

Zakierski v Island Water Sports Corp.

2018 NY Slip Op 34278(U)

March 30, 2018

Supreme Court, Suffolk County

Docket Number: Index No. 616811/2016

Judge: Martha L. Luft

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This opinion is uncorrected and not selected for official publication.

Short Form Order

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - COUNTY OF SUFFOLK

PRESENT:

Hon. Martha L. Luft
Acting Justice Supreme Court

DECISION AND ORDER

JOSEPH ZAKIERSKI, x

Plaintiff,

-against-

ISLAND WATER SPORTS CORP., its
Agents, Servants, and/or Employees, and
JEFFREY DRAPAL,

Defendants.
_____ x

Mot. Seq. No. 001 - MG
Orig. Return Date: 10/27/2017
Mot. Submit Date: 10/31/2017

PLAINTIFF'S ATTORNEY

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White Plains, NY 10601

DEFENDANTS' ATTORNEY

Paul T. Spataro, Esq.
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Jericho, NY 11753

Upon the e-filed documents numbered 1 through 18, it is hereby

ORDERED, that plaintiff's motion for summary judgment on liability is granted.

This is an action for personal injuries resulting from a motor vehicle accident which took place on Montauk Highway in the Town of Southampton, New York in the late morning of June 6, 2016. The plaintiff's undisputed assertion is that he was stopped to make a left turn when he was hit in the rear by a vehicle owned by defendant Island Water Sports Corp. and driven by defendant Jeffrey Drapal ("Drapal") with its permission.

Issue has been joined and discovery has taken place. Plaintiff has moved for summary judgment on liability and in so doing relies upon the plaintiff's affidavit, defendant Drapal's signed deposition transcript and admissions made by Drapal in an uncertified police report. The plaintiff's affidavit establishes that he was stopped to make a left turn and that he was hit from behind by the vehicle driven by Drapal. Drapal admits

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in his deposition testimony that he struck plaintiff's vehicle in the rear, that he was going faster than the plaintiff had been going and that he couldn't stop in time. The police report indicates that Drapal admitted to the police officer that he "didn't see the plaintiff's vehicle until the last minute."

In opposition to the motion the defendants submit an attorney's affirmation which incorrectly claims that Drapal's deposition transcript was unsigned. Defendants also claim that the police report is inadmissible hearsay. Defendants also point to a flaw in plaintiff's affidavit which was corrected in plaintiff's reply. The Court notes that in his deposition testimony Drapal denied having made the admission to the police officer that he "didn't see the plaintiff's car until the last minute."

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]. The movant has the initial burden of proving entitlement to summary judgment. *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *Id.* Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form...and must "show facts sufficient to require a trial of any issue of fact." CPLR 3212 [b]; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true. *Roth v. Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v. Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987].

It is well settled that when a driver of a motor vehicle approaches another automobile from the rear, he or she is bound to maintain a safe rate of speed, to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. Vehicle and Traffic Law § 1129 [a]; *Gibson v. Levine*, 95 AD3d 1071, 944 NYS2d 610 [2d Dept 2012]; *Zweeres v. Materi*, 94 AD3d 1111, 942 NYS2d 625 [2d Dept 2012]; *Nsiah-Ababio v. Hunter*, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]. Moreover, a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of liability regarding the operator of the moving vehicle and imposes a duty of explanation on the operator of the moving vehicle to excuse the collision by providing a

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non-negligent explanation, such as a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement or some other reasonable excuse.

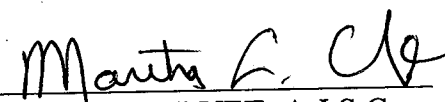
Fajardo v. City of New York, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012];
Giangrasso v. Callahan, 87 AD3d 521, 928 NYS2d 68 [2d Dept 2011]; *Ortiz v. Hub Truck Rental Corp.*, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011].

Here, the plaintiff established his *prima facie* entitlement to summary judgment as he demonstrated that plaintiff's vehicle was struck in the rear by the defendant's vehicle. The burden then shifted to the defendant to come forward with a non-negligent explanation for the accident. Defendants have failed to put forth any such explanation.

Contrary to defendant's contentions, the portion of the uncertified police accident report which contains Drapal's admission is admissible. *Gezelter v. Pecora*, 129 AD3d 1021, 13 NYS3d 141 [2d Dep't., 2015]; *Lesaldo v. Dabas*, 140 AD3d 708, 32 NYS3d 321 [2d Dep't., 2016]. Although Drapal denied in his deposition testimony having made the admission to the police officer, that deposition testimony "is insufficient to raise an issue of fact because statements by a party in a police accident report may constitute admissions, and later conflicting statements containing a different version of the facts present only a feigned issue of fact." *Colon v. Vals Ocean Pac. Sea Food, Inc.*, 157 AD3d 462, 463, 66 NYS.3d 445, 446 [1st Dept 2018], citing, *Garzon-Victoria v. Okolo*, 116 AD3d 558, 983 NYS2d 718 [1st Dept 2014]. Moreover, there was a sufficient showing for a grant of summary judgment to the plaintiff without the disputed admission, particularly since the defendants have offered no reasonable excuse for hitting plaintiff's vehicle from the rear.

ENTER

DATE: March 30, 2018
Riverhead, New York


MARTHA L. LUFT, A.J.S.C.

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 FINAL DISPOSITION

 x NON-FINAL DISPOSITION