Neale v Gusler
2017 NY Slip Op 33423(U)
October 30, 2017
Supreme Court, Nassau County
Docket Number: Index No. 607394/16
Judge: Randy Sue Marber

SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**
JUSTICE TRIAL/IAS PART 10

X

VERA NEALE,

Plaintiff,

-against-

Index No.: 607394/16
Motion Sequence…02
Motion Date…09/15/17

KAREN S. GUSLER and JAHTIEF S. BURNETT,

Defendants.

X

Papers Submitted:
Notice of Motion.....x
Affirmation in Opposition.....x
Affirmation in Reply.....x

Upon the foregoing papers, the motion by the Plaintiff, VERA NEALE (hereinafter "NEALE"), seeking an Order, pursuant to CPLR § 3212, granting her summary judgment on the issue of liability, is decided as provided herein.

This action arises out of a motor vehicle accident that occurred on October 19, 2015, at approximately 9:15 a.m. on the Meadowbrook State Parkway, one half of a mile south of Exit M6, in the town of Hempstead, County of Nassau, New York (*See* the Summons and Verified Complaint annexed to the Plaintiff's Notice of Motion as Exhibit "A").

By Short Form Order, dated June 16, 2017, this Court granted the Defendant, KAREN S. GUSLER's (hereinafter "GUSLER"), motion (Mot. Seq. 01) for summary judgment on the issue of liability.

In support of the instant motion, the Plaintiff, VERA NEALE, submits a sworn Affidavit wherein she attests that, on the date of the incident, she was a passenger in the vehicle owned and operated by the Defendant, JAHTIEF S. BURNETT (hereinafter "BURNETT") (*See* the Affidavit of Vera Neale, sworn to February 21, 2017, annexed to the Plaintiff's Notice of Motion as Exhibit "H"). NEALE attests that BURNETT's vehicle was traveling northbound in the left lane when the vehicle in front of it, operated by the Defendant, GUSLER, came to a sudden and abrupt stop. Resultantly, the front bumper of BURNETT's vehicle in came into contact with the rear bumper of GUSLER's vehicle.

NEALE also seeks pre-judgment interest from June 16, 2017, the date on which the Defendant, GUSLER, was granted summary judgment on liability.

In opposition, counsel for the Defendant, BURNETT, argues that the Affidavit proffered by the Plaintiff is self-serving, and as such, insufficient as a matter of law to establish *prima facie* entitlement to summary judgment. Counsel for the Defendant further asserts that the Plaintiff's motion is premature, as depositions of the parties have not yet been held.

This Court notes that, while counsel for the Defendant, BURNETT, submits an attorney Affirmation, the Defendant, BURNETT, has not proffered an Affidavit or any other admissible evidence in opposition to the instant motion.

Summary judgment should only be granted where there are no triable issues of fact (*See Andre v. Pomery*, 35 N.Y.2d 361 [1974]). The goal of summary judgment is to issue find, rather than issue determine (*See Hantz v. Fleischman*, 155 A.D.2d 415 [2d Dept. 1989]). In the instant matter, neither party denies that the front of BURNETT's vehicle struck the rear of GUSLER's vehicle.

Rear-end collision cases create a *prima facie* case of liability with respect to the party who collides with the vehicle in front of it. This *prima facie* liability imposes a duty of explanation upon the operator of the rear vehicle to rebut the inferences of negligence by providing some non-negligent explanation for the collision (*See Crisano v. Comp Tools Corp.*, 295 A.D.2d 393 [2d Dept. 2002]). A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rearmost vehicle, imposing a duty of explanation on that operator to excuse the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause (*Filipaazzo v. Santiago*, 277 A.D.2d 419 [2d Dept. 2000]; *Singh v. Avis Rent A Car System, Inc.*, 119 A.D.3d 768 [2d Dept. 2014]).

When a 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 (*Id.; see also* Vehicle and Traffic Law § 1129 [a]). This rule imposes upon drivers the duty to be aware of traffic conditions, including vehicle stoppages (*Johnson v. Phillips*, 261 A.D.2d 269 [1st Dept. 1999]). It has also been applied even when the front vehicle stops suddenly (*See Mascitti v. Greene*, 250 A.D.2d 821 [2d Dept. 1998]; *Barba v. Best Sec. Corp.*, 235 A.D.2d 381 [2d Dept. 1997]; *Leal v. Wolff*, 244 A.D.2d [2d Dept. 1996]). Further, "drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Johnson v. Phillips*, 261 A.D.2d 269 [1st Dept. 1999]).

The sworn Affidavit of the Plaintiff, NEALE, sufficiently establishes that the vehicle in which she was a passenger struck the rear of the vehicle operated by the Defendant, GUSLER, and that the Plaintiff did not contribute in any way to the accident. In turn, the

Defendant, BURNETT, fails to present a non-negligent excuse and has failed to submit any evidence in opposition to the Plaintiff's sworn Affidavit to rebut the presumption of negligence arising from the subject rear-end collision. As such, the Defendant, BURNETT, has failed to raise a triable issue of fact.

Further, contrary to the Defendant, BURNETT's contention, summary judgment in this matter is not premature. Pursuant to CPLR § 3212, incomplete discovery will not necessarily bar summary judgment (*See Rainford v. Han*, 18 A.D.3d 638 [2d Dept. 2005]). A motion for summary judgment will not be denied based on a "mere hope or speculation" that discovery may uncover evidence sufficient to defeat the motion (*See Kimyagarov v. Nixon Taxi Corp.*, 45 A.D.3d 736 [2d Dept. 2007]). Here, the Defendant, BURNETT, failed to suggest what non-negligent excuse may be obtained if depositions of the parties were conducted prior to the Court determining this motion. Moreover, this case has been certified as ready for trial and that discovery is complete.

In an automobile-related personal injury action in which the no-fault "serious injury" threshold is an issue, prejudgment interest must be computed pursuant to CPLR § 5002 from the date common-law liability attaches in favor of the plaintiff and not from a finding of "serious injury". [*Van Nostrand v. Froehlich*, 44 A.D.3d 54 (2d Dept. 2007); *see also Odumbo v. Perera*, 50 A.D.3d 658 (2d Dept. 2008)]. In this matter, for purposes of determining prejudgment interest, liability is established in favor of the Plaintiff as of the date of this Order, not from the date of GUSLER's favorable liability determination. As such, the Plaintiff's application for prejudgment is **GRANTED**, to the extent that such interest shall accrue from the date of this Order.

Accordingly, it is hereby

ORDERED, that the motion by the Plaintiff, VERA NEALE, for summary judgment, pursuant to CPLR § 3212, on the issue of liability, is **GRANTED**, and this matter shall proceed to trial on the issue of damages; and it is further

ORDERED, that the Plaintiff's application for prejudgment interest pursuant to CPLR § 5002 is **GRANTED** insofar as such interest, if any, shall accrue from the date of this Order.

All matters not decided herein are hereby **DENIED**.

This decision constitutes the Order of the Court.

DATED: Mineola, New York
October 30, 2017

ENTERED

NOV 06 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. RANDY SUE MARBER, J.S.C.

HON. RANDY SUE MARBER