Coan v New Era Iron Work Corp.
2020 NY Slip Op 34741(U)
January 2, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 620343/2018
Judge: Robert F. Quinlan

SHORT FORM ORDER INDEX NO. 620343/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 SUFFOLK COUNTY

PRESENT: HON. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE:04/30/19 (001;002)
SUBMIT DATE: 08/22/19 (001;002)
Mot. Seq.: #001 - MG
#002 - MotD

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ROSEMARY COAN, KEVIN COAN, AND VICTORIA COAN,

Plaintiffs,

against

NEW ERA IRON WORK CORP., WILFREDO ACUNA AND JANE M. DEGIROLAMO,

Defendants.
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Upon the following papers read on this motion for an order granting summary judgment; Defendant Jane Degirolamo's Notice of Motion and supporting papers (Doc #14); Plaintiffs' Notice of Cross Motion for summary judgment with supporting papers and in opposition to Degirolamo's motion (Doc #15-21); Defendant Degirolamo's Reply Affirmation to opposition of plaintiff (Doc #22); Defendants New Era and Acuna's opposition to co defendant Degiorlamo's motion (Doc #27); Defendants New Era and Acuna's opposition to plaintiff's motion (Doc #28); Plaintiffs' reply to opposition of New Era and Acuna and in support of cross motion (Doc #29); Defendant Degirolamo's Reply Affirmation to opposition of co-defendants (Doc #30); it is,

ORDERED that the motion (Seq. #001) by defendant Jane M. Degirolamo for summary judgment pursuant to CPLR §3212 dismissing the complaint and all cross-claims against her is granted; and it is further

ORDERED that part of plaintiffs' cross motion (Seq. #002) for summary judgment against defendant Jane M. Degirolamo on the issue of liability pursuant to CPLR §3212 is denied as moot; and it is further

ORDERED that part of plaintiffs' cross motion for summary judgment against defendants New Era Iron Work Corp. and Wilfredo Acuna on the issue of liability pursuant to CPLR §3212 is granted; and it is further

ORDERED that part of plaintiffs' cross motion dismissing the counterclaim asserted by defendants New Era Iron Work Corp., and Wilfredo Acuna is granted; and it is further

ORDERED that defendants New Era Iron Work Corp., and Wilfredo Acuna's third and eighth affirmative defenses alleging plaintiff's culpable conduct and the emergency doctrine are stricken.

Plaintiffs commenced this action to recover damages for alleged personal injuries sustained as a result

of an accident involving three motor vehicles that occurred on November 3, 2015 at approximately 11:30 a.m. on eastbound Sunrise Highway, at its intersection with North Monroe Avenue, Town of Babylon, Suffolk County, New York ("the location"). The accident occurred when the first vehicle, owned and operated by defendant Jane M. Digirolamo ("Digirolamo"), was struck in the rear while stopped at a red light by the second vehicle, owned by defendant New Era Iron Work Corp. and operated by defendant Wilfredo M. Acuna ("New Era and Acuna"), pushing Digirolamo's vehicle into the third vehicle, owned and operated by plaintiff Kevin Coan with plaintiffs Rosemary Coan and Victoria Coan as passengers ("plaintiffs") .

Defendant Digirolamo now moves (Seq. #001) for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all cross claims against her on the ground that no liability exists against her. In support of her motion she submits the pleadings, the affirmation of counsel, her affidavit, and a certified copy of the police report. In her affidavit Digirolamo states that on November 3, 2015 she was involved in a three car motor vehicle accident at the location, that while she was stopped at a red light at the location her vehicle was hit in the rear by the New Era and Acuna vehicle, which pushed her vehicle forward resulting in contact between the front of her vehicle and the rear of plaintiffs' vehicle. At the time of the accident the weather was sunny with blue skies and the roads were dry. Digirolamo states she was at a complete stop for the red light for a minute or more prior to the accident, her foot was on the brake pedal at the time of impact, that as a result of the impact to the rear of her vehicle she was pushed forward causing her vehicle to make contact with plaintiffs' vehicle. She had no warning that her car was going to be struck in the rear, she did not recall any horns, brakes or screeching tires prior to the impact and she had not made contact with the vehicle in front of her prior to being struck in the rear by the vehicle behind her.

