Tomasino v Prunty
2020 NY Slip Op 35042(U)
March 3, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 605810-2019
Judge: David T. Reilly

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 605810-2019

---x

CRAIG TOMASINO,

Plaintiff,

-against-

BRIAN PATRICK PRUNTY and ISLAND INTERNATIONAL INDUSTRIES INC.,

Defendant.

---x

The Bongiorno Law Firm, PLLC
Attorneys for Plaintiffs
1415 Kellum Place, Suite 205
Garden City, NY 11530

Abrams Fensterman, LLP
Attorneys for Defendants
3 Dakota Drive - Suite 300
Lake Success, NY 11042

MOTION DATE: 11/19/19
SUBMITTED: 01/22/20
MOTION SEQ. NO.: 2
MOTION: MG

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff dated October 15, 2019 and supporting papers; (2) Defendants' Affirmation In Opposition dated December 31, 2019; and (3) Plaintiff's Reply Affirmation dated January 6, 2020 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that plaintiff's motion seeking an Order granting him partial summary judgment as to the issue of liability pursuant to Civil Practice Law and Rules (CPLR) 3212 is granted; and it is

ORDERED that upon completion of all discovery proceedings and the filing of a note of issue together with a copy of this Order, this matter shall be placed on the calendar for a trial on the issue of damages.

This action arises from a motor vehicle accident which occurred on April 10, 2018 on the eastbound portion of the Long Island Expressway at or near the intersection of Wading River Road (Exit 69) in the County of Suffolk. According to the plaintiff, he was on duty as a Suffolk County Police Officer at the time of the accident. Plaintiff avers that his police vehicle was stopped in the left lane of the roadway with the emergency lights activated, attending to an unrelated accident, when his vehicle was struck from behind by a vehicle driven by defendant Brian Patrick Prunty and owned by defendant Island International Industries, Inc. The collision allegedly caused the plaintiff to suffer serious personal injuries.

Plaintiff now seeks an Order granting him summary judgment as to the issue of liability. He submits a copy of the pleadings, an uncertified MV-104A police accident report and his own affidavit. Defendants have submitted an affirmation in opposition wherein counsel contends that plaintiff's motion is premature in that depositions of the parties have not been taken.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*).

Once the movant demonstrates a *prima facie* entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see* ***Winegard v New York Univ. Med. Ctr.***, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***New York City Asbestos Litig. v. Chevron Corp.***, 33 NY3d 20, 2019 NY Slip Op 01259 [2019]; ***Stonehill Capital Mgt., LLC v Bank of the West***, 28 NY3d 439, 45 NYS3d 864 [2016]).

In order to establish his or her *prima facie* entitlement to judgment, a plaintiff is no longer required to show freedom from comparative fault (*see* ***Rodriguez v City of New York***, 31 NY3d 312, 76 NYS3d 898 [2018]; ***Catanzaro v Edery***, 172AD3d 995, 101 NYS3d 170 [2d Dept 2019]; ***Buchanan v Keller***, 169 AD3d 989, 95 NYS3d 252 [2d Dept 2019]). A driver of an automobile approaching another automobile from the rear must maintain a reasonably safe rate of speed and control over his or her vehicle and exercise reasonable care to avoid colliding with the other vehicle (*see* ***Schmertzler v Lease Plan U.S.A., Inc.***, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]; ***Gallo v Jairath***, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]). A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, and imposes a duty upon that operator to proffer a non-negligent explanation for the collision (*see* ***Buchanan v Keller***, *supra*; ***Binkowitz v Kolb***, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]). A non-negligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the vehicle ahead, or any other reasonable cause (*see* ***Binkowitz v Kolb***, *supra*; ***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]). However, stops of the lead vehicle which are foreseeable under prevailing traffic conditions must be anticipated by the driver who follows (*see* ***Catanzaro v Edery***, *supra*; ***Buchanan v Keller***, *supra*).

Here, plaintiff has established his *prima facie* entitlement to summary judgment. His submission demonstrates that he was stopped on the roadway with his emergency lights activated before he was struck in the rear by the defendants' vehicle. Plaintiff has also sufficiently demonstrated that he was not comparatively at fault in the happening of the accident (*see* ***Rodriguez v City of New York,*** *supra*).

In opposition defendant failed to raise a triable issue of fact. Notably, defendant does not submit an affidavit to contest plaintiff's asseveration that his vehicle was stopped, only an affirmation of counsel which questions the time and manner in which the plaintiff's vehicle was stopped. As defendant's attorney lacks personal knowledge of the facts, her affirmation lacks probative value and is insufficient to raise a triable issue of fact (*see* ***Zuckerman v City of New York***, *supra*). Additionally, as to defendant's assertion that the motion is premature, the mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (*see* CPLR 3212(f); ***Hanover Ins. Co. v. Prakin***, 81 AD3d 778, 916 NYS3d 615 [2d Dept 2011]).

Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted.

This shall constitute the decision and Order of the Court.

Dated: March 3, 2020
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION