

Mincione v County of Suffolk
2019 NY Slip Op 34535(U)
October 25, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 622048/2017
Judge: Joseph A. Santorelli
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SHORT FORM ORDER ORIGINAL

INDEX No. 622048/2017
CAL No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH A. SANTORELLI
Justice of the Supreme Court

MOTION DATE 7-19-19
SUBMIT DATE 10-3-19
Mot. Seq. # 01 - MG

STACIE A. MINCIONE and KATHLEEN
DOWSETT as Administratrix of the Estate of
JENNIFER M. MAIELLO,

Plaintiffs,

- against -

THE COUNTY OF SUFFOLK; SUFFOLK
COUNTY DEPARTMENT OF PUBLIC
WORKS, and CHARLES KIELB, JR.,

Defendants.

KAPLAN LAWYERS, PC
Atty. for Plaintiffs
6901 JERICHO TPKE, STE 100
SYOSSET, NY 11791

FUMUSO, KELLY, SWART, FARRELL,
POLIN & CHRISTESEN
Atty. for Defendants
110 MARCUS BLVD, STE 500
HAUPPAUGE, NY 11788

Upon the following papers numbered 1 to 31 read on this motion for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 10; Notice of Cross Motion and supporting papers; Answering
Affidavits and supporting papers 11 - 22; Replying Affidavits and supporting papers 23 - 31; Other; (and after
hearing counsel in support and opposed to the motion) it is,

The plaintiffs seek an order pursuant to CPLR 3212 granting summary judgment on liability.
The defendants oppose this application.

CPLR §3212(b) states that a motion for summary judgment "shall be supported by affidavit,
by a copy of the pleadings and by other available proof, such as depositions and written admission."
If an attorney lacks personal knowledge of the events giving rise to the cause of action or defense,
his ancillary affidavit, repeating the allegations or the pleadings, without setting forth evidentiary
facts, cannot support or defeat a motion by summary judgment (Olan v. Farrell Lines, Inc., 105 AD
2d 653, 481 NYS 2d 370 (1st Dept., 1984; aff'd 64 NY 2d 1092, 489 NYS 2d 884 (1985); Spearman
v. Times Square Stores Corp., 96 AD 2d 552, 465 NYS 2d 230 (2nd Dept., 1983); Weinstein-Korn-
Miller, New York Civil Practice Sec. 3212.09)).

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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 (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]). To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*Sillman v Twentieth Century-Fox Film Corporation*, 3 NY2d 395, 165 NYS2d 498 [1957]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form . . . and must “show facts sufficient to require a trial of any issue of fact” CPLR3212 [b]; *Gilbert Frank Corp. v Federal Insurance Co.*, 70 NY2d 966, 525 NYS2d 793, 520 NE2d 512 [1988]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). The opposing party must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (*Castro v Liberty Bus Co.*, 79 AD2d 1014, 435 NYS2d 340 [2d Dept 1981]). Furthermore, the evidence submitted in connection with a motion for summary judgment should be viewed in the light most favorable to the party opposing the motion (*Robinson v Strong Memorial Hospital*, 98 AD2d 976, 470 NYS2d 239 [4th Dept 1983]).

On a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue (see *S.J. Capelin Associates v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [1974]). However, the court must also determine whether the factual issues presented are genuine or unsubstantiated (*Prunty v Keltie's Bum Steer*, 163 AD2d 595, 559 NYS2d 354 [2d Dept 1990]). If the issue claimed to exist is not genuine but is feigned and there is nothing to be tried, then summary judgment should be granted (*Prunty v Keltie's Bum Steer, supra*, citing *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 293 NYS2d 93, 239 NE2d 725 [1968]; *Columbus Trust Co. v Campolo*, 110 AD2d 616, 487 NYS2d 105 [2d Dept 1985], *affd*, 66 NY2d 701, 496 NYS2d 425, 487 NE2d 282).

In support of motion, the plaintiffs have submitted, inter alia, an attorney's affirmation; copies of the summons and verified complaint; copies of the verified answer; copies of the plaintiff's verified bill of particulars; copies of the accident report; the transcript from the GML 50(h) hearing for Stacie Mincione; and the transcript from the GML 50(h) hearing for Jennifer Maiello. In opposition to the motion, defendants have submitted, inter alia, an attorney's affirmation; copies of the summons and verified complaint; copies of the verified answer; copies of the plaintiff's verified bill of particulars; copies of a Conference Stipulation and Order dated August 29, 2019; and an affidavit of Charles Kielb.

