

Lisa v Rengifo

2018 NY Slip Op 34266(U)

October 12, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 610696/2018

Judge: Paul J. Baisley, Jr.

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SHORT FORM ORDER

INDEX NO. 610696/2018

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY

PRESENT:

Hon. Paul J. Baisley, Jr., J.S.C.

CHRISTINA LISA,

Plaintiff,

-against-

JOSE RENGIFO and KAMCO SUPPLY CORP.,

Defendants.

ORIG. RETURN DATE: August 1, 2018
FINAL RETURN DATE: September 5, 2018
MOT. SEQ. #: 001 MG

PLTF'S ATTORNEY:
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DEFT'S ATTORNEY:
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Upon the following papers read on this motion for partial summary judgment; Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated July 16, 2018; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by defendants, dated August 16, 2018; Replying Affidavits and supporting papers by plaintiff, dated September 4, 2018; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion by plaintiff for partial summary judgment in her favor is granted; and it is

ORDERED that the parties shall appear for a preliminary conference at 10:00 a.m. on October 26, 2018 at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York.

This is an action to recover damages for injuries allegedly sustained by plaintiff Christina Lisa as a result of a motor vehicle collision that occurred on February 28, 2018, on the Long Island Expressway near exit 59, in Ronkonkoma, New York. The accident allegedly occurred when a motor vehicle owned by defendant Kamco Supply Corp., and operated by defendant Jose Rengifo failed to stop and struck plaintiff's vehicle in the rear while plaintiff was completely stopped in traffic.

Plaintiff now moves for partial summary judgment in her favor on the issue of liability. In support of her motion, plaintiff submits, among other things, copies of the pleadings, a certified police accident report, and her own affidavit. In opposition, defendants submit an affidavit of Jose Rengifo and of defendants attorney.

It is well settled that the proponent of a summary judgment motion bears the initial burden of establishing his or her entitlement to judgment, as a matter of law, in his or her favor by offering admissible evidence sufficient to eliminate any material issues of fact from the case (*see 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]). Failure to make such a

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showing requires denial of the motion, regardless of the sufficiency of any opposition thereto (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant has made the requisite showing, the burden then shifts to the opposing party, requiring him or her to present admissible evidence and facts sufficient to require a trial on any issue of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*). On such a motion, the Court is charged with determining whether issues of fact exist while viewing any evidence in a light most favorable to the nonmoving party; the court is not responsible for resolving issues of fact or determining matters of credibility (*see Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Pearson v Dix McBride, LLC*, 63 AD3d 895, 883 NYS2d 53 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 AD3d 493, 787 NYS2d 392 [2d Dept 2005]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Chimbo v Bolivar, supra; Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

“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 of the moving vehicle to come forward with an adequate non-negligent explanation for the accident” (*Ramirez v Konstanzer*, 61 AD3d 837, 878 NYS2d 381 [2d Dept 2009], quoting *Arias v Rosario*, 52 AD3d 551, 552, 860 NYS2d 168 [2d Dept 2008]). A driver following behind another must maintain a reasonably safe rate of speed and distance to avoid colliding with the preceding driver (*Cajas-Romero v Ward*, 106 AD3d 850, 965 NYS2d 559 [2d Dept 2013]; see Vehicle and Traffic Law § 1129 [a]).

“[V]ehicle 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 car and the car ahead” (*Shamah v Richmond County Ambulance Serv.*, 279 AD2d 564, 719 NYS2d 287 [2d Dept 2001]; see Vehicle and Traffic Law § 1129 [a]). However, the preceding driver also has the duty to “not stop suddenly or slow down without proper signaling so as to avoid a collision” (*Drake v Drakoulis*, 304 AD2d 522, 523, 756 NYS2d 881 [2d Dept 2003], quoting *Niemiec v Jones*, 237 AD2d 267, 268, 654 NYS2d 163 [2d Dept 1997]; see *Balducci v Velasquez*, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]; see Vehicle and Traffic Law § 1163). Thus, a conclusory assertion that “the driver of the [preceding] vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence” (*Ramirez v Konstanzer, supra*, quoting *Russ v Investech Securities, Inc.*, 6 AD3d 602, 602, 775 NYS2d 867 [2d Dept 2004]; see *Shamah v Richmond County Ambulance Serv., supra*). A plaintiff may obtain partial summary judgment on the issue of liability without demonstrating the absence of his or her own comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Plaintiff has made a prima facie case of entitlement to summary judgment in her favor on the issue of liability (*see Ramirez v Konstanzer, supra*). Plaintiff’s affidavit states that after coming to a gradual and complete stop due to traffic on the Long Island Expressway, which was “stop-and-go numerous times before the last stop,” her vehicle was struck in the rear by defendants’ vehicle. Plaintiff also states that the impact involved the rear of her vehicle and the front-end of defendants’ vehicle. The police accident report indicates that “both vehicles were westbound in the right lane when traffic slowed suddenly.” Defendant Rengifo, driving a 2013 Mack truck registered to defendant Kamco Supply Corp., “attempted to stop but

