

**Donegan v Daniels**

2019 NY Slip Op 34364(U)

June 4, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 623871/2018

Judge: Paul J. Baisley, Jr.

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SHORT FORM ORDER

INDEX NO. 623871/2018

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

**PRESENT:**

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

\_\_\_\_\_  
TINA M. DONEGAN,

Plaintiff,

-against-

ANN S. DANIELS,

Defendant.  
\_\_\_\_\_

**ORIG. RETURN DATE:** March 6, 2019  
**FINAL RETURN DATE:** April 17, 2019  
**MOT. SEQ. #** 001 MG

**PLTF'S ATTORNEY:**  
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Upon the following papers read on this motion for partial summary judgment: Notice of Motion and supporting papers by the plaintiff, dated February 4, 2019; Answering Affidavits and supporting papers by the defendant, dated March 29, 2019; Replying Affidavits and supporting papers by the plaintiff, dated April 6, 2019; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the motion by plaintiff Tina M. Donegan for, inter alia, partial summary judgment in her favor on the issue of defendant's liability is granted; and it is further

**ORDERED** that the parties shall appear for a preliminary conference at 10:00 a.m. on June 25, 2019, at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

This action was commenced by plaintiff Tina M. Donegan to recover damages for injuries she allegedly sustained on May 6, 2017, when her motor vehicle was struck in the rear by a vehicle owned and operated by defendant Ann S. Daniels.

Plaintiff now moves for partial summary judgment in her favor as to defendant's negligence, arguing that defendant's actions were the sole proximate cause of the subject accident. Plaintiff also moves for an order dismissing defendant's first affirmative defense asserted in her answer, alleging "contributory negligence and/or culpable conduct." In support of her motion, plaintiff submits copies of the pleadings, her own affidavit, and a certified copy of an MV-104A police accident report.

In her affidavit, plaintiff states that on the date in question, she was operating her motor vehicle southbound in the left lane of Patchogue-Holbrook Road, near its intersection with Broadway Avenue, in the Town of Brookhaven, New York. She indicates that as she approached the aforementioned intersection, she brought her vehicle to a complete stop for a red traffic light. Once the traffic light turned green, she moved her vehicle forward into the intersection. Plaintiff stated that immediately thereafter, an ambulance facing east on Broadway Avenue activated its lights and sirens. In response,

Donegan v Daniels  
Index No. 623871/2018  
Page 2

she brought her vehicle to a complete stop, whereupon a vehicle operated by Ann S. Daniels struck her vehicle in the rear.

A party moving for summary judgment “must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see O’Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157 [2011]).

A plaintiff “is no longer required to show freedom from comparative fault in order to establish his [or her] prima facie entitlement to judgment as a matter of law on the issue of liability” (*Merino v Tessel*, 166 AD3d 760, 760, 87 NYS3d 554 [2d Dept 2018]; *see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]). The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see Shui-Kwan Lui v Serrone*, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]; *Barbieri v Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]).

A driver of a vehicle approaching another vehicle from the rear “is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle” (*Auguste v Jeter*, 167 AD3d 560, 560, 88 NYS3d 509 [2d Dept 2018], quoting *Nsiah-Ababio v Hunter*, 78 AD3d 672, 672, 913 NYS2d 659 [2d Dept 2010]; *see Vehicle and Traffic Law* § 1129 [a]). “A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (*Buchanan v Keller*, 169 AD3d 989, 991, 95 NYS3d 252 [2d Dept 2019]; *see Tutrani v County of Suffolk*, 10 NY3d 906, 861 NYS2d 610 [2008]). Examples of such non-negligent explanations include mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause (*Tumminello v City of New York*, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]; *see also Foti v Fleetwood Ride, Inc.*, 57 AD3d 724, 871 NYS2d 215 [2d Dept 2008]; *Klopchin v Masri*, 45 AD3d 737, 846 NYS2d 311 [2d Dept 2007]; *Filippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 [2d Dept 2000]). It is also 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 and has the duty to keep control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Carhuayano v J & R Hacking*, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; *see also Vehicle and Traffic Law* § 1129 [a]). Moreover, an operator of a motor vehicle has 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, 566 [2d Dept

Donegan v Daniels  
Index No. 623871/2018  
Page 3

2001]; *see also Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]).

Plaintiff's submissions established a prima facie case of entitlement to judgment in her favor on the issue of defendant's liability for her alleged injuries, and for an order striking defendant's first affirmative defense of "contributory negligence and/or culpable conduct" (*see Cortese v Pobejimov*, 136 AD3d 635, 24 NYS3d 405 [2d Dept 2016]; *see generally Alvarez v Prospect Hosp., supra*). Plaintiff demonstrated that she was lawfully stopped for an emergency vehicle with its lights and sirens activated when her motor vehicle was struck in the rear. Further, with regard to that portion of plaintiff's motion seeking an order striking defendants' first affirmative defense, "the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence" (*Poon v Nisanov*, 162 AD3d 804, 808, 79 NYS3d 227 [2d Dept 2018]). Plaintiff's affidavit is sufficient to demonstrate, prima facie, that defendant driver's actions were the sole proximate cause of her injuries and that her first affirmative defense should be dismissed (*see Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]). The burden then shifted to defendant to raise a triable issue (*see generally Vega v Restani Constr. Corp., supra*).

In opposition, defendant argues that plaintiff's motion is premature and that material issues of fact exist as to the manner in which the accident occurred. In support of her arguments, defendant submits her own affidavit. In that affidavit, defendant states that at approximately 3:00 p.m. on the date in question, she was operating her vehicle southbound in the left lane of Patchogue-Holbrook Road when she brought her vehicle to a stop directly behind plaintiff's vehicle. She indicated that there were two additional vehicles stopped at the red traffic signal in the right lane. When the traffic light turned green, the plaintiff's vehicle moved forward, as did the two vehicles in the right lane, and she began moving forward also. She avers that the two vehicles in the right lane proceeded through the intersection completely, but that plaintiff's vehicle stopped "abruptly," "without warning and for no apparent reason," in the middle of the intersection, causing defendant's vehicle to strike it in the rear. She further states that the vehicles on Broadway Avenue were stopped for their red traffic signal at the time of the collision. Defendant, in response to plaintiff's question to her following the collision, admitted that she heard sirens, "but there were no emergency vehicles to be seen." Defendant indicates that "it was not until several minutes after the accident" that she "observed an ambulance with lights and sirens approach from Broadway Avenue and then proceed onto Patchogue-Holbrook Road." In conclusion, defendant opines that plaintiff should have "continued through the intersection at a slower pace and/or pull[ed] over to the side of the road allowing vehicles behind to follow suit."

Defendant's argument that triable questions of fact preclude granting partial summary judgment in plaintiff's favor on the issue of defendant's negligence is unavailing. Operators of motor vehicles have a duty to yield the right of way to approaching emergency vehicles (*see Vehicle and Traffic Law* § 1144 [a]). Defendant admitted that she heard sirens and, thus, plaintiff's sudden stop was not "unexplained" pursuant to *Tumminello v City of New York, supra*, but, rather, a response to sirens being audible immediately prior thereto. Further, defendant had the duty to remain a sufficient distance behind plaintiff's vehicle to avoid a collision (*see Carhuayano v J. & R. Hacking, supra*).

Defendant's argument that plaintiff's motion is premature is similarly unavailing. Summary

Donegan v Daniels  
Index No. 623871/2018  
Page 4

judgment may not be avoided based on a claim that discovery is needed “unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence” (*Anne Koplick Designs, Inc. v Lite*, 76 AD3d 535, 536, 906 NYS2d 331 [2d Dept 2010], quoting *Ruttura & Sons Constr. Co. v J. Petrocelli Constr.*, 257 AD2d 614, 615, 684 NYS2d 286 [2d Dept 1999]; see *Wienfeld v HR Photography, Inc.*, 149 AD3d 1014, 52 NYS3d 458 [2d Dept 2017]). Here, there is no evidentiary basis suggesting discovery “might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant” (*Skura v Wojtlowski*, 165 AD3d 1196, 1200, 87 NYS3d 100 [2d Dept 2018], quoting *MVB Collision, Inc. v Progressive Ins. Co.*, 129 AD3d 1040, 1041, 13 NYS3d 139 [2d Dept 2015] [internal quotations and citations omitted]). Finally, as to that portion of plaintiff’s motion seeking dismissal of defendant’s first affirmative defense, defendant failed to adduce facts sufficient to demonstrate that she was not the sole proximate cause of plaintiff’s alleged injuries.

Accordingly, the motion by plaintiff Tina M. Donegan for, inter alia, partial summary judgment in her favor on the issue of defendant’s liability is granted.

Dated: 6/9/19

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