The plaintiffs commenced this action to recover damages for personal injuries sustained as a result of a rear-end collision that occurred on March 23, 2017. Plaintiff Stacie Mincione alleges that she was operating a 2010 Chevy sedan, in which decedent Jennifer Maiello was a passenger, and was stopped at a red light northbound on Route 112 at or near its intersection with Pine Road, Coram, Town of Brookhaven, New York. Plaintiff Mincione contends that she was stopped at a red light when defendant, Charles Kielb, Jr., operating a bus owned by defendants County of Suffolk and

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Suffolk County Department of Public Works, struck the plaintiff's vehicle in the rear. In opposition defendant Kielb states that he came to a "full stop" at the red light and then proceeded to move when the light turned green. He contends that "with no warning, and for no reason that I could see, the Chevrolet abruptly stopped and the bus that I was driving came into contact with the rear of the Chevrolet." The certified copy of the police accident report indicates that defendant Kielb stated "when he was stopped and when light turned green he went to go, and looked down briefly and struck" the plaintiffs.

A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the moving vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Xian Hong Pan v Buglione*, 101 AD3d 706, 955 NYS2d 375 [2d Dept 2012]; *see also Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007], citing *Carhuayano v J & R Hacking*, 28 AD3d 413, 414, 813 NYS2d 162; *Milskiy v Solanky*, 8 AD3d 353, 777 NYS2d 734; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86). 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, 271, 690 NYS2d 545 [1st Dept 1999]). "A claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence" (*Arias v. Rosario*, 52 AD3d 551, 552, 860 NYS2d 168 (App Div 2d Dep't 2008); *citing, Russ v Investech Secs.*, 6 AD3d 602, 775 NYS2d 867 [2004]; *see Johnston v Spoto*, 47 AD3d 888, 850 NYS2d 204 [2008]; *Campbell v City of Yonkers*, 37 AD3d at 751; *Neidereger v Misuraca*, 27 AD3d 537, 811 NYS2d 758 [2006]; *Ayach v Ghazal*, 25 AD3d 742, 808 NYS2d 759 [2006]).

Here, the plaintiffs established a *prima facie* entitlement to judgment as a matter of law. The defendants were then required to proffer evidence in admissible form to show facts sufficient to require a trial of any issue of fact. In opposition to the motion, the defendants have failed to rebut the *prima facie* showing by solely claiming that plaintiff Mincione made a sudden stop and thereby caused the accident.

Therefore, th motion by the plaintiffs for an order awarding summary judgment in their favor on the issue of liability is granted; and it is further

ORDERED that the attorneys for the parties shall proceed to discovery on the issue of damages; and it is further

ORDERED that counsel for the plaintiffs shall serve a copy of this order upon opposing counsel and upon the Calendar Clerk of this court within twenty (20) days from the date of this order; and it is further

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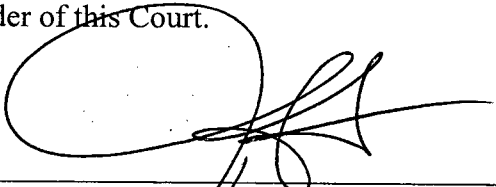
ORDERED that upon the completion of discovery and the filing of a Note of Issue, this action shall proceed to trial on the issue of damages; and it is further

ORDERED that a compliance conference is presently scheduled for November 21, 2019; and it is further

ORDERED, that any unrepresented parties and attorneys shall appear on **Thursday, November 21, 2019 at 9:30 a.m.** in Courtroom A361 of the Hon. Alan D. Oshrin Supreme Court Building, 1 Court Street, Riverhead, New York, as part of the above-referenced action. Attorneys appearing must have knowledge of the case and be authorized to discuss details regarding this action. A failure to appear may result in the matter being dismissed or a default being granted.

The foregoing constitutes the decision and Order of this Court.

Dated: October 25, 2019



HON. JOSEPH A. SANTORELLI
J.S.C.