

Sougstad v Capuano
2021 NY Slip Op 33648(U)
March 4, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 607490/2019
Judge: William G. Ford
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SHORT FORM ORDER

INDEX No. 607490/2019

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

PRESENT:

Hon. WILLIAM G. FORD
Justice of the Supreme Court

MOTION DATE 6/8/20 (001)
MOTION DATE 6/29/20 (002)
ADJ. DATE 7/2/20
Mot. Seq. # 001 MG
Mot. Seq. # 002 MG; CASEDISP

-----X
RICHARD C. SOUGSTAD,

Plaintiff,

- against -

JOHN J. CAPUANO, MICHELLE J.
CAPUANO, ANTHONY M. CAPUANO and
CHRISTOPHER J. CAPUANO,

Defendants.
-----X

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Upon the following e-filed papers read on these motions for summary judgment: Notice of Motion and supporting papers by defendants Anthony M. Capuano and Christopher J. Capuano, dated April 23, 2020; Notice of Motion and supporting papers by defendants John J. Capuano and Michelle J. Capuano, dated May 12, 2020; Answering Affidavits and supporting papers by plaintiff, dated June 17, 2020; Answering Affidavits and supporting papers by plaintiff, dated June 17, 2020; Replying Affidavits and supporting papers by defendants John J. Capuano and Michelle J. Capuano, dated June 25, 2020; Replying Affidavits and supporting papers by defendants Anthony M. Capuano and Christopher J. Capuano, dated July 1, 2020; it is

ORDERED that the motion (seq. 001) by defendants Anthony M. Capuano and Christopher J. Capuano, and the motion (seq. 002) by defendants John J. Capuano and Michelle J. Capuano, are consolidated for purposes of this determination; and it is

ORDERED that the motion by defendants Anthony M. Capuano and Christopher J. Capuano for summary judgment dismissing the complaint and the cross claims against them is granted; and it is further

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ORDERED that the motion by defendants John J. Capuano and Michelle J. Capuano for summary judgment dismissing the complaint and the cross claims against them is granted.

This action was commenced by plaintiff Richard Sougstad to recover damages for injuries he allegedly sustained on June 21, 2018, when his motor vehicle collided with the rear of a motor vehicle owned by defendant Michelle J. Capuano and operated by defendant John J. Capuano at Exit 63 of the Long Island Expressway in Farmingville, New York. The force of the impact allegedly propelled the Capuano vehicle into the rear of a vehicle owned by defendant Anthony M. Capuano and operated by defendant Christopher J. Capuano. Defendants assert counterclaims against one another for indemnification and contribution. In a related case filed in Queens County under index number 714750/2018 by John Capuano and Linda Capuano, as plaintiffs, against Richard C. Sougstad and Brittany M. McCarthy, as defendants, a decision rendered by the Honorable Richard G. Latin, dated January 24, 2020, granted John Capuano and Linda Capuano's motion for summary judgment dismissing Sougstad's counterclaims.

Defendants Anthony M. Capuano and Christopher J. Capuano now move for summary judgment in their favor, arguing, inter alia, that their vehicle was stopped at the time it was struck in the rear and that plaintiff was the sole proximate cause of the accident. In support of their motion, they submit, among other things, transcripts of the deposition testimony of plaintiff and John Capuano, an affidavit of nonparty Craig Haynes, the transcript of nonparty Michael Rottler's deposition testimony, and an uncertified copy of an MV-104A police accident report.

Defendants John J. Capuano and Michelle J. Capuano also move for summary judgment in their favor, arguing that their vehicle was stopped at the time it was struck in the rear and that they were not negligent in the happening of the accident in question. In support of their motion, they submit, among other things, transcripts of plaintiff's and John Capuano's deposition testimony, an affidavit of nonparty Craig Haynes, the transcript of nonparty Michael Rottler's deposition testimony, a copy of Justice Latin's January 24, 2020 decision, and an uncertified copy of an MV-104A police accident report.

Plaintiff testified that on the incident date he was operating his 2012 Dodge Ram at no more than 65 miles per hour in the eastbound HOV lane of the Long Island Expressway (LIE), while not wearing a seatbelt. He stated that he intended to exit the LIE at Exit 63, so he exited the HOV lane and entered the LIE's left lane. After spending "mere seconds" in the left lane, he moved his vehicle into the middle lane, began slowing down to between 60 and 65 miles per hour, and remained there for 10 to 15 seconds before moving into the right lane. Plaintiff indicated that as soon as he was "mostly" in the right lane he "made contact." Upon questioning, he explained that the right lane of the LIE branches off into two exit lanes at Exit 63, while also continuing to head eastbound as a "through" lane. Plaintiff testified that the accident in question occurred in the right "through" lane of the LIE, that he only observed the other vehicle for a "fraction of a second" before colliding with it, and that he "did not touch [his] brakes once." He further testified that the other vehicle "did not appear to be moving" at the time the front of his vehicle struck it in the rear, and that he does not know if any other vehicles were ahead of it. In addition, he emphasized that the accident occurred in the right "through" lane of the LIE, not the leftmost exit lane, which he intended to enter further ahead.

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John Capuano testified that at approximately 7:15 p.m. on the date in question he was operating his daughter-in-law Michelle Capuano's Hyundai Sonata on the LIE. He stated that he has two adult sons, Anthony Capuano and Christopher Capuano, and that Michelle Capuano is Christopher's wife. John Capuano indicated that his wife, Linda Capuano, was a passenger in the vehicle's back seat, while Christopher was in the front passenger seat. He testified that they stopped at the Ronkonkoma LIRR train station so that Christopher could pick up another vehicle there, a Nissan Maxima, and drive it to his home in Farmingville. John Capuano indicated that after Christopher exited the Hyundai, Linda remained in the back seat, and they began following Christopher as he drove the Nissan back onto the LIE. John Capuano described the traffic on the LIE as a bit crowded, or "[m]edium." He stated that he and Christopher traveled in the middle lane of the LIE for most of the time between the train station and the accident location, but eventually entered the right lane for the purpose of leaving the LIE at Exit 63. He further stated that the traffic on the exit ramp was at "backed up" due to road construction near the traffic light ahead on the south service road. John Capuano testified that both Christopher's vehicle ahead and his vehicle were stopped in the leftmost of the two exit lanes, approximately 50 feet from the entrance to the exit ramp, due to the traffic. He denied having any further personal knowledge of the accident, as his first memory thereafter was of waking in the hospital two days later.

Detective Michael Rottler testified that he drafted one of the two police accident reports generated with regard to the instant matter. He stated that his police unit is usually called to the scene of motor vehicle accidents involving serious injury or death, and that investigations are conducted to assess if criminality contributed thereto, as well as other details of the incident. Questioned as to where the subject accident occurred, he stated that it was "prior to the exit ramp." Detective Rottler testified that he obtained permission from plaintiff to retrieve the "black box" from his vehicle, which recorded that plaintiff's vehicle was traveling at 61 miles per hour at the time of the collision, that the vehicle's cruise control was activated, and that the vehicle's brake pedal was not depressed.

In his affidavit, nonparty Craig Haynes states that at the subject date and time, he was operating a motor vehicle eastbound in the middle lane of the Long Island Expressway just west of Exit 63. He indicates traffic in all lanes of the LIE near the incident location was "stop and go." Mr. Haynes avers that he observed a red pickup truck approximately three or four car lengths ahead of him "swerve from the middle lane into the right lane and hit the rear of a red sedan," causing the red pickup truck to flip over two or three times. He further states that the impact of the red pickup truck with the rear of the red sedan pushed the red sedan forward, causing it to collide with the rear of a "gray colored vehicle."

A party moving for 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, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the

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light most favorable to the nonmoving party (*see Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see Brodney v Picinic*, 172 AD3d 673, 99 NYS3d 399 [2d Dept 2019]). 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” (*Auguste v Jeter*, 167 AD3d 560, 560, 88 NYS3d 509 [2d Dept 2018], quoting *Nsiah-Ababio v Hunter*, 78 AD3d 672, 672, 913 NYS2d 659 [2d Dept 2010]; *see* Vehicle and Traffic Law § 1129 [a]). “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, requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Lopez v Suggs*, 186 AD3d 589, 589-590, 126 NYS3d 676 [2d Dept 2020]; *see Tutrani v County of Suffolk*, 10 NY3d 906, 861 NYS2d 610 [2008]). Examples of such non-negligent explanations include mechanical failure, a sudden, unexplained stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause (*Tumminello v City of New York*, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]). “[A]n 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, 772, 123 NYS3d 683 [2d Dept 2020]). Further, an operator of a motor vehicle has a “common-law duty to see that which [he or she] should have seen through the proper use of [his or her] senses” (*Botero v Erraez*, 289 AD2d 274, 275, 734 NYS2d 565, 566 [2d Dept 2001]; *see also Ferrara v Castro*, 283 AD2d 392, 724 NYS2d 81 [2d Dept 2001]).

Here, all four Capuano defendants established a prima facie case of entitlement to summary judgment in their favor (*see Bardizbanian v Bhuiyan*, 181 AD3d 772, 121 NYS3d 299 [2d Dept 2020]; *Staskiv v Shlayan*, 132 AD3d 971, 18 NYS3d 686 [2d Dept 2015]; *see generally Alvarez v Prospect Hosp., supra*). Through the deposition testimony of John Capuano, Christopher Capuano and John Capuano demonstrated that they were operating the first and second vehicles, respectively, in a chain collision, that both vehicles were stopped in traffic, and that neither engaged in behavior which was a proximate cause of the incident. The burden then shifted to plaintiff to raise a triable issue (*see generally Vega v Restani Constr. Corp., supra*).

Plaintiff opposes the motions, submitting, among other things, his own affidavit and a copy of Justice Latin’s January 24, 2020 decision in the related matter. He argues, inter alia, that the instant motions are premature, that the vehicles operated by Christopher Capuano and John Capuano simultaneously stopped “suddenly and without warning,” and that triable issues remain as to the culpability of the parties. In his affidavit submitted in opposition, plaintiff states, in relevant part, that he “drove towards the left of the two exit lanes and to [his] shock [he] encountered a car that was stopped in what [he] call[s] the left through lane of the exit ramp.” He then states that his pickup truck “struck the rear of the stopped car, causing [his] vehicle to flip over and roll a few times.”

Plaintiff has failed to raise a triable issue. His affidavit clearly contradicts his attorney’s affirmation, wherein it is argued that the two operators of the Capuano vehicles stopped “suddenly and without warning,” and contradicts his prior deposition testimony. Thus, plaintiff’s affidavit serves as is

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an attempt to avoid the consequences of his earlier testimony by raising a feigned issue of fact (*see generally Doran v. JP Walsh Realty Grp., LLC*, 189 AD3d 1363, 134 NYS3d 787 (2d Dept 2020)). Nevertheless, the mere fact that plaintiff states he was “shocked” to see the Capuano vehicles stopped in such lane does not raise a triable issue as to whether defendant drivers were negligent. Plaintiff had a duty to maintain a sufficient distance behind any vehicles ahead of him, and to be aware of the presence of any stopped vehicles in his lane of travel. Thus, the Court need not reach that portion of plaintiff’s opposition arguing against the applicability of the doctrine of collateral estoppel with regard to Justice Latin’s decision in the related matter. Plaintiff’s other arguments are without merit. Accordingly, the motions are granted.

Dated: March 04, 2021
Riverhead, New York



WILLIAM G. FORD, J.S.C.

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