SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX Part 14

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Michael Parisella,

Plaintiff(s),

DECISION

Index # 31556/2019E

-against-

Grizel Lazier as administratrix of the Estate of Jennifer Parisella, Mariuez Chrzanowski, George Hildebrandt, Inc., Daniel E. Madura, and Dan Madura Jr. Farms, LLC.,

Defendant(s).

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HON. BEN R. BARBATO:

Plaintiff Michael Parisella ("plaintiff") claims that he was seriously injured in a motor vehicle accident which occurred on November 17, 2018. At that time he was a front seat passenger in the vehicle being driven by deceased defendant Jennifer Parisella. The accident took place at approximately 6:55 AM in the southbound lanes of the Major Deegan Expressway as traffic would be approaching the ramp leading to the Triborough Bridge. The vehicle in which plaintiff was a passenger hit the rear of the flatbed truck being driven by defendant Mariuez Chrzanowski, and owned by defendant George Hildebrandt, Inc. ("movants"). Apparently the impact took place at a high rate of speed as the result of which Jennifer Parisella was killed and plaintiff, who was asleep immediately prior to the impact, claims to have sustained serious injury.

The movants now seek summary judgment and dismissal of the complaint and all cross-claims against them. They argue that because their vehicle was struck in the rear, there is a presumption of entitlement to summary judgment, and that there is no evidence which would create a question of fact to warrant a trial. They contend that video footage of the actual accident

supports the argument for dismissal in that it shows their vehicle coming to a gradual stop because of the traffic conditions ahead of it, and then being struck in the rear by the vehicle in which plaintiff was a passenger, and which was traveling at a high rate of speed and which seemed to take no action to prevent the impact. Further, they argue that a decision rendered after an administrative hearing held on October 30, 2019, in which Administrative Law Judge ("ALJ") Patrick Carroll determined that the fault for the accident was attributable to the Parisella vehicle is controlling as the "law of the case".

Plaintiff opposes the motion and is joined in that opposition by the remaining defendants. Plaintiff argues that the investigative materials from the New York City Police Department and the video which supposedly depicts the accident itself, should not be considered by the court on this motion since they have not been properly authenticated. Alternatively, he argues that the instant motion is premature since he was asleep at impact, and the driver of the vehicle unfortunately was killed as a result of the accident, so only the movants would possess knowledge with reference to the condition of the rear of the flatbed prior to the accident, and they have not yet been deposed. In that regard, plaintiff contends that the moving defendants have failed to demonstrate that the flatbed had a type of rear guard which is required under federal law, specifically 49 CFR §393. 86 (a) (1) and 571.223 (S5.1), and that the photographs contained within the police department investigative materials do not prove that such a required rear guard was in place. While not disputing that the vehicle in which plaintiff was a passenger struck the rear of the movants' vehicle, plaintiff argues that there may be more than one cause of a person sustaining injuries, and the lack of the required rear guard on the flatbed could be such a cause. Finally, plaintiff argues that the decision of the ALJ is not controlling in this matter since the hearing in question was only limited to whether the movant driver had submitted an accident report as required, plaintiff was never notified about such a hearing, and any conclusion that the ALJ would have come to with reference to the cause of the accident was not necessary to the determination he was called to make, and would have been, in essence, just an "advisory opinion".

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). "[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. . . .Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923, 925-926 [1986] [citations omitted].)

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. *(Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].) As stated in *Scott v. Long Island Power Auth.* (294 A.D.2d 348, 348, 2002 N.Y. App. Div. LEXIS 4864, *1-2 [2d Dept. 2002]):

> "It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366)."

Here, it is not controverted that the movant's vehicle was struck in its rear by the vehicle driven by Jennifer Parisella, in which the plaintiff was a front seat passenger "When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. A rear-end collision with a stopped "or stopping" vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." (*Gaeta v. Carter*, 6 A.D.3d 576 [2d Dept. 2004].)

