

Wasserman v Bourgade
2019 NY Slip Op 34341(U)
September 5, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 603589/2017
Judge: Linda Kevins
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SHORT FORM ORDER

INDEX No. 603589/2017

CAL No. _____

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

Hon. LINDA KEVINS
Justice of the Supreme Court

-----X

JEFFREY S. WASSERMAN,

Plaintiff,

-against-

DECISION AND ORDER
MOTION Seq. # 001 - MG

DAVID BOURGADE AND DANIELLE BOURGAGE,

Defendant.

-----X

The following papers have been read on this Motion by Plaintiff:

Notice of Motion, Affirmation, Affidavit & Exhibits	1
Affirmation in Opposition & Memorandum of Law	2
Reply Affirmation	3

Upon the foregoing papers, it is Ordered that this Motion is decided as follows:

Plaintiff seeks an Order granting Summary Judgment against Defendants pursuant to CPLR 3212. Defendants oppose the Application.

Plaintiff Jeffrey S. Wasserman commenced this action to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on September 22, 2015, while traveling westbound in the left lane of the Long Island Expressway near exit 46, Suffolk County, New York. Plaintiff alleges the accident occurred when Defendant Danielle Bourgade, operating a 2008 Ford vehicle owned by Defendant David Bourgade, struck the rear of the vehicle Plaintiff was operating, a 2015 Audi. Issue has been joined.

Plaintiff now moves for an order granting summary judgment in his favor on the issue of liability. In support of the motion, Plaintiff submits copies of the pleadings, bill of particulars, and verified answer. Defendant opposes the motion and submits an affirmation in opposition.

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 issue of fact (see *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). 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*, 289 AD2d 557 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600 [2d Dept 1991]; *O'Neill v Town of Fishkill*, 134 AD2d 487 [2d Dept 1987]).

It is well settled that a driver has a duty to maintain control of their vehicle so that when approaching another vehicle from the rear, the driver is bound to maintain a reasonably safe rate of speed, and to use reasonable care to avoid colliding with the other vehicle (see *Tutrani v County of Suffolk*, 64 AD3d 53 [2d Dept 2009]; *Gaeta v Carter*, 6 AD3d 576 [2d Dept 2004]; *Chepal v Meyers*, 306 AD2d 235 [2d Dept 2003]). Drivers must maintain safe distances between their cars and cars in front of them (Vehicle and Traffic Law § 1129 [a]) and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages, to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (see *Johnson v Phillips*, 261 AD2d 269 [1st Dept 1999]). Thus, the occurrence of a rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (see *Hauser v Adamov*, 74 AD3d 1024 [2d Dept 2010]; *Arias v Rosario*, 52 AD3d 551 [2d Dept 2008]; *Leal v Wolff*, 224 AD2d 392 [2d Dept 1996]). This 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 AD3d 869 [2d Dept 2010]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 75 AD3d 489 [2d Dept 2010]; *Moran v Singh*, 10 AD3d 707 [2d Dept 2004]; *Barile v Lazzarini*, 222 AD2d 635 [2d Dept 1995]).

Plaintiff alleges that he was involved in a motor vehicle accident during rush hour which occurred on September 22, 2015, while traveling westbound in stop and go traffic on the Long Island Expressway approaching Exit 46 in Suffolk County, New York. Plaintiff claims the traffic was stop and go and that as he approached the exit, he gradually came to a stop and at that time his vehicle was struck from behind by the Defendant Danielle Bourgade. Plaintiff states she did nothing to cause the accident and was stopped at the time.

Here, Plaintiff's submissions are sufficient to make a *prima facie* showing of entitlement to summary judgment on the issue of liability (see *Kastritsios v Marcello*, 84 AD3d 1174 [2d Dept 2011]; *Bernier v Torres*, 79 AD3d 776 [2d Dept 2010]; *Mandel v Benn*, 67 AD3d 746 [2d Dept 2009]). The burden, then, shifted to Defendant to offer a non-negligent explanation for the accident sufficient to raise a triable issue of fact (see *Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368 [2d Dept 2006]; *Rainford v Han*, 18 AD3d 638 [2d Dept 2005]).

In opposition to Plaintiff's motion, Defendants submit an affirmation of counsel, which does not provide a non-negligent explanation for failure to avoid impact with the rear of Plaintiff's vehicle. The affirmation of Defendants' attorney is insufficient to defeat summary judgment, because it lacks evidentiary value since he has no personal knowledge of the facts (see *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Furthermore, the contention that Plaintiff's motion is premature because depositions have not yet been conducted does not establish what information Defendants believe will be discovered at those depositions which would relieve them of liability (see *Cajas-Romero v Ward*, 106 AD3d 850 [2d Dept 2013]). "[T]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Lopez v WS Distrib., Inc.*, 34 AD3d 759 [2d Dept 2006]). Thus, Defendants have not met their burden.

Accordingly, the Plaintiff's Motion for Summary Judgment in favor of Plaintiff on the issue of liability is granted.

Accordingly, it is hereby

ORDERED, that Plaintiff's Motion for partial summary judgment on the issue of liability is **GRANTED**; and it is further

ORDERED, that all Parties' Counsel and if no counsel then the Parties, are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, on Tuesday, **OCTOBER 22, 2019, at 9:30 A.M.**, for a compliance conference; and it is further

ORDERED, that non-appearance will not be countenanced by the Court and may subject the non-appearing Party to one or more of the sanctions pursuant to 22 NYCRR §§ 202.27 and 130-2; and it is further

ORDERED, that at the call of the calendar, if any Party does not appear or proceed or announce their readiness to proceed, the Court shall consider an Order pursuant to 22 NYCRR § 202.27 as follows: (a) if the Plaintiff appears but the Defendant does not, the Court shall consider granting judgment by default and order an inquest; (b) if the defendant appears but the Plaintiff does not, the Court shall consider a dismissal of the action and order a severance of counterclaims; and (c) if no Party appears, the Court shall make such order as appears just; and it is further

ORDERED, that the Parties and their Counsel, if any, comply with Part 29 Court Rules, https://www.nycourts.gov/courts/10jd/suffolk/SC_Part_Rules/Kevins.pdf; and it is further

ORDERED, that Plaintiff(s) is/are directed to immediately serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk; and it is further

ORDERED, that upon Entry of this Order by the Suffolk County Clerk, Plaintiff(s) is/are directed to serve, forthwith, a copy of this Order with Notice of Entry upon all parties and to

promptly file the Affidavit(s) of Service with the Clerk of the Court.

Any requested relief not specifically granted herein is hereby DENIED.

This constitutes the Decision and Order of this Court.

Dated: September 5, 2019
Riverhead, New York



HON. LINDA KEVINS
J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION