Faulhaber v Nix
2021 NY Slip Op 33512(U)
February 16, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 604705/2019
Judge: William G. Ford
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SHORT FORM ORDER **INDEX NO.: 604705/2019**

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE OF THE SUPREME COURT

Motion Submit Date: 07/02/20
Mot Seq #: 001 - MG; RTC

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DENISE FAULHABER,

Plaintiff,

-against-

STEVEN J. NIX,

Defendant.

---x

PLAINTIFF'S COUNSEL:
SIBEN & SIBEN ESQS
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DEFENDANTS' COUNSEL:
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In this electronically filed personal injury action, concerning plaintiff's motion for partial summary judgment as to liability pursuant to CPLR 3212, in reaching its determination the Court considered the following: NYSCEF Docs. Nos. 11 – 23; and upon due deliberation and full consideration of the same; it is

ORDERED that plaintiff's motion for partial summary judgment as to liability is **granted** as follows, and it is further

ORDERED that plaintiff's counsel is hereby directed to serve a copy of this decision and order with notice of entry via electronic filing and electronic mail upon defendants' counsel; and it is further

ORDERED that, if applicable, within 30 days of the entry of this decision and order, that defendant's counsel is also hereby directed to give notice to the Suffolk County Clerk as required by CPLR 8019(c) with a copy of this decision and order and pay any fees should any be required; and it is further

ORDERED that counsel shall appear remotely at a discovery certification conference via the Microsoft Teams platform, invitation and link to be provided by the Court under separate cover to counsel of record via email at their addresses on file with the Court via NYSCEF, on the previously scheduled date of **Thursday, April 2, 2021 at 11:30 a.m.** Counsel may waive appearance provided that all pretrial disclosure in this matter is certified as complete and a proposed certification order is filed and uploaded by NYSCEF by then.

FACTUAL BACKGROUDN & PROCEDURAL POSTURE

Plaintiff commenced this personal injury negligence action against defendants arising out of a motor vehicle collision which occurred on August 28, 2018. According to her pleadings, plaintiff seeks damages for personal injury premised on defendants negligence as a proximate cause of the underlying motor vehicle collision and attendant alleged serious injuries. Presently, plaintiff moves for an award of partial summary judgment on liability against the defendant.

In support of her application, plaintiff submits copies of the pleadings and the deposition transcripts of the parties, as well as a certified copy of the policy accident investigation report.

SUMMARY OF THE ARGUMENTS

Arguing in support of entry of judgment as a matter of law against defendant for liability in this matter, plaintiff submits a copy of the transcript from her examination before trial dated October 22, 2019. There, plaintiff testified that on the morning of August 28, 2018 she operated her SUV travelling in the left lane of the westbound Long Island Expressway (LIE) between exits 50 & 51. Plaintiff characterized the flow of traffic as heavy or "stop and go" traffic. While stopped from anywhere between 15 and 30 seconds, plaintiff recalled a heavy impact to the rear of her vehicle.

At his examination before trial held also on October 22, 2019, defendant testified that on approximate date and time of the incident, he travelled in his vehicle in the left lane of the LIE in heavy or "stop and go" traffic. Defendant further stated that immediately prior to the collision, he had looked down at his car radio and upon looking up, observed a stopped vehicle ahead causing him to deploy his brakes. In so doing, defendant attempted evasive maneuvers to move his vehicle to the left into the HOV lane without success. Being unable to stop his vehicle in time, defendant came into contact with plaintiff's vehicle ahead causing a collision which defendant characterized as "medium to heavy."

Relying on this testimony, plaintiff seeks partial summary judgment on liability arguing that defendant is liable to her as the proximate cause for the incident having initiated a rear-end collision with her vehicle stopped in traffic.

STANDARD OF REVIEW

The motion court's role on review of a motion for summary judgment is issue finding, not issue determination (***Trio Asbestos Removal Corp. v Gabriel & Sciacca Certified Pub. Accountants, LLP***, 164 AD3d 864, 865, 82 NYS3d 127, 129 [2d Dept 2018]). The court should refrain from making credibility determinations (***Gniewek v Consol. Edison Co.***, 271 AD2d 643, 643, 707 NYS2d 871 [2d Dept 2000]).

