. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). 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*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

In support of his motion, the plaintiff submits the pleadings, the affirmation of his attorney, his sworn affidavit, and a copy of a police accident report, Form MV-104A, regarding this accident. The police accident report record relied on by the plaintiff is plainly inadmissible and has not been considered by the Court in making this determination (*see* CPLR 4518 [c]; *Cover v Cohen*, 61 NY2d 261, 473 NYS2d 378 [1984]; *Cheul Soo Kang v Violante*, 60 AD3d 991, 877 NYS2d 354 [2d Dept 2009]; *Mooney v Osowiecky*, 235 AD2d 603, 651 NYS2d 713 [3d Dept 1997]).

In his affidavit, the plaintiff swears that he was the owner and operator of a motor vehicle traveling southbound on Deer Park Avenue on June 8, 2016, that he brought his vehicle to a stop near its intersection with Woods Road because there was a police vehicle approaching said intersection, and that there were two vehicles in front of his that had also stopped to allow the police vehicle to proceed through the intersection. He states that he "had been stopped for several seconds" when he felt a violent impact to the rear of his vehicle, that it was a "clear day," and that "the roads were dry."

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Carhuayano v J & R Hacking*, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; *Gaeta v Carter*, 6 AD3d 576, 775 NYS.2d 86 [2d Dept 2004]; *Chepel v Meyers*, 306 AD2d 235, 762 NYS2d 95 [2d Dept 2003]; *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 [2d Dept 1999]; *see also* Vehicle and Traffic Law § 1129 [a]). Moreover, a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, and unavoidable skidding on a wet pavement or some other reasonable excuse (*see Davidoff v Mullokandov*, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; *Carhuayano v J & R Hacking*, *supra*; *Rainford v Sung S. Han*, 18 AD3d 638; 795 NYS2d 645 [2d Dept 2005]; *Thoman v Rivera*, 16 AD3d 667, 792 NYS2d 558 [2d Dept 2005]; *Gaeta v Carter*, *supra*).

The plaintiff has established his prima facie entitlement to summary judgment herein and it is incumbent upon the defendant to produce evidence in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, *supra*; *Rebecchi v Whitmore*, *supra*; *O'Neill v Fishkill*, *supra*). In opposition to the plaintiff's motion, the defendant submits the affirmation of his attorney, and his sworn affidavit. In his affidavit, the defendant swears that he was the owner and operator of a motor vehicle traveling southbound on Deer Park Avenue on the date of this accident, that he was traveling behind the plaintiff's vehicle, and that the "roadway of Deer Park Avenue was wet at that time." He states that a police vehicle traveling eastbound on Woods Road "entered the intersection at a high rate of speed and without warning ... [and] engaged his lights and sirens as it was entering the intersection." He indicates that "all cars were required to come to a sudden and abrupt stop," that he forcefully applied his brakes, that his vehicle slid on the wet pavement, and that the impact with the plaintiff's vehicle was "extremely minor." The defendant further swears that he was traveling a "reasonable distance" behind the plaintiff's vehicle, that he allowed "enough distance to stop safely without impact had my vehicle not skidded on the wet pavement," and that he could not have done anything to avoid the incident because the plaintiff had stopped suddenly and without warning.

In his affirmation, counsel for the defendant contends, among other things, that the police accident report submitted by the plaintiff is inadmissible herein, that the defendant's affidavit creates issues of fact requiring a trial of this action, and that the plaintiff's has not made a prima facie showing of entitlement to summary judgment herein.

In reply, counsel for the plaintiff contends, among other things, that the police accident report is "admissible as it is a certified copy," that "both the plaintiff and the police officer who arrived at the scene ... noted that the pavement was dry," and that, if the defendant's vehicle skidded it was because he was operating his vehicle negligently, carelessly, and recklessly.

The copies of the police accident report submitted in support of the plaintiff's motion and in the reply, as well as the copy scanned to the e-filing system, contain an illegible "rubber"stamp, without a signature or attestation, which may or may not be intended to be a certification that the copy is a genuine document from the records of the Suffolk County Police Department. Regardless, the stamp does not establish that the requirements of CPLR 4540 have been met to establish the authenticity of the submitted copy.

CPLR 4540, entitled "Authentication of official record of court or government office in the United States" provides in pertinent part:

> (a) Copies permitted. An official publication, or a copy attested as correct by an officer or a deputy of an officer having legal custody of an official record of the United States or ... of any of its courts, legislature, offices, public bodies or boards is prima facie evidence of such record.
>
> (b) Certificate of officer of the state. Where the copy is attested by an officer of the state, it shall be accompanied by a certificate signed by, or with a facsimile of the signature of ... the officer having legal custody of the original, or his deputy or clerk, with his official seal affixed ...

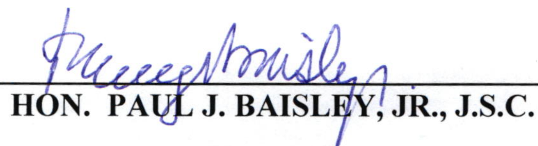
Here, the copy of the police accident report submitted by the plaintiff is not admissible as it fails to comply with the statute providing for admission into evidence of certified copies of official records of courts or government offices (*see Brown v Reece*, 194 Misc 2d 269, 753 NYS2d 825 [Civ Ct, New York County 2003]). In addition, the stamp does not establish that the requirements of CPLR 4518 (a) have been met, and that the document is admissible as a business record (*see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C4518:10). "When a public record is offered into evidence, at least two issues are presented: (1) Are the contents of the public record admissible over a hearsay objection? and (2) Is the public record genuine; or if a copy is proffered, is it a genuine copy of the original on file in the relevant public office? CPLR 4540 addresses only the second issue, which is a matter of authentication. The hearsay issue is addressed by such miscellaneous statutory provisions as CPLR 4518, 4520, 4521 and 4522" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of New York, Book 7B, CPLR C4540:1).

In any event, even if said report is admissible, the plaintiff has failed to submit evidence as to the time when, and under what conditions, the police officer who responded to this accident made the notation on the police accident report that the roadway of Deer Park Avenue was dry, and that the defendant's testimony is incredible. The court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the nonmoving party and all inferences that may be drawn are to be accepted as true (*see Doize v Holiday Inn Ronkonkoma*, 6 AD3d 573, 774 NYS2d 792 [2d Dept 2004]; *Roth v Barreto*, *supra*; *Rennie v Barbarosa Transport, Ltd.*, 151 AD2d 379, 543 NYS2d 429 [1st Dept 1989]).

Because summary judgment deprives the litigant of his or her day in court, it is considered a "drastic remedy" which should be invoked only when there is no doubt as to the absence of triable issues (*Andre v Pomeroy*, 35 NY2d 361, 364, 362 NYS2d 131 [1974]; *Elzer v Nassau County*, 111 AD2d 212, 489 NYS2d 246 [2d Dept 1985]). Indeed, where there is any doubt as to the existence of triable issues, or where the issue is even arguable, the Court must deny the motion (*Chilberg v Chilberg*, 13 AD3d 1089, 788 NYS2d 533 [4th Dept 2004], *rearg denied* 16 AD3d 1181, 792 NYS2d 368 [4th Dept 2005]; *Barclay v Denckla*, 182 AD2d 658, 582 NYS2d 252 [2d Dept 1992]). Here, there are questions of fact, including, but not limited to, the roadway condition at the time of this incident, and whether the defendant has a non-negligent explanation for the happening of this accident.

Accordingly, the plaintiff's motion for partial summary judgment as to the defendant's liability is denied.

Dated: 8/2/17



HON. PAUL J. BAISLEY, JR., J.S.C.