Prevost v Rathod
2020 NY Slip Op 35279(U)
July 28, 2020
Supreme Court, Orange County
Docket Number: Index No. EF001083-2020
Judge: Catherine M. Bartlett
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SUPREME COURT-STATE OF NEW YORK
IAS PART-ORANGE COUNTY

Present: HON. CATHERINE M. BARTLETT, A.J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

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CICELY PREVOST,

Plaintiff,

-against-

MAHENDRASINGH KESHARSINGH RATHOD and FLY EAGLES FLY LOGISTICS, LLC,

Defendants.

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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. EF001083-2020
Motion Date: July 27, 2020

The following papers numbered 1 to 5 were read on Plaintiff's motion for partial summary judgment on the issue of liability:

Notice of Motion - Affirmation / Exhibits - Affidavit 1-3

Affirmation in Opposition 4

Reply Affirmation 5

Upon the foregoing papers it is ORDERED that the motion is disposed of as follows:

This is a personal injury action stemming from a rear-end motor vehicle accident that occurred on September 14, 2019 (at 4:38 p.m. per the certified Police Report) at the intersection of Route 9W and Carter Avenue in the Town of Newburgh, New York. Plaintiff Cicely Prevost moves for partial summary judgment on the issue of liability. She avers that "[a]s she was at a complete stop for a red traffic light, the Defendants suddenly and without any warning struck the rear of my vehicle." The certified Police Report reflects defendant Rathod's statement that "he began to stop too late to avoid striking [Plaintiff's vehicle]."

Vehicle and Traffic Law §1129(a) provides:

> 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.

Section 1129(a) requires that "[a] driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle." *Xin Fang Xia v. Saft,* 177 AD3d 823 (2d Dept. 2019); *Batashvili v. Veliz-Palacios,* 170 AD3d 791, 792 (2d Dept. 2019). *See, Cajas-Romero v. Ward,* 106 AD3d 850, 851 (2d Dept. 2013). Hence, the Second Department has consistently held that "[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, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Xin Fang Xia v. Saft, supra. See, Batashvili v. Veliz-Palacios, supra; Arslan v. Costello,* 164 AD3d 1408, 1409 (2d Dept. 2018); *Nikolic v. City-Wide Sewer & Drain Service Corp.,* 150 AD3d 754, 755 (2d Dept. 2017); *Tumminello v. City of New York,* 148 AD3d 1084, 1084-85 (2d Dept. 2017); *Le Grand v. Silberstein,* 123 AD3d 773 (2d Dept. 2014); *Amador v. City of New York,* 120 AD3d 526 (2d Dept. 2014); *Rodriguez v. Farrell,* 115 AD3d 929, 930 (2d Dept. 2014).

Plaintiff established via her own affidavit and defendant Rathod's admission to the responding police officer that she was stopped at a red light when Mr. Rathod negligently rear ended her vehicle.[1] She thereby established *prima facie* entitlement to summary judgment, and

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[1]Plaintiff also proffers what purports to be a videotape of the collision captured on the surveillance camera of a nearby gas station. However, as defense counsel asserts, Plaintiff has failed to authenticate the videotape. First, Plaintiff has not identified any of the vehicles shown on the videotape as those involved in the accident. Second, while the police report states that the accident occurred at 4:38 p.m., the gas station's custodian purports to have provided videotape

the burden shifted to Defendants to rebut the inference of negligence by providing a non-negligent explanation for the collision.

"While a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle" (*Arslan v. Costello, supra*; *see*, *Xin Fang Xia v. Saft, supra*; *Tumminello v. City of New York, supra*), and "[a]n unavoidable skid on wet pavement may suffice as a nonnegligent explanation for a rear-end automobile accident" (*Phillip v. D & D Carting Co., Inc.*, 136 AD3d 18, 24 [2d Dept. 2015]), Defendants have produced no competent evidence that Ms. Prevost stopped short, or that Mr. Rathod skidded on wet pavement, or that there is any other non-negligent excuse for his rear-ending Ms. Prevost's vehicle. In the absence of any explanation for their failure to produce a sworn affidavit from Mr. Rathod, the Defendants' showing is insufficient to demonstrate the existence of any triable issue of fact precluding summary judgment.

Defendants' contention that summary judgment is premature because discovery has yet to occur is unavailing. CPLR §3212(f) states:

> Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

"A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant [cit.om.]." *Singh v. Avis Rent A Car System, Inc.*, 119 AD3d 768, 770 (2d Dept. 2014). An "evidentiary basis"

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footage only from 6:30 p.m. to 8:00 p.m. on the date of the accident. Plaintiff having thus failed to establish the admissibility of the proffered videotape, the Court does not consider it in determining this motion.

justifying resort to CPLR §3212(f) is required. *See, Martinez v. Kreychmar,* 84 AD3d 1037 (2d Dept. 2011). The evidence before the Court shows that Plaintiff was stopped at a red light when defendant Rathod suddenly struck her from the rear because he began to stop too late. It was quite plainly Defendants' obligation to come forward, explain how the accident occurred, and demonstrate why under those circumstances they require additional discovery. Defendants have quite obviously failed to carry their burden. *See, Alvord & Swift v. Muller Constr. Co.,* 46 NY2d 276 (1978); *Prado v. Bowne & Sons,* 207 AD2d 875 (2d Dept. 1994); *Curilae v. AIG Multi-Line Syndicate, Inc.,* 204 AD2d 237 (1st Dept. 1994). Hence, Plaintiff's motion is not properly deniable as premature. *See, Le Grand v. Silberstein, supra*; *Rodriguez v. Farrell, supra*; *Garner v. Chevalier Transportation Corp.,* 58 AD3d 802 (2d Dept. 2009); CPLR §3212(f).

Defendants having failed to rebut the inference of negligence arising from defendant Rathod's rear ending Plaintiff's stopped vehicle, partial summary judgment on liability is warranted.

It is therefore

ORDERED, that Plaintiff's motion for partial summary judgment against Defendants on the issue of liability only is granted.

The foregoing constitutes the decision and order of the Court.

Dated: July 28, 2020 ENTER
Goshen, New York

HON. CATHERINE M. BARTLETT, A.J.S.C.
HON. C. M. BARTLETT
JUDGE NY STATE COURT OF CLAIMS
ACTING SUPREME COURT JUSTICE