

Capocciamo v Modi

2020 NY Slip Op 35494(U)

December 4, 2020

Supreme Court, Queens County

Docket Number: Index No. 717302/2019

Judge: Lourdes M. Ventura

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SHORT FORM ORDER

FILED

SUPREME COURT OF THE STATE OF NEW YORK - QUEENS COUNTY

**12/4/2020
2:53 PM**

Present: HONORABLE LOURDES M. VENTURA, J.S.C.

IAS Part 37

**COUNTY CLERK
QUEENS COUNTY**

-----X
MARY CAPOCCIAMO,

Plaintiff,

Index

Number: 717302/2019

-against-

Motion

Date: August 24, 2020

KUMAR ANAND MODI,

Defendant.

Motion

Seq. No.: 1

-----X

The following electronically filed (EF) papers read on this motion by plaintiff, for an Order: granting summary judgment on the issue of liability pursuant to CPLR 3212, striking defendant’s first affirmative defense of culpable conduct/contributory negligence; striking defendants' second affirmative defense of failure to use seatbelts; striking defendant’s third affirmative defense of assumption of risk; and for such other and further relief as this Court may deem just and proper.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibits.....	EF 10-17
Opposition to Motion - Affirmation - Exhibits.....	EF 19-20
Affirmation in Reply - Exhibits.....	EF 21

Upon the foregoing papers, it is Ordered that plaintiff’s motion is determined as follows:

The plaintiff commenced this action to recover for damages arising from injuries allegedly sustained in a motor vehicle collision that occurred on or about November 5, 2018, when the vehicle operated by Plaintiff was struck in the rear by the vehicle owned and operated by Defendant Kumar while Plaintiff was stopped at a red light on 73rd Avenue, at or near the intersection of 196th Street, County of Queens, State of New York.

Here, plaintiff filed the instant motion seeking summary judgment on the issue of liability.

In order to succeed on a motion for summary judgment “it is necessary that the movant establish [its] cause of action or defense ‘sufficiently to warrant the court as a matter of law in

directing judgment' in [its] favor [CPLR 3212, subd. (b)], and [it] must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557 (1980).

" Only us the movant succeeds in meeting its burden will the burden shift to the opponent to demonstrate through legally sufficient evidence that there exists a triable issue of fact" [cite omitted] (see *Richardson v County of Nassau*, 156 AD3d 924 [2d Dept 2017]). Consequently, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (see *Voss v Netherlands Ins. Co.*, 22 NY3d 728 [2014]). A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of the opponent to the motion" (*Myers v Fir Cab Corp.*, 64 NY2d 806 [1985]). "[I]n a comparative negligence case, a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault" (see *Rodriguez v City of New York*, 31 NY3d 312 [2d Dept 2018]).

In support of plaintiff's moving papers, it submits an affidavit, which in relevant part states:

3. On November 5, 2018, at approximately 4:20 p.m., I was the driver of a 2015 KIA motor vehicle bearing New York State license plate number DXM6519.

4. Prior to the impact, my vehicle was stopped for a red traffic light on 73rd Avenue, at its intersection with 196th Street, County of Queens, State of New York.

5. I was heading eastbound, and I wearing my seatbelt.

6. 73rd Avenue, at its intersection with 196th Street in the direction I was heading has one lane for moving traffic, a bike lane and a parking lane.

7. I was stopped in the moving lane for a red traffic signal and was at a complete stop for over (3) seconds when suddenly and without waning I was rear ended by a 2016 Nissan motor vehicle bearing New York State license plate number HPL4644.

8. My brakes and brake lights were completely functional at the time of the impact.

9. The 2016 Nissan motor vehicle that struck my vehicle in the rear was owned and operated by defendant KUMAR ANAND MODI, whom is the defendant in this action.

10. As a result of the aforesaid impact, I sustained serious and severe personal injuries for which I continue to receive medical treatment.

11. I did nothing to cause or contribute to the happening of this accident. I understand that my attorneys are moving for summary judgment on the issue of liability and respectfully submit this affidavit in support thereof."