Plaintiffs oppose Degirolamo's motion and cross move for partial summary judgment on the issue of all defendants' liability. In support of their cross motion plaintiffs submit the pleadings, the affirmation of counsel and sworn affidavit of plaintiff Kevin Coan ("Coan"). Coan avers that on November 3, 2018 he was operating a 2012 SUV and stopped at a red traffic signal at the intersection of Sunrise Highway and North Monroe Avenue, the weather was clear and the roads were dry, and at the moment of impact he was at a complete stop because there was a red light governing his direction of travel. He had been at a complete stop for the red light for more than a minute prior to the collision. He first became aware that an accident had occurred when he heard a first impact behind him to the Dodge vehicle operated by defendant Degirolamo, when it was struck from behind by a Ford truck operated by defendant Wilfredo M. Acuna. Coan states his foot was on the brake pedal at the time of impact, and he did not recall hearing any horns, brakes or screeching tires prior to impact.

Defendants New Era and Acuna oppose Degirolamo's motion and submit their attorney's affirmation who argues summary judgment is premature as deposition have not been conducted, that Degirolamo's affidavit and the police report submitted in support of her motion are inadmissable and finally that Degirolamo has failed to make a prima facie showing of entitlement to summary judgment. Degirolamo submits the affirmation of counsel in reply.

The 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 eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). The movant has the initial burden of proving entitlement to summary judgment, failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form to establish a factual issue sufficient to require a trial (CPLR 3212 [b]; *see Zuckerman v City of New York*, 49 NY2d 557 [1980]). The court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of

credibility (*Vega v Restani Corp.*, 18 NY3d 499 [2012]).

It is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the driver of the rearmost vehicle, requiring the operator of that vehicle to provide a non-negligent explanation for the accident (*see Klopchin v Masri*, 45 AD3d 737 [2d Dept 2007]; *Hakakian v McCabe*, 38 AD3d 493 [2d Dept 2007]; *Volpe v Limoncelli*, 74 AD3d 795 [2d Dept 2010]; *Brothers v Bartling*, 130 AD3d 554 [2d Dept 2015]). Further, "[i]n a chain collision accident, the operator of the middle vehicle may establish *prima facie* entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle" (*Morales v Amar*, 145 AD3d 1000 [2d Dept 2016], quoting *Chuk Hwa Shin v Correale,* 142 AD3d 518 [2d Dept 2016]).

Degirolamo has made a *prima facie* showing of entitlement to summary judgment as a matter of law dismissing the complaint and all counterclaims by submission of her affidavit which demonstrates she was stopped at a red light behind plaintiffs' vehicle when her vehicle was struck in the rear by the New Era and Acuna vehicle which propelled her into plaintiffs' vehicle (*Abdou v Malone*, 166 AD3d 931 [2d Dept 2018]). Therefore the burden shifted to opponents of the motion to establish the existence of a material issue of fact requiring a trial (*see generally Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Although titled "Affirmation in Opposition and in Support of Cross Motion for Summary Judgment" neither plaintiffs' counsel's affirmation, nor the Coan affidavit, raise a triable issue of fact regarding Degirolamo's involvement in the accident. In fact the Coan affidavit supports Degirolamo's version of the accident, that both plaintiffs' vehicle and Degirolamo's vehicle were stopped at a red light when Degirolamo's vehicle was struck by the New Era and Acuna vehicle, propelling Degirolamo's vehicle into plaintiffs.

