Fleurisma v Montenes
2019 NY Slip Op 34629(U)
December 10, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 612787/2019
Judge: Paul J. Baisley, Jr.

SHORT FORM ORDER **INDEX NO. 612787/2019**

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

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

ELIZABETH FLEURISMA,

Plaintiff,

-against-

TRACY MONTENES, and CHESTNUT RIDGE TRANSPORTATION, INC.,

Defendants.

ORIG. RETURN DATE: September 19, 2019
FINAL RETURN DATE: October 18, 2019
MOT. SEQ. #: 001 MG

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Upon the following papers read on this e-filed motion for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, dated August 29, 2019; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by defendants, dated October 3, 2019; Replying Affidavits and supporting by plaintiff, dated October 9, 2019; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion for summary judgment in her favor on the issue of defendants' negligence and for a determination as to her comparative fault is granted; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference at 10:00 a.m. on January 7, 2020 at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York.

This action was commenced by plaintiff Elizabeth Fleurisma to recover damages for injuries she allegedly sustained on April 1, 2019, when her motor vehicle was struck in the rear by a vehicle operated by defendant Tracy Montenes and owned by Chestnut Ridge Transportation, Inc. The accident allegedly occurred on Carman Road, at its intersection with Rainbow Commons Court, in Dix Hills, New York.

Plaintiff now moves for summary judgment on the issue of defendants' negligence and for a determination as to her comparative fault. In support of her motion, plaintiff submits, among other things, her affidavit, in which she avers that her vehicle was completely stopped at the subject intersection when it was struck in the rear by defendant driver's vehicle. She further avers that her vehicle was stopped at the subject intersection because she was waiting for oncoming traffic to clear before making a left turn onto Rainbow Commons Court.

In opposition to plaintiff's motion for summary judgment, defendants contend that triable issues of fact remain as to whether plaintiff caused or contributed to the accident by bringing her vehicle to a

sudden stop. Defendants also contend that plaintiff's motion is premature because she has not been deposed. In support of their opposition, defendants submit the affidavit of defendant driver.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once the movant demonstrates a prima facie entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient 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]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the court must view all evidence in the light most favorable to the nonmoving party (*see Matter of New York City Asbestos Litig.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]).

A driver of an automobile approaching another automobile from the rear must maintain a reasonably safe distance and rate of speed and control under the prevailing condition to avoid colliding with the other vehicle (*see Ordonez v Lee*, ___ AD3d ___, 2019 NY Slip Op 08199 [2d Dept 2019]; *Gelo v Meehan*, ___ AD3d ___, 2019 NY Slip Op 08175 [2d Dept 2019]; *Mihalatos v Barnett*, 175 AD3d 492, 106 NYS3d 165 [2d Dept 2019]). 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, and thereby requires that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*see Liu v Lowe*, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; *Morgan v Flippen*, 173 AD3d 735, 102 NYS3d 108 [2d Dept 2019]; *Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]). A non-negligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the leading vehicle, an unavoidable skidding on wet pavement, or any other reasonable cause (*see Grant v Carrasco*, 165 AD3d 631, 84 NYS3d 235 [2d Dept 2018]; *Tumminello v City of New York*, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]; *Orcel v Haber*, 140 AD3d 937, 33 NYS3d 429 [2d Dept 2016]; *Binkowitz v Kolb*, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]). However, a driver who follows another vehicle must anticipate that the leading vehicle may stop, even suddenly, based on prevailing traffic conditions (*see Catanzaro v Edery*, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; *Buchanan v Keller*, 169 AD3d 989, 991 NYS3d 252 [2d Dept 2019]; *Annan v New York State Off. of Mental Health*, 165 AD3d 1020, 87 NYS3d 70 [2d Dept 2018]).