It is well settled that summary judgment is a drastic remedy which should not be granted when there is doubt as to the existence of a triable issue of fact. Where, however, one seeking summary judgment tenders evidentiary proof in admissible form establishing its defense sufficiently to warrant the court as a matter of law in directing judgment in its favor, the burden falls upon the opposing party to show, also by evidentiary proof in admissible form, that there is a material issue of fact requiring a trial of the matter (*see* ***Zuckerman v. City of New York,*** 49

NY2d 557, 562, 427 NYS2d 595 [1980]). The evidence presented on a motion for summary judgment must be scrutinized in the light most favorable to the party opposing the motion (*see* ***Goldstein v. Monroe County,*** 77 AD2d 232, 236, 432 NYS2d 966 [1980]).

The proponent on a motion of summary judgment 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 (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985];]; ***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]).

If the moving party fails in meeting this burden, the motion must be denied. If, however, this burden is satisfied, then the burden shifts to the opposing party to establish the existence of material issues of fact requiring a trial (*see* ***Zuckerman,*** *supra*). The function of the court in determining a motion for summary judgment is issue finding, not issue determination (***Pantote Big Alpha Foods, Inc. v Schefman,*** 121 AD2d 295, 503 NYS2d 58 [1st Dept. 1986]).

The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Roth v Barreto***, 289AD2d 557, 735 NYS2d 197 [2d Dept. 2001]; ***Rebecchi v Whitmore***, 172 AD2d 600, 568 NYS2d 423 [2d Dept. 1991]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [2d Dept. 1987]). The law is well-established that summary judgment is a drastic remedy to be granted only when there is clearly no genuine issue of fact to be presented at trial (*see* ***Andre v Pomeroy,*** 35 NY2d 361, 362 NYS2d 131 [1974]; ***Benincasa v Garrubo,*** 141 AD2d 636, 529 NYS2d 797 [2d Dept. 1988])

DISCUSSION

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (***Hai Ying Xiao v Martinez***, 185 AD3d 1014, 126 NYS3d 369, 370 [2d Dept 2020]). A plaintiff is no longer required to show freedom from comparative fault to establish her or his prima facie entitlement to judgment as a matter of law on the issue of liability (***Xin Fang Xia v Saft***, 177 AD3d 823, 825, 113 NYS3d 249, 251 [2d Dept 2019]; *see also* ***Rodriguez v. City of New York,*** 31 NY3d 312 [2018]).

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence 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 (***Edgerton v City of New York***, 160 AD3d 809, 810, 74 NYS3d 617, 618 [2d Dept 2018]). Stops by a lead vehicle which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who. Moreover, an assertion that the lead vehicle came to a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the operator of the rear vehicle (***Perez v Persad***, 183 AD3d 771, 123 NYS3d 683, 684-85 [2d Dept 2020]).

"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" (***Comas-Bourne v City of New York***, 146 AD3d 855, 856, 45 NYS3d 182, 183 [2d Dept 2017]). Drivers have a duty to see

what should be seen and to exercise reasonable care under the circumstances to avoid an accident (***Williams v Spencer-Hall***, 113 AD3d 759, 760, 979 NYS2d 157, 159 [2d Dept 2014]). a rear-end collision with a stopped 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 nonnegligent explanation for the collision (***Sayyed v Murray***, 109 AD3d 464, 464, 970 NYS2d 279, 281 [2d Dept 2013]).

The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the following vehicle (*see* ***Zdenek v Safety Consultants, Inc.***, 63 AD3d 918, 918, 883 NYS2d 57, 58 [2d Dept 2009]; ***Kastritsios v. Marcello,*** 84 AD3d 1174, 923 NYS2d 863; ***Franco v. Breceus,*** 70 AD3d 767, 895 NYS2d 152; ***Mallen v. Su,*** 67 AD3d 974, 890 NYS2d 79; ***Rainford v. Han,*** 18 AD3d 638, 795 NYS2d 645; ***Russ v. Investech Secs.***, 6 AD3d 602, 775 NYS2d 867; ***Xian Hong Pan v Buglione***, 101 AD3d 706, 707, 955 NYS2d 375, 377 [2d Dept 2012]).

