Wai v Heuser
2017 NY Slip Op 33440(U)
April 20, 2017
Supreme Court, Nassau County
Docket Number: Index No. 609253-16
Judge: Daniel Palmieri

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.

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GIGI WAI,

Plaintiff,

-against-

KRISTINA S. HEUSER,

Defendant.

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TRIAL/IAS PART 16

Index No.: 609253-16

Mot. Seq. 001
Mot. Date: 3-13-17

Submit Date: 4-17-17

The following papers have been read on this motion:

Notice of Motion, dated 2-24-17.....1
Affirmation in Opposition, dated 4-11-17.....2
Reply Affirmation, dated 4-17-17.....3

The motion of plaintiff (seq.1) for summary judgment pursuant to CPLR §3212 on the issue of liability or fault is denied.

The case arises out of an automobile accident which took place on October 14, 2015 on westbound Jericho Turnpike and Cold Spring Road, Huntington New York. Plaintiff's affidavit states that she came to a "complete stop" for a red light "and while stopped was struck in the rear by defendant. She avers that when she stopped for the light and until struck her "vehicle never moved again". In her affidavit defendant claims that she and plaintiff were stopped behind other vehicles at a red light, the light turned green "we all proceeded" and plaintiff's vehicle then immediately and abruptly stopped again after moving less than a car length and all the while the "light remained green". She adds that she later learned from the plaintiff that plaintiff stopped to let a vehicle out of a

shopping center driveway. Neither side has submitted any other details or evidence and it does not appear that any depositions have been held or that any other discovery has taken place.

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 (4th 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 (1st Dept. 2006); *Velasquez v. Denton Limo Inc.*, 7 AD3d 787 (2d Dept. 2004); *see also Schmidt v. Guenther*, 103 AD3d 1162 (4th Dept. 2013). Accordingly, plaintiff has made out a *prima facie* showing that she is entitled to summary judgment as to the defendant.

However defendant has met her burden of providing a non negligent explanation for the accident. *Cheow v. Jin*, 121 AD3d 1058 (2d Dept. 2014). 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). Vehicle stops, 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 from the car ahead. *Brothers v Bartling*, 130 AD3d 554 (2d Dept. 2015). *Cf., Pollard v Independent Beauty & Barber Supply* Co., 94 AD3d 845 (2d Dept. 2012) [no lead car, green light, intersection clear of traffic and pedestrians]. However, the Court is not prepared to rule on the sparse evidence presented that

defendant's explanation does not create a material issue of fact as to the respective culpability of the parties for the happening of the accident.

Where, a sudden stop is unexplained by the existing circumstances and conditions an issue of fact as to liability is raised. *Etingof v. Metro Laundry Machinery Sales, Inc.* 134 AD3d 667 (2d Dept. 2015). A non negligent explanation may include a sudden unexplained stop of the vehicle ahead or any other reasonable cause. *Binkowitz v. Kolb*, 135 AD3d 884 (2d Dept. 2016). By her affidavit defendant has raised a triable issue of fact as to whether she has a non negligent explanation for the collision. *D'agostino v. YRC, Inc.*, 120 AD3d 1291 (2d Dept. 2014). Here the Court is presented with more than the bare claim of a sudden stop because defendant is in effect refuting the contention that it should have been anticipated. *Cf Hearn v. Manzolillo*, 103 AD3d 689 (2d Dept. 2013).

All parties shall appear at a preliminary conference at the Supreme Courthouse, 100 Supreme Court Drive, Mineola, N.Y., on August 23, 2017, 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.).

This shall constitute the Decision and Order of this Court.

ENTER:

DATED: April 20, 2017
Mineola, New York

ENTERED
APR 25 2017
NASSAU COUNTY
COUNTY CLERK'S OFFICE

HON. DANIEL PALMIERI
Supreme Court Justice

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