

Budke v Oh
2020 NY Slip Op 35105(U)
March 6, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 616689/2019
Judge: Paul J. Baisley, Jr.
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

INDEX NO. 616689/2019

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY**PRESENT:**Hon. Paul J. Baisley, Jr., J.S.C.RICHARD BUDKE and MICHELE BUDKE,

Plaintiffs,

-against-

TIMOTHY S. OH,

Defendant.

ORIG. RETURN DATE: November 1, 2019
FINAL RETURN DATE: December 30, 2019
MOT. SEQ. #: 001 MG**PLTF'S ATTORNEY:**
GRUENBERG KELLY DELLA
700 KOEHLER AVENUE
RONKONKOMA, NEW YORK 11779**DEFT'S ATTORNEY:**
GENTILE & TAMBASCO.
115 BROAD HOLLOW ROAD, STE 300
MELVILLE, NEW YORK 11747

Upon the following papers read on this motion for summary judgment : Notice of Motion and supporting papers by plaintiffs, dated October 9, 2019 ; Affirmation in Opposition and supporting papers by defendant, dated December 20, 2019 ; Reply Affirmation and supporting papers by plaintiffs dated December 30, 2019 ; it is,

ORDERED that the motion by the plaintiffs for an order granting summary judgment in their favor on the issue of liability and dismissing the first and second affirmative defenses is granted; and it is further

ORDERED that the parties shall appear at 10:00 a.m. on March 10, 2020 at the DCM-J Part of the Supreme Court, One Court Street, Riverhead, New York, for a preliminary conference.

This an action to recover damages for injuries allegedly sustained by plaintiff Richard Budke in a motor vehicle accident which took place on February 28, 2019, on the Long Island Expressway, in Roslyn, New York. The action also seeks to recover damages allegedly suffered derivatively by plaintiff Michele Budke.

Plaintiffs now move for summary judgment in their favor on the issue of liability, arguing that defendant's negligence was the sole proximate cause of the accident. Plaintiffs also move for an order dismissing defendant's first affirmative defense of comparative negligence and dismissing the second affirmative defense of failure to use a seatbelt. In support, plaintiffs submit copies of the pleadings, plaintiff driver's affidavit and a certified copy of the MV104A police accident report. Defendant opposes the motion, arguing, *inter alia*, that plaintiff's affidavit is insufficient to establish a prima facie case of negligence, that triable issues of fact exist, and that the motion is premature since examinations before trial of the parties have not been conducted.

The proponent of a summary judgment motion must make a prima facie showing of entitlement

Budke v Oh
Index No. 616689/2019
Page 2

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 moving party has the initial burden of proving entitlement to summary judgment (*id.*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once the moving party demonstrates a prima facie entitlement to judgment as a matter of law, the burden then shifts to the opposing party to produce evidentiary proof in admissible form showing facts 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 Winegrad 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, 99 NYS3d 734 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]). To establish prima facie entitlement to judgment as a matter of law on the issue of liability, a plaintiff “is no longer required to show freedom from comparative fault” (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Bloechle v Heritage Catering, Ltd.*, *supra*; *Catanzaro v Edery*, *supra*; *Marks v Rieckhoff*, 172 AD3d 847, 101 NYS3d 63 [2d Dept 2019]; *Auguste v Jeter*, 167 AD3d 560, 560, 88 NYS3d 509 [2d Dept 2018]).

The driver of a vehicle approaching another vehicle 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 Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]; *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 requires the operator of the rear vehicle to rebut the inference of negligence by providing a nonnegligent explanation for the collision (*see Miller v Steinberg*, 164 AD3d 492, 82 NYS3d 597 [2d Dept 2018]; *Edgerton v City of New York*, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). A nonnegligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the lead vehicle, an unavoidable skidding on wet pavement, or any other reasonable cause (*Grant v Carrasco*, 165 AD3d 631, 84 NYS3d 235 [2d Dept 2018]; *Binkowitz v Kolb*, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]; *Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]). However, a driver who follows another vehicle must anticipate that the lead vehicle may stop, even suddenly, based on prevailing traffic conditions (*Catanzaro v Edery*, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; *Buchanan v Keller*, 169 AD3d 989, 95 NYS3d 252 [2d Dept 2019]).

Plaintiffs’ submissions establish, prima facie, that defendant’s negligence was the sole proximate cause of the accident (*see Skura v Wojtowski*, 165 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]; *Kuris v ElSol Contr. & Constr. Corp.*, 116 AD3d 675, 983 NYS2d 580 [2d Dept 2014]; *see also Morales v Amar*, 145 AD3d 1000, 44 NYS3d 184 [2d Dept 2016]). According to plaintiff driver at the time of the accident, he was seat-belted and operating his motor vehicle traveling westbound in the left lane of the Long Island Expressway, near the Searingtown Road exit, when the traffic gradually slowed and stopped. He observed in his rear view mirror defendant’s vehicle approaching his vehicle about one

Budke v Oh
Index No. 616689/2019
Page 3

second before it struck his vehicle in the rear. Plaintiff stated he could not avoid the collision. The issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion if the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Plaintiff having met his prima facie burden on the issue of negligence, the burden now shifts to defendant to offer competent evidence, in admissible form, which raises a triable issue of fact as to whether defendant had a nonnegligent explanation for the collision (*see Alvarez v Prospect Hosp.*, *supra*; *Cortes v Whelan*, 83AD3d 763, 922 NYS2d 419 [2d Dept 2011]; *see generally Rodriguez v City of New York*, *supra*). In opposition, defendant's affidavit states that he was operating his motor vehicle in the left lane traveling westbound on "Interstate Highway 495" near the Searingtown Road exit in Roslyn, New York. Defendant states there was snow and ice on the road, and that plaintiff's vehicle came to an abrupt stop in front of his vehicle. He further states that he was traveling approximately 20 mph and that he immediately braked to avoid colliding with plaintiff's vehicle. Defendant states that due to the ice and snow on the roadway, he was unable to avoid hitting the rear of plaintiff's vehicle.

Defendant's attorney's affirmation in opposition states, *inter alia*, that defendant has made out a nonnegligent explanation, thereby establishing a triable issue of fact, and as such, plaintiff's motion for summary judgment should be denied. The affirmation in opposition also contends that the motion is premature, because discovery has not been held and depositions have not yet taken place. As to that point, defendant driver has personal knowledge of the relevant facts underlying the accident, the purported need to conduct discovery does not warrant denial of the motion (*see Pierre v Demoura*, 148 AD3d 736, 48 NYS3d 260 [2d Dept 2017]; *Turner v Butler*, 139 AD3d 715, 32 NYS3d 174 [2d Dept 2016]; *Deleg v Vinci*, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered" by further discovery is an insufficient basis for denying the motion (*Lopez v WS Distrib. Inc.*, 34 AD3d 759, 760, 825 NYS2d 516, 517 [2d Dept 2006]; *see Conte v. Frelen Assoc., LLC*, 51 AD3d 620, 858 NYS2d 258 [2d Dept 2008]).

As to the defendant's contention that he made out a nonnegligent explanation for the collision, plaintiff proffered a certified copy of the MV104A police accident report. The report indicates that on the date in question, the roadway surface was dry and that the weather was clear. Furthermore, the statements attributed to the defendant noted on the MV 104A report state, in sum and substance, "that defendant [driver 1] saw MV2 [plaintiff's vehicle] stopping but that he wasn't able to stop in time." As this statement is an admission against interest, it qualifies as an exception to the hearsay rule on the issue of liability. A plethora of case law upholds this principle (*see Vaden v Rose*, 4 AD3d 468, 771 NYS2d 670 [2d Dept 2004]; *Kemenyash v McGoey*, 306 AD2d 516, 762 NYS 2d 629 [2d Dept 2003]; *Guevara v Zaharakis*, 303 AD2d 555, 756 NYS 2d 465 [2d Dept 2003]). Thus, defendant's submissions fail to raise a triable material issue of fact to rebut plaintiff driver's prima facie showing that defendant's negligence was the sole proximate cause of the accident (*see Rodriguez v City of New York*, *supra*; *Zuckerman v City of New York*, *supra*).

Accordingly, the motion by plaintiffs for summary judgment in their favor on the issue of liability and for dismissal of defendant's first affirmative defense of comparative negligence and second

Budke v Oh
Index No. 616689/2019
Page 4

affirmative defense of failure to use a seatbelt is hereby granted.

Dated: *March 6, 2020*



HON. PAUL J. BAISLEY, JR., J.S.C.