Diehl v Gagliuso
2019 NY Slip Op 31254(U)
May 3, 2019
Supreme Court, New York County
Docket Number: 157188/2018
Judge: Adam Silvera

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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THOMAS DIEHL,

Plaintiff,

- v -

DONNA GAGLIUSO, ANNE KAVANAGH

Defendant.

INDEX NO. 157188/2018

MOTION DATE 12/28/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19
were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, it is for ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, is granted on the issue of liability against defendants. The branch of plaintiff's motion which seeks to an Order finding plaintiff free from comparative fault is denied.

Plaintiff Thomas J. Diehl's motion, which contends that on January 10, 2017, he was operating a vehicle traveling northbound on the FDR at or near its intersection with East 71st street in the County, and State of New York when it was struck from behind by a vehicle operated by defendant Donna J. Gagliuso and owned by defendant Anne T. Kavanagh, has made out a prima facie case of negligence, and the burden shifts to defendant to raise a triable issue of fact (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 (1980).

"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" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure … to do [so]" (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

"A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident" (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep't 2017]). Here, it is undisputed that plaintiff's stopped vehicle was struck in the rear by defendants' vehicle. Plaintiff attaches the Police Report and Certified copy of the MV-104 from the accident which recorded defendant Gagloiso's admission against interest that defendants' vehicle rear-ended plaintiff's vehicle (Mot, Exh 1 & 4). Thus, plaintiff has made a prima facie showing of entitlement to summary judgment on the issue of liability and the burden shifts to defendants to raise an issue of fact or non-negligent explanation for the accident.

In opposition, defendants claim that there is a non-negligent excuse for the collision at issue. Defendants aver that plaintiff's vehicle suddenly stopped short and caused the accident at issue. However, the law is clear that a claim that the vehicle in front stopped suddenly, standing alone, is insufficient to raise a triable issue of fact (*Cruz v Lise,* 123 AD3d 514 [1st Dept 2014]). Defendants claim that defendant Gagliuso was faced with a sudden and unexpected circumstance Under the emergency doctrine a triable issue of fact may exist as to whether the conduct of a

defendant may be excused due to an emergency situation (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991] [finding that "the common-law emergency doctrine which 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context,' provided the actor has not created the emergency"]). Where defendants have provided "alternative explanations for the accident, including that plaintiff's vehicle stopped short, and that snow create an emergency condition" the First Department Appellate Division has declined to consider such arguments and granted summary judgment in favor of plaintiff (*Williams v Kadri*, 112 AD3d 442, 443 [1st Dep't 2013]).

Here, defendants' excuse that plaintiff's vehicle suddenly stopped short has failed to raise an issue of fact or provide a non-negligent explanation for the accident at issue. Plaintiff's motion for summary judgment on the issue of liability as against defendants is granted.

The branch of plaintiff's motion seeking an Order finding plaintiff free from comparative fault is denied. It is well settled law that the issue of a plaintiff's comparative negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff (*Rodriguez v City of New York*, 31 NY3d 312, 330 [2018]). Thus, summary judgment is not the appropriate manner to address plaintiff's comparative negligence, contributory negligence and culpable conduct which is for the jury to decide.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability as against defendants is granted; and it is further

ORDERED that the branch of plaintiff's motion to find plaintiff free from comparative fault is denied; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

5/3/19
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE