

GEICO Gen. Ins. Co. v Town of Islip
2020 NY Slip Op 35133(U)
November 18, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 603778/2019
Judge: Denise F. Molia
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PUBLISH

Index No.: 603778/2019

SUPREME COURT - STATE OF NEW YORK
I.A.S. Part 39 - SUFFOLK COUNTY

PRESENT:

Hon. DENISE F. MOLIA,
Justice

Motion R/D: 06/22/20
Submission Date: 07/24/20
Motion Sequence No.: 004; MG

GEICO GENERAL INSURANCE
COMPANY A/S/O DENISE WEIS and
DENISE WEIS,

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Plaintiff,

- against -

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THE TOWN OF ISLIP and
JOSEPH M. AMITRANO,

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Defendants.

Upon the **E-file document list** numbered 80 to 109 read on the application of plaintiff Denise Weis for an order granting her summary judgment against defendants on the issue of liability; it is

ORDERED that the motion by plaintiff Denise Weis for an order granting her summary judgment against defendants on the issue of liability is **GRANTED** pursuant to CPLR 3212.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Denise Weis ("Weis") as a result of a motor vehicle accident that occurred on December 28, 2017 on the eastbound Sunrise Highway Service Road, approximately 200 feet east of Redmond Avenue, in the Town of Islip, County of Suffolk and State of New York. Weis served a notice of claim upon defendant Town of Islip ("Town") on January 11, 2018. Weis then commenced the within action by the filing of a summons and complaint on February 25, 2019. Issue was joined by defendants on April 3, 2019. Weis served a bill of particulars on July 29, 2019. A

property damage subrogation claim was commenced by plaintiff Geico General Insurance Company ("Geico") in the First District Court, Ronkonkoma Part on May 15, 2018, which action was consolidated with this action by order of this Court dated October 15, 2019. The depositions of the parties have been completed and Weis now moves for summary judgment on the issue of liability. In support of her motion, Weis submits, *inter alia*, an attorney affirmation, her sworn affidavit, a copy of the pleadings, bill of particulars, consolidation order, uncertified amended police report, transcript of 50 (h) hearing, her examination before trial, the examination before trial of defendant Joseph M. Amitrano ("Amitrano"), and photographs. Weis asserts that while her vehicle was slowing down, it was struck in the rear by defendants' vehicle and that there is no issue as to Amitrano's liability. Defendants oppose the motion and submit, *inter alia*, an attorney affirmation, the sworn affidavit of Amitrano, an uncertified police narrative dated December 29, 2017, uncertified police accident report, the deposition transcripts of Weis and Amitrano, and Geico correspondence dated June 15, 2018. Defendants assert that the emergency doctrine applies to this case or, at the very least, there is a question of fact as to whether it applies. Defendants further argue that summary judgment is premature. Plaintiff replies and defendants sur-reply.

During her 50 (h) examination, Weis testified that the accident occurred at the exit ramp of Exit 44 of Sunrise Highway in the Town of Islip. Weis further testified that she was exiting Sunrise Highway heading onto the service road and as she was "slowing down to yield onto the service road", there was a car in front of her and "out of nowhere [she] got hit in the rear." Weis further testified that the rear of her car was impacted, the back windshield was "blown out...[and] the whole back was damaged and pushed in." At her examination before trial, Weis testified similarly that she was exiting Sunrise Highway and slowing down to merge onto the service road when her vehicle was suddenly hit in the rear. Plaintiff avers in her affidavit sworn to on May 20, 2020, that she "was traveling East on Sunrise Highway Service Road when suddenly and without warning" she felt an impact to the rear of her vehicle by a vehicle owned by the Town being operated by Amitrano. Plaintiff further avers in her affidavit that her vehicle "was fully in its lane of traffic at the time of the accident."

Defendant Amitrano testified during his examination before trial that on the date of the accident he was employed by the Town, that the vehicle he was operating was owned by the Town, that the accident occurred on the off-ramp of Sunrise Highway and that the impact was to the driver's side front bumper of the Town vehicle he was driving. Amitrano's sworn affidavit avers that both vehicles were merging onto the Sunrise Highway ramp at Exit 44, with plaintiff's vehicle being in front of his. He further avers that plaintiff's vehicle "came to a near stop in front of

[him],” that he immediately applied his brakes hard and turned his steering wheel to the right in an effort to avoid colliding with plaintiff’s vehicle but that despite his efforts, his vehicle “struck the passenger side rear bumper of plaintiff’s vehicle.” He further avers that “the actions of the plaintiff’s vehicle coming to a near stop was unexpected.”

Summary judgment is a drastic remedy and should only be granted in the absence of any triable issues of fact (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 413 NYS2d 141 [1978]; *Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974]). It is well-settled that the proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient proof to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]; *Seidman v Indus. Recycling Props., Inc.*, 52 AD3d 678, 861 NYS2d 692 [2d Dept 2010]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). Once such a showing has been made, 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*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O’Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof in evidentiary form; conclusory allegations are insufficient to raise a triable issue of fact (see *Friends of Animals, Inc. v Associated Fur Mfrs.*, 46 NY2d 1065, 416 NYS2d 790 [1979]; *Burns v City of Poughkeepsie*, 293 AD2d 435, 739 NYS2d 458 [2d Dept 2002]). A motion for summary judgment should be denied where the facts are in dispute or where conflicting inferences may be drawn from the evidence (see *Chimbo v Bolivar*, 142 AD3d 944, 37 NYS3d 339 [2d Dept 2016]; *Benetatos v Comerford*, 78 AD3d 730, 911 NYS2d 155 [2d Dept 2010]).

When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate of speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the other vehicle (Vehicle and Traffic Law § 1129 [a]; *Gallo v Jairath*, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]; *Cajas-Romero v Ward*, 106 AD3d 850, 965 NYS2d 559 [2d Dept 2013]; *Nsiah-Ababio v Hunter*, 78 AD3d 672, 913 NYS2d 659 [2d Dept 2010]). A driver is negligent in failing to see that which under the facts and circumstances he should have seen by the proper use of his senses (see *Barbieri v Vokoun*, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; *Domanova v State of New York*, 41 AD3d 633, 838 NYS2d 644 [2d Dept 2007]; *Lester v Jolicofur et al.*, 120 AD2d 574; 502 NYS2d 61 [2d Dept

1986)).

The occurrence of a rear-end collision with a stopped or stopping vehicles creates a prima facie case of negligence on the part of the operator of the rear vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*Montalvo v Cedeno*, 170 AD3d 1166, 96 NYS3d 638 [2d Dept 2019]; *McLaughlin v Lunn*, 137 AD3d 757, 26 NYS3d 338 [2d Dept 2016]; *Cheow v Cheng Lin Jin*, 121 AD3d 1058, 995 NYS2d 186 [2d Dept 2014]; *Perez v Roberts*, 91 AD3d 620, 936 NYS2d 259 [2d Dept 2012]; *Volpe v Limoncelli*, 74 AD3d 795, 902 NYS2d 152 [2d Dept 2010]; *Ramirez v Konstanzer*, 61 AD3d 837, 878 NYS2d 381 [2d Dept 2009]). This burden is placed on the driver of the rear vehicle because he 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 (*Sayyed v Murray*, 109 AD3d 464, 970 NYS2d 279 [2d Dept 2013]; *Fajardo v City of New York*, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]). “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” (*Volpe v Limoncelli*, *supra*, 74 AD3d at 795-796, 902 NYS2d 152, quoting *Shamah v Richmond County Ambulance Serv*, 279 AD2d 564, 565, 719 NYS2d 287 [2d Dept 2001]; see also *Gutierrez v Trillium, USA, LLC*, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]; *Fajardo v City of New York*, 95 AD3d 820, 943 NYS2d 587 [2d Dept 2012]). Thus, the assertion that the lead car suddenly stopped, by itself, is insufficient to rebut the presumption of negligence by the rear vehicle (see *Waide v Ari Fleet, LT*, 143 AD3d 975, 39 NYS3d 512 [2d Dept 2016]; *Brothers v Bartling*, 130 AD3d 554, 13 NYS3d 202 [2d Dept 2015])(assertion of a “sudden stop” is insufficient to provide a non-negligent explanation); *LeGrand v Silberstein*, 123 AD3d 773, 999 NYS2d 96 [2d Dept 2014]; *Gutierrez v Trillium USA, LLC*, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]; *Volpe v Limoncelli*, *supra* at 795-796, 902 NYS2d 152 [2d Dept 2010], quoting *Shamah v Richmond County Ambulance Serv*, 279 AD2d 564, 565, 719 NYS2d 287 [2d Dept 2001]; *Animah v Agyei*, 63 Misc.3d 783, 97 NYS3d 440 [Bronx Cty. 2019]).

If the operator of the rear vehicle cannot come forward with evidence to rebut the inference of negligence, then the plaintiff is entitled to summary judgment (*Gibson v Levine*, 95 AD3d 1071, 944 NYS2d 6 10 [2d Dept 2012]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]). A plaintiff may obtain partial summary judgment on the issue of liability without demonstrating the absence of his or her own comparative fault (*Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227

[2d Dept 2018]; **Edgerton v City of New York**, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). Notwithstanding, “when a defendant’s liability is established as a matter of law before trial, the jury still must determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff’s injuries. If so, the comparative fault of each party is then apportioned by the jury” (**Rodriguez**, 31 NY3d at 324).

The emergency doctrine “recognizes that, faced with an emergency, even a reasonable person might choose a course of action which, in hindsight, proves to have been mistaken or ill-advised” (**Bello v Transit Authority of New York City**, 12 AD3d 58, 60, 783 NYS2d 648 [2d Dept 2004]). “The emergency doctrine holds that those faced with sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency” (*Id.* at 60; **Rivera v New York City Tr. Auth.**, 77 NY2d 322, 567 NYS2d 629 [1991]; see also **Maisonet v Roman**, 139 AD3d 121, 123, 30 NYS3d 24 [1st Dept 2016]). As a general rule, the question of the existence of an emergency and the reasonableness of the response to it are issues for the trier of fact (**Rivera**, *supra*; **Makagon v Toyota Motor Credit Corp.**, 23 AD3d 443, 444, 808 NYS2d 120 [2d Dept 2005]).

Here, plaintiff provides conflicting testimony regarding the precise location of her vehicle at the time of the accident. In her affidavit, she avers that she was fully in her lane when the accident occurred, while her 50 (h) and deposition testimonies indicate she was yielding and merging onto the service road. In any event, whether her vehicle was on the Sunrise Highway exit ramp, merging onto the service road, or fully in her lane of travel on the service road, is of no moment. Regardless of the location of her vehicle upon impact, Weis has established her *prima facie* entitlement to summary judgment on the issue of liability by demonstrating that her vehicle was struck in the rear by defendants’ vehicle (see **Rodriguez v City of New York**, 31 NY3d 312, 76 NYS3d 898 [2018]; **Binkowitz v Kolb**, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]; **Volpe v Limoncelli**, *supra*; **Johnson v Spoto**, 47 AD3d 888, 850 NYS2d 204 [2d Dept 2008]).

Having made the requisite *prima facie* showing of entitlement to summary judgment, the burden shifts to the defendants to raise a triable issue of fact or offer a non-negligent explanation for the accident (see **Bene v Dalessio**, 135 AD3d 679, 22 NYS3d 237 [2d Dept 2016]; **Cortes v Whelan**, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]; **Balducci v Velasquez**, 92 AD3d 626, 938 NYS2d 178 [2d Dept 2012]). Defendants argue that a compromise settlement letter issued by Geico (the “Geico

letter”) regarding this accident creates a question of fact. The Geico letter indicates its payment of 85% of property damage to a building hit by defendants’ vehicle and as the basis for such payment, the Geico letter states “our insured driver changed lanes into the path of a 2014 Ford, failing to yield the right of way to the driver of that vehicle.” Weis argues this letter is not in admissible form nor from one with personal knowledge of the facts of the accident. The Geico letter, much like a police report prepared after the accident, is inadmissible hearsay, unless an exception applies. Here, no authority has been provided by defendants as to the admissibility of the Geico letter and, as such, it is not properly before the Court.

Defendants next assert that there is a question of fact as to whether the emergency doctrine applies. In support of their emergency doctrine argument, defendants refer to the narrative report of police officer Rivera who was called to the scene of the accident. During his investigation, officer Rivera interviewed Weis who explained that “she was exiting the highway onto the service road at exit 44 with the Town vehicle behind her. Two vehicles, a red car and a truck, tried to enter the off-ramp in front of her, causing her to slow down.” While the narrative report of officer Rivera generally would be considered inadmissible hearsay (*Lacagnino v Gonzalez*, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]; *Hegy v Coller*, 262 AD2d 606, 692 NYS2d 463 [2d Dept 1999]), the statements of Weis are admissible under the admission against interest exception to the hearsay rule (see *Shehab v Powers*, 150 AD3d 918, 54 NYS3d 104 [2d Dept 2017]; *Jackson v Trust*, 103 AD3d 851, 852, 962 NYS2d 267 [2d Dept 2013]; *Scott v Kass*, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]). Defendant Amitrano also was interviewed by officer Rivera who took Amitrano’s statement that he “was exiting the highway when Ms. Weis’ vehicle came to a near stop and he swerved to avoid hitting her.” Defendants further rely upon the police accident report narrative which includes a statement that Weis “stopped short.” However, there is no indication in the police report that this statement is attributable to Weis.

