

<b>Clancy v Tiedemann</b>
2019 NY Slip Op 34620(U)
April 1, 2019
Supreme Court, Westchester County
Docket Number: Index No. 53100/2018
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
EUGENIA CLANCY,

Plaintiff,

-against-

GRANT A. TIEDEMANN and KATHLEEN A. TIEDEMANN,

Defendants.  
-----X

Index No. 53100/2018  
DECISION/ORDER  
Motion Date: 02/27/19  
Motion Seq. 1

**Ecker, J.**

The following papers were considered on the motion of plaintiff EUGENIA CLANCY ("plaintiff") [Mot. Seq. 1], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment as to liability, as against GRANT A. TIEDEMANN and KATHLEEN A. TIEDEMANN ("defendants"):

**PAPERS**

- Notice of Motion, Affirmation, Affidavit, Exhibits A-D <sup>1</sup>
- Affirmation in Opposition, Exhibit A
- Reply Affirmation

Upon the foregoing papers, the court determines as follows:

Plaintiff alleges that she sustained serious injuries in a motor vehicle accident on May 30, 2017. At the time of the incident, plaintiff was a rear seat passenger in a vehicle operated by non-party Roseann Sprague. The Sprague vehicle came to a full stop at the red traffic light on Boston Post Road at the intersection of Route 1 and I-95. It was then struck in the rear by the vehicle operated by defendant Grant A. Tiedemann ("Grant") (owned by defendant Kathleen A. Tiedemann).

Plaintiff now moves, pursuant to CPLR 3212, for an order granting her summary judgment on liability against defendants. In support of the motion, plaintiff submits a verified complaint, a certified police accident report and her deposition in support of the

<sup>1</sup> Plaintiff is directed to use numbered exhibit tabs, and not to repeat the same number (or in this case letter) within the same motion sequence.

motion. Plaintiff argues that, when considered together, these submissions warrant the grant of the motion as to liability. In opposition, defendants assert that the police report shows that the roadway was wet and it was raining, and argue that Grant may offer a non-negligent reason for his conduct.

Grant has not yet been deposed nor does he submit an affidavit in opposition to the motion. Instead, his attorneys submit a letter from the United States Army, dated November 28, 2018, confirming that: on that date Grant was a private on active duty in Fort Wainwright, Alaska and was stationed there at the time; and it was expected that he would remain on duty in Alaska until December 19, 2020. [NYSCEF No. 23]. It is undisputed that this remains Grant's current military status, and it appears that defendants seek a stay of the matter based on Grant's military service.

Military Law §304 provides that, at any stage of any action in which a person in military service is involved as a party, during the period of such service or within sixty days thereafter may, in the discretion of the court before which it is pending, be stayed unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense, is not materially affected by reason of the military service (see *Vargas v Ahmed*, 41 AD3d 328. [1<sup>st</sup> Dept 2007]; *Pinkowski v All States Sawing and Trenching, Inc.*, 290 AD2d 873 [2d Dept 2002]).

In deciding whether a soldier's ability to defend a case is materially affected by his or her military service, the court must determine whether such factors as the service member's geographical location or specific position or duties in the military prevents him or her from adequately defending the action in question (see *Greco v Renegades, Inc.*, 307 AD2d 711 [4<sup>th</sup> Dept 2003]; *KCF v TLSF*, 15 Misc.3d 1119(A) [Sup. Ct. Kings County 2017]). As a result, courts have generally looked to the servicemember's commanding officer for guidance with respect to whether the defendant is available to attend court hearings or otherwise participate in the active defense of the subject action (*KCF v TLSF, supra*; see *Warshawsky v Warshawsky*, 215 AD2d 374, 375 [1995]; cf. *Mirisoloff v Monroe*, 16 AD3d 1161 [4<sup>th</sup> Dept 2005]).

Here, defendants are required to: establish the manner in which current military duty requirements materially affect defendant's ability to appear and a date when defendant will be available to appear (Military Law § 522 [b] [2] [A]); and to submit a letter from defendant's commanding officer stating that defendant's current military duty prevents appearance and that military leave is not authorized for defendant at the time of the letter (Military Law § 522 [b] [2] [B]; *Mirisoloff v Monroe, supra*). It is undisputed that the letter submitted satisfies the second requirement.

Reviewing the submissions, however, the court finds that defendants fail to demonstrate that their ability to defend the action in terms of liability is materially affected by reason of Grant's current military service. There is no evidence presented which contradicts plaintiff's version of the facts of the accident. Grant does not submit an affidavit on this motion. In addition, the responding police officer wrote that Grant stated: "that it

began to rain and he looked down and the next thing he knew the airbag from his vehicle struck him in the face." As the air bag could only have been triggered by the significant impact of his vehicle with the car in front of him, in which plaintiff was a passenger, and defendant does not deny plaintiff was at a full stop, there is no question of fact as to whether plaintiff's motor vehicle was rear-ended by Grant's motor vehicle.

Furthermore, on this motion, plaintiff establishes *prima facie* entitlement to judgment as a matter of law by submitting evidence that she brought her vehicle safely to a stop before being struck in the rear by the defendants' vehicle (*Abdou v Malone*, 166 AD3d 931 [2d Dept 2018]; *Martinez v Kuhl*, 165 AD3d 774 [2d Dept 2018]). It is well established that, when the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*Comas-Bourne v City of New York*, 146 AD3d 855 [2d Dept 2017]; *Gaeta v Carter*, 6 AD3d 576 [2d Dept 2004]; VTL § 1129[a]). As such, 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 (*Lopez v Dobbins*, 164 AD3d 776 [2d Dept 2018]; see *Tutrani v County of Suffolk*, 10 NY3d 906 [2008]). Based on the submissions, therefore, plaintiff has set forth a *prima facie* case here.

Defendants' only argument in opposition to the motion for summary judgment is that there is a need for further disclosure, namely the taking of Grant's deposition. However, defendants fail to show that such additional discovery might lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge and control of plaintiff (CPLR 3212[f]; *Noel v Nationwide Insurance Company of America*, 2019 N.Y. Slip Op. 02348 [2d Dept 2019]; *Pabarroo v TS 405 Lexington Owner, LLC*, 141 AD3d 634 [2d Dept 2016]; *Orellana v Maggies Paratransit Corp.*, 138 AD3d 941 [2d Dept 2016]). Again, defendants elected to not provide an affidavit from Grant. The 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 (*Pabarroo v TS 405 Lexington Owner, LLC. supra*). The court finds that plaintiff proves that she was rear-ended by defendants while at a full stop, and defendants fail to provide any evidence capable of creating a question of fact as to the issue.

This action cannot proceed to an inquest, however, while Grant remains unavailable due to military service. Grant's testimony concerning the impact of the vehicles may be necessary at the inquest on damages as impact pertains to the extent of plaintiff's injuries. As such, he is entitled to participate at the inquest and the scheduling of an inquest must be stayed. Of import, the parties may continue the exchange of experts' reports, medical records, and other discovery during the stay and pending the vacating of the stay. The inquest as to damages shall not take place, however, until it has been demonstrated to the satisfaction of the Justice assigned to the motion to vacate the stay that Grant is available to participate in the proceeding.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the motion of plaintiff EUGENIA CLANCY [Mot. Seq.1], made pursuant to CPLR 3212, for an order granting partial summary judgment as to liability, as against defendants GRANT A. TIEDEMANN and KATHLEEN A. TIEDEMANN, is granted; and it is further

ORDERED that the scheduling of the inquest is stayed until such time as defendant GRANT A. TIEDEMANN is available to attend the inquest to be held in this action; and it is further

ORDERED that during the period of the stay, the parties shall continue to conduct the usual and customary pre-trial disclosure of plaintiff's injuries, including the conduct of defendants' experts examinations;

ORDERED that the parties shall appear, as previously scheduled, in the Compliance Conference Part of the Court, Room 811 at 9:15 a.m. on May 20, 2019.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York  
April 1, 2019

ENTER



HON. LAWRENCE H. ECKER, J.S.C.

**Appearances:**

All Parties appearing via NYSCEF