Opman v Pollio
2018 NY Slip Op 34134(U)
November 5, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 619040/2016
Judge: William G. Ford

SHORT FORM ORDER **INDEX NO.: 619040/2016**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 03/01/18
Mot Seq 001 MG

PLAINTIFF'S COUNSEL:
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RACHELLE OPMAN & JOHN OPMAN,

Plaintiff,

-against-

RONALD POLLIO,

Defendant.

On plaintiff's motion for partial summary judgment on liability pursuant to CPLR 3212, the following was considered: Notice of Motion & Affirmation in Support dated January 19, 2018 and supporting papers; Affirmation in Opposition dated February 27, 2018; Plaintiff's Reply Affirmation in Further Support dated March 1, 2018; and upon due deliberation and full consideration, it is

ORDERED that plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendant is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry on counsel for all parties by overnight mail, return receipt requested forthwith.

FACTUAL BACKGROUND & PROCEDURAL POSTURE

Plaintiffs Rachelle & John Opman brought this personal injury negligence action against defendant arising out of a motor vehicle collision which occurred on Friday, June 13, 2014 at the intersection of Veterans Memorial Highway and the Long Island Expressway South Service Road in the Town of Islip, Suffolk County, New York.

This action commenced with plaintiff electronically filing a summons and complaint against defendant seeking recovery of damages for alleged personal injury premised on defendant's alleged negligence as a proximate cause of the underlying motor vehicle collision on November 23, 2016. Defendant joined issue filing an answer to the complaint January 22, 2017. Plaintiff amplified her pleadings filing a verified bill of particulars on August 1, 2017. Discovery in this matter is ongoing. Presently before the Court is plaintiff's opposed motion for partial summary judgment on liability against the defendant, which is resolved as follows.

In support of her application, plaintiff submits a copy of the pleadings, an affidavit in support dated January 20, 2017, a certified copy of the transcript of her deposition held on November 2, 2017; as well as an uncertified copy of the police accident investigation report.

At her pretrial deposition held on November 2, 2017, plaintiff testified that she was involved in a collision with a vehicle operated by defendant on Friday, June 13, 2014 at approximately 4:00 p.m. She recalled it was a dry clear day. Plaintiff was on her commute home from work in medium to heavy traffic on Veterans Memorial Highway, in the outermost left-hand turn lane, with the intention of turning left onto the Long Island Expressway South Service Road. She was stopped in traffic at a red light-controlled intersection, the fourth vehicle in traffic for approximately a minute when she felt a medium impact to the rear of her vehicle, a Lexus convertible. She did not observe defendant's vehicle prior to impact, nor did she recall hearing squealing/screeching of tires or horns blaring. Immediately after impact, she observed damage to the rear bumper of her vehicle. At the time of impact, plaintiff's right foot was on her brake pedal.

Based on this presentation, plaintiff presently moves pursuant to CPLR 3212 seeking partial summary judgment on liability based upon the rear-end collision in this case, arguing that her affidavit supports a determination as a matter of law that the defendant is liable for the incident plaintiff alleges as proximate cause for her damages

STANDARD OF REVIEW

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman***, *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

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***

600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (***Mulhern v Gregory***, 161 AD3d 881, 883, 75 NYS3d 592, 594 [2d Dept 2018]; ***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]; ***Whelan v Sutherland***, 128 AD3d 1055, 1056, 9 NYS3d 639, 640 [2d Dept 2015]; ***Tutrani v. County of Suffolk***, 10 NY3d 906, 908; ***Gutierrez v. Trillium USA, LLC***, 111 AD3d 669, 670–671, 974 NYS2d 563; ***Pollard v. Independent Beauty & Barber Supply Co.***, 94 AD3d 845, 846, 942 NYS2d 360; ***Perez v Roberts***, 91 AD3d 620, 621, 936 NYS2d 259, 260 [2d Dept 2012]; ***Le Grand v Silberstein***, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]).

The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; ***Kastritsios v. Marcello***, 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus***, 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su***, 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han***, 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]). However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini***, 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

"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 vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Williams v Spencer-Hall***, 113 AD3d 759, 760, 979 NYS2d 157, 159 [2d Dept 2014]). a rear-end collision with a stopped vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***Sayyed v Murray***, 109 AD3d 464, 464, 970 NYS2d 279, 281 [2d Dept 2013]).

A possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (***Tumminello v City of New York***, 148 AD3d 1084, 1085, 49 NYS3d 739, 741 [2d Dept 2017]; ***Shamah v. Richmond County Ambulance Serv.***, 279 A.D.2d 564, 565, 719 N.Y.S.2d 287; *see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; ***Robayo v. Aghaabdul,*** 109 A.D.3d 892, 893, 971 N.Y.S.2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape

liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g.* ***Romero v Al Haag & Son Plumbing & Heating, Inc.***, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014][even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff's vehicle under Vehicle and Traffic Law § 1129[a], defendant's deposition testimony relied upon by plaintiff, itself raised a triable issue of fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord* ***Fernandez v Babylon Mun. Solid Waste***, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; ***Sokolowska v Song***, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

Thus, the burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see* ***Abbott v Picture Cars E., Inc.***, 78 A.D.3d 869, 911 N.Y.S.2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 A.D.3d 489, 904 N.Y.S.2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2d Dept 2004]).

Most importantly, the New York Court of Appeals has recently clarified plaintiff-movant's burden on a motion such as that *sub judice*. The Court has reaffirmed and reminded motion courts that "a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case, holding that plaintiff-movant seeking partial summary judgment on liability in a motor vehicle accident litigation "[t]o be entitled to partial summary judgment, ... does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." (***Rodriguez v City of New York***, 31 NY3d 312, 324–25 [2018]; ***Edgerton v City of New York***, 160 AD3d 809, - - - NYS3d - - - [2d Dept 2018]).

Our courts have held that a movant establishes a *prima facie* entitlement to judgment as a matter of law on the issue of liability, based on an affidavit testimony stating that plaintiff's vehicle was stopped in traffic when it was struck in the rear by the defendants' vehicle, thus shifting the burden to the defendants to come forward with a non-negligent explanation for the accident (***Oguzturk v. Gen. Elec. Co.***, 65 AD3d 1110, 1110, 885 NYS2d 343, 344 [2d Dept 2009]; *see also* ***McLaughlin v Lunn***, 137 AD3d 757, 758, 26 NYS3d 338, 339 [2d Dept 2016][plaintiff established *prima facie* entitlement to judgment as a matter of law on submission of affidavit providing that while completely stopped behind three other vehicles for 5 to 10 seconds at a red light at an intersection, her vehicle was hit in the rear by the defendants' vehicle, sufficient to raise an inference of with respect to the operator of the defendants' vehicle]).

DISCUSSION

Having reviewed his moving papers, the Court finds that both plaintiff has met her *prima facie* burden for entitlement to summary judgment on liability based on the submission of her sworn deposition testimony which demonstrates a *prima facie* case of negligence against the defendants. Thus, the burden has shifted to defendant to come forward with a non-negligent

explanation for the incident.

Defendants have submitted opposition to plaintiff's motion by way of counsel's affirmation. Within that affirmation, defendants principally argue that plaintiff's motion is premature or inappropriate and should be denied since discovery in the matter is incomplete. More particularly, defendants argue that defendants' depositions are outstanding and incomplete. Further, defendants argue that triable issues of fact exist concerning the degree to which defendants might argue or rely upon the emergency doctrine as a potential non-negligent explanation for the rear-end collision here.

I. Premature Application Under CPLR 3212(f)

For reasons more fully articulated below, defendant cannot successfully rely on the fact that defendants have yet to be deposed as the sole basis to deprive plaintiff's judgment as a matter of law on liability at this time.

Defendant argues that plaintiff's motion is premature because it comes before the close of discovery relying in part on ***Adrianis v Fox***, 30 AD3d 550, 550–51, 817 NYS2d 374, 375 (2d Dept 2006) holding that a motion court properly denies a partial liability summary judgment motion as premature where at least one party's deposition was still outstanding and the parties had previously stipulated to hold that deposition only seven days after the motion was made. Put differently, defendant's argument is that they have been unfairly deprived the opportunity to fully probe whether plaintiff bore any contributing or comparative fault in the resulting rear-end collision, not having the benefit of party depositions (*see* ***Amico v Melville Volunteer Fire Co., Inc.***, 39 AD3d 784, 785, 832 NYS2d 813 [2d Dept 2007][resolving that a party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment]).

However, the Second Department is clear that defendant's mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g.* ***Rodriguez v Farrell***, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; ***Medina v Rodriguez***, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; ***Kimyagarov v Nixon Taxi Corp.***, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; ***Hill v Ackall***, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]). This is even more so in the wake of recently decided matter in the Court of Appeals making painstakingly clear that New York plaintiffs no longer bear the burden of establishing freedom from comparative fault to be entitled to partial summary judgment on liability (*see e.g.* ***Rodriguez supra.***).

A party opposing summary judgment is entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated." ***Chmelovsky v. Country Club Homes, Inc.***, 106 AD3d 684, 964 NYS2d 245, 246 [2d Dept 2013]; ***Martinez v. 305 W. 52 Condo.***, 128 AD3d 912, 914, 9 NYS3d 375, 377 [2d Dept 2015]["A party should be afforded a reasonable opportunity to conduct discovery prior to the

determination of a motion for summary judgment"]). The non-movant should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment (*see* ***Video Voice, Inc. v. Local T.V., Inc.,*** 114 AD3d 935, 980 NYS2d 828; ***Bank of Am., N.A. v. Hillside Cycles, Inc.,*** 89 AD3d 653, 932 NYS2d 128; ***Venables v. Sagona,*** 46 AD3d 672, 673, 848 NYS2d 238). Further, non-movant is also entitled to obtain further discovery when it appears that facts supporting the opposing party's position may exist but cannot then be stated (*see* CPLR 3212[f]; ***Nicholson v. Bader,*** 83 AD3d 802, 920 NYS2d 682; ***Family–Friendly Media, Inc. v. Recorder Tel. Network,*** 74 AD3d 738, 739, 903 NYS2d 80; ***Juseinoski v. New York Hosp. Med. Ctr. of Queens,*** 29 AD3d 636, 637, 815 NYS2d 183). ***Malester v. Rampil***, 118 A.D.3d 855, 856, 988 N.Y.S.2d 226, 227-28 [2d Dept 2014]).

Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (***Juseinoski v. New York Hosp. Med. Ctr. of Queens***, 29 AD3d 636, 637, 815 NYS2d 183, 184-85 [2d Dept 2006]; ***Baron v. Inc. Vil. of Freeport,*** 143 AD2d 792, 92-93; 533 NYS2d 143, 148 [2d Dept 1998]).

This Court remains unpersuaded by defendant's submission that he has carried his burden of demonstrating that this application cannot be resolved absent defendants' depositions. Thus, because this Court does not agree that the pre-disclosure status of plaintiff's application warrants denial solely for that reason under CPLR 3212(f), that aspect of defendant's opposition is unsuccessful.

II. No Triable Issue of Fact Precludes Entry of Summary Judgment for Plaintiff

Further, defendant opposes plaintiff's motion for summary judgment arguing the existence of triable questions of fact. However, this opposition exists solely in the form of counsel's affirmation, argument which in and of itself does not constitute competent or admissible evidence. Nowhere in defendants' opposition is any affidavit from either defendant or any other tangible piece of evidence supplied. Thus, defendants fail to carry their shifted burden of rebutting plaintiff's *prima facie* case of negligence against them by competent or admissible proof raising a triable question of fact meriting a liability trial and precluding judgment as a matter of law on liability for the plaintiff.

The law in this regard is settled. Defendants' reliance on their attorney's affirmation, without further submission of sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, is insufficient to establish triable issues of fact warranting denial of summary judgment. The Second Department has repeatedly cautioned counsel on this point (***Huerta v Longo***, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; ***Collins v Laro Serv. Sys. of New York, Inc.***, 36 AD3d 746, 746–47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; ***Cordova v Vinueza***, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Thus, having found that plaintiff has met his *prima facie* their burden for entitlement to summary judgment on liability for a case of negligence against defendants, and further that

defendants have failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the rear-end collision here, necessitating a trial on their liability, this Court accordingly **grants** plaintiff partial summary judgment on liability against defendants under CPLR 3212.

The foregoing constitutes the decision and order of this Court.

Dated: November 5, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

_____ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**