SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. ROBERT A. ONOFRY, J.S.C.

SUPREME COURT : ORANGE COUNTY

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MATTHEW GAMORY,

Plaintiff,

- against –

KAROL M. ZAPOLSKI,

Defendant.

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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.

Index No. EF005411-2019

DECISION and ORDER

Motion Date: June 17, 2020
adjourned to July 15, 2020

The following papers numbered 1 to 6 were read and considered on a motion by the Defendant, pursuant to CPLR § 3212, for summary judgment dismissing the complaint.

Notice of Motion- Mahoney Affirmation- Exhibits A-E 1-3
Affirmation in Opposition- Del Duco- Exhibit 4-5
Affirmation in Reply- Mahoney 6

Upon the foregoing papers, it is hereby,

ORDERED, that the motion is granted.

Introduction

The Plaintiff Matthew Gamory commenced this action to recover damages allegedly arising from a motor vehicle accident.

The Defendant now moves for summary judgment seeking dismissal of the complaint and all causes of action asserted therein.

The motion is granted.

Factual/Procedural Background

In support of his motion, the Plaintiff submits an affirmation from counsel, Dennis Mahoney, III.

Mahoney asserts, in relevant part, that, inexplicably, the Plaintiff commenced this action against the Defendant even though it was he who rear-ended the Defendant.

Consequently, he notes, on April 24, 2020, his office e-mailed the Plaintiff's counsel and formally requested that the action be discontinued. However, counsel declined. Thus, the current motion ensued.

As background, Mahoney notes that the Plaintiff, at his examination before trial, testified as follows.

The accident at issue occurred on Memorial Day, May 28, 2018, at approximately 3:00 p.m. He was traveling alone in an easterly direction from Middletown, New York towards Warwick, New York on Route 17. The weather was "[c]lear, sunny."

He first saw the other Defendant's vehicle "[a] second, split second, yeah. I'm trying to be accurate " before the impact occurred.

When he first saw the Defendant's vehicle, it was in front of his vehicle and stopped. Both vehicles were in the left-hand lane (*i.e.*, the passing lane) of Route 17. Prior to the impact, he had been traveling behind another vehicle that was directly in front of him. The other vehicle, which was also in the left-hand/passing lane of Route 17, was between his vehicle and the Defendant's vehicle. The other vehicle then suddenly "[s]werved to the right lane." At this point, he was "maybe a car length" directly behind the other vehicle and traveling at about 45 miles per hour. The presence of the other vehicle directly ahead of him prevented him from

seeing the Defendant's vehicle until the other vehicle swerved into the right-hand lane. At that moment, his front bumper was about a "half to a quarter [car length], give or take " from the Defendant's rear bumper.

When he first saw the Defendant's vehicle, it was stopped. Concerning the same, the following colloquy occurred.

> Q: So tell me what you did with respect to the operation of your car when that vehicle that was in front of you moved from the left lane into the right lane? What did you do at that point?
>
> A: At that point when the vehicle swerved to the right lane, I saw [the Defendant's vehicle], and I did not think it would be stopped, so I did not apply pressure to the brakes right away. Then obviously when the vehicle became closer, a half car distance, I slammed on the brakes and I veered to the left side, which was into the guardrail, and pin-balled between the guardrail into the [Defendant's] vehicle.

He struck the guardrail before he rear ended the Defendant's vehicle; that is, the front left portion of his vehicle hit the guardrail at an angle, and his vehicle bounced to the right into the Defendant's vehicle.

His vehicle eventually came to rest against the guardrail, and the Defendant's vehicle eventually came to rest still in the left-hand lane.

When the police arrived, he told the police officer about "this [other] car swerving out of the way, not [Defendant's] vehicle, but the vehicle behind them, swerving out of the way. And the [Defendant's] vehicle was at a standstill in the left lane, and I tried to avoid contact."

He did not speak to the Defendant at the scene.

Finally, he testified, there was no traffic in front of the Defendant's vehicle.

At an examination before trial, Mahoney notes, the Defendant Karol Zapolski testified as follows.