The Court finds that plaintiff has established a prima facie entitled to judgment as a matter of law on the issue of liability through the submission of an affidavit which alleges that plaintiff

was stopped at a red light for three seconds before being struck in the rear by defendant's vehicle (see *Hewitt v. Gordon-Fleetwood*, 163 AD3d 536 [2018] [where movant submitted an affidavit wherein she asserted that she brought the vehicle she was operating to a stop at a certain intersection, in compliance with a red traffic light, and that the vehicle was stopped for approximately five seconds before it was struck in the rear by the vehicle owned and operated by the defendant; the court held that this evidence established the plaintiff's prima facie entitlement to judgment as a matter of law]).

The burden now shifts to defendant to raise a triable issue of fact (see *Richardson v County of Nassau*, 156 AD3d 924 [2d Dept 2017]). "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 [citations omitted]" (see *Nsiah-Ababio v Hunter*, 78 AD3d 672 [2d Dept 2010] "Thus, 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 to rebut the inference of negligence [citations omitted]" (see *Montalvo v Cedeno*, 170 AD3d 1166 [2d Dept 2019]).

Here, defendant opposes plaintiff's motion and avers *inter alia* that plaintiff's motion is premature as no depositions have been held to date and significant discovery remains outstanding. Defendant further avers that plaintiff's motion for summary judgment should be denied as issues of facts exist. In support of defendant's opposition, it submits an affidavit which in relevant part states:

12. At the time of the accident it was rainy and foggy. The road was wet.
13. There were two vehicles involved in the accident, my vehicle and plaintiff's vehicle.
14. Plaintiff Mary Capocciamo was the owner and operator of a 2015 Kia four door SUV bearing New York license plate number DXM6519.
15. I travelled on 73rd Avenue for under 5 minutes prior to the accident occurring.
16. My highest rate of speed while travelling on the roadway where the accident occurred was slightly higher than 25 mph.
17. Plaintiff's vehicle was traveling directly ahead of my vehicle on 73rd Avenue.
18. I was not distracted and I was looking at the road ahead of me at the time of impact.
19. While I was traveling on 73rd Ave I observed that plaintiff's vehicle had stopped.
20. In response to plaintiff's stopped vehicle, I immediately applied by brakes in order to avoid an impact with plaintiff's vehicle.
21. Unfortunately, despite my best efforts, I was not able to stop my vehicle on time to avoid an impact.
22. I believe that the wet roads may have prevented me from timely stopping and avoiding the impact."

The Court finds that defendant's affidavit failed to rebut the inference of negligence (see *Volpe v Limoncelli*, 74 AD3d 795 [2d Dept 2010] [the inference of negligence was not rebutted by the mere assertion that the defendants' vehicle was unable to stop on the allegedly wet roadway]).

credit to defendant's version of how the collision occurred, it was insufficient to raise a triable issue of fact (see *Volpe v Limoncelli*, 74 AD3d 795 [2d Dept 2010]).

The Court further finds that defendant's opposing papers fail "to establish 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 Plaintiff" (*Pierre v. Demoura*, 148 AD3d 736 [NY App Div 2017]). "The 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 [citations omitted]" (see *Pierre v Demoura*, 148 AD3d 736 [2d Dept 2017]). Thus, defendant's failure to demonstrate that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the Plaintiff does not warrant denial of the instant motion since defendant has personal knowledge of the relevant facts (see *Pierre v. Demoura*, 148 AD 3d 736 [NY App Div 2017] citing *Turner v Butler*, 139 AD 3d 715 [2016]).

Accordingly, plaintiff's motion for an Order pursuant to CPLR 3212 on the issue of liability is granted. In addition, plaintiff's request to strike defendant's first affirmative defense of culpable conduct/contributory negligence; strike defendants' second affirmative defense of failure to use seatbelts; strike defendant's third affirmative defense of assumption of risk is granted. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: December 4, 2020



LOURDES M. VENTURA, J.S.C.

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