Typically, a “sudden stop” does not establish a non-negligent explanation for an accident nor a non-negligent reason for the failure of the defendant to maintain a safe distance between his vehicle and plaintiff’s vehicle (see *Shehab v Powers*, 150 AD3d 918, 54 NYS3d 104 [2d Dept 2017]; *Brothers v Bartling*, 130 AD3d 554, 13 NYS3d 202 [2d Dept 2015])(assertion of a “sudden stop” is insufficient to provide a non-negligent explanation); *Gutierrez v Trillium USA, LLC*, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]). Defendants insist that they are not claiming a “sudden stop” but rather that the plaintiff’s own statements indicate that two unknown vehicles cut her off, setting off a chain of events, which caused the accident. (see *Green v Metropolitan Transp. Auth. Bus Co.*, 26 NY3d 1061, 44 NE3d 220, 23 NYS3d 145 [2015]; *Tutrani v County of Suffolk*, 10 NY3d 906, 861 NYS2d 610 [2008]).

Based upon the admissible evidence presented, the Court finds that defendants have failed to raise a triable issue of material fact warranting denial of Weis' motion. While Weis may have been confronted with an emergency situation, her response did not create an emergency situation for defendant Amitrano. Defendant Amitrano's failure to maintain a safe distance between his vehicle and Weis' vehicle was the proximate cause of the accident (see *Tumminello v City of New York*, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]; *Grim v Bailey*, 105 AD3d 703, 963 NYS2d 277 [2d Dept 2013]; *Plummer v Nourddine*, 82 AD3d 1069, 919 NYS2d 187 [2d Dept 2011]; *Faul v Reilly*, 29 AD3d 626, 816 NYS2d 502 [2d Dept 2006]). Indeed "a trailing driver's conduct in failing to leave a reasonable distance creates the possibility that a sudden stop will be necessary" (*Shehab v Powers*, 150 AD3d 918, 54 NYS3d 104 [2d Dept 2017]). Thus, Amitrano was not "reacting to an emergency, but rather, to a common traffic occurrence" (*Id.* At 920, 54 NYS3d at 107).

Defendants argument that summary judgment is premature is unfounded, as defendants fail to adequately demonstrate how discovery might lead to relevant evidence or that facts essential to justify opposition to the motion are exclusively within the knowledge or control of Weis (see CPLR 3212 (f); *Williams v Spencer-Hall*, 113 AD3d 759, 979 NYS2d 157 [2d Dept 2014]; *Cajas-Romero v Ward*, 106 AD3d 850, 965 NYS2d 559 [2d Dept 2013]; *Romero v Greve*, 100 AD3d 617, 953 NYS2d 296 [2d Dept 2012]). Indeed, "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion" (*Cajas-Romero v Ward*, *supra*, 106 AD3d at 852). Here, there is no dispute that the accident occurred when defendants' vehicle rear-ended Weis' vehicle. No further discovery is necessary on the issue of liability under the circumstances presented (see *Deleg v Vinci*, 82 AD3d 1146, 919 NYS2d 396 [2d Dept 2011]; see also *Williams v Spencer-Hall*, 113 AD3d 759, 979 NYS2d 157 [2d Dept 2014]; *Cajas-Romero v Ward*, 106 AD3d 850, 965 NYS2d 559 [2d Dept 2013]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD3d 736, 846 NYS2d 309 [2d Dept 2007]; *Abramov v Miral Corp.*, 24 AD3d 397, 398 [2d Dept 2005]). The Court has considered the remaining contentions of defendants and finds that they lack merit.

Accordingly, the motion by plaintiff Denise Weis for summary judgment on the issue of liability is **GRANTED**.

The foregoing constitutes the decision and **ORDER** of the Court.

Dated: November 18, 2020


HON. DENISE F. MOLIA, A.J.S.C.