At the time of the accident, he and his family were returning home from a holiday. He had been driving on Route 17 for around forty-five (45) minutes before the accident occurred. Traffic was generally "heavy" with occasional slow downs during this period of time.

In the area where the accident occurred there are two eastbound and two westbound lanes of travel separated by a guardrail. The speed limit was fifty-five(55) miles per hour, and the roadway in his direction of travel was "flat and mostly straight." He had been traveling in the left-hand (*i.e.*, passing lane) lane for "[p]robably a few minutes" before the accident occurred, and the traffic was "medium to heavy."

The vehicle directly ahead of him (also in the left-hand lane) was about three to four car lengths in front of his. The vehicle (a sedan) began to slow down and he slowed down accordingly, reducing his speed from fifty/fifty-five (50/55) to forty/forty-five (45) miles per hour. The other vehicle had reduced its speed by applying its brakes, and he in turn applied his brakes, such that his speed was reduced to twenty (20) miles per hour. The distance between his front bumper and the rear of the other vehicle "probably two car lengths." Eventually, the other vehicle "nearly stopped" -it was "[j]ust rolling probably a few miles, maybe 1, 2, or 3 miles [per hour]." He continued braking and, as he did so he "looked to [his] left mirror and [ ] saw a car going, or plowing through the side to the highway [guardrail]." The first impact between the Plaintiff's vehicle and his involved the front right of the Plaintiff's vehicle colliding with his rear bumper. The impact was "[h]eavy."

At the accident scene, he asked the Plaintiff if he was okay. The Plaintiff stated he was and that he was "sorry."

When the police arrived, the Defendant told the police officer that he was "[s]lowing

down and then nearly stopped" when the accident occurred.

In opposition to the motion, the Plaintiff submits his own affidavit.

As to the happening of the accident, the Plaintiff avers as follows.

> I had been driving approximately one car-length behind another vehicle belonging to a non-party. My speed at that time was 45 miles per hour. The traffic was light with few vehicles on the road during the course of my travels. The non-party vehicle, which I was traveling behind, suddenly took drastic evasive action, without signaling, in order to exit our lane of travel. When the non-party vehicle suddenly left the lane, that revealed another vehicle which I later learned was being operated by the Defendant. This vehicle was stopped. However, the Defendant's taillights were not illuminated. Further, the Defendant's hazard lights were not activated.
>
> I did not expect a vehicle to stop on a highway, in light traffic, without explanation. Because the Defendant's vehicle had suddenly been revealed and did not have brake lights illuminated, I did not expect or immediately notice that the Defendant's vehicle had stopped until the vehicle had visibly grown closer in its approach. At this time, I vigorously applied my own brakes and altered my course to the left. I then impacted the guard rail on the left side of the road which diverted my vehicle into the Defendant's vehicle with an impact strong enough to deploy my airbags. Immediately after the accident, I looked to the road beyond the Defendant's vehicle and noted that there was no traffic in the lane of travel in front of the Defendant's vehicle. However, the non-party vehicle which had to aggressively change to the right lane of travel to avoid impacting the Defendant's vehicle was still visible as it continued ahead of the accident scene in the right lane.
>
> I believe that it was the Defendant's sudden, unexplained, stop without appropriate warning lights which forced the non-party vehicle to react by taking drastic evasive measures and leaving the lane of travel. Regardless, I believe that the lack of effective brake or hazard lights prevented me from immediately recognizing that the Defendant's vehicle had stopped and critically delayed my response to the obstacle. Had the brake and hazard lights been functional, I may have been able to avoid the impact.

In reply, counsel for the Defendant, Dennis Mahoney, argues that the Plaintiff's entire affidavit ought to be rejected outright because his contention that the Defendant came to a sudden stop directly contradicts his prior deposition testimony, and constitutes an improper attempt to feign an issue of fact to avoid summary judgment.

The remainder of the Plaintiff's opposition, he argues, mis-characterizes deposition testimony, absurdly asserts that it was the Defendant's vehicle that rapidly approached the Plaintiff's vehicle, and relies upon irrelevant evidentiary material.

Discussion/Legal Analysis

A party seeking summary judgment bears the initial burden of establishing a *prima facie* entitlement to judgment as a matter of law by tendering competent evidence in admissible form sufficient to eliminate any triable, material issues of fact from the case. If the moving party fails to meet this burden, the papers submitted in opposition need not be considered. If the moving party makes such a *prima facie* showing, the burden then shifts to the opposing party to demonstrate the existence of an issue of fact requiring a trial. *Phillip v. D & D Carting Co., Inc.*, 136 A.D.3d 18 [2nd Dept. 2015]; *Dempster v. Liotti*, 86 A.D.3d 169 [2nd Dept. 2011].

In general, a driver is bound to see what is there to be seen through the proper use of his or her senses and is negligent for failure to do so. *Lu Yuan Yang v. Howsal Cab Corp.*, 106 A.D.3d 1055 [2nd Dept. 2013]. A driver also has a duty to exercise reasonable care under the circumstances to avoid an accident. *Lu Yuan Yang v. Howsal Cab Corp.*, 106 A.D.3d 1055 [2nd Dept. 2013].

Pursuant to Vehicle and Traffic Law § 1129(a): "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."

Relevant to the case at bar, 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, requiring that operator to come forward with evidence of a non-negligent explanation for the

collision in order to rebut the inference of negligence. *Nikolic v. City-Wide Sewer & Drain Service Corp.*, 150 A.D.3d 754 [2nd Dept. 2017]; *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. A non-negligent explanation may include a mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause. *Tumminello v. City of New York*, 148 A.D.3d 1084 [2nd Dept. 2017]. However, while a non-negligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, because 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 A.D.3d 1084 [2nd Dept. 2017].

To prevail on a motion for summary judgment on the issue of liability in a negligence case, the movant need no longer demonstrate that he or she was free from comparative fault. *Davis v. Commack Hotel, LLC*, 174 A.D.3d 501 [2nd Dept. 2019].

Here, in support of his motion, the Defendant demonstrated a *prima facie* entitlement to judgment as a matter of law dismissing the complaint, to wit: That he was stopping or slowing due to slowing traffic when he was struck from the rear.

In opposition, the Plaintiff failed to raise a triable issue of fact.

Initially, it is noted, during his examination before trial, and in his affidavit in opposition to the motion, the Plaintiff makes the somewhat stunning admission that, just prior to the accident, he was driving around 45 miles per hour but was merely one car length behind the vehicle in front of him. This was clearly negligent per se. *Adobea v. Junel*, 114 A.D.3d 818 [2nd Dept. 2014].

Further, he testified, although, when he first saw the Defendant's vehicle, he was only one-quarter to one-half of a car length away, he nonetheless had a period of delay before applying his brakes because he did not initially perceive that the vehicle was stopped. This testimony would appear to defy the laws of physics.

Regardless, this does not necessarily mean that the Defendant was free from comparative fault in the happening of the accident.

Concerning such, the Plaintiff makes, again, the somewhat stunning assertion that the Defendant was stopped in the passing lane of a very busy highway, on a holiday weekend, with his family, for no apparent reason.

However, this assertion, although not incredible as a matter of law, does not withstand scrutiny.

The Plaintiff admitted that he did not see or look for traffic in front of the Defendant until after the accident. Thus, he lacks a basis of knowledge for offering any testimony as the traffic conditions in front of the Defendant prior to the accident. Thus, his contention that the Defendant was stopped for no reason is mere speculation.

By contrast, the Defendant testified that he was braking in response to the road conditions ahead of him, to wit: a slowing vehicle.

Thus, the Defendant's motion must be, and is hereby, granted.

Accordingly, and for the reasons cited herein, it is hereby,

ORDERED, that the motion of the Defendant, for summary judgment, which seeks dismissal of the complaint and all causes of action asserted therein, is granted, and the complaint is dismissed.

The foregoing constitutes the decision and order of the court.

Dated: August 27 , 2020
Goshen, New York

ENTER

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VIA NYSCEF