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was unsuccessful” and struck the rear of plaintiff’s vehicle “which was stopped in traffic.” While the police report is a certified copy, there is no evidence that the police officer witnessed the accident, therefore, the conclusions contained therein are not admissible (*see Conners v Duck’s Cesspool Serv.*, 144 AD2d 329, 533 NYS2d 942 [2d Dept 1988]). Based upon her affidavit, however, plaintiff has demonstrated, prima facie, that she is entitled to summary judgment on the issue of liability (*see Lewis v City of New York*, 157 AD3d 879, 66 NYS3d 916 [2d Dept 2017]; *Cortese v Pobejimov*, 136 AD3d 635, 24 NYS3d 405 [2d Dept 2016]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden shifts to the defendants to rebut the presumption of negligence or raise a triable issue of fact or offer a non negligent explanation (*see Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *Balducci v Velasquez*, *supra*).

In opposition defendants submit the affirmation of their attorney who contends that summary judgment is a drastic remedy and that the motion is premature because discovery has not been conducted. “[S]ummary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (*Williams v D & J School Bus*, 69 AD3d 617, 893 NYS2d 133 [2d Dept 2010]; *Panasuk v Viola Park Realty*, 41 AD3d 804, 939 NYS2d 520 [2d Dept 2007]; *Gasis v City of New York*, 35 AD3d 533, 828 NYS2d 407 [2d Dept 2006]). This is especially true when the facts which would support a non-negligent explanation for the accident lie within the exclusive knowledge of the defendants. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered as a result of discovery is an insufficient basis for denying the motion (*see generally Lauriello v Gallotta*, 59 AD3d 497, 873 NYS2d 690 [2d Dept 2009]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]). Here, it is determined that summary judgment is not premature as there is no evidentiary basis offered to suggest that discovery could lead to relevant evidence.

Defendants’ argument that plaintiff has failed to establish that defendant Kamco Supply Corp. owned the vehicle operated by defendant Rengifo is specious, as defendant Jose Rengifo avers that he is employed as a truck driver for Kamco Supply Corp., and on February 28, 2018 was operating a 2013 Mack truck during the course of his employment with Kamco Supply Corp. Defendant Rengifo also admits that on February 28, 2018, “at or around the time of the accident, [he] observed that traffic had slowed down suddenly.” He avers “approximately a second before the alleged accident occurred, [he] observed plaintiff’s vehicle in question and an unidentified uninvolved vehicle suddenly and abruptly move and cut in front of the truck [he] was operating.” He further avers that he was presented with an emergency situation and that he “did not have any time to avoid this accident.” The emergency doctrine recognizes that when a driver is confronted with an emergency situation which leaves little or no time for thought, deliberation or consideration, he or she may not be negligent if the actions taken were reasonable and prudent in the emergency context (*Jacobellis v New York State Thruway Auth.*, 51 AD3d 976, 858 NYS2d 786 [2d Dept 2008]). The emergency doctrine applies only to circumstances where a party is confronted by a sudden and unforeseen occurrence not of his own making (*see Cascio v Metz*, 305 AD2d 354, 759 NYS2d 502 [2d Dept 2003]; *Muye v Liben*, 282 AD2d 661, 723 NYS2d 510 [2d Dept 2001]). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact (*see Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443, 444, 808 NYS2d 120 [2d Dept 2005]), those issues “may in

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appropriate circumstances be determined as a matter of law” (*Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004]; see *Huggins v Figueroa*, 305 AD2d 460, 462, 762 NYS2d 404 [2d Dept 2003]). Here, the slowing of traffic was not unforeseen. Moreover, while defendant Rengifo’s affidavit establishes some fault on behalf of plaintiff, it does not establish, after *Rodriguez v City of New York, supra*, that defendants were completely without fault. As an operator of a motor vehicle Rengifo had a “common-law duty to see that which [he or she] should have seen through the proper use of [his or her] senses” (*Botero v Erraez*, 289 AD2d 274, 275, 734 NYS2d 565 [2d Dept 2001]; see also *Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]).

Accordingly, as defendants have not raised a triable issue of fact, the motion by plaintiff for summary judgment in her favor on the issue of liability is granted.

Dated:

10/12/18


HON. PAUL J. BAISLEY, JR., J.S.C.