"A nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle." (*Brothers v. Bartling*, 130 A.D.3d 554, 555 [2d Dept. 2015] [deposition testimony demonstrated that traffic was moving slowly, and that lead vehicle was merging onto the parkway when it was struck in the rear; rear driver's assertion of sudden stop insufficient];

Salako v. Nassau Inter-County Express, 131 A.D.3d 687 [2d Dept. 2015] [allegations that the collision occurred because the vehicle abruptly and unexpectedly stopped in the roadway with no warning and for no apparent reason, even though traffic was moving well and nothing was blocking its progress, was sufficient to raise an issue of fact].) Nevertheless, "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." (*Shamah v Richmond County Ambulance Serv.*, 279 A.D.2d 564, 565 [2d Dept. 2001].)

An inference of negligence which emanates from a rear end collision may be rebutted by a reasonable excuse such as "mechanical failure or a sudden stop of the vehicle ahead, or an unavoidable skidding on wet pavement." (See, *Baule v. Lanzzarini*, 222 A.D.2d 635, 636 [1st Dept. 1995]; but see, *Ng v. Reid*, 259 A.D.2d 601[2d Dept. 1999] [driver who was able to safely stop her own vehicle when vehicle in front of her stopped abruptly was not liable for injuries sustained by motorist who collided with rear end of driver's automobile]).

However, the presumption can only be rebutted by evidentiary submissions; conclusory allegations or the hope that discovery may uncover evidence will not suffice (*Rainford v. Han*, 18 A.D.3d 638 [2d Dept. 2005] [driver's conclusory all3egation of sudden stopping was insufficient to rebut presumption]; *Pampris v. Egnasher*, 20 A.D.3d 746 [3d Dept. 2005] [allegation that decedent did not have opportunity to question witnesses insufficient]).

Preliminarily, this Court notes that it does not consider the decision of the ALJ to be controlling, nor is it the "law of the case" here. That decision, rendered December 23, 2019 was as the result of a hearing called for the specific purpose of deciding whether the movant driver had submitted a required accident report, which would not call for a determination as to the fault, or lack of fault, attributable to any of the parties here. Apparently, the only "witness" who testified at the hearing was a police detective who was not a witness to the accident itself and presumably gave evidence with reference to what the investigation by the Police Department revealed. Additionally, it is not disputed that plaintiff here did not receive notice of the hearing, so did not have the opportunity to participate. Therefore, that decision cannot considered to be controlling. Collateral estoppel applies only "if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had

a full and fair opportunity to litigate the issue in the earlier action" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d at 349; *City of New York v Welsbach Elec. Corp.*, 9 NY3d at 128; *Ryan v New York Tel. Co.*, 62 NY2d 494, 500-501 [1984]).

In this case, the presumption created by the evidence that movants' vehicle was struck in the rear has not been rebutted since no evidence has been submitted in admissible form to rebut the presumption, merely an affirmation of plaintiff's attorney. In that affirmation he argues that the movants have failed to demonstrate that the flatbed was equipped with a certain required rear guard. However, an affirmation by an attorney is insufficient to raise a question of fact, and plaintiff has failed to supply either an affidavit from someone with personal knowledge as to the existence of this rear guard, or from an expert who reviewed the voluminous investigative materials and could legitimately opine on the issue.

Likewise, the contention that further discovery may yield some evidence of fault on the movants' part is speculative and therefore insufficient to rebut the presumption. The fact that the movants have not yet been deposed does not render this motion premature, as plaintiff argues. CPLR §3212 (f) states as follows:

> f) Facts unavailable to opposing party. *Should it appear from affidavits submitted in opposition to the motion* that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just [emphasis added].

As stated above, plaintiff has submitted no affidavits in opposition to the motion, and, as such, it cannot be considered premature under the language of the statute.

Accordingly, the motion for summary judgment by defendants Mariuez Chrzanowski and George Hildebrandt, Inc. is granted. The complaint and all crossclaims against them are dismissed.

The foregoing constitutes the decision and order of the court.

Dated: July 24, 2020

JSC

HON. BEN. R. BARBATO, J.S.C.