

**Barrett v Vano**

2020 NY Slip Op 34949(U)

September 15, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 619775/2018

Judge: Sanford Neil Berland

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SHORT FORM ORDER

INDEX No. 619775/2018  
CAL. No. 20200034MV

**E-FILE**

SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 6 - SUFFOLK COUNTY

**PRESENT:**

Hon. SANFORD N. BERLAND  
Acting Justice of the Supreme Court

MOTION DATE 6/2/20  
ADJ. DATE 7/7/20  
Mot. Seq. # 001 MG

-----X  
UNA S. BARRETT,

Plaintiff,

- against -

JENNA M. VANO and SUZETTE VANO,

Defendants.  
-----X

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Upon the following papers on this e-filed motion for summary judgment: Notice of Motion and supporting papers filed by the plaintiff on May 6, 2020; Answering Affidavits and supporting papers filed by the defendant on June 30, 2020; and Replying Affidavits and supporting papers filed by the plaintiff on July 6, 2020, it is

**ORDERED** that plaintiff Una S. Barrett's motion for summary judgment in the plaintiff's favor on the issue of liability is granted.

Plaintiff Una S. Barrett commenced this action to recover for personal injuries she allegedly sustained on July 10, 2018, when her vehicle was struck in the rear by a vehicle operated by defendant Jenna M. Vano ("the defendant driver") and owned by defendant Suzette Vano ("the defendant owner"). The collision occurred on Commack Road, at or near its intersection with Polo Street, in Dix Hills, New York. According to the parties, the incident involved three vehicles: the plaintiff's, which was traveling in the lead; a nonparty's vehicle, which followed that of the plaintiff; and the defendant driver's vehicle, which was the rearmost vehicle. The defendant driver initially struck the rear of the nonparty's vehicle, which was the rearmost vehicle. The defendant driver subsequently traveled across the double yellow lines and into the lane of opposing traffic. The defendant driver then proceeded to strike the rear of the plaintiff's vehicle. The plaintiff alleges that she sustained severe and permanent personal injuries as a result of the collision.

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The plaintiff now moves for summary judgment pursuant to CPLR 3212 on the issue of liability, arguing that the defendants are entirely at fault for the collision and that the plaintiff bears no fault. The plaintiff seeks an immediate trial on damages. In support of the motion, the plaintiff submits, *inter alia*, the pleadings, a police accident report, photographs of the plaintiff's vehicle and transcripts of the deposition testimony of the plaintiff, the defendant driver and the defendant owner. The defendants filed an opposition in which they urge the Court to deny the motion on two grounds. First, they contend that the police report conflicts with the plaintiff's and defendant driver's testimony with respect to how the accident occurred, thereby giving rise to a triable issue of material fact. Second, they maintain that the non-negligent explanation they have offered for the collision - that the non-party's vehicle and the vehicles ahead of it allegedly stopped short to observe police activity on a side street - also raises a triable issue of material fact.

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Hasan v City of New York*, 183 AD3d 572, 121 NYS3d 653, 654 [2d Dept 2020]). In determining whether the moving party has satisfied this burden, the evidence must be viewed in the light most favorable to the non-moving party (*Richardson v Cablevision Sys. Corp.*, 173 AD3d 1083, 1084, 104 NYS3d 655 [2d Dept 2019]). The movant's failure to make such a showing requires denial of the motion regardless of the opposing papers (*id.*). Where prima facie entitlement to judgment as a matter of law is established, the burden shifts to the non-movant to present evidence that gives rise to a genuine issue of material fact as to the movant's comparative fault (*Bien-Aime v Clare*, 124 AD3d 814, 814, 2 NYS3d 557, 558 [2d Dept 2015]).

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Perez v Persad*, 183 AD3d 771, 123 NYS3d 683, 684 [2d Dept 2020] [internal quotation marks omitted]). "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the [driver and the owner of] the moving vehicle and imposes a duty of explanation on the driver" (*Trombetta v Cathone*, 59 AD3d 526, 526, 874 NYS2d 169, 179 [2d Dept 2009]; *see Sooklall v Morisseav-Lafague*, \_\_\_ AD3d \_\_\_, 2020 NY Slip Op 04339, \*2 [2d Dept 2020]). "A nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause" (*Grant v Carrasco*, 165 AD3d 631, 632, 84 NYS3d 235 [2d Dept 2018] [internal quotation marks omitted]).

A plaintiff is no longer required to show freedom from comparative fault to establish prima facie entitlement to judge as a matter of law on the issue of liability (*Rodriguez v City of New York*, 31 NY3d 312, 324, 76 NYS3d 898, 905 [2d Dept 2018]). However, "[t]he issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where[ ] the plaintiff seeks summary judgment dismissing an affirmative defense alleging comparative negligence" (*Yayoi Higashi v M & R Scarsdale Rest., LLC*, 176 AD3d 788, 789, 111 NYS3d 92, 93 [2d Dept 2019]).

The plaintiff has established prima facie entitlement to judgment as a matter of law by submitting evidence that the defendant driver's vehicle struck the rear of the plaintiff's vehicle (*see Xin Fang Xia v*

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*Saft*, 177 AD3d 823, 826, 113 NYS3d 249, 252 [2d Dept 2019]). The defendant driver's testimony that the plaintiff's vehicle and the nonparty's vehicle stopped short is insufficient to raise a triable issue of material fact as to the defendants' liability (*see Dileo v Greenstein*, 281 AD2d 586, 722 NYS2d 259 [2d Dept 2001]). "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" (*Robayo v Aghaabdul*, 109 AD3d 892, 893, 971 NYS2d 317 [2d Dept 2013] [internal quotation marks omitted]). Here, the defendant driver testified that the traffic in her lane of travel became heavy once the vehicles approached two police vehicles that were stopped on a side road that ran parallel to Commack Road. According to the defendant driver, "[p]eople were stopping short because of the cops, and trying to see what goes on because that's what most people do when they see cops pulled over." When the defendant driver was asked how long she drove in heavy traffic, she responded "five minutes." In view of the purported length of time that the defendant driver was traveling in heavy traffic prior to the collision, the Court finds that even if the non-party vehicle and the plaintiff's vehicle did stop short<sup>1</sup>, doing so was foreseeable and, as such, does not give rise to an issue of fact with respect to the defendant driver's negligence. Moreover, the defendant driver's representation that her vehicle skidded for at least 10 feet prior to striking the plaintiff's vehicle is also insufficient to raise a triable issue of fact, as the defendant has not demonstrated that the skidding was unavoidable (*see Tumminello v City of New York*, 148 AD3d 1084, 1085, 49 NYS3d 739 [2d Dept 2017]).

In addition to the parties' deposition transcripts, the plaintiff submitted a copy of an uncertified police accident report in support of her motion. The police accident report provides that "Veh[icle] 3 [the defendant driver's vehicle] struck veh[icle] while in traffic. Veh[icle] 1[, the plaintiff's vehicle] then struck veh[icle] 2 [the nonparty's vehicle]." A diagram on the final page of the report purports to depict the three vehicles at the time of the collision. The nonparty's vehicle is shown in the lead and is followed by the plaintiff's vehicle directly behind it. The defendant driver's vehicle is the rearmost vehicle and is shown immediately behind the plaintiff's vehicle. As it is not certified as a business record, the police accident report it is inadmissible (*see CPLR 4518[a],[c]*; *see also CPLR 2307*). Moreover, there is no entry in the report itself or in the submitted testimony establishing the source of the aforementioned information, nor is there any evidence indicating that the reporting police officer witnessed the collision (*Battista v Rizzi*, 228 AD2d 533, 644 NYS 2d 332, 333 [2d Dept 1996]; *Gagliano v Vaccaro*, 97 AD2d 430, 431, 467 NYS2d 396, 397 [2d Dept 1983]). Thus, even if the report were otherwise admissible, the description of how the collision occurred and the diagram of the three vehicles would constitute inadmissible hearsay, which, as a general matter, may not be considered by the Court (*see Noakes v Rosa*, 54 AD3d 317, 318, 862 NYS2d 573 [2d Dept 2008]). Moreover, even if the Court were to consider the police accident report and its full contents, they would not be sufficient to give rise to a triable issue of material fact. The police accident report is inconsistent with the parties' testimony that the plaintiff's vehicle was in the lead, followed by the vehicle driven by the nonparty, and

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<sup>1</sup> Plaintiff testified that she was "just cruising along," with her foot on the gas pedal, traveling between 25 and 30 miles per hour in traffic - but "not jammed up traffic" - when she saw another vehicle "shooting past" her and into the opposing lane and then felt her own vehicle being struck from behind.

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that the defendant driver's vehicle struck the rear of the plaintiff's vehicle after the nonparty's vehicle crossed the double yellow line and traveled into the opposing lane of traffic. These inconsistencies cannot create a triable issue of fact as the parties agree on the sequence in which the collisions occurred.

In opposition to the motion, the defendants failed to introduce any evidence giving rise to a triable issue of material fact with respect to liability. Accordingly, the plaintiff's motion seeking summary judgment in the plaintiff's favor on the issue of liability is granted.

This constitutes the decision and order of the court.

Dated: \_\_\_\_\_

9/15/2020  
Riverhead, New York

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HON. SANFORD NEIL BERLAND, A.J.S.C.

\_\_\_\_ FINAL DISPOSITION     X  NON-FINAL DISPOSITION