Cherry v Robkoff
2019 NY Slip Op 34656(U)
August 28, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 624390/2018
Judge: Paul J. Baisley, Jr.
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SHORT FORM ORDER **INDEX NO. 624390/2018**

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

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

JOEANNA CHERRY,

Plaintiff,

-against-

JERROLD L. ROBKOFF and FIRE GUYS NY, INC.,

Defendants.

ORIG. RETURN DATE: June 26, 2019
FINAL RETURN DATE: June 26, 2019
MOT. SEQ. # 001 MG
MOT. SEQ. # 002 MotD
MOT. SEQ. # 003 WDN

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Upon the following papers read on this e-filed motions for summary judgment and to dismiss : Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, filed on May 22, 2019; by defendants, filed on May 31, 2019; by defendants, filed on June 20, 2019 ; Notice of Cross Motion and supporting papers_____; Answering Affidavits and supporting papers by plaintiff, filed on June 25, 2019 ; Replying Affidavits and supporting papers ______; Other correspondence dated June 25, 2019 ; it is,

ORDERED that the motion by plaintiff for summary judgment and the motions by defendants to dismiss are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (seq. 001) by plaintiff Joeanna Cherry for summary judgment in her favor on the issue of defendants' liability and to strike defendants' first affirmative defense of "culpable conduct" is granted; and it is further

ORDERED that the motion (seq. 002) by defendants Jerrold L. Robkoff and Fire Guys NY, Inc., for, *inter alia*, an order dismissing the complaint based on plaintiff's failure to comply with disclosure demands, is granted to the limited extent that counsel for the parties shall appear on September 17, 2019 at 10:00 a.m. at the DCM-J Part of the Supreme Court, 1 Court Street, Riverhead, New York for a preliminary conference, and is otherwise denied; and it is further

ORDERED that the motion (seq. 003) by defendants Jeffold L. Robkoff and Fire Guys NY, Inc., shall be marked withdrawn in accordance with correspondence from defense counsel dated June 25, 2109.

This action was commenced by plaintiff Joeanna Cherry to recover damages for injuries

allegedly sustained on March 16, 2017, when her motor vehicle was struck in the rear by a vehicle owned by defendant Fire Guys NY, Inc., and operated by defendant Jerrold L. Robkoff. The accident allegedly occurred when plaintiff's vehicle was stopped in traffic on the Long Island Expressway westbound, near Exit 44, in the Town of Oyster Bay, New York.

Plaintiff now moves for summary judgment in her favor on the issue of liability, arguing that defendant driver's negligence was the sole proximate cause of the accident. Plaintiff argues that defendant driver violated, *inter alia*, Vehicle and Traffic Law § 1129 (a) by following too closely. Plaintiff also moves to strike defendants' first affirmative defense of comparative negligence. In support of her motion, plaintiff submits, *inter alia*, copies of the pleadings, her own affidavit, and the certified police accident report. Defendants oppose the motion, arguing that further discovery is necessary before summary judgment may be considered, and that plaintiff has not complied with discovery demands, rendering her motion premature. In support, defendants submit the affirmation of their attorney and the certified police report.

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 moving party has the initial burden of proving entitlement to summary judgment (*id.*). Once the moving party 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 New York City Asbestos Litig. v Chevron Corp.*, 33 NY3d 20, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]).

The driver of a vehicle approaching another vehicle from the rear must maintain a reasonably safe rate of speed and control over his or her vehicle and exercise reasonable care to avoid colliding with the other vehicle (*see Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; *Schmertzler v Lease Plan U.S.A., Inc.*, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]; *Gallo v Jairath*, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]). 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 requires the operator of the rear vehicle to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Miller v Steinberg*, 164 AD3d 492, 82 NYS3d 597 [2d Dept 2018]; *Edgerton v City of New York*, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). A nonnegligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the lead vehicle, an unavoidable skidding on wet pavement, or any other reasonable cause (*Grant v Carrasco*, 165 AD3d 631, 84 NYS3d 235 [2d Dept 2018]; *Binkowitz v Kolb*, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]; *Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 918 NYS2d 156 [2d Dept

2011]). However, a driver who follows another vehicle must anticipate that the lead vehicle may stop, even suddenly, based on prevailing traffic conditions (*Catanzaro v Edery*,172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; *Buchanan v Keller*, 169 AD3d 989, 95 NYS3d 252 [2d Dept 2019]).

To establish prima facie entitlement to judgment as a matter of law on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Bloechle v Heritage Catering, Ltd.*, *supra*; *Catanzaro v Edery*, *supra*; *Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]; *Auguste v Jeter*, 167 AD3d 560, 560, 88 NYS3d 509 [2d Dept 2018]). 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 (*Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

By her affidavit, plaintiff avers that her vehicle was completely stopped, and that her foot was on the brake pedal, on the Long Island Expressway, waiting for traffic to clear, when she was struck in the rear by defendants' vehicle. Therefore, plaintiff has established her prima facie entitlement to judgment as a matter of law on the issue of defendants' negligence (*see Catanzaro v Edery*, *supra*; *Buchanan v Keller*, *supra*; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]; *Drakh v Levin*, 123 AD3d 1084, 1 NYS3d 202 [2d Dept 2014]).

Plaintiff having made a prima facie showing, the burden now shifts to defendants to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident (*see Alvarez v Prospect Hosp.*, *supra*; *Cortes v Whelan,* 83AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *see generally Rodriguez v City of New York*, *supra*). In opposition, defendants submit an affirmation of their attorney alleging that further discovery is necessary to determine whether triable issues of fact exist as to the happening of the accident. However, the affirmation from an attorney having no personal knowledge of the facts is without evidentiary value and, thus, is insufficient to raise a triable issue of fact (*see Zuckerman v City of New York*, *supra*). Further, as defendant driver has personal knowledge of the relevant facts underlying the accident, the purported need to conduct discovery does not warrant denial of the motion (*see Pierre v Demoura*, 148 AD3d 736, 48 NYS3d 260 [2d Dept 2017]; *Turner v Butler*, 139 AD3d 715, 32 NYS3d 174 [2d Dept 2016]; *Deleg v Vinci*, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (*Lopez v WS Distrib. Inc.*, 34 AD3d 759, 760, 825 NYS2d 516, 517 [2d Dept 2006]; *see Conte v. Frelen Assoc., LLC*, 51 AD3d 620, 858 NYS2d 258 [2d Dept 2008]). Thus, defendants' submissions fail to rebut plaintiff's prima facie showing that defendants' negligence was the proximate cause of the accident (*see Rodriguez v City of New York*, *supra*; *Zuckerman v City of New York*, *supra*).

With respect to that portion of plaintiff's motion seeking an order striking defendants' affirmative defense of comparative negligence, CPLR 3211 (b) authorizes a plaintiff to move, at any time, to dismiss a defendant's affirmative defense on the ground that it has no merit (*see Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; *South Point, Inc. v Redman*, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "[W]hen moving to dismiss or strike an affirmative

defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (*Greco v Christoffersen*, 70 AD3d 769, 771, 896 NYS2d 363 [2d Dept 2010], quoting *Vita v New York Waste Servs., LLC*, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*Fireman's Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]). Plaintiff's submissions are also sufficient to demonstrate, prima facie, that she was not at fault for the occurrence of the collision (*see Comas-Bourne v City of New York*, 167 AD3d 977, 91 NYS3d 183 [2d Dept 2017]; *Poon v Nisanov, supra*). Plaintiff's affidavit is sufficient to demonstrate, prima facie, that the sole proximate cause of the subject collision was defendant driver's failure to stop before colliding with her vehicle. The burden now shifts to defendant to raise a triable issue of fact (*see generally Vega v Restani Constr. Corp., supra*). As defendants submit no argument in opposition, they fail to raise an issue of fact as to plaintiff's negligence.

Accordingly, the motion by plaintiff for summary judgment in her favor on the issue of liability and dismissal of defendant's first affirmative defense of comparative negligence is granted.

Dated: 8/28/19

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