

Barry v Nixon

2020 NY Slip Op 35001(U)

February 13, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 616227/2016

Judge: William G. Ford

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SHORT FORM ORDER

INDEX NO.: 616227/2016

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

IDA BARRY f/k/a IDA A. D'ANGELO &
MICHAEL K. BARRY,

Plaintiffs,

-against-

ELIZABETH L. NIXON,

Defendant.
_____x

Motion Submit Date: 02/13/20
Mot Seq 001 MG

PLAINTIFFS' COUNSEL:
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DEFENDANT'S COUNSEL:
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In this electronically filed motor vehicle accident negligence action, on plaintiff's opposed motion for partial summary judgment on liability pursuant to CPLR 3212, this Court considered the following: NYSCEF Docs. Nos. 10 – 16; and upon due deliberation and full consideration of all of the above, it is

ORDERED that plaintiff's motion seeking partial summary judgment as to liability pursuant to CPLR 3212 against defendants is **granted** as follows; and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon defendant's counsel forthwith; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required.

BACKGROUND & POSTURE

Plaintiff commenced this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on February 29, 2016. By the pleadings filed, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries. Presently, plaintiff moves for an award of partial summary judgment on liability against the defendant.

In support of the application, plaintiff submits a copy of the pleadings, and copies of the

transcripts of the parties' examinations before trial.

Plaintiff's Deposition Testimony

Plaintiff Ida Barry was deposed on August 23, 2018. She testified that approximately 6:30 a.m. in the morning of February 29, 2016 she operated a 2004 Saturn Vue vehicle on her commute to work in clear and dry weather. She explained that on that date and time she was involved in a motor vehicle collision at the intersection of Edgewood Avenue and Jericho Turnpike. Prior to the incident, plaintiff stated that she had been travelling southbound on Edgewood Avenue. As she approached its intersection with Jericho Turnpike, she observed a red traffic light. Her intent was to make a right-hand turn onto Jericho Turnpike and travel westbound. Her testimony further reflected that she stopped her car at the red light at the intersection and was the first vehicle in traffic. While stopped in that fashion for what plaintiff estimated was between 5 and 10 seconds, without recalling hearing screeching of the brakes or honking of a horn, she observed a rear-end impact to her vehicle.

Defendant's Deposition Testimony

At her deposition held on October 5, 2018, defendant testified that on February 29, 2016 she was commuting to work from her home when she was involved in a motor vehicle collision at the intersection of Edgewood and State Route 25 in Smithtown, Suffolk County, New York at approximately 7:00 a.m. Prior to the occurrence, defendant operated a 2014 Honda CRV travelling southbound on Edgewood Avenue in "busy" traffic approaching the intersection with Route 25. As she approached the intersection, defendant was slowing her vehicle due to traffic ahead. Defendant did not recall observing the color of the traffic light at the intersection, however. She testified that she recalled observing plaintiff's vehicle, a red sedan, approximately 10 seconds prior to impact. Defendant stated she had soft rear end contact with plaintiff's vehicle approximately 2 MPH.

The Parties' Arguments

Relying on the above testimony and evidence, plaintiff seeks partial summary judgment on liability arguing that defendant is liable to her as the proximate cause for the incident having initiated a rear-end collision with her vehicle stopped in traffic at an intersection.

Defendant for her part by counsel submits an affirmation opposition to plaintiff's motion. Therein, defendant makes no substantive argument opposing judgment as a matter of law concerning liability, but rather seeks to reserve all rights to conduct discovery concerning plaintiff's allegations of damages arising from the incident, an issue not presently before the Court and bearing no relevancy on the question of liability. Thus, the Court considers plaintiff's motion unopposed for purposes of this determination.

STANDARD OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (*Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP*, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should

refrain from making credibility determinations (*Gniewek v Consol. Edison Co.*, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see Zuckerman v. City of New York*, 49 NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see Goldstein v. Monroe County*, 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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 (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see Zuckerman, supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (*Pantote Big Alpha Foods, Inc. v Schefman*, 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]; *Benincasa v Garrubo*, 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988]).

DISCUSSION

The plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries (*Montalvo v Cedeno*, 170 AD3d 1166 [2d Dept 2019]; *accord Buchanan v Keller*, 169 AD3d 989, 991, 95 NYS3d 252, 254 [2d Dept 2019][holding that plaintiff-movant seeking summary judgment on liability is no longer required to show freedom from comparative fault in order to establish *prima facie* entitlement to judgment as a matter of law]. Stated another way, “[t]o be entitled to partial summary judgment a plaintiff does not bear the ... burden of establishing ... the absence of his or her own comparative fault” (*Balladares v City of New York*, 2018-11929, 2019 WL 6334162, at *2 [2d Dept Nov. 27, 2019]; *quoting Rodriguez v. City of New York*, 31 NY3d 312 [2018]).

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 the operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Mulhern v Gregory*, 161 AD3d 881, 883, 75 NYS3d 592, 594 [2d Dept 2018]; *Comas-Bourne v City of New York*, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]; *Whelan v Sutherland*, 128 AD3d 1055, 1056, 9 NYS3d 639, 640 [2d Dept 2015]; *Tutrani v. County of Suffolk*, 10 NY3d 906, 908; *Gutierrez v. Trillium USA, LLC*, 111 AD3d 669, 670–671, 974 NYS2d 563; *Pollard v. Independent Beauty & Barber Supply Co.*, 94 AD3d 845, 846, 942 NYS2d 360; *Perez v Roberts*, 91 AD3d 620, 621, 936 NYS2d 259, 260 [2d Dept 2012]; *Le Grand v Silberstein*, 123 AD3d 773, 774, 999 NYS2d 96, 97 [2d Dept 2014]).

The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see Zdenek v Safety Consultants, Inc.*, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; *Kastritsios v. Marcello*, 84 AD3d 1174, 923 NYS2d 863; *Franco v. Breceus*, 70 AD3d 767, 895 NYS2d 152; *Mallen v. Su*, 67 AD3d 974, 890 NYS2d 79; *Rainford v. Han*, 18 AD3d 638, 795 NYS2d 645; *Russ v. Investech Secs.*, 6 AD3d 602, 775 NYS2d 867; *Xian Hong Pan v Buglione*, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]). However, “[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law” (*Barile v. Lazzarini*, 222 AD2d 635, 636, 635 NYS2d 694; *D’Agostino v YRC, Inc.*, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

“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” (*Comas-Bourne v City of New York*, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*Williams v Spencer-Hall*, 113 AD3d 759, 760, 979 NYS2d 157, 159 [2d Dept 2014]). a rear-end collision with a stopped 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 nonnegligent explanation for the collision (*Sayyed v Murray*, 109 AD3d 464, 464, 970 NYS2d 279, 281 [2d Dept 2013]).

A possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle,” however, it is equally true that “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” (*Tumminello v City of New York*, 148 AD3d 1084, 1085, 49 NYS3d 739, 741 [2d Dept 2017]; *Shamah v. Richmond County Ambulance Serv.*, 279 A.D.2d 564, 565, 719 N.Y.S.2d 287; *see Gutierrez v Trillium USA, LLC*, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; *Robayo v. Aghaabdul*, 109 A.D.3d 892, 893, 971 N.Y.S.2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g. Romero v Al Haag & Son Plumbing & Heating, Inc.*, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014])[even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff’s vehicle under Vehicle and Traffic Law § 1129[a], defendant’s deposition testimony relied upon by plaintiff, itself raised a triable issue of

fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord Fernandez v Babylon Mun. Solid Waste*, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; *Sokolowska v Song*, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

Thus, the burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see Abbott v Picture Cars E., Inc.*, 78 A.D.3d 869, 911 N.Y.S.2d 449 [2d Dept 2010]; *DeLouise v S.K.I. Wholesale Beer Corp.*, 75 A.D.3d 489, 904 N.Y.S.2d 761 [2d Dept 2010]; *Moran v Singh*, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2d Dept 2004]).

