

Sprague v Tiedemann
2019 NY Slip Op 34665(U)
September 6, 2019
Supreme Court, Westchester County
Docket Number: Index No. 67811/2018
Judge: Sam D. Walker
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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
ROSEANN SPRAGUE,
Plaintiff,

-against-

DECISION & ORDER
Index No. 67811/2018
Seq. 1

GRANT TIEDEMANN and KATHLEEN TIEDEMANN.,

Defendants.
-----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 negligence:

Notice of Motion/Affirmation/Exhibits A-F	1-8
Affirmation in Opposition/Exhibits A	9-10
Reply Affirmation	11

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

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff commenced this action to recover damages for alleged serious injuries she sustained in a motor vehicle accident that occurred on May 30, 2017 at or near the intersection of Boston Post Road and I-95 South on-ramp in Westchester County, New York. The plaintiff alleges that he came to a complete stop at a red traffic light when his vehicle was struck in the rear by a vehicle owned by the defendant, Kathleen Tiedemann and operated by the defendant, Grant Tiedemann ("Tidermann").

The plaintiff now files the instant motion seeking summary judgment against the defendants, pursuant to CPLR 3212 on the issue of liability. The plaintiff's attorney argues that Tiedemann's negligent conduct was the sole proximate cause of the accident and that there are no triable issues of fact.

In opposition, the attorney for the Tiedemanns argues that depositions are necessary to develop the relevant facts and the issue of a non-negligent defense and contends that the motion should be denied as premature. The attorney further asserts that the police report is inadmissible because there is nothing to indicate if the police officer witnessed the accident. The attorney also argues that Tiedemann has not been deposed and he is currently on active duty with the U.S. Army stationed at Fort Wainwright, Alaska and will remain on active duty until December 25, 2020. The attorney contends that the plaintiff relies entirely on the uncertified police report and his self-serving affidavit to support entitlement to summary judgment.

In support of his motion, the plaintiff relies upon, *inter alia*, an attorney's affirmation, a copy of the uncertified 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 plaintiff has made out a prima facie showing of her entitlement to summary judgment. The evidence submitted by the plaintiff 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 a non-negligent defense, 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 Tiedemann 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]).

Although the police report is uncertified, that portion of the police report which contains Tiedemann's admission that "he looked down to find the windshield wiper switch and the next thing he know the airbag from his vehicle struck him in the face" is admissible as a party admission. Additionally, Tiedemann's military service is not a bar to a grant of summary judgment on liability. His counsel does not indicate that Tiedemann was unable to submit an affidavit due to his active duty status and did not request a stay of the action.

Further, the attorney does not have personal knowledge of the accident and

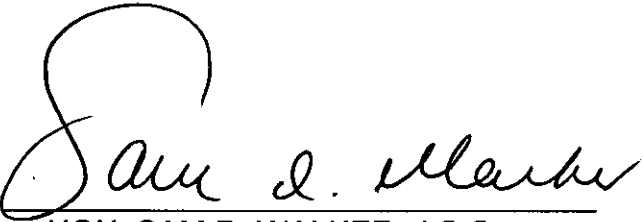
therefore, an affirmation is insufficient to dispute the plaintiff's affidavit. The attorney did not address the specifics of the accident and Tiedemann did not provide an affidavit in opposition to the motion. Further, the need to conduct discovery does not warrant denial of the motion, since the plaintiff 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.

The affirmative defenses raised by the defendant with regard to liability also 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, it is

ORDERED that the motion is GRANTED.

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

Dated: White Plains, New York
September 6, 2019



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