

Neder v Andrews

2020 NY Slip Op 35555(U)

November 24, 2020

Supreme Court, Bronx County

Docket Number: Index No. 28920/2019

Judge: Ben R. Barbato

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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Lourdes Neder

Index No. 28920/2019

-against-

Hon. BEN R. BARBATO

**Sheldon Andrews and Tri State Plumbing
Services, Inc.**

Justice Supreme Court

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The following papers NYSCEF Doc. # 9 to 18 were read on this motion (Seq. No. 001)
For SUMMARY JUDGMENT/LIABILITY noticed on October 8, 2020.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF Doc. # 9-18
Answering Affidavit and Exhibits	NYSCEF Doc. # 21-22
Replying Affidavit and Exhibits	NYSCEF Doc. # 23-28

Upon the foregoing papers, it is ordered that this motion is decided as follows:

The motor vehicle accident giving rise to this matter occurred on June 20, 2019. On that date the motor vehicle operated by plaintiff Lourdes Neder (“plaintiff”) was struck in the rear by the vehicle operated by defendant Sheldon Andrews and owned by defendant Tri State Plumbing Services Inc. (“defendants”), near the intersection of Throop Avenue and McDonough Street in a Brooklyn. The case was begun by the filing of a summons and complaint on or about July 31, 2019; issue was joined by the service and filing of defendant’s answer on or about August 9, 2019.

Plaintiff now moves for: (1) summary judgment on the issue of liability, and (2) dismissal of the defendants’ affirmative defense of comparative negligence. Specifically, she claims that her vehicle was stopped at the red light controlling the intersection for approximately five seconds when she was struck in the rear by the defendants’ vehicle. She argues that she is entitled to summary judgment since by demonstrating that this was a rear end collision she has shown her prima facie entitlement to it, and the defendants can provide no non-negligent explanation for the accident. Plaintiff cites to statements attributable to the defendant driver on the certified copy of the police report that he believed she had “stopped short”; but that, in and of itself plaintiff contends, is insufficient to deny her summary judgment on the issue of liability. She likewise submits that defendant can cite to no negligent conduct on her part, so that she is entitled to dismissal of the affirmative defense of comparative negligence.

Defendants oppose the motion. They argue that merely because this is a case involving a rear end collision, such does not automatically qualify for the granting of summary judgment. Defendant driver has submitted an affidavit in opposition to the motion in which he argues that he observed the traffic light at the intersection go from green to yellow, but that plaintiff continued into the intersection and then stopped short, and he was unable to avoid her. At no time, does he state that the light facing them never changed to red. Since questions of fact exist

as to the actions of both drivers, defendants contend that summary judgment should be denied. They also claim that since depositions and other discovery have not yet been held, the motion should be denied as premature.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). "[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923, 925-926 [1986] [citations omitted].)

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].) As stated in *Scott v. Long Island Power Auth.* (294 A.D.2d 348, 348, 2002 N.Y. App. Div. LEXIS 4864, *1-2 [2d Dept. 2002]):

"It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (see *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366)."

Where a plaintiff moves for summary judgment in an action in which the plaintiff's comparative negligence is at issue, the plaintiff need not establish his or her freedom from comparative negligence. Once the plaintiff establishes the defendant's negligence, the plaintiff is entitled to judgment, as the plaintiff's negligence, if any, does not affect the defendant's liability, but relates only to the amount of damages, if any. "To be entitled to partial summary judgment 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." (*Rodriguez v. City of New York*, 31 N.Y.3d 312, 324-325, 101 N.E.3d 366, 374, 76 N.Y.S.3d 898, 906 [2018].)

By satisfactorily demonstrating that the impact was one where the front of the defendant's vehicle came into contact with the rear of plaintiff's vehicle, plaintiff has established her prima facie entitlement to summary judgment. "When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control

over his vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. A rear-end collision with a stopped "or stopping" vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." (*Gaeta v. Carter*, 6 A.D.3d 576 [2d Dept. 2004].)