Defendants New Era and Acuna offer no proof in evidentiary, admissible form in opposition to the motion and only submit the affirmation of counsel, which is of no probative or evidentiary value and is insufficient to defeat Degirolamo's motion (*see Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]). Notably New Era and Acuna do not contest the accuracy of Degirolamo's affidavit but rather argue her affidavit should not be considered because it was not affirmed "under penalties of perjury." That argument is without merit and counsel's reliance on *Feinman v Mennan Oil Co.*, 248 AD2d 503 [2d Dept 1998] is misplaced as rather than requiring an affiant affirm "under the penalties of perjury" the court in *Feinman* clearly states "[t]here is no specific form of oath required in this State." Here Degirolamo's affidavit, which is clearly labeled "Affidavit," begins with the following language "[the affiant], being duly sworn deposes and says..." and ends with the sentence "I swear that this information is true and accurate to the best of my knowledge and recollection." me...". Under these circumstances, and there being no specific form of oath required, the court finds Degirolamo's affidavit acceptable. Further the affidavit is signed by the affiant and duly notarized with the customary language in the notary jurat "sworn to before me" (*see NYCTL 205-A Trust v Rosenberger Boat Livery, Inc.*, 96 AD3d 425 [1st Dept 2012]).

New Era and Acuna's argument that Degirolamo's motion is premature because discovery is outstanding is without merit as they have failed to offer an evidentiary basis to suggest that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively within the knowledge and control of the movant (*see* CPLR 3212[f]; *Singh v Avis Rent A Car Sys., Inc.*, 119 AD3d 768 [2d Dept 2014]; *Williams v Spencer-Hall*, 113 AD3d 759 [2d Dept 2014]). The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion (*see Fenko v. Mealing*, 43 AD3d 856 [2d Dept 2007]; *Friedlander Org. LLC v Ayorinde*, 94 AD3d 693 [2d Dept 2012]). Defendant Jane M. Degirolamo's motion is granted.

By their cross motion plaintiffs are seeking an order granting summary judgment against all three defendants, New Era, Acuna and Degirolamo, on the issue of liability, and for an order dismissing the counterclaim asserted by New Era and Acuna as well as for statutory costs. Degirolamo does not oppose plaintiffs' motion and since the court has granted her motion to dismiss, plaintiffs' request for relief as against Degirolamo is not considered. Defendants New Era and Acuna submit the affirmation of counsel in opposition to plaintiffs' motion who makes the same three arguments noted in opposition to Degoralimo's motion, which as discussed above fails to raise a triable issue of fact.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence 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 (*Arslan v Costello*, 164 AD3d 1408 [2d Dept 2018]; *see Edgerton v City of New York*, 160 AD3d 809 [2d Dept 2018]]). Here plaintiffs have established their prima facie entitlement to judgment as a matter of law. In opposition New Era and Acuna have failed to rebut the inference of negligence by failing to provide a non-negligent explanation for the collision. A driver, as a matter of law, is charged with seeing what there is to be seen on the road, that is, what should have been seen, or what is capable of being seen at the time, and must exercise reasonable care under the circumstances to avoid an accident (*see Lu Yuan Yang v Howsal Cab Corp.*, 106 AD3d 1055 [2d Dept 2013]; *Wilson v Rosedom*, 82 AD3d 970, 919 NYS2d 59 [2d Dept 2011]). Here defendants New Era and Acuna offer no proof in evidentiary admissible form in opposition to the motion and only submit the affirmation of counsel, which is of no probative or evidentiary value and is insufficient to defeat plaintiff's motion (*see Warrington v Ryder Truck Rental, Inc.*, *supra*).

Although not directly requested in plaintiff's cross motion, the court dismisses defendant New Era and Acuna's third affirmative defense (culpable conduct) and Eighth affirmative defense (emergency doctrine). Inherent in granting plaintiff's cross motion for summary judgment on the issue of defendant New Era and Acuna's liability is a finding that neither plaintiff's culpable conduct nor the emergency doctrine are viable defenses.

Any prayer for relief not specifically addressed in this Short Form Order is deemed denied.

This constitutes the Order and decision of the Court.

Dated: January 2, 2020

HON. ROBERT F. QUINLAN, J.S.C.

[ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION