

Whinstanley v Gilpin
2020 NY Slip Op 35012(U)
March 20, 2020
Supreme Court, Westchester County
Docket Number: Index No. 52621/2019
Judge: Sam D. Walker
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
P R E S E N T: HON. SAM D. WALKER, J.S.C.**

-----X
RICHARD R. WHINSTANLEY,
Plaintiffs,

DECISION & ORDER
Index No. 52621/2019
Seq. # 2 & 3

-against-

SAWANDAW A. GILPIN, LORENNY ALMANZAR,
ARMAND DIAMOND, GREGORY FISK and NICOLE
FISK SALDANA,
Defendants.

-----X
SAWANDAW A. GILPIN,
Plaintiffs,

-against-

LORENNY ALMANZAR, ARMAND DIAMOND,
GREGORY FISK and NICOLE FISK SALDANA,
Defendants.

-----X

The following papers were read on a motion for summary judgment seeking dismissal of the action:

Notice of Motion/Affirmation/Exhibits A-E	1-7
Affirmation in Opposition	8
Affirmation in Opposition/Exhibit A	9-10
Reply Affirmation	11
Notice of Amended Cross-Motion/Affirmation/Exhibits A-G	12-20
Reply Affirmation	21

Upon the foregoing papers it is ordered that the motion is GRANTED and the cross-motion is also GRANTED.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff filed this action by filing a summons and complaint on February 14, 2019, seeking money damages for injuries he sustained on December 12, 2017, in a motor vehicle accident involving five vehicles. The defendant, Sawandae A. Gilpin (“Gilpin”) filed an answer and a third-party summons and complaint against Loreny Almanzar, Armand Diamond, Gregory Fisk and Nicole Fisk Saldana. The plaintiff then filed a motion to amend the verified complaint to add the third-party defendants. This Court granted that motion and the plaintiff served and filed an amended complaint, adding the third-party defendants as defendants.

Defendants/ third-party defendants, Nicole Saldana Fisk and Gregory M. Fisk, now file the instant motion seeking to dismiss all claims against them. Gregory Fisk (“Fisk”) avers that, on December 2, 2017, he was operating the vehicle owned by his wife, Nicole Saldana Fisk, with permission, on the southbound side of the Saw Mill River Parkway and came to a gradual stop at the Moshulu Parkway exit ramp. As he stopped he observed a black Mercedes, operated by Armand Diamond (“Diamond”), stop behind his vehicle. They were stopped for approximately ten seconds, when he observed, in his rearview mirror, another vehicle, driven by the plaintiff, Richard R. Whinstanley (“Whinstanley”), rear end the Diamond vehicle, causing that vehicle to rear end his vehicle. Fisk avers that he did not observe any other impacts other than the impact between the Whinstanley vehicle and the Diamond vehicle and there was nothing he could have done to avoid the accident. Fisk also argues that the police report supports his account of the accident.

Diamond also filed a cross-motion and amended cross-motion¹, seeking dismissal of the plaintiff's amended complaint and the third-party complaint and any and all claims, counter-claims, and cross-claims asserted against him. Diamond adopts and incorporates the arguments, case law and supporting exhibits contained in the Fisk motion. Diamond also avers that his stopped vehicle was struck in the rear by the vehicle operated by Whinstanley. Diamond argues that, neither the plaintiff nor Gilpin can point to any affirmative act of negligence attributable to Diamond and the police report supports his account of the accident, therefore, all claims against him should be dismissed.

Gilpin opposes the motion, arguing that the motion is premature because examinations before trial have not been conducted. Gilpin also argues that the police report relied upon by the motions, is uncertified inadmissible hearsay and not within any exception.

The plaintiff also opposes the motion, arguing that both motions rely on a police report submitted in inadmissible form. The plaintiff further argues that Fisk negligently stopped his vehicle suddenly without appropriate justification and Diamond was negligent in following too closely to Fisk's vehicle. The plaintiff also argues that summary judgment is premature, since necessary pretrial discovery remains outstanding.

In reply to the opposition, the Fisks request that the Court grant the motion and dismiss all claims against them, including the direct claims by the plaintiff in the amended complaint. The Fisks' attorney reiterates that Fisk stated in his affidavit that

¹ Diamond amended the cross-motion to include dismissal of the plaintiff's

the impact between the Whinstanley and Diamond vehicles caused the Diamond vehicle to impact the rear of his stopped vehicle. The attorney also asserts that the police report corroborates Fisk's version of events and contains the parties' admissions. The Fisks' attorney also argues that Diamond submitted his own affidavit in support of his cross-motion, which supports Fisk's version of how the accident occurred, stating that Fisk's vehicle came to a complete stop in front of his vehicle, due to traffic conditions, he came to a complete stop behind the Fisk vehicle and was hit in the rear by the Whinstanley vehicle, while stopped. The Fisks' attorney further contends that the police report submitted in support of the motion is clearly certified and in admissible form and any affidavits contradicting the report are self-serving and raise feigned issues of fact insufficient to defeat the motion.

With regard to Gilpin's opposition, the Fisks' attorney argues that Gilpin has not submitted his own affidavit or any evidence in opposition and the plaintiff and Gilpin have failed to show that the motion is premature, because they have failed to provide any evidentiary basis to demonstrate that discovery may lead to relevant evidence or that any facts essential to opposing the motion, are in the movants' exclusive knowledge and control.

In reply, Diamond adopts incorporates the arguments and case law contained in the Fisks' reply affirmation and further argues that Gilpin fails to raise a question of fact in not submitting an affidavit or non-negligent excuses for her conduct. Diamond also argues that Whinstanley feigns an issue of fact by relying solely on his own affidavit to argue that Diamond may have struck the Fisks' vehicle prior to the plaintiff's alleged

amended verified complaint against him.

subsequent collision with Diamond and even if true, does not raise an issue of fact as to Diamond's lack of liability toward the plaintiff, who was travelling behind him. Diamond asserts that the plaintiff fails to provide a non-negligent excuse for rear-ending Diamond's vehicle and fails to rebut the presumption of negligence. Similar to the Fisks, Diamond also argues that the motion is not premature because the opposing party has to demonstrate that discovery will lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge and control of the moving party, and Whinstanley and Gilpin have failed to demonstrate such. Diamond also assert that the police report is certified and the statements in the report, admissible as a party admission.

DISCUSSION

A party on a motion for summary judgment must assemble affirmative proof to establish his entitlement to judgment as a matter of law, (*see Zuckerman v City of N.Y.*, 49 NY2d 557 [1980]). "[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" (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Only when such a showing has been made must the opposing party set forth evidentiary proof establishing the existence of a material issue of fact, (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

New York Vehicle and Traffic Law § 1129 states in pertinent part that:

The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway. (NY VTL § 1129[a]).

A rear-end collision creates a presumption that the operator of the second vehicle was negligent, thus entitling the injured occupants of the front vehicle to summary judgment on liability unless the driver of the second vehicle can proffer a non-negligent explanation for the collision, (see *Agramonte v City of New York*, 288 AD2d 75, 76 [2001]); *Johnson v Phillips*, 261 AD2d 269, 271 [1999]; *Danza v Longioliere*, 256 AD2d 434, 435 [1998], lv dismissed 93 NY2d 957 [1999]). “In chain collision accidents, 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 struck from behind by the rear vehicle and propelled into the lead vehicle (see *Kuris v El Sol Contr. & Constr. Corp.*, 116 AD3d 675 [2d Dept 2014]; see also *Niosi v Jones*, 133 AD3d 578 [2d Dept 2015]).

The evidence submitted by the Fisks and Diamond establish entitlement to summary judgment as a matter of law, thereby shifting the burden to the Whinstanley and Gilpin to demonstrate the existence of a factual issue requiring a trial (see *Macauley v Elrac, Inc.*, 6 AD3d 584, 585 [2d Dept 2004] [Rear-end collision is sufficient to create a prima facie case of liability]). If the operator of the striking vehicle fails to rebut this presumption and the inference of negligence, the operator of the stopped vehicle is entitled to summary judgment on the issue of liability (see *Leonard v City of New York*, 273 AD2d 205 [2d Dept 2000]; *Longhito v Klein*, 273 AD2d 281 [2d Dept 2000]; *Velasquez v Quijada*, 269 AD2d 592 [2d Dept 2000]; *Brant v Senatobia Operating Corp.*, 269AD2d 483 [2d Dept 2000]).

In (*Leal v Wolff*), the Second Department held that since Whinstanley and Gilpin were under a duty to maintain a safe distance between their vehicles and Fisks’ and

Diamond's vehicle (see Vehicle and Traffic Law Section 1129[a]), their failure to do so in the absence of a non-negligent explanation constituted negligence as a matter of law" (*Leal v Wolf*, 224 AD2d 392 [2d Dept 1996]).

Further, "[w]hen the driver of an automobile approaches from the rear, he or she 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 *Zweeres v Materi*, 94 AD3d 1111 [2d Dept 2012]). "Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident" (*Id.*).

Both Whinstanley and Gilpin fail to offer any non-negligent explanations for the accident and their oppositions do not create any issues of fact with regard to liability. Gilpin failed to submit an affidavit in opposition and the Court deems Whinstanley's affidavit to be a feigned attempt to create an issue of fact. Even if Diamond hit Fisk's vehicle first prior to Whinstanley hitting Diamond's vehicle, Whinstanley was behind Diamond and had an obligation to exercise reasonable care to avoid colliding with the vehicle in front of him.

Further, the police report submitted in support of the motion and cross-motion is certified and not an uncertified report as claimed and the statements in the report are admissible as party admissions. "The police officer who prepared the report was acting within the scope of his duty in recording the statements and the statements are admissible as the admissions of parties in the action (*Scott v Kass*, 48 AD3d 785 [2d Dept 2008]).

Additionally, the need to conduct discovery does not warrant denial of the motion, since the movants have personal knowledge of the relevant facts of the accident (see *Niyazov v Bradford*, 13 AD3d 501 [2d Dept 2004]). Therefore, the plaintiff and Gilpin did not establish the existence of any material issue of fact to rebut the prima facie showing of entitlement to summary judgment.

The Court granted the motion to amend subsequent to the Fisks' motion seeking dismissal of the third-party complaint and cross-claims. However, the plaintiff had an opportunity to and did oppose the Fisks' motion for dismissal.

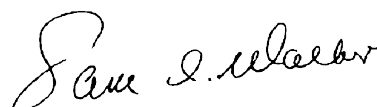
Accordingly, based on the foregoing, it is

ORDERED that the motion for summary judgment, is granted and all claims against Gregory Fisk and Nicole Fisk Saldana are dismissed; and it is further

ORDERED that the cross-motion for summary judgment is granted and all claims against Armand Diamond are dismissed.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
March 20, 2020



HON. SAM D. WALKER, J.S.C.