

Wood v Lieblein

2019 NY Slip Op 34514(U)

April 2, 2019

Supreme Court, Suffolk County

Docket Number: Index No. 605880/2018

Judge: Paul J. Baisley, Jr.

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SHORT FORM ORDER

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

PRESENT:**Hon. Paul J. Baisley, Jr., J.S.C.**_____
CATHERINE WOOD,

Plaintiff,

-against-

COREY LIEBLEIN,

Defendant.

COREY LIEBLEIN,

Third-Party Plaintiff,

-against-

DONALD WOOD,

Third-Party Defendant.

ORIG. RETURN DATE: November 1, 2018 (001)**ORIG. RETURN DATE:** November 5, 2018 (002)**FINAL RETURN DATE:** December 6, 2018**MOT. SEQ. #:** 001 MD**MOT. SEQ. #:** 002 MG**PLTF'S ATTORNEY:**

GRUENBERG KELLY DELLA

700 KOEHLER AVENUE

RONKONKOMA, NEW YORK 11779

DEFT/THIRD-PARTY PLTF'S ATTY:

ROE & ASSOCIATES

1055 FRANKLIN AVENUE, SUITE 204

GARDEN CITY, NEW YORK 11530

THIRD-PARTY DEFT'S ATTY:

DESENA & SWEENEY, ESQS.

1500 LAKELAND AVENUE

BOHEMIA, NEW YORK 11716

Upon the following papers read on these motions for summary judgment and partial summary judgment : Notice of Motion and supporting papers by the third-party defendant, dated October 1, 2018 ; Notice of Motion and supporting papers by the plaintiff, dated October 18, 2018 ; Affirmation in Support by the plaintiff dated October 25, 2018 ; Answering Affidavits and supporting papers by the defendant/third-party plaintiff, dated November 19, 2018 ; Replying Affidavits and supporting papers by the third-party defendant, dated November 20, 2018 ; Replying Affidavits and supporting papers by the plaintiff, dated December 5, 2018 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (seq. 001) by third-party defendant Donald Wood and the motion (seq. 002) by plaintiff Catherine Wood are consolidated for purposes of this determination; and it is

ORDERED that the motion by third-party defendant Donald Wood for summary judgment dismissing the third-party complaint against him is denied; and it is

ORDERED that the motion by plaintiff Catherine Wood for partial summary judgment as to defendant Corey Lieblein's negligence is granted; and it is further

ORDERED that the parties shall appear for a preliminary conference at 10:00 a.m. on April 9, 2019, at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York.

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This action was commenced by plaintiff Catherine Wood to recover damages for injuries she allegedly sustained on September 2, 2017, while a passenger in a motor vehicle operated by her husband, third-party defendant Donald Wood. Plaintiff alleges their vehicle was struck in the rear by a vehicle owned and operated by defendant/third-party plaintiff Corey Lieblein. Mr. Lieblein asserts a third-party claim against Donald Wood for contribution.

Donald Wood now moves for summary judgment dismissing the third-party complaint, arguing that defendant's negligence was the sole proximate cause of plaintiff's alleged injuries. In support of his motion, Mr. Wood submits copies of the pleadings and his own affidavit. Plaintiff moves for partial summary judgment in her favor as to Corey Lieblein's negligence. In support of her motion, she submits, among other things, her own affidavit, a copy of Mr. Wood's affidavit, and a certified copy of an MV-104A police accident report.

In his affidavit, Mr. Wood states that at approximately 2:00 p.m. on the date in question he was operating a 2002 Chevy on Washington Avenue in Riverhead, New York. He avers that "[w]hile gradually slowing to read a street sign," he "was unexpectedly struck from behind by a male-operated Ford vehicle." Mr. Wood states that his vehicle "did not have any operational problems prior to the accident and [his] brake/tail lights were all on and operational."

Plaintiff indicates that on the date in question she was the seat-belted passenger in a motor vehicle owned by herself, but operated by Donald Wood. She states that as the Wood vehicle traveled southbound on Washington Avenue, it "started to gradually slow" over a period of "at least 10 seconds," so that its driver could "look for an address." Mrs. Wood further states that while the Wood vehicle was traveling at "approximately five miles per hour," it was struck in the rear by a vehicle operated by Corey Lieblein. She indicates that "[a]t no time did [the Wood] vehicle come to a sudden stop."

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*

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Serrone, 103 AD3d 620, 959 NYS2d 270 [2d Dept 2013]; *Barbieri v Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; *Coogan v Torrissi*, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]).

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, requiring that operator to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence” (*Cortese v Pobejimov*, 136 AD3d 635, 636, 24 NYS3d 405 [2d Dept 2016]; 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 2001]; see also *Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]).

