

McCauley v Sik Kin Lo
2017 NY Slip Op 33526(U)
January 10, 2017
Supreme Court, Suffolk County
Docket Number: Index No. 608696/2015
Judge: Joseph Farneti
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ORIGINAL

SHORT FORM ORDER

INDEX NO. 608696/2015

**SUPREME COURT - STATE OF NEW YORK
I.A.S. TERM, PART 37 - SUFFOLK COUNTY**

PRESENT:

HON. JOSEPH FARNETI
Acting Justice Supreme Court

CATHERINE E. McCAULEY,

Plaintiff,

-against-

SIK KIN LO, JOHNNY LO and SUSANNE M.
NIGRO,

Defendants.

ORIG. RETURN DATE: MARCH 28, 2016
FINAL SUBMISSION DATE: APRIL 28, 2016
MTN. SEQ. #: 001
MOTION: MD

ORIG. RETURN DATE: MARCH 31, 2016
FINAL SUBMISSION DATE: APRIL 28, 2016
MTN. SEQ. #: 002
CROSS-MOTION: XMD

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Upon the following papers numbered 1 to 11 read on this motion and cross-motion **FOR SUMMARY JUDGMENT**

Notice of Motion and supporting papers 1-3; Notice of Cross-motion and supporting papers 4-6; Affirmation in Opposition and supporting papers 7, 8; Reply Affirmation 9; Reply Affirmation and Affirmation in Opposition 10; Affirmation in Reply to Co-Defendant's Opposition 11; it is,

[* 1]

ORDERED that this motion (seq. #001) by defendants SIK KIN LO and JOHNNY LO ("Lo defendants") for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff CATHERINE E. McCAULEY and any and all cross-claims against the Lo defendants on the grounds that the Lo defendants bear no liability for the subject accident, is hereby **DENIED** for the reasons set forth hereinafter; and it is further

ORDERED that this cross-motion (seq. #002) by defendant SUSANNE M. NIGRO ("Nigro") for an Order, pursuant to CPLR 3212, granting summary judgment to Nigro dismissing plaintiff's complaint and any and all cross-claims against Nigro on the grounds that there are no triable issues of fact against Nigro, is hereby **DENIED** for the reasons set forth hereinafter.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff in a three-car motor vehicle accident that occurred on April 20, 2014, on westbound Route 25 at or near its intersection with Arnold Drive, in the Town of Brookhaven, State of New York. In her complaint, plaintiff alleges that defendants were negligent in the operation of their motor vehicles, causing their vehicles to collide with plaintiff's vehicle. The Lo defendants allege that their vehicle was slowing down for a yellow light on Route 25 when Nigro's vehicle struck the rear of their vehicle. Plaintiff, in the rear-most vehicle, collided with the rear of Nigro's vehicle.

Plaintiff commenced this action by the filing of a Summons and Verified Complaint dated July 21, 2015. The Lo defendants served a Verified Answer with cross-claims dated September 8, 2015. Nigro served a Verified Answer with cross-claim dated January 7, 2016.

The Lo defendants have now filed the instant motion for summary judgment to dismiss plaintiff's complaint as asserted against them, arguing that the Lo defendants bear no responsibility for the subject accident because their vehicle was hit in the rear. Nigro has filed the instant cross-motion for summary judgment to dismiss plaintiff's complaint as asserted against Nigro, similarly arguing that Nigro bears no responsibility for the subject accident because her vehicle was hit in the rear by plaintiff's vehicle.

On a motion for summary judgment the Court's function is to determine whether issues of fact exist not to resolve issues of fact or to determine

matters of credibility (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]; *Tunison v D.J. Stapleton, Inc.*, 43 AD3d 910 [2007]; *Kolivas v Kirchoff*, 14 AD3d 493 [2005]). 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 [2004]; *Roth v Barreto*, 289 AD2d 557 [2001]; *Mosheyev v Pilevsky*, 283 AD2d 469 [2001]). The failure of the moving party to make such a *prima facie* showing requires denial of the motion regardless of the insufficiency of the opposing papers (see *Dykeman v Heht*, 52 AD3d 767 [2008]; *Sheppard- Moblely v King*, 10 AD3d 70 [2004]; *Celardo v Bell*, 222 AD2d 547 [1995]). Once the movant's burden is met, the burden shifts to the opposing party to establish the existence of a material issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]; *Zuckerman v New York*, 49 NYS2d 557 [1980]). However, mere allegations, unsubstantiated conclusions, expressions of hope or assertions are insufficient to defeat a motion for summary judgment (see *Zuckerman v City of New York*, *supra*; *Blake v Guardino*, 35 AD2d 1022 [1970]).

When the driver of an automobile approaches another vehicle from behind, it is the duty of the driver of the rear vehicle to maintain a reasonably safe rate of speed and control over his or her vehicle, to maintain a safe distance between his or her vehicle and the other vehicle, and to exercise reasonable care so as to avoid colliding with the other vehicle (see Vehicle and Traffic Law § 1129 [a]; *Klopchin v Masri*, 45 AD3d 737 [2007]; *Gaeta v Carter*, 6 AD3d 576 [2004]; *Chepel v Meyers*, 306 AD2d 235 [2003]). A rear-end collision creates a *prima facie* case of negligence on behalf of 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 *Niyazov v Bradford*, 13 AD3d 501 [2004]; *Stalkas v United Material*, 306 AD2d 810 [2003], *aff'd* 100 NY2d 626 [2003]; *Ruzycki v Baker*, 301 AD2d 48 [2002]; *Niemiec v Jones*, 237 AD2d 267 [1997]).

Based upon the adduced evidence, the Court finds that the Lo defendants and Nigro have established *prima facie* that they are entitled to judgment as a matter of law on the issue of liability dismissing the complaint (see *Winegrad v New York Univ. Med. Ctr.*, *supra*; *Vaden v Rose*, 4 AD3d 468 [2004]; *McNulty v DePetro*, 298 AD2d 566 [2002]). As discussed, the Lo defendants

allege that their vehicle was struck in the rear by Nigro's vehicle, and Nigro alleges that her vehicle was struck in the rear by plaintiff's vehicle.

However, in opposition, the Court finds that plaintiff and Nigro have raised a question of fact and proffered a potentially non-negligent explanation for the collision. Although the Lo defendants contend that their vehicle was slowing for a yellow traffic signal when it was struck in the rear, both Nigro and plaintiff aver that the Lo defendants' vehicle came to sudden and complete stop at a *flashing* yellow light at the intersection. Thus, the Court finds that a question of fact exists as to whether a yellow traffic signal or a flashing yellow traffic signal controlled the subject intersection.

Furthermore, while the Second Department has held that the mere assertion a vehicle came to a sudden stop is insufficient to raise a triable issue of fact (see *Gutierrez v Trillium USA, LLC*, 111 AD3d 669 [2013]; *Plummer v Nourddine*, 82 AD3d 1069 [2011]; *Staton v Ilic*, 69 AD3d 606 [2010]; *Kosinski v Sayers*, 294 AD2d 407 [2002]; *Schmidt v Edelman*, 263 AD2d 502 [1999]), a sudden stop coupled with an alleged violation of the Vehicle and Traffic Law may provide a non-negligent explanation for the collision and rebut the presumption of negligence (see *Abbott v Picture Cars East, Inc.*, 78 AD3d 869 [2010]; *Klopchin*, 45 AD3d 737; *Gaeta*, 6 AD3d 576; *Purcell v Axelsen*, 286 AD2d 379 [2001]). Vehicle and Traffic Law § 1113 (b), entitled "[f]lashing yellow indications," provides that "[v]ehicular traffic facing a circular yellow signal or yellow arrow with rapid intermittent flashes may proceed through the intersection or past such signal only with caution." The aforementioned section does not require a vehicle to come to a complete stop prior to proceeding through an intersection, but rather requires the driver of such vehicle to proceed with caution (see *Rabenstein v Suffolk County Dept. of Pub. Works*, 131 AD3d 1145 [2015]). The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards constitutes negligence *per se* (see *Shui-Kwan Lui v Serrone*, 103 AD3d 620 [2013]).

Moreover, plaintiff avers that she was traveling at a safe distance and speed for the traffic conditions, but that the Lo defendants' vehicle complete and sudden stop at a flashing yellow light caused both impacts. Although the Lo defendants argue that the accident was caused by Nigro and plaintiff following too closely, there can be more than one proximate cause of an accident, and evidence that one driver was negligent does not preclude a finding that the

comparative negligence of another driver contributed to the accident (see *Exime v Williams*, 45 AD3d 633 [2007]; *Cox v Nunez*, 23 AD3d 427 [2005]).

In view of the foregoing, the Lo defendants' motion and Nigro's cross-motion for summary judgment dismissing plaintiff's complaint are both **DENIED**, without prejudice to renewal at the completion of discovery (see CPLR 3212 [f]).

The foregoing constitutes the decision and Order of the Court.

Dated: January 10, 2017



HON. JOSEPH FARNETI
Acting Justice Supreme Court

___ FINAL DISPOSITION

X NON-FINAL DISPOSITION