Arrospide v Murphy
2019 NY Slip Op 34645(U)
October 30, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 605073/2019E
Judge: William B. Rebolini
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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:
WILLIAM B. REBOLINI
Justice

Jean Arrospide,

Plaintiff,

-against-

Russel J. Murphy,

Defendant.

Motion Sequence No.: 001; MG
Motion Date: 8/8/19
Submitted: 8/14/19

Index No.: 605073/2019E

Attorney for Plaintiff:

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Clerk of the Court

Upon the **E-file document list** numbered 9 to 17 read on plaintiff's application for an order granting summary judgment on liability pursuant to CPLR 3212; it is

ORDERED that plaintiff's motion for summary judgment on liability is granted.

This is a personal injury action arising from a motor vehicle accident alleged to have occurred on January 16, 2018 at approximately 6:55 p.m. on Interstate 495 approximately .25 miles west of Route 110 in Suffolk County, New York. Plaintiff commenced this action by the filing of a summons and complaint on March 15, 2019 and alleges therein that defendant's vehicle struck his vehicle in the rear. Issue was joined on May 23, 2019 by the service of an answer. A preliminary conference was held on July 10, 2019. Plaintiff now moves for summary judgment on the issue of liability and submits in support thereof an affirmation of counsel, a sworn affidavit, a copy of the

pleadings, verified bill of particulars, and the police report. Defendant opposes the motion and plaintiff replies.

It is well settled that 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 eliminate any material issue of fact (*see* ***Alvarez v. Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v. Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). However, once the movant has made the requisite showing, the burden then shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to require a trial on any material issue of fact (***Zuckerman v. City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (*see* ***Friends of Animals, Inc. v. Associated Fur Mfrs.***, 46 NY2d 1065, 416 NYS2d 790; ***Burns v. City of Poughkeepsie***, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (***Nomura***, *supra*; *see also* ***Ortiz v. Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157 [2011]). A motion for summary judgment should be denied where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see* ***Chimbo v. Bolivar***, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; ***Benetatos v. Comerford***, 78 AD3d 730, 911 NYS2d 155 [2d Dept. 2010]).

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (Vehicle and Traffic Law § 1129 [a]; ***Gallo v. Jairath***, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]; ***Cajas-Romero v. Ward***, 106 AD3d 850, 965 NYS2d 559 [2d Dept 2013]; ***Nsiah-Ababio v. Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). A driver is negligent in failing to see that which under the facts and circumstances he should have seen by the proper use of his senses (*see* ***Barbieri v. Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept.2010]; ***Domanova v. State of New York***, 41 AD3d 633, 838 NYS2d 644 [2d Dept. 2007]; ***Lester v Jolicofur et al.***, 120 AD2d 574; 502 NYS2d 61 [2d Dept 1986]). The occurrence of a rear-end collision with a stopped or stopping vehicles creates a prima facie case of negligence on the part of the operator of the rear vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (***Montalvo v. Cedeno,*** 170 AD3d 1166, 96 NYS3d 638 [2d Dept. 2019]; ***McLaughlin v Lunn***, 137 AD3d 757, 26 NYS3d 338 [2d Dept 2016]; ***Cheow v Cheng Lin Jin***, 121 AD3d 1058, 995 NYS2d 186 [2d Dept 2014]; ***Perez v Roberts***, 91 AD3d 620, 936 NYS2d 259 [2d Dept 2012]; ***Volpe v Limoncelli***, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; ***Ramirez v Konstanzer***, 61 AD3d 837, 878 NYS2d 381 [2d Dept 2009]). This burden is placed on the driver of the rear vehicle because he is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (***Sayyed v. Murray***, 109 AD3d 464, 970 NYS2d 279 [2d Dept 2013]; ***Fajardo v. City of New York***, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]).

"Vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (***Volpe v. Limoncelli***, *supra* at 795-796, 902 NYS2d 152 [2d Dept 2010], *quoting* ***Shamah v. Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 NYS2d 287 [2d Dept 2001]; *see* ***Gutierrez v. Trillium, USA, LLC***, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]; ***Kimyagarov v. Nixon Taxi Corp.***, *supra*). Thus, the assertion that the lead car suddenly stopped, by itself, is insufficient to rebut the presumption of negligence by the rear vehicle (*see* ***Waide v. Ari Fleet, LT,*** 143 AD3d 975, 39 NYS3d 512 [2d Dept. 2016]; ***Brothers v. Bartling,*** 130 AD3d 554, 13 NYS3d 202 [2d Dept. 2015](assertion of a "sudden stop" is insufficient to provide a non-negligent explanation); ***LeGrand v. Silberstein,*** 123 AD3d 773, 999 NYS2d 96 [2d Dept. 2014]; ***Gutierrez v. Trillium USA, LLC,*** 111 AD3d 669, 974 NYS2d 563 [2d Dept. 2013]; ***Volpe v. Limoncelli***, *supra* at 795-796, 902 NYS2d 152 [2d Dept 2010], *quoting* ***Shamah v. Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 NYS2d 287 [2d Dept 2001];***Animah v. Agyei,*** 63 Misc.3d 783, 97 NYS3d 440 [Bronx Cty. 2019]). If the operator of the rear vehicle cannot come forward with evidence to rebut the inference of negligence, then the plaintiff is entitled to summary judgment (***Gibson v Levine***, 95 AD3d 1071, 944 NYS2d 6 10 [2d Dept 2012]; ***Kimyagarov v. Nixon Taxi Corp.***, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]). A plaintiff may obtain partial summary judgment on the issue of liability without demonstrating the absence of his or her own comparative fault (***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Poon v. Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]; ***Edgerton v. City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]).

Generally, an uncertified MV-104 police accident report constitutes hearsay and is inadmissible, unless it is subject to an exception to the hearsay rule (*see* ***Siemucha v. Garrison,*** 111 AD3d 1398, 1399, 975 NYS2d 518 [4th Dept. 2013]; *see also* ***Lacagnino v. Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept. 2003]; ***Hegy v. Coller***, 262 AD2d 606, 692 NYS2d 463 [2d Dept. 1999]). Here, however, the police accident report contains a statement by defendant that he "bumped" plaintiff's rear bumper, which is admissible under the admission against interest exception to the hearsay rule (*see* ***Harrinarain v. Sisters of St. Joseph,*** 173 AD3d 983, 104 NYS3d 661 [2d Dept. 2019]; ***Lebron v. Mensah,*** 161 AD3d 972, 76 NYS3d 219 [2d Dept. 2018]; ***Jackson v. Trust***, 103 AD2d 851, 852, 962 NYS2d 267 [2d Dept. 2013]; ***Scott v. Kass,*** 48 AD3d 785, 851 NYS2d 649 [2d Dept. 2008]; ***Wu v. Continental Truck body Corp.,*** 2019 NY Slip Op. 30571, 2019 WL 1093458 [Sup. Ct. NY Cty. 2019]). This admission, as well, supports the facts as presented by plaintiff (*see* ***Rosenblatt v. Venizelos,*** 49 AD3d 519, 853 NYS2d 578 [2d Dept. 2008]; *see also* ***Lariviere v. New York City Transit Authority,***82 AD3d 1165, 920 NYS2d 231 [2d Dept. 2011]).

Here, plaintiff has established his prima facie entitlement to summary judgment through a sworn affidavit that his vehicle was struck in the rear by the vehicle operated by defendant (*see* ***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Binkowitz v. Kolb***, 135 AD3d 884, 24 NYS3d 186 [2d Dept. 2016]; ***Volpe v Limoncelli***, *supra*; ***Johnson v. Spoto,*** 47 AD3d 888, 850 NYS2d 204 [2d Dept. 2008]). Plaintiff further averred through his affidavit that he did not make any sudden stops or abruptly change lanes and that his vehicle was in perfect working condition.

Having made the requisite prima facie showing of entitlement to summary judgment, the burden shifts to defendant to rebut the presumption of negligence or raise a triable issue of fact or offer a non-negligent explanation for the accident (*see* ***Bene v. Dalessio,*** 135 AD3d 679, 22 NYS3d 237 [2d Dept. 2016]; ***Cortes v. Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept. 2011];***Balducci v. Velasquez***, 92 AD3d 626, 938 NYS2d 178 [2d Dept. 2012]). Defendant failed to submit any evidence in admissible form to raise a triable issue of fact (*see* ***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). In that regard, the affirmation of defendant's attorney has no probative value (*see* ***Cullin v. Spiess***, 122 AD3d 792, 997 NYS 2d 460 [2d Dept 2014]). Further, when a party fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (***Kuehne & Nagel, Inc. v. Baiden***, 36 NY2d 539, 369 NYS2d 667 [1975]; ***Madeline D'Anthony Enter., Inc. v. Sokolowsky***, 101 AD3d 606, 957 NYS2d 88 [1st Dept 2012]; ***Argent Mtge. Co, LLC v. Mentesana***, 79 AD3d 1079, 915 NTS2d 591 [2d Dept 2010]). Thus, in the absence of an affidavit from defendant, the facts as set forth in the sworn affidavit of plaintiff describing how the accident occurred are deemed admitted.

Defendant nevertheless argues that the motion is premature and that he is entitled to discovery on the issue of plaintiff's comparative fault prior to consideration of plaintiff's within motion for summary judgment. Defendant's argument that summary judgment is premature however, is unfounded, as he failed to adequately demonstrate how discovery might lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge or control of plaintiff (*see* CPLR 3212 (f); ***Williams v. Spencer-Hall***, 113 AD3d 759, 979 NYS2d 157 [2d Dept. 2014]; ***Cajas-Romero v. Ward***, 106 AD3d 850, 965 NYS2d 559 [2d Dept. 2013]; ***Romero v. Greve***, 100 AD3d 617, 953NYS2d 296 [2d Dept. 2012]). Indeed, "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" (***Cajas-Romero v. Ward***, *supra,* 106 AD3d at 852; *see also* ***Niyazov v. Hunter EMS, Inc.***, 154 AD3d 954, 63 NYS3d 457 [2d Dept. 2017]). Defendant provides no evidentiary basis for his claim that further discovery may reveal facts known only to plaintiff. Indeed, defendant was involved in the accident, had personal knowledge of what occurred immediately prior to and during the time of the accident, and thus, defendant could have presented his version of the accident but declined to submit an affidavit to that effect. Again, plaintiff's testimony establishes defendant's negligence, which is deemed admitted in the absence of an affidavit from defendant. Under these circumstances, a denial of summary judgment as premature is unwarranted (*see* ***Hewitt v. Gordon-Fleetwood,*** 163 AD3d 536, 79 NYS3d 641 [2d Dept. 2018]; ***Tsyganash v. Auto Mall Fleet Mgt., Inc.***, 163 AD3d 1033, 83 NYS3d 74 [2d Dept. 2018]; ***Deleg v. Vinci,*** 82 AD3d 1146, 919 NYS2d 396 [2d Dept. 2011]; *see also* ***Williams v. Spencer-Hall,*** 113 AD3d 759, 979 NYS2d 157 [2d Dept. 2014]; ***Cajas-Romero v. Ward,*** 106 AD3d 850, 965 NYS2d 559 [2d Dept. 2013]; ***Kimyagarov v. Nixon Taxi Corp.***, 45 AD3d 736, 846 NYS2d 309 [2d Dept. 2007]; ***Abramov v. Miral Corp.,*** 24 AD3d 397, 398 [2d Dept. 2005]). Moreover, it is well established that plaintiff is not required to show an absence of comparative fault to be entitled to summary judgment on the issue of liability (***Rodriguez v. City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Harrinarain v. Sisters of St. Joseph,*** 173 AD3d 983, 104 NYS3d 661 [2d Dept. 2019]) and "when a defendant's liability is established as a matter of law before trial, the jury still must determine whether the plaintiff was negligent and whether such negligence was

a substantial factor in causing plaintiff's injuries. If so, the comparative fault of each party is then apportioned by the jury" (***Rodriguez,*** 31 NY3d at 324).

Based upon the foregoing, the Court concludes that the admissible evidence presented by plaintiff, which has not been refuted by any admissible evidence from defendant, establishes that the negligence of defendant Russell Murphy was the proximate cause of the accident.

Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

Dated: 10/30/2019

HON. WILLIAM B. REBOLINI, J.S.C.

_______ **FINAL DISPOSITION** ___X___ **NON-FINAL DISPOSITION**