Schulman v Boccio
2019 NY Slip Op 34700(U)
November 1, 2019
Supreme Court, Suffolk County
Docket Number: Index No. 620473/2018
Judge: Paul J. Baisley Jr
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SHORT FORM ORDER **INDEX NO. 620473/2018**

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

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

ERIC SCHULMAN,

Plaintiff,

-against-

JOSEPH BOCCIO, TRIUS, INC., CAROLYN DAWSON, and FRANK DAWSON,

Defendants.

ORIG. RETURN DATE: July 17, 2019
FINAL RETURN DATE: September 11, 2019
MOT. SEQ. # 001 MG

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Upon the following papers read on this motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by the Dawson defendants, dated June 12, 2019 ; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by the defendant Boccio, dated July 11, 2019 ; Replying Affidavits and supporting papers by the Dawson defendants, dated August 7, 2019 ; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by the defendants Carolyn Dawson and Frank Dawson seeking summary judgment dismissing the complaint against them is granted; and it is further

ORDERED that parties in the instant action shall appear on December 2, 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.

The plaintiff Eric Schulman commenced this action to recover damages for injuries he allegedly sustained as a result of a motor vehicle accident that occurred on the westbound Long Island Expressway, near exit 56, approximately 100 feet from the Motor Parkway Bridge, in the Town of Smithtown on April 24, 2018. It is alleged that the accident occurred when the vehicle operated by the defendant Joseph Boccio struck the rear of the vehicle operated by the defendant Carolyn Dawson and owned by the defendant Frank Dawson while it was stopped in the westbound right lane of travel on the Long Island Expressway. As a result of the impact between the Boccio and Dawson vehicles, the

Dawson vehicle was propelled forward into the rear of the vehicle owned and operated by the plaintiff.

The defendants Carolyn Dawson and Frank Dawson (collectively referred to as the "Dawson defendants") now move for summary judgment on the basis that the defendant Boccio's negligent operation of his vehicle was the sole proximate cause of the subject accident. In support of the motion, the Dawson defendants submit copies of the pleadings, Carolyn Dawson's affidavit, and a certified copy of the police accident report. The defendant Boccio opposes the motion on the ground that there are material triable issues of fact as to the subject accident's occurrence. Specifically, the defendant Boccio alleges that the Dawson vehicle struck the plaintiff's vehicle prior to his vehicle striking the Dawson vehicle. In opposition to the motion, the defendant Boccio submits his own affidavit.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). 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.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

It is well settled that a driver approaching a vehicle from the rear 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* Vehicle and Traffic Law § 1129 [a]; *Brothers v Bartling*, 130 AD3d 554, 13 NYS3d 202 [2d Dept 2015]; *Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 825 NYS2d 330 [4th Dept 2006]). A rear-end collision creates a prima facie case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation (*see Ballatore v HUB Truck Rental Corp.*, 83 AD3d 978, 922 NYS2d 180 [2d Dept 2011]; *Katritsios v Marcello*, 84 AD3d 1174, [2d Dept 2011]; *Plummer v Nourddine*, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]). However, the lead vehicle also has a duty not to stop suddenly or slow down without proper signaling so as to avoid a collision (*Chepel v Meyers*, 306 AD2d 235, 237, 762 NYS2d 95 [2d Dept 2003]; *see Carhuayano v J&R Hacking*, 28 AD3d 413, 813 NYS2d 162 [2d Dept 2006]; *Gaeta v Carter*, 6 AD3d 576, 775 NYS2d 86 [2d Dept 2004]; *Purcell v Axelsen*, 286 AD2d 379, 729 NYS2d 495 [2d Dept 2001]; *Colonna v Suarez*, 278 AD2d 355, 718 NYS2d 618 [2d Dept 2000]; *see also* Vehicle and Traffic Law § 1163). A non-negligent explanation for the collision, such as mechanical failure or the sudden and abrupt stop of the vehicle ahead, is sufficient to overcome the inference of negligence and preclude an award of summary judgment (*Danner v Campbell*, 302 AD2d 859, 859, 754 NYS2d 484 [4th Dept 2003]; *see Davidoff v Mullokandov*, 74 AD3d 862, 903 NYS2d 107 [2d Dept 2010]; *Rodriguez-Johnson v Hunt*, 279 AD2d 781, 718 NYS2d 501 [3rd Dept 2001]).

