

Reid v Coviello
2020 NY Slip Op 35341(U)
August 3, 2020
Supreme Court, Dutchess County
Docket Number: Index No. 2020-51275
Judge: Christi J. Acker
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To commence the 30-day 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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

-----X
DAVID M. REID,

Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2020-51275

DOMINICK W. COVIELLO,
Defendant.

-----X

The following papers, numbered 1 to 9, were read on Plaintiff David M. Reid's (hereinafter "Plaintiff") motion pursuant to CPLR 3212 for partial summary judgment on the issue of liability against Defendant Dominick W. Coviello (hereinafter "Defendant") and for an Order striking Defendant's Second and Eighth Affirmative defenses:

Notice of Motion-Affirmation of Michael G. Del Vecchio, Esq.-Exhibits A-D-	
Affidavit of Plaintiff	1-7
Affirmation in Opposition of Julie E. Iacobucci, Esq.....	8
Reply Affirmation of Michael G. Del Vecchio, Esq.	9

Plaintiff commenced this personal injury action on or about May 29, 2020 against Defendant regarding a car accident that occurred on September 25, 2019 at approximately 8:55 p.m. Plaintiff alleges that on that date, he was injured when the vehicle driven by Defendant rear-ended his stopped vehicle on Interstate Route 684.

Plaintiff now moves for summary judgment on the ground that this is a rear-end accident and Defendant's negligence is the sole proximate cause of the accident. In support of the motion, Plaintiff submits his own affidavit, the Pleadings, the police accident report and Defendant's

Report of Motor Vehicle Accident. In opposition, Defendant submits only an attorney affirmation.

It is uncontested that the vehicle that Plaintiff was driving was struck in the rear by Defendant's vehicle. According to Plaintiff's affidavit, on the date of the accident, he was driving an attenuator truck that was owned by his employer and that he was operating the truck in the course and scope of his employment as part of a road construction project on Interstate 684. At the time of the impact, Plaintiff asserts that the roadway was being prepared for lane closures and his truck was stopped in the center lane behind two other construction trucks. It was dark at the time of the accident, but Plaintiff avers that his truck's rear amber lights were activated, as well as strobe lights and large orange directional arrows. At the time of the accident, Plaintiff's vehicle had been stopped for approximately five minutes. Both the police accident report and Defendant's Report of Motor Vehicle Accident confirm that Defendant rear ended Plaintiff's truck.

"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 nonnegligent explanation for the collision in order to rebut the inference of negligence." *Orcel v. Haber*, 140 AD3d 937 [2d Dept 2016]. Plaintiff's submissions establish a *prima facie* case of negligence on the part of Defendant, which requires Defendant to come forward with evidence of a nonnegligent explanation for the collision in order to rebut the inference of negligence. *Orcel, supra*. "A nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause." *Id.*

In opposition, Defendant fails to offer any nonnegligent explanation. Defendant submits only an attorney affirmation, which argues that the motion is premature because insufficient discovery has been conducted. Specifically, Defendant's counsel asserts that Plaintiff's affidavit is self-serving and Defendant has not been able to fully explore questions related to culpability. However, contrary to Defendant's contention, Plaintiff's motion was not premature, as Defendant "failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." *Deleg v. Vinci*, 82 AD3d 1146 [2d Dept. 2011]; *see also* *Turner v. Butler*, 139 A.D.3d 715, 716, 32 N.Y.S.3d 174, 175 (2016) ("The defendants' professed need to conduct discovery did not warrant denial of the motion since they already had personal knowledge of the relevant facts."). Although Defendant has personal knowledge of the facts, he did not submit his own affidavit or any other evidence with respect to the happening of the accident that would support his attorney's argument.

Pursuant to CPLR 3212(f), "[s]hould 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 [emphasis supplied]." Thus, it was incumbent upon Defendant to establish by affidavit that discovery might lead to relevant evidence or to facts that are exclusively in the control of Plaintiff. *Deleg, supra*. Defendant has failed to do so¹ and Plaintiff is entitled to summary judgment on the issue of liability.

Plaintiff has also moved to strike Defendant's Second and Eighth affirmative defenses.

¹ Indeed, Defendant's Report of Motor Vehicle Accident submitted by Plaintiff establishes that Defendant rear-ended Plaintiff and raises no facts which would support a non-negligent explanation for the accident.

The Second Affirmative Defense asserts that the accident was caused solely or in part by Plaintiff's culpable conduct and the Eighth Affirmative Defense asserts an assumption of risk defense. Plaintiff has demonstrated his *prima facie* entitlement to this relief and Defendant has not specifically addressed this application in opposition. Accordingly, Plaintiff's motion to dismiss Defendants' Second and Eighth affirmative defenses is also granted.

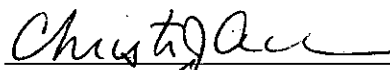
Now, therefore, it is hereby

ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability and to dismiss Defendant's Second and Eighth affirmative defenses is granted;

ORDERED that, this matter is scheduled for a preliminary conference on September 2, 2020 at 9:30 am.

The foregoing constitutes the Decision and Order of the Court.

Dated: Poughkeepsie, New York
August 3, 2020


CHRISTI J. ACKER, J.S.C.

To: All parties via ECF