

**Marte v Kessler**

2018 NY Slip Op 34528(U)

September 12, 2018

Supreme Court, Bronx County

Docket Number: Index No. 27240/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: **PART 14**

-----X  
MARTE, YONNY

Index No. 27240/2018E

- against -

Hon. JOHN R. HIGGITT,

-----X  
KESSLER, RAPHAEL

A.J.S.C.

The following papers numbered 6 to 16 in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on **September 5, 2018** and duly submitted as No. **40** on the Motion Calendar of **September 5, 2018**

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion – Exhibits and Affidavits Annexed	6-10
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	11
Replying Affidavit and Exhibits	12-16
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, the motion of plaintiff for partial summary judgment is granted, in accordance with the annexed decision and order.

Dated: 09/12/2018

Hon.   
JOHN R. HIGGITT, A.J.S.C.

**Check one:**

- Case Disposed in Entirety
- Case Still Active

**Motion is:**

- Granted  GIP
- Denied  Other

**Check if appropriate:**

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
YONNY MARTE,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 27240/2018E

RAPHAEL KESSLER,

Defendants.

-----X

John R. Higgitt, J.

Upon plaintiff’s August 8, 2018 notice of motion and the affirmation, affidavit and exhibits submitted in support thereof; defendant’s August 13, 2018 affirmation in opposition; plaintiff’s August 21, 2018 affirmation in reply and the exhibits submitted therewith; and due deliberation; the motion of plaintiff for partial summary judgment is granted.

Plaintiff moves for partial summary judgment on the issue of defendant’s liability for causing the subject motor vehicle accident, submitting plaintiff’s affidavit in which he avers that he was bringing his vehicle to a stop due to stationary vehicles ahead when suddenly his vehicle was struck from behind by defendant’s vehicle.

“A rear-end collision with a stationary vehicle creates a prima facie case of negligence requiring a judgment in favor of the stationary vehicle unless defendant proffers a nonnegligent explanation for the failure to maintain a safe distance . . . A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself [or herself] and cars ahead of him [or her] so as to avoid collisions with stopped vehicles, taking into account weather and road conditions” (*LaMasa v Bachman*, 56 AD3d 340, 340 [1st Dept 2008]). The happening of a rear-end collision is itself a prima facie case of negligence on the part of the rearmost driver in a chain confronted with a stopped or stopping vehicle (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]).

The general rule regarding liability for rear-end accidents “has been applied when the front vehicle stops suddenly in slow-moving traffic; even if the sudden stop is repetitive; when the front vehicle, although in stop-and-go traffic, stopped while crossing an intersection; and when the front car stopped after having changed lanes” (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). The sudden stop of the lead vehicle, without more (*see Cabrera, supra*), “is generally insufficient to rebut the presumption of non-negligence on the part of the lead vehicle” (*Woodley v Ramirez*, 25 AD3d 451, 452 [1st Dept 2006] [citations omitted]). Plaintiff’s unrefuted affidavit was sufficient to meet his prima facie burden (*see Santana v Danco Inc.*, 115 AD3d 560 [1st Dept 2014]), and established defendant’s negligence (*see Dicturel v Dukureh*, 71 AD3d 558 [1st Dept 2010]).

In opposition, defendant fails to submit evidence in admissible form sufficient to raise a triable issue of fact with respect to his negligence (*see Erkan v McDonald’s Corp.*, 146 AD3d 466 [1st Dept 2017]). Instead, he argues the motion is premature because depositions have not yet taken place.

That discovery remains outstanding does not warrant the denial of the motion, particularly where the opposition fails to indicate what discovery might be expected that would raise an issue of fact as to defendant’s liability (*see Doherty v City of New York*, 16 AD3d 124 [1st Dept 2005]). The opposition “advanced no non-speculative basis to believe that additional discovery might yield evidence warranting a different disposition” (*Rosario v N.Y. City Transit Auth.*, 8 AD3d 147, 148 [1st Dept 2004]). Defendant’s “mere expressions of hope” that disclosure might yield relevant information are insufficient to raise an issue of fact (*Piccinich v New York Stock Exch.*, 257 AD2d 438, 439 [1st Dept 1999]; *see also A & E Stores, Inc. v U.S. Team, Inc.*, 63 AD3d 486, 486-87 [1st Dept 2009] [“speculation that useful information may be

learned during discovery does not constitute grounds for denying the motion”]).

As it is defendant himself who failed to submit any admissible evidence in opposition, his argument is not persuasive (*see* CPLR 3212[f]; *Woods v 126 Riverside Corp.*, 64 AD3d 422 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). Given his failure to provide a non-negligent explanation for the collision and the failure to maintain a safe distance from plaintiff’s vehicle, any claimed lack of discovery does not warrant denial of the motion (*see Maynard v Vandyke*, 69 AD3d 515 [1st Dept 2010]).

Defendant having failed to rebut the presumption of his negligence (*see Dattilo v Best Transp. Inc.*, 79 AD3d 432 [1st Dept 2010]), the motion is granted.

The court notes that plaintiff did not seek to dismiss defendant’s affirmative defense of comparative default and that defense remains extant.

Accordingly, it is

ORDERED, that plaintiff’s motion for partial summary judgment on the issue of defendant’s liability for causing the subject motor vehicle accident is granted.

This constitutes the decision and order of the court.

Dated: September 12, 2018

  
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John R. Higgins, A.J.S.C.