First, arguing in opposition to plaintiffs' motion by counsel's affirmation, defendant first contends that the application is premature and results in substantial and unfair prejudice under CPLR 3212(f) since now pretrial discovery has yet been conducted. This line of argument is unavailing and here is insufficient to preclude entry of summary judgment. Recent caselaw within the Second Department clearly holds that under similar circumstances as regards non-movant's claim of outstanding discovery as an impediment to the consideration of summary judgment "[w]here outstanding discovery identified by the non-movant seeks production solely of evidence pertaining to plaintiff's comparative fault, such a motion is not premature in light of the fact that plaintiff is no longer required to show freedom from comparative fault in order to establish a *prima facie* case of the defendants' liability (*Francois v Tang*, 2018-03447, 2019 WL 1782208, at *1 [2d Dept Apr. 24, 2019]). Thus, to the extent that defendant seeks to conduct discovery regarding liability, and really the extent or scope of plaintiff's comparative fault for the underlying incident, that no longer is relevant in the post *Rodriguez* landscape. More importantly, the Second Department is clear that defendant's mere hope or speculation that additional discovery might lead to or create a triable fact issue is insufficient to preclude the entry of summary judgment on liability in this negligence motor vehicle action (*see e.g. Rodriguez v Farrell*, 115 AD3d 929, 931, 983 NYS2d 68, 70 [2d Dept 2014][appellate court determining that summary judgment not premature where defendant failed to demonstrate that discovery would lead to relevant evidence or that facts essential to justify opposition to the motions were exclusively within the knowledge and control of the plaintiffs]; *Medina v Rodriguez*, 92 AD3d 850, 851, 939 NYS2d 514, 515 [2d Dept 2012]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 737, 846 NYS2d 309, 310–11 [2d Dept 2007]; *Hill v Ackall*, 71 AD3d 829, 829–30, 895 NYS2d 837, 838 [2d Dept 2010]). Defendant's arguments simply do not meet this standard and thus they are unsuccessful in invoking CPLR 3212(f) to prevent this Court from weighing the issuance of summary judgment on liability in plaintiffs' favor. Accordingly, that branch of defendant's opposition to summary judgment as premature due to outstanding discovery is hereby denied.

Next, having reviewed all of the parties' motion papers, the Court finds that plaintiff has dispensed with her requisite burden entitling her to judgment as a matter of law regarding liability with submission of her deposition testimony and the certified police accident investigation report. All taken together, the Court finds plaintiff's papers demonstrate a *prima facie* case of negligence against the defendant. Accordingly, the burden has shifted to defendant to come forward with a non-negligent explanation for the incident.

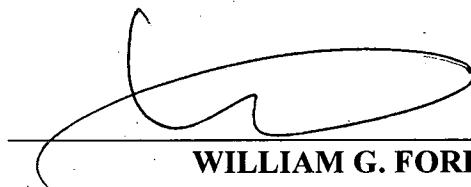
With the burden shifted to her, defendant relies upon her counsel's affirmation to oppose the plaintiff's liability summary judgment motion. Thus, submitted to the Court is solely defense counsel's affirmation in opposition consisting of 1 sole page. Moreover, that submission explicitly states it offers no contest on the question of liability. Nevertheless, the law in this regard is settled. Defendant's reliance on its attorney's affirmation, without further submission of sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, is insufficient to establish triable issues of fact warranting denial of summary judgment. The Second Department has repeatedly cautioned counsel on this point (*Huerta v Longo*, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; *Collins v Laro Serv. Sys. of New York, Inc.*, 36 AD3d 746, 746-47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; *Cordova v Vinuesa*, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Thus, defendant fails to carry its shifted burden of rebutting plaintiff's *prima facie* case of negligence against her by competent or admissible proof raising a triable question of fact meriting a liability trial and precluding judgment as a matter of law on liability for the plaintiff.

Because defendant has failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the collision here, necessitating a trial on its liability, this Court **grants** plaintiff's partial summary judgment on liability against defendant under CPLR 3212.

The foregoing constitutes the decision and order of this Court.

Dated: February 13, 2020
Riverhead, New York



WILLIAM G. FORD, J.S.C.

_____ FINAL DISPOSITION

_____ X _____ NON-FINAL DISPOSITION