Marrero v Carolan
2018 NY Slip Op 34233(U)
June 15, 2018
Supreme Court, Suffolk County
Docket Number: Index No. 607525/2017
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 607525/2017**

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: 12/05/17
Mot Conf Held: 03/01/18
Motion Seq 001 MG

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DANIEL MARRERO,

Plaintiff,

-against-

LEONARD CAROLAN, as Administrator of the Estates of and MARGARET CAROLAN,

Defendant.

---x

PLAINTIFF'S COUNSEL:
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DEFENDANTS' COUNSEL:
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Upon the reading and filing of the following papers on defendant's motion seeking summary judgment as to liability pursuant to CPLR 3212: (1) Notice of Motion and Affirmation in Support dated October 26, 2017 and supporting papers; (2) Affirmation in Opposition dated November 20, 2017; and upon due deliberation and full consideration, now it is

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

ORDERED that movants' 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.

Plaintiff Daniel Marrero brought this personal injury negligence action against defendants Leonard Carolan, individually and as administrator for the estate of Margaret Carolan, arising out of a motor vehicle accident which occurred on or about March 17, 2017 at approximately 1:20 p.m. on Route 25 A at or near the intersection with Miller Place Road, in the Town of Brookhaven, Suffolk County, New York. Plaintiff seeks recovery of money damages for alleged serious personal injuries which he argues were premised upon defendants' negligence.

The action commenced with plaintiff's electronic filing of a summons and complaint on April 20, 2017, which were then supplemented on June 26, 2017. Defendant joined issue serving an amended answer on July 21, 2017. Discovery in this matter is well underway, with the parties having entered into a Preliminary Conference Order on October 17, 2017. This case has appeared on this Court's discovery compliance conference calendar on several occasions, and specifically this motion was conferenced on March 8, 2018. At the time of the making of

this application, the parties had not appeared to give pretrial depositions.

Plaintiff moves pursuant to CPLR 3212 seeking partial summary judgment on liability based upon the rear-end collision and contact in this case, arguing that it supports a determination as a matter of law that the defendant was liable for the incident plaintiff alleges as proximate cause for his injuries and damages. In support of his application, plaintiff submits a copy of the pleadings, a copy of an uncertified police accident investigative report dated March 17, 2017, and an affidavit sworn by plaintiff dated October 30, 2017.

By his affidavit, plaintiff testifies that on or about March 17, 2017 while operating a 2010 Chevrolet motor vehicle, he was involved in a rear-end collision with a 2002 Lexus motor vehicle operated by Peter T. Carolan on Route 25A at or near its intersection with Miller Place Road in the Town of Brookhaven, County of Suffolk, New York. Plaintiff states that he was travelling eastbound on Route 25 A and brought his vehicle to a complete stop in traffic at or near the intersection, and was stopped for approximately 4 seconds when the front of defendant's vehicle impacted the rear of his vehicle.

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 Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 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 against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision (***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" (***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 (*see* ***Edgerton v City of New York***, 160 AD3d 809, - - - NYS3d - - - [2d Dept 2018]; *quoting* ***Rodriguez v. City of New York***, - - - N.Y.3d - - -, - - - N.Y.S.3d - - - 2018 N.Y. Slip Op. 02287, 2018 WL 1595658 [Apr. 3, 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]).

Having reviewed his moving papers, the Court finds that plaintiff has met his *prima facie* their burden for entitlement to summary judgment on liability based on the submission of his sworn affidavit establishing 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, defendant principally argues that plaintiff's motion is premature or inappropriate and should be denied since discovery in the matter is incomplete. More particularly, defendants argue that none of the parties have given any pretrial deposition testimony, and thus argues triable issues of fact exist concerning the degree to which plaintiff may have contributed to the occurrence, or was otherwise comparatively at fault for the rear-end collision.

I. The Police Accident Investigation Report

The Court will not consider the police accident investigation report in connection with

movants' application as it is not in admissible form, and cannot for the basis for a determination as a matter of law that defendants the Gilleys were not liable for plaintiff's accident.

To the extent that plaintiff submits or otherwise or relies upon the police accident investigation report as substantive evidence, this Court agrees that it cannot be considered on the issue of liability or causation of the collision *sub judice*. The Second Department has clearly held that conclusory statements as to how the accident occurred constitute inadmissible hearsay (*see* ***Cheul Soo Kang v. Violante***, 60 A.D.3d 991, 992, 877 N.Y.S.2d 354; ***Quaglio v. Tomaselli***, 99 A.D.2d 487, 488, 470 N.Y.S.2d 427; ***Sanchez v. Steenson***, 101 AD3d 982, 983, 957 NYS2d 239, 240 [2d Dept 2012]).

The Appellate Division has artfully summarized the state of evidentiary law concerning police accident reports thusly:

> Pursuant to CPLR 4518(a), a police accident report is admissible as a business record so long as the report is made based upon the officer's personal observations and while carrying out police duties ... If information contained in a police accident report was not based upon the police officer's personal observations, it may nevertheless be admissible as a business record "if the person giving the police officer the information contained in the report was under a business duty to relate the facts to him [or her]" .... .
>
> [However] If the person giving the police officer the information was not under a business duty to give the statement to the police officer, such information "may be proved by a business record only if the statement qualifies [under some other] hearsay exception, such as an admission" ....
>
> In other words, "each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception" ... "The proponent of hearsay evidence must establish the applicability of a hearsay-rule exception"

Memenza v. Cole, 131 AD3d 1020, 1021–22, 16 NYS3d 287, 289 [2d Dept 2015][holding that where police officer had no personal recollection of his accident investigation and was unable to testify as to the source of the information contained in the accident report, report is inadmissible because the source of the information contained therein was unidentifiable and thus unauthenticated: it could not be established whether the source of the information had a duty to make the statement or whether some other hearsay exception applied]; *see also* ***Hazzard v Burrowes***, 95 AD3d 829, 831, 943 NYS2d 213, 214–15 [2d Dept 2012][police accident report was inadmissible, as it was not certified as a business record and the statements by both parties were self-serving, did not fall within any exception to the hearsay rule, and bore upon the ultimate issues of fact to be decided by the jury]; ***Noakes v. Rosa***, 54 AD3d 317, 318, 862 NYS2d 573; ***Casey v. Tierno***, 127 AD2d 727, 728, 512 NYS2d 123).

II. Premature Application Under CPLR 3212(f)

For reasons more fully articulated below, defendant cannot rely on the early stage of this litigation's status as the sole basis on which to deny plaintiff judgment as a matter of law on liability.

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, as premature, partial liability summary judgment motion 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. Stated another way, defendants argument is that t they have been unfairly deprived the opportunity to fully test the merits of the plaintiff's, concerning any and all factors causing or contributing to the rear-end collision incident, not having the benefit of party depositions and thus no access to full, complete or thorough pretrial disclosure, to include 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 all the 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 v. City of New York***, - - - N.Y.3d - - -, - - -N.Y.S.3d - - - 2018 N.Y. Slip Op. 02287, 2018 WL 1595658 , *6[holding that for plaintiff to be entitled to partial summary judgment, a plaintiff 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]).

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 party depositions. Thus, because this Court does not agree that the early pre-disclosure status of plaintiff's application warrants denial merely for that reason under CPLR 3212(f), that aspect of defendant's opposition is unsuccessful.

Further, while defendant has opposed plaintiff's motion for summary judgment, that opposition fails to supply this Court with evidence in admissible form sufficient to raise a triable question of fact to preclude a finding as a matter of law on liability for plaintiff and entry of summary judgment. In the first instance, defendant relies relied upon his attorney's affirmation, without reliance upon any sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, to oppose the instant motion. The Second Department has repeatedly cautioned attorneys that opposition to summary judgment consisting solely of an attorney's affirmation, absent any other reliance on sworn testimony from witnesses with personal knowledge, is insufficient to raise a question of fact precluding entry of judgment as a matter of law (***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 based on the submission of his sworn affidavit establishing a *prima facie* case of negligence against the defendants, and that further that defendant has failed to carry its shifted burden of establishing a triable issue of fact warranting a trial on liability. Accordingly, this Court plaintiff's motion for partial summary judgment on liability under CPLR 3212 is hereby **granted.**

The foregoing constitutes the decision and order of this Court.

Dated: June 15, 2018
Riverhead, New York

WILLIAM G. FORD, J.S.C.

✓ NON-FINAL DISPOSITION