

Demonsieru v Suscello
2017 NY Slip Op 33452(U)
August 18, 2017
Supreme Court, Nassau County
Docket Number: Index No. 603695/16
Judge: Denise L. Sher
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

NICAISSE DEMONSIERU,

Plaintiff,

- against -

MICHAEL SUSCELLO,

Defendant.

TRIAL/IAS PART 35
NASSAU COUNTY

Index No.: 603695/16
Motion Seq. No.: 01
Motion Date: 07/11/17

The following papers have been read on this motion:

	Papers Numbered
<u>Notice of Motion, Affirmation and Exhibits and Affidavit</u>	<u>1</u>

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Plaintiff moves, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability. No opposition was submitted to the motion.

The instant action arises from personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on March 30, 2015, at approximately 11:49 a.m., on Broadway, at or near its intersection with Maple Drive, Amityville, County of Suffolk, State of New York. The subject accident involved two vehicles - a 2008 Bluebird bus, operated by plaintiff, and a 2012 Kia, owned and operated by defendant. See Plaintiff's Affirmation in Support Exhibits C and D.

Plaintiff commenced the instant action with the filing of a Summons and Verified Complaint on or about May 18, 2016. *See* Plaintiff's Affirmation in Support Exhibit A. Issue was joined on or about July 22, 2016. *See* Plaintiff's Affirmation in Support Exhibit B.

In support of the motion, plaintiff submits her own Affidavit in which she states, in pertinent part, "[o]n March 30, 2015, I was a driver of a vehicle that was moving on the roadway on Broadway at or near its intersection with Maple Drive, Village of Amityville, County of Suffolk, State of New York. At the place of the accident the roadway was straight, dry, flat and without other obstructions. At the time and place indicated, my car was moving when I felt an impact to the rear of my vehicle. The vehicle that struck me was owned by defendant MICHAEL SUSCELLO. Clearly, the defendant was negligent in the operation of his vehicle in striking my vehicle in the rear." *See* Plaintiff's Affidavit in Support.

Counsel for plaintiff contends that defendant was the negligent party in that he failed to maintain a safe distance behind plaintiff's vehicle, as well as failed his duty to exercise reasonable care under the circumstances to avoid an accident. Counsel for plaintiff additionally claims that defendant cannot come up with a reasonable excuse or a non-negligent explanation for his vehicle striking plaintiff's vehicle in the rear.

As previously indicated, no opposition was submitted to the motion.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to demonstrate the absence of material issues of fact. *See Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 165 N.Y.S.2d 498 (1957); *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 508 N.Y.S.2d 923 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 427

N.Y.S.2d 595 (1980); *Bhatti v. Roche*, 140 A.D.2d 660, 528 N.Y.S.2d 1020 (2d Dept. 1988). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidentiary proof, in admissible form, sufficient to warrant the court, as a matter of law, to direct judgment in the movant's favor. *See Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Such evidence may include deposition transcripts, as well as other proof annexed to an attorney's affirmation. *See CPLR § 3212 (b); Olan v. Farrell Lines Inc.*, 64 N.Y.2d 1092, 489 N.Y.S.2d 884 (1985).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial. *See Zuckerman v. City of New York, supra*. When considering a motion for summary judgment, the function of the court is not to resolve issues but rather to determine if any such material issues of fact exist. *See Sillman v. Twentieth Century-Fox Film Corp., supra*. Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue. *See Gilbert Frank Corp. v. Federal Ins. Co.*, 70 N.Y.2d 966, 525 N.Y.S.2d 793 (1988).

Further, to grant summary judgment, it must clearly appear that no material triable issue of fact is presented. The burden on the Court in deciding this type of motion is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist. *See Barr v. Albany County*, 50 N.Y.2d 247, 428 N.Y.S.2d 665 (1980); *Daliendo v. Johnson*, 147 A.D.2d 312, 543 N.Y.S.2d 987 (2d Dept. 1989). It is the existence of an issue, not its relative strength that is the critical and controlling consideration. *See Barrett v. Jacobs*, 255 N.Y. 520 (1931); *Cross v. Cross*, 112 A.D.2d 62, 491 N.Y.S.2d 353 (1st Dept. 1985). The

evidence should be construed in a light most favorable to the party moved against. *See Weiss v. Garfield*, 21 A.D.2d 156, 249 N.Y.S.2d 458 (3d Dept. 1964).

When the 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 pursuant to New York State Vehicle and Traffic Law (“VTL”) § 1129(a). *See Krakowska v. Niksa*, 298 A.D.2d 561, 749 N.Y.S.2d 55 (2d Dept. 2002); *Bucceri v. Frazer*, 297 A.D.2d 304, 746 N.Y.S.2d 185 (2d Dept. 2002).

A rear end collision with a vehicle establishes a *prima facie* case of negligence on the part of the operator of the offending vehicle. *See Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 861 N.Y.S.2d 610 (2008). Such a collision imposes a duty of explanation on the operator. *See Hughes v. Cai*, 55 A.D.3d 675, 866 N.Y.S.2d 253 (2d Dept. 2008); *Gregson v. Terry*, 35 A.D.3d 358, 827 N.Y.S.2d 181 (2d Dept. 2006); *Belitsis v. Airborne Express Freight Corp.*, 306 A.D.2d 507, 761 N.Y.S.2d 329 (2d Dept. 2003).

As noted, 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, thereby requiring the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dept. 2006); *McGregor v. Manzo*, 295 A.D.2d 487, 744 N.Y.S.2d 467 (2d Dept. 2002).

Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since the following driver is under a duty to maintain a safe distance between his or her car and the car ahead. *See Shamah v. Richmond County Ambulance Service, Inc.*, 279 A.D.2d 564, 719 N.Y.S.2d 287 (2d Dept. 2001).

Drivers must maintain safe distances between their cars and the cars in front of them and this rule imposes on them a duty to be aware of traffic conditions including stopped vehicles. See VTL § 1129(a); *Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dept. 1999).

Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. See *Filippazzo v. Santiago*, 277 A.D.2d 419, 716 N.Y.S.2d 710 (2d Dept. 2000).

Plaintiff, in her motion, has demonstrated *prima facie* entitlement to summary judgment on the issue of liability against defendant. Therefore, the burden shifts to defendant to demonstrate an issue of fact which precludes summary judgment. See *Zuckerman v. City of New York, supra*.

As previously indicated, no opposition was submitted to the motion. Therefore, defendant has failed to meet his burden to demonstrate an issue of fact which precludes summary judgment.

Accordingly, plaintiff's motion, pursuant to CPLR § 3212, for an order granting partial summary judgment against defendant on the issue of liability, is hereby **GRANTED**.

All parties shall appear for a Compliance Conference in IAS Part 35, Nassau County Supreme Court, 100 Supreme Court Drive, Mineola, New York, on September 12, 2017, at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTERED

ENTER:

AUG 23 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE


DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
August 18, 2017