

**Weber v Petrie**

2019 NY Slip Op 34640(U)

March 29, 2019

Supreme Court, Westchester County

Docket Number: Index No. 57544/2018

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time period 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  
WESTCHESTER COUNTY  
P R E S E N T: HON. SAM D. WALKER, J.S.C.**

-----X  
GERHARD WEBER and WENDY WEBB-WEBER,  
Plaintiff,

**DECISION & ORDER**  
Index No.57544/2018  
Seq. 1

-against-

JEAN-PAUL PETRIE and PRESTIGE  
MOTORWERKS, INC.,

Defendant.  
-----X

The following papers were read on a motion for summary judgment pursuant to CPLR 3212, on the issue of liability and to strike the defendants' affirmative defenses of comparative fault:

Notice of Motion/Affirmation/Exhibits A-E	1-7
Affirmation in Opposition/Exhibits A-C	8-11
Reply Affirmation/Exhibit F	12-13

Upon the foregoing papers it is ordered that the motion is GRANTED.

**FACTUAL AND PROCEDURAL BACKGROUND**

The plaintiffs commenced this action to recover damages for serious injuries he allegedly sustained in a motor vehicle accident that occurred on May 8, 2017 on Route 116 in Somers, New York. The plaintiffs allege that Gerhard Weber ("Weber") was operating his vehicle going westbound on Route 116, at or near the intersection of Entrance Way East and was at a complete stop waiting to make a left turn onto Entrance Way East, when

his vehicle was struck in the rear by a vehicle owned by the defendant, Prestige Motorwerks, Inc. ("Prestige"), and operated by the defendant, Jean-Paul Petrie ("Petrie").

The plaintiffs now files the instant motion seeking summary judgment against the defendants, pursuant to CPLR 3212 on the issue of liability. The plaintiffs' attorney argues that Petrie's negligent conduct was the sole proximate cause of the accident and that given the undisputed facts, the motion is not premature, even in the absence of discovery. The plaintiffs' attorney further argues that the issue of Weber's comparative fault is irrelevant because it is not his burden to disprove his negligence, but the defendant's burden to prove comparative fault and only pertains to the issue of damages.

In opposition, the attorney for Petrie argues that depositions are necessary to develop the relevant facts and the issue of Weber's comparative negligence and contends that the motion should be denied as premature. The attorney further asserts that the police report, which is uncertified and unsworn is inadmissible and therefore, should not be considered by the Court. The attorney also argues that Weber's affidavit is self-serving and insufficient to prove the non-existence of triable issues of fact. Prestige also opposes the motion, also arguing that the motion is premature, that the police report is inadmissible and that Weber's affidavit is self serving.

In support of his motion, the plaintiffs rely upon, *inter alia*, an attorney's affirmation, a copy of the certified police report, the plaintiff's affidavit, and a copy of the pleadings.

#### Discussion

"[T]he 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 demonstrate the absence of any material issues of fact" (*see Alvarez v Prospect Hosp.*, 68 NY2d 320,

324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

“A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle, and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision” (see *Sokolowska v Song*, 123 AD3d 1004 [2d Dept 2014]); see also *Agramonte v City of New York*, 288 AD2d 75, 76 [2001]; *Johnson v Phillips*, 261 AD2d 269, 271 [1999]; *Danza v Longieliere*, 256 AD2d 434, 435 [1998], lv dismissed 93 NY2d 957 [1999]).

In this case, the plaintiffs have made out a prima facie showing of their entitlement to summary judgment. The evidence submitted by the plaintiffs establishes entitlement to summary judgment as a matter of law, thereby shifting the burden to the defendants to demonstrate the existence of a factual issue requiring a trial (see *Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004]) [Rear-end collision is sufficient to create a prima facie case of liability.] If the operator of the striking vehicle fails to rebut this presumption and the inference of negligence, the operator of the stopped vehicle is entitled to summary judgment on the issue of liability (see *Leonard v City of New York*, 273 AD2d 205 [2d Dept 2000]; *Longhito v Klein*, 273 AD2d 281 [2d Dept 2000]; *Velasquez v Quijada*, 269 AD2d 592 [2d Dept 2000]; *Brant v Senatobia Operating Corp.*, 269AD2d 483 [2d Dept 2000]).

In opposition, the defendants argue that the motion is premature and that depositions are necessary to determine Weber's comparative fault, that the police report

is inadmissible and that Weber's affidavit is self serving. However, the defendants' attorney did not provide a non-negligent explanation as to why the Petrie could not stop before hitting the plaintiff's vehicle.

New York Vehicle and Traffic Law § 1129 states in pertinent part that:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. NY VTL § 1129 (a)

In (*Leal v Wolff*), the Second Department held that "[s]ince the defendant was under a duty to maintain a safe distance between his car and [the plaintiff's] car (see Vehicle and Traffic Law Section 1129[a]), his failure to do so in absence of a non negligent explanation constituted negligence as a matter of law" (*Leal v Wolf*. 224 AD2d 392 [2d Dept 1996]).

Further, "[w]hen the driver of an automobile approaches 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" (see *Zweeres v Materi*, 94 AD3d 1111 [2d Dept 2012]). "Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Id.*).

The defendants fail to offer any non-negligent explanation for the accident and the opposition does not create any issues of fact with regard to liability. Further, the plaintiffs are not required to show the absence of comparative fault for a grant of summary judgment (*Rodriguez v City of New York*, 31 NY3d 312 [2018]).

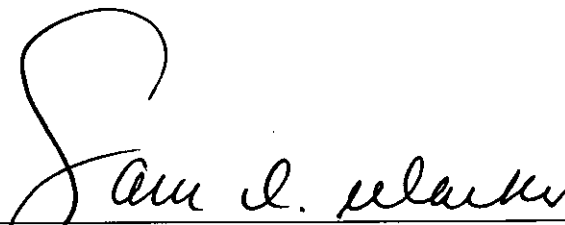
Here, the attorney does not have personal knowledge of the accident and therefore, an affirmation is insufficient to dispute Weber's affidavit. Further, the attorney did not address the specifics of the accident and Petrie did not provide an affidavit in opposition

to the motion. Further, the need to conduct discovery does not warrant denial of the motion, since the plaintiff has personal knowledge of the relevant facts of the accident (see *Niyazov v Bradford*, 13 AD3d 501 [2d Dept 2004]). Therefore, the defendants did not establish the existence of any material issue of fact to rebut the plaintiffs' prima facie showing of entitlement to summary judgment.

Additionally, the affirmative defenses raised by the defendant with regard to liability offer no factual support and simply utilize boilerplate language with no factual foundation. Unsupported conclusory allegations are not "evidentiary facts" and are insufficient to defeat the plaintiff's prima facie showing, (see *F.D.I.C v 7 A.M. to 11 P.M. Delicatessen, Inc.*, 251 AD2d 620 [2d Dept 1998]; *JPMorgan Chase Bank v Gamut-Mitchell, Inc.*, 27 AD3d 622 [2d Dept 2006]). Therefore, based on all the foregoing, the motion is GRANTED.

The foregoing shall constitute the Decision and Order of the Court.

Dated: White Plains, New York  
March 29, 2019

  
HON. SAM D. WALKER, J.S.C.