Here, Donald Wood’s submissions establish a prima facie case of entitlement to summary judgment dismissing the third-party complaint (see *Cortese v Pobejimov*, *supra*; see generally *Alvarez v Prospect Hosp.*, *supra*). Mr. Wood demonstrated that his vehicle was struck in the rear as it slowed. As to plaintiff’s motion, her submissions also establish a prima facie case of entitlement to judgment in her favor on the issue of defendant’s negligence (see *Cortese v Pobejimov*, *supra*; see generally *Rodriguez v City of New York*, *supra*; *Alvarez v Prospect Hosp.*, *supra*). The burden, thus, shifted to Corey Lieblein to raise a triable issue (see generally *Vega v Restani Constr. Corp.*, *supra*).

In opposition to both motions, Mr. Lieblein argues that his affidavit raises questions of fact, that a rear-end collision “does not lead to the automatic conclusion that the driver of the rear vehicle was at fault,” that “a short stop provides a non-negligent explanation for a rear end collision,” and that the Wood vehicle failed to have operational brake lights.

In his affidavit, Mr. Lieblein states that on the date in question he was operating his motor vehicle “approximately two to three car lengths directly behind” the Wood vehicle. He indicates that the Wood vehicle “suddenly, abruptly and unforeseeably stopped” and “[a]t no time did this vehicle’s brake lights illuminate.” Mr. Lieblein avers that he immediately applied his brakes, but was unable to avoid a collision with plaintiff’s vehicle due to its sudden braking and the “failure of its brake lights to

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illuminate.”

Initially, the Court will address the admissibility of defendant’s affidavit, which was notarized in Oklahoma, but is unaccompanied by the certification required by CPLR 2309 (c). Plaintiff contends that such affidavit is inadmissible. However, such defect is not fatal and the affidavit will be considered (*see Bank of New York Mellon v Vytalingam*, 144 AD3d 1070, 42 NYS3d 274 [2d Dept 2016]). After consideration of defendant’s affidavit, the Court finds it insufficient to raise a triable issue as to plaintiff’s motion. Regarding Mr. Lieblein’s contention that the Wood vehicle came to a sudden stop, such a stop does not absolve him of his duty to maintain a safe distance behind that vehicle (*see Buchanan v Keller*, ___AD3d___, 2019 NY Slip Op 01385 [2d Dept 2019]; *Auguste v Jeter*, *supra*; *Carhuayano v J & R Hacking*, *supra*; *Lundy v Llatin*, 51 AD3d 877, 858 NYS2d 341 [2d Dept 2008]). Mr. Lieblein, as the following driver, did not assert that plaintiff’s vehicle cut in front of his vehicle, only that it stopped suddenly in front of him (*cf. Merino v Tessel*, *supra*; *Cruz v Valentine Packaging Corp.*, 167 AD3d 707, 89 NYS3d 316 [2d Dept 2018]; *Abaev v Reddy Raw, Inc.*, 146 AD3d 846, 45 NYS3d 528 [2d Dept 2017]). As to Mr. Lieblein’s allegation, asserted for the first time in opposition to the instant motions, that the Wood vehicle’s tail lights were non-functional, this, too, is insufficient to raise a triable issue as to plaintiff (*see Schmertzler v Lease Plan U.S.A., Inc.*, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]; *Cortese v Pobejimov*, *supra*; *Cortes v Whelan*, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]). Even assuming, *arguendo*, the tail lights of the vehicle did not illuminate as Mr. Wood applied the brakes, such a circumstance would merely be an issue of comparative negligence to be determined at the damages stage of any trial (*see Rodriguez v City of New York*, *supra*). Accordingly, plaintiff’s motion for partial summary judgment as to defendant’s negligence is granted.

As to the motion by Mr. Wood, plaintiff does not oppose it; instead, she submits papers in support of that motion. However, Mr. Lieblein raises triable issues regarding whether Mr. Wood stopped his vehicle suddenly and without warning, and whether his brake lights were functional at the time, precluding the dismissal of the third-party complaint (*see Conroy v NY City Tr. Auth.*, 167 AD3d 977, 91 NYS3d 183 [2d Dept 2018]; *Sorocco v Meglio*, 157 AD3d 838, 66 NYS3d 895 [2d Dept 2018]; *Etingof v Metro. Laundry Mach. Sales, Inc.*, 134 AD3d 667, 20 NYS3d 589 [2d Dept 2015]; *Bell v Brown*, 152 AD3d 1114, 61 NYS3d 167 [3d Dept 2017]). While plaintiff’s motion for partial summary judgment in her favor as to Mr. Lieblein’s liability required only a showing that he was negligent, Mr. Wood was required to demonstrate that Mr. Lieblein’s negligence was the sole proximate cause of plaintiff’s alleged injuries (*see Suris v Citiwide Auto Leasing, Inc.*, 145 AD3d 817, 43 NYS3d 434 [2d Dept 2016]; *see generally Rodriguez v City of New York*, *supra*). The Court, in assuming the truth of Mr. Lieblein’s statements in his affidavit, as it must do on a motion for summary judgment, finds that he has raised triable issues as to Mr. Wood’s possible negligence (*see generally Ortiz v Varsity Holdings, LLC*, *supra*). Accordingly, the motion by third-party defendant Donald Wood for summary judgment dismissing the third-party complaint against him is denied.

Dated: 4/2/19


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