In her affidavit, Carolyn Dawson states that prior to the subject accident's occurrence she was traveling westbound in the right lane of the Long Island Expressway, that traffic conditions were moderate, and that she was traveling approximately 40 to 50 miles per hour. She further states that although she does not recall the exact speed she was traveling or whether her foot was on the brake pedal at the time of impact, when her vehicle was struck in the rear by the vehicle operated by defendant Boccio it was moving, and that as a result of the impact between her vehicle and the Boccio vehicle, her

vehicle was pushed forward into plaintiff's vehicle. The Dawson defendants' submission is sufficient to establish their prima facie entitlement to judgment as a matter of law (*see Abbott v Picture Cars East, Inc.*, 78 AD3d 869, 911 NYS2d 449 [2d Dept 2010]; *Costa v Eramo*, 76 AD3d 942, 907 NYS2d 510 [2d Dept 2010]; *Carman v Arthur J. Edwards Mason Contr. Co., Inc.*, 71 AD3d 813, 897 NYS2d 191 [2d Dept 2010]). A driver approaching a vehicle from the rear 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* Vehicle and Traffic Law § 1129 [a]; *Brooks v High St. Professional Bldg., Inc.*, 34 AD3d 1265, 825 NYS2d 330 [4th Dept 2006]). Moreover, vehicle stops that are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she has a duty to maintain a safe distance between his or her vehicle and the car ahead (*Shamah v Richmond County Ambulance Serv.*, 279 AD2d 564, 565, 719 NYS2d 287 [2d Dept 2001]; *see* Vehicle and Traffic Law § 1129 [a]).

In opposition, the defendant Boccio failed to raise a triable issue of fact as to the existence of a non-negligent explanation for the subject accident's occurrence (*see Hill v Ackall*, 71 AD3d 829, 895 NYS2d 837 [2d Dept 2010]; *Johnson v First Student, Inc.*, 54 AD3d 492, 863 NYS2d 303 [3d Dept 2008]; *Faul v Reilly*, 29 AD3d 626, 816 NYS2d 502 [2d Dept 2006]). The defendant Boccio has submitted an affidavit in which he attests that he was traveling westbound on the Long Island Expressway, that traffic was stop and go due to vehicular volume, that he was traveling behind the Dawson vehicle and that he was "adjusting his speed accordingly." He states that the Dawson vehicle came to an abrupt stop, striking the vehicle ahead of it, and that the Dawson vehicle did not attempt to stop, since he did not observe any brake lights on the vehicle prior to it suddenly stopping and striking plaintiff's vehicle. The defendant Boccio further avers that he tried to bring his vehicle to a stop, but was unable to and struck the rear of the Dawson vehicle, which already had struck the rear of the plaintiff's vehicle.

However, the defendant Boccio's statements in the certified police accident report states that "traffic stopped and he couldn't stop in time." Thus, the defendant Boccio's affidavit is a belated attempt to avoid the consequences of his earlier admission by raising a feigned issue of fact, and is insufficient to defeat the Dawson defendants' prima facie showing (*see Benedikt v Certified Lbr. Corp.*, 60 AD3d 798, 875 NYS2d 526 [2d Dept 2009]; *Grange v Jacobs*, 11 AD3d 582, 783 NYS2d 634 [2d Dept 2004]; *Guevara v Zaharakis*, 303 AD2d 555, 756 NYS2d 465 [2d Dept 2003]). The defendant Boccio's statement in the police report was taken down by an officer who was acting within the scope of his employment and concomitantly serve as an admission against a party's interest (*see Sydnor v Home Dept U.S.A., Inc.*, 74 AD3d 1185, 906 NYS2d 279 [2d Dept 2010]; *Scott v Kass*, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2003]; *Ferrara v Poranski*, 88 AD2d 904, 450 NYS2d 597 [2d Dept 1982]). The defendant Boccio was under a duty to see that which his senses should have readily seen, and to maintain a safe distance between his vehicle and the Dawson defendants' vehicle in order to avoid colliding with the vehicle in front of his vehicle (*see Rieman v Smith*, 302 AD2d 510, 755 NYS2d 256 [2d Dept 2003]; *Karkowska v Niksa*, 298 AD2d 561, 749 NYS2d 55 [2d Dept 2002]; *Stiles v County of Dutchess*, 278 AD2d 304, 717 NYS2d 325 [2d Dept 2000]; *see also* Vehicle and Traffic Law § 1129 [a]). As a consequence, the defendant Boccio has failed to come forth with a nonnegligent excuse for the happening of the accident or to show the existence of any genuine triable issue of fact as to the Dawson defendants' comparative negligence regarding the subject accident's occurrence (*see Hernandez v*

Burkitt, 271 AD2d 648, 706 NYS2d 456 [2d Dept 2000]; *Bolta v Lohan*, 242 AD2d 356, 661 NYS2d 286 [2d Dept 1997]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991] *cf. Guzman v Bowen*, 38 AD3d 837, 833 NYS2d 548 [2d Dept 2007]; *Perla v Wilson*, 287 AD2d 606, 732 NYS2d 35 [2d Dept 2001]). Accordingly, the Dawson defendants' motion for summary judgment dismissing the complaint against them is granted.

Dated: 11/1/19

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