Although a sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision, "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows" (***Buchanan v Keller***, 169 AD3d 989, 991-92, 95 NYS3d 252, 254 [2d Dept 2019]). Thus, while a possible non-negligent explanation for a rear-end collision could be the sudden stop of the lead vehicle," however, it is equally true that "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" (***Tumminello v City of New York***, 148 AD3d 1084, 1085, 49 NYS3d 739, 741 [2d Dept 2017]; ***Shamah v. Richmond County Ambulance Serv.***, 279 AD2d 564, 565, 719 N.Y.S.2d 287; *see* ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 671, 974 NYS2d 563, 566 [2d Dept 2013]; ***Robayo v. Aghaabdul,*** 109 AD3d 892, 893, 971 NYS2d 317). Even assuming that a lead vehicle stopped short or suddenly, following vehicles should not escape liability for an assumed failure to maintain a proper or safe following distance under the presented circumstances, where the record presents a scenario with triable questions of fact ripe for jury determination, rather than summary determination on the law (*see e.g.* ***Romero v Al Haag & Son Plumbing & Heating, Inc.***, 113 AD3d 746, 747, 978 NYS2d 895, 896 [2d Dept 2014][even assuming that the defendant driver failed to maintain a reasonably safe distance and rate of speed while traveling behind the plaintiff's vehicle under Vehicle and Traffic Law § 1129[a], defendant's deposition testimony relied upon by plaintiff, itself raised a triable issue of fact on whether the plaintiff contributed to the accident by driving in an erratic manner]; *accord* ***Fernandez v Babylon Mun. Solid Waste***, 117 AD3d 678, 679, 985 NYS2d 289, 290 [2d Dept 2014][under circumstances where plaintiff came to an abrupt stop for no apparent reason resulting in a collision, a triable issue of fact exists]; ***Sokolowska v Song***, 123 AD3d 1004, 1004, 999 NYS2d 847, 848 [2d Dept 2014]).

However, "[i]f the operator cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law" (***Barile v. Lazzarini,*** 222 AD2d 635, 636, 635 NYS2d 694; ***D'Agostino v YRC, Inc.***, 120 AD3d 1291, 1292, 992 NYS2d 358, 359 [2d Dept 2014]).

Thus, the burden is placed on the driver of the offending vehicle, as he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, unavoidable skidding on wet pavement, or some other reasonable cause (*see*

Abbott v Picture Cars E., Inc., 78 A.D.3d 869, 911 N.Y.S.2d 449 [2d Dept 2010]; ***DeLouise v S.K.I. Wholesale Beer Corp.***, 75 A.D.3d 489, 904 N.Y.S.2d 761 [2d Dept 2010]; ***Moran v Singh***, 10 A.D.3d 707, 782 N.Y.S.2d 284 [2d Dept 2004]).

Having reviewed all of the parties' motion papers, the Court finds that plaintiff has dispensed with her requisite burden entitling her to judgment as a matter of law regarding liability with submission of her deposition testimony and the certified police accident investigation report. All taken together, the Court finds plaintiff's papers demonstrate a *prima facie* case of negligence against the defendant. Accordingly, the burden has shifted to defendant to come forward with a non-negligent explanation for the incident.

Plaintiff having met with her burden of establishing *prima facie* entitlement to judgment as a matter of law for liability, in opposition defendant relies solely on his counsel's affirmation in opposition Here, the law is settled. Defendant's reliance on its attorney's affirmation, without further submission of sworn testimony by any competent witness with direct personal or firsthand knowledge of the facts and circumstances underlying the subject accident, is insufficient to establish triable issues of fact warranting denial of summary judgment. The Second Department has repeatedly cautioned counsel on this point (***Huerta v Longo***, 63 AD3d 684, 685, 881 NYS2d 132, 133 [2d Dept 2009]; ***Collins v Laro Serv. Sys. of New York, Inc.***, 36 AD3d 746, 746–47, 829 NYS2d 168, 169 [2d Dept 2007][attorney's affirmation, together with inadmissible hearsay documents insufficient to warrant denial of the motion]; ***Cordova v Vinueza***, 20 AD3d 445, 446, 798 NYS2d 519, 521 [2d Dept 2005][attorney's affirmation offering speculation unsupported by any evidence insufficient to raise a triable issue of fact]).

Thus, defendant fails to carry its shifted burden of rebutting plaintiff's *prima facie* case of negligence against her by competent or admissible proof raising a triable question of fact meriting a liability trial and precluding judgment as a matter of law on liability for the plaintiff.

Because defendant has failed to come forward with competent and admissible proof demonstrating triable issues of fact or non-negligent explanations for the collision here, necessitating a trial on its liability, this Court **grants** plaintiff's partial summary judgment on liability against defendant under CPLR 3212.

CONCLUSION

Plaintiff's motion for partial summary judgment as to liability is **granted.**

All other contentions not expressly referenced herein are denied.

The foregoing constitutes the decision and order of this Court.

Dated: February 16, 2021
Riverhead, New York

WILLIAM G. FORD, J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**