Defendants proffer the explanation that plaintiff entered the intersection with a yellow signal and, while the signal was still yellow, came to a sudden stop, precipitating the collision. They also argue that the motion is premature since depositions of the parties have not yet been conducted.

"A nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle." (*Brothers v. Bartling*, 130 A.D.3d 554, 555 [2d Dept. 2015] [deposition testimony demonstrated that traffic was moving slowly, and that lead vehicle was merging onto the parkway when it was struck in the rear; rear driver's assertion of sudden stop insufficient]; *Salako v. Nassau Inter-County Express*, 131 A.D.3d 687 [2d Dept. 2015] [allegations that the collision occurred because the vehicle abruptly and unexpectedly stopped in the roadway with no warning and for no apparent reason, even though traffic was moving well and nothing was blocking its progress, was sufficient to raise an issue of fact].) Nevertheless, "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." (*Shamah v. Richmond County Ambulance Serv.*, 279 A.D.2d 564, 565 [2d Dept. 2001].) Moreover, "[a] conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation." (*Gutierrez v. Trillium, USA, LLC*, 111 A.D.3d 669, 670 – 671 [2d Dept. 2013].)

An inference of negligence which emanates from a rear end collision may be rebutted by a reasonable excuse such as "mechanical failure or a sudden stop of the vehicle ahead, or an unavoidable skidding on wet pavement." (See, *Baule v. Lanzzarini*, 222 A.D.2d 635, 636 [1st Dept. 1995]; but see, *Ng v. Reid*, 259 A.D.2d 601 [2d Dept. 1999] [driver who was able to safely stop her own vehicle when vehicle in front of her stopped abruptly was not liable for injuries sustained by motorist who collided with rear end of driver's automobile]). However, the presumption can only be rebutted by evidentiary submissions; conclusory allegations or the hope that discovery may uncover evidence will not suffice (*Rainford v. Han*, 18 A.D.3d 638 [2d Dept. 2005] [driver's conclusory allegation of sudden stopping was insufficient to rebut presumption]; *Pampris v. Egnasher*, 20 A.D.3d 746 [3d Dept. 2005] [allegation that decedent did not have opportunity to question witnesses insufficient]). Here, it cannot be said that the instant motion is premature since both drivers have supplied affidavits attesting to their version of events, both parties have referred to the certified police report, and defendants have not been able to state with specificity what they believe further discovery would reveal as to the manner in which the accident occurred.

Defendants argue that a question of fact is created based upon their driver’s version of the accident; that is, that plaintiff brought her vehicle to a sudden stop after entering the intersection. However, an allegation that a party stopped suddenly in the middle of an intersection at a yellow light is not a sufficient non-negligent explanation. (*Malone v. Morillo*, 6 A.D.3d 324 [1st Dept. 2004] [plaintiff rear-ended defendant; plaintiff’s complaint dismissed]); *Toulson v. Young Han Pae*, 6 A.D.3d 292 [1st Dept. 2004] [“In view of defendant’s admission that plaintiff’s vehicle was stopped before he rear-ended it, his claim that she failed to timely activate her turn signal does not raise an issue of fact as to the cause of the collision.”]).

Consequently, no question of fact has been raised as to the liability for the defendants in causing the accident. Therefore, that portion of plaintiff’s motion is granted. However, that portion of the motion which seeks dismissal of the affirmative defense of comparative negligence is denied, as the trier of fact should be able to assess whether or not plaintiff’s actions also contributed to the happening of the accident.

Accordingly, it is

ORDERED that summary judgment on the issue of liability is granted to the plaintiff as against the defendant. It is further

ORDERED that the portion of the motion which seeks dismissal of the affirmative defense of comparative negligence is denied.

This constitutes the decision and order of the court.

Dated: 11/24/2020


BEN R. BARBATO, J.S.C.

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- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
 - 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT