Dinome v Singh
2020 NY Slip Op 35619(U)
January 29, 2020
Supreme Court, Queens County
Docket Number: Index No. 706471/2018
Judge: Chereé A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

ROBERT E. DINOME,

Plaintiff,

-against-

BALKAR SINGH, 5 STAR LEASING INC., DEAN WHITAKER and KOSHANA HART,

Defendants.

Index No.: 706471/ 2018

Motion
Date: December 11, 2020

Motion Cal. No.: 12

Motion Sequence No.: 1

The following papers numbered 20-26, 29 and 31-39 submitted and considered on this motion by plaintiff ROBERT E. DINOME (hereinafter referred to as "Plaintiff") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment finding the named defendants (collectively referred to as "Defendants") were solely responsible for causing the accident.

	Papers Numbered
Notice of Motion- Affirmation in Support	EF 20-26
Affirmation in Opp- Exhibits.....	EF 31-33
Affirmation in Opp- Exhibits.....	EF 34-36
Reply Affirmation.....	EF 37-39

This is a negligence action arising out of a three car collision that occurred on March 1, 2017 at or near Astoria Boulevard. Plaintiff claims at 7:00 to 7:30 pm he exited the Grand Central Parkway and brought himself to a "gradual stop" at a red light. That he was stopped at the light for 7-10 seconds when he felt an impact to the rear of his vehicle then 2-3 seconds after he heard the two vehicles behind him collide and felt a second impact to his rear. Plaintiff alleges that prior to the impact, through his rearview mirror he saw the defendant Balkar Singh ("Singh") holding a cell phone, coming towards his vehicle, with windshield wipers and headlights off. Plaintiff claims he neither heard horns nor tires screeching prior to the collisions and that both his brake lights and headlights were working. Plaintiff alleges there was light rain fall at the time but it was still daylight.

Singh claims the incident occurred between 8:00 and 9:00 p.m, that at the time he was leasing a vehicle from defendant 5 Star leasing, Inc. Singh claims the roads were wet due to rain and he had his windshield wipers, headlights and tail lights on. Furthermore, Singh claims he was stopped behind Plaintiff prior to any collision, that his brake lights were also on and he was neither holding nor using his cell phone to text at that time. Singh states 5 seconds prior to the collision he saw defendant Dean Whitaker ("Dean") 4 car lengths behind him traveling at a high rate of speed. Singh claims he did not hear a horn but did hear Dean's brakes coming from behind. Singh states he came into contact with Plaintiff's car after and as a result of Dean coming into contact with his car.

Dean does not include an affidavit attesting to the facts, instead he includes the Certified Police Report. The Certified Police Report identifies Dean as vehicle three, it states in part " VEHICLE THREE STATES HE WAS ALSO TRAVELING E/B ON 77 STREET AND ASTORIA BLVD SOUTH WHEN THE DRIVER OF VEHICLE TWO WHO HE STATES WAS ALSO DISTRACTED WITH HIS PHONE ALL OF SUDDEN REAR-ENDED VEHICLE ONE. VEHICLE THREE STATES HE TRIED TO STOP IN TIME BUT BECAUSE OF BAD WEATHER COULD NOT AND VEHICLE THREE REAR ENDED VEHICLE TWO".

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "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" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[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" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing

papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

"A rear-end collision is sufficient to create a prima facie case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle". (*Rimona Levine et al. v. Clyde Taylor et al.*, 268 A.D.2d 566 [2nd Dept 2000]). In *Levine*, the plaintiff was struck in the rear by the defendant. Defendant attempted to rebut the presumption of negligence by arguing that the plaintiff stopped short. (*Id* at 567). The court held defendant's arguments were insufficient to rebut the presumption that he was negligent. (*Id*).

Here, Plaintiff has established prima facie entitlement to partial summary judgment on the issue of liability the burden now shifts to the Defendants to rebut the presumption of negligence.

In *Marlene Le Grand v. Zaev Silberstein*, 123 A.D.3d 773, 774 [2nd Dept 2014] where plaintiff and defendants were involved in a motor vehicle accident. Plaintiff was the passenger in a vehicle that was struck in the rear by defendant Silberstein as both were traveling eastbound on the Staten Island Expressway in heavy traffic (*id*). The owner and operator of the vehicle that plaintiff was traveling in moved for summary judgment. "A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*id*). In opposition defendant Silberstein stated that the moving defendant made a sudden stop. The court found that plaintiff and defendant Silberstein failed to raise a triable issue of fact (*id* at 775). The court cites *Maria Chepel v. Meyers*, 306 A.D.2d 235, 237 (2nd Dept 2003) "[o]ne of several non-negligent explanations for a rear-end collision [may be] a sudden stop of the lead vehicle" (*Id* at 774). Additionally the court cites *Dawn Shamah v. Richmond County Ambulance Serv.*, 279 A.D.2d 564, 565 [2nd Dept 2001] "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". (*Id* at 775).

To the extent that Dean alleges there are issues of fact surrounding whether Singh made a sudden stop, this court rejects such an argument. Dean was approaching two stopped cars. Whether or not the cars were stopped because Singh collided with Plaintiff's car is irrelevant as to Dean's liability.

In *Bournazos v. Malfitano*, 275 A.D.2d 437 [2d Dept 2000], three vehicles were involved in a motor vehicle accident. The first car came to a full stop due to a malfunction (*id*). The second and third cars dispute what occurred next. The third car asserts the second car came into contact with the first before it came into contact with the second (*id*). The second car asserts that it was stopped before the third car came into contact with it, which subsequently caused it's collision with the first car. The third car failed to dispute that the second car was stopped before it came into contact with the second car. The court held that the second car established their entitlement to summary judgment (*id* at 438). The court reasoned the evidence was undisputed that the second car was stopped before

it was struck in the rear (*Id*). Therefore, it was the third cars burden to rebut the inference of its own negligence created by the rear-end collision, or to demonstrate that negligence on the part of the second car contributed to the collision between the two (*id*). The court held, whether or not the second vehicle struck the first vehicle before the collision between the second and third car was irrelevant in determining the third car's liability. (*Id*).

Plaintiff's testimony and the Certified Police Report raise issues of fact as to whether Singh's car was stopped prior to his impact with Plaintiff's vehicle. If he was not stopped prior to his impact with Plaintiff, Singh will be liable to Plaintiff.

Dean asserts that he is entitled to the emergency doctrine which precludes a finding that he was liable.

In *Amaro v City of New York*, 40 N.Y.2d 30, 33 [1976], the plaintiff fireman was injured after falling through a pole hole due to darkness in the upstairs portion of the fire house. At the time the plaintiff was responding to the "first due alarm" which required him to immediately head for the nearest pole (*id*). In that case, the court found the essence of the emergency doctrine involves "...sudden and unexcepted circumstances where an actor is left little or no time for thought, or is reasonably so disturbed or excited that he must make a speedy decision and cannot weigh alternative courses of action, he 'cannot reasonably be held to the same conduct as one who has had full opportunity to reflect"... (*id* at 36).

In support of its motion Dean cites *Meshele Phillip v D&D Carting Co., Inc. et al.*, 136 Ad3D 18, 19 (2d Dept 2015); *William Joseph Deanelis et al. v Martens Farms. LLC.* 104 AD3d 1125, 1126 (4th Dept 2013); *Joseph Cammilleri et al. v S&W Realty Assoc.*, 243 AD2d 530, 531 (2d Dept 1997); and *Jan J. Puigh v Chester Cab Corp.*, 41 AD2d 615 (1st Dept 1973) all four cases have one material fact that is absent in this case all drivers assert their vehicle skid due to the presence of oil or fuel on the roadway. Here, Dean has made no such assertion. Nonetheless, "An unavoidable skid on wet pavement may suffice as a non-negligent explanation for a rear-end automobile accident" (*Phillip* at 19).This court lacks the knowledge necessary to discern whether Dean is or isn't entitled to the emergency doctrine. Therefore it is,

ORDERED, that Plaintiff's motion for partial summary judgment on the issue of liability is denied in its entirety,

The foregoing constitutes the decision and Order of this Court.

Dated: January 29, 2020

Hon. Chereé A. Buggs, JSC

FILED
FEB 11 2020
COUNTY CLERK
QUEENS COUNTY