Although a plaintiff is no longer required to show freedom from comparative fault to establish his or her prima facie entitlement to judgment as a matter of law on the issue of negligence (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *see Liu v Lowe*, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; *Heard v Schade*, 172 AD3d 1335, 99 NYS3d 666 [2d Dept 2019], the issue of a plaintiff's comparative negligence may, however, be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of

comparative negligence (*see Higashi v M & R Scarsdale Rest., LLC*, ___ AD3d ___, 2019 NY Slip Op 07240 [2d Dept 2019]; *Wray v Galella*, 172 AD3d 1446, 101 NYS3d 401 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). Here, the Court deems plaintiff's application for a declaration that she is free from comparative negligence, in effect, as a request for summary judgment dismissing defendants' affirmative defense of comparative negligence. As a motor vehicle accident can have more than one proximate cause (*see Richardson v Cablevision Sys. Corp.*, 173 AD3d 1083, 104 NYS3d 655 [2d Dept 2019]; *Enriquez v Joseph*, 169 AD3d 1008, 94 NYS3d 599 [2d Dept 2019]; *Matias v Bello*, 165 AD3d 642, 84 NYS3d 551 [2d Dept 2018]), the issue of comparative fault is generally a question for the fact finder to determine (*see Richardson v Cablevision Sys. Corp.*, *supra*; *Matias v Bello*, *supra*; *Vuksanaj v Abbott*, 159 AD3d 1031, 73 NYS3d 224 [2d Dept 2018]).

Plaintiff made a prima facie case of entitlement to judgment as a matter of law on the issue of defendant driver's negligence (*see Morgan v Flippen*, *supra*; *Buchanan v Keller*, *supra*; *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, 150 AD3d 754, 53 NYS3d 684 [2d Dept 2017]). As previously indicated, plaintiff alleges that her vehicle was completely stopped at the subject intersection when it was struck in the rear by defendant driver's vehicle. As to defendant Chestnut Ridge Transportation, Inc., Vehicle and Traffic Law § 388 provides that an owner of a motor vehicle is vicariously liable for the negligence of those whom the owner allows to drive his or her vehicle (*see Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 811 NYS2d 302 [2006]; *Jung v Glover*, 169 AD3d 782, 93 NYS3d 390 [2d Dept 2019]). In defendants' verified answer, they admit that defendant Chestnut Ridge Transportation, Inc., owned defendant driver's vehicle, and that she operated the vehicle with its consent. Plaintiff's submissions were also sufficient to establish, prima facie, that she did not contribute to the happening of the accident, and that defendant driver's negligence was the sole proximate cause of the accident (*see Martinez v Allen*, 163 AD3d 951, 82 NYS3d 130 [2d Dept 2018]; *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, *supra*; *Ramos v Baig*, 145 AD3d 696, 43 NYS3d 110 [2d Dept 2016]; *Poon v Nisanov*, *supra*; *Waide v ARI Fleet, LT*, 143 AD3d 975, 39 NYS3d 512 [2d Dept 2016]).

In opposition, defendants failed to raise a triable issue of fact (*see Auguste v Jeter*, 167 AD3d 560, 88 NYS3d 509 [2d Dept 2018]; *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, *supra*; *Hackney v Monge*, 103 AD3d 844, 960 NYS2d 176 [2d Dept 2013]). In her affidavit, defendant driver avers that a vehicle ahead of her vehicle abruptly stopped to make a left turn, which caused the vehicle in front of her to stop short. She states that although she applied the brakes to her vehicle, she was unable to avoid the collision. Absent evidence that defendant driver's vehicle was maintaining a reasonably safe distance and speed behind plaintiff's vehicle, defendants' claim that plaintiff's vehicle came to a sudden stop was insufficient to raise a triable issues of fact as to whether a non-negligent explanation for the accident existed (*see Auguste v Jeter*, *supra*; *Hackney v Monge*, *supra*; *Taing v Drewery*, 100 AD3d 740, 954 NYS2d 175 [2d Dept 2012]). Further, plaintiff's motion was not premature, as defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of plaintiff (*see* CPLR 3212[f]; *Romain v City of New York*, ___ AD3d ___, 2019 NY Slip Op 07885 [2d Dept 2019]; *Harrinarain v Sisters of St. Joseph*, 173 AD3d 983, 104 NYS3d 661 [2d Dept 2019]; *Kerolle v Nicholson*, 172 AD3d 1187, 101 NYS3d 387 [2d Dept 2019]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis

for denying plaintiff's motion (*see Batashvili v Veliz-Palacios*, 170 AD3d 791, 96 NYS3d 146 [2d Dept 2019]; *Figueroa v MTLR Corp.*, 157 AD3d 861, 69 NYS3d 359 [2d Dept 2018]; *Niyazov v Hunter EMS, Inc.*, 154 AD3d 954, 63 NYS3d 457 [2d Dept 2017]).

Accordingly, plaintiff's motion is granted.

Dated: 12/10/19

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