

Jakubowski v Diperna
2021 NY Slip Op 34317(U)
March 17, 2021
Supreme Court, Nassau County
Docket Number: Index No. 609616/2020
Judge: James P. McCormack
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SUPREME COURT- STATE OF NEW YORK

Honorable James P. McCormack

Justice

JOYCE JAKUBOWSKI,

Plaintiff(s),

-against-

MATTHEW FRANCIS DIPERNA and
PAULINE A. DIPERNA,Defendant(s).
_____Trial IAS Part 12
Nassau County

Index No.: 609616/2020

Motion Seq. No.: 001
Motion Submitted: 2/9/21

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
 Affirmation in Opposition.....X
 Reply Affirmation.....X

Plaintiff, Joyce Jakubowski (Jakubowski), moves this court for (a) an order, pursuant to CPLR §3212, granting her summary judgment on the issue of liability and (b) an order, striking the affirmative defenses alleging comparative negligence. Defendants, Matthew Francis Diperna (Matthew) and Pauline A. Diperna (Pauline), oppose the motion.

This action arises from a motor vehicle accident that occurred on October 24,

2019, on the southbound Sagtikos Parkway, near the exit for the Southern State Parkway, County of Suffolk. On that date, Jakubowski alleges she was rear-ended by the vehicle driven by Matthew and owned by Pauline. Jakubowski commenced this action by service of a summons and complaint dated September 9, 2020. Issue was joined by service of an answer dated October 21, 2020.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). 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 (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 N2d 361 [1974]).

Summary judgment is properly granted even where the possibility of comparative negligence exists. *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 (2018). Article 14–A of the CPLR contains New York’s codified comparative negligence principles. *Id.* at 317, 901. The legislative history of article 14–A establishes that “a plaintiff’s comparative negligence is not a complete defense and its absence need not be pleaded and proved by the plaintiff, but rather is only relevant to the mitigation of plaintiff’s damages and should be pleaded and proven by the defendant.” *Id.*

In support of the motion, Jakubowski submits, *inter alia*, her own affidavit and a certified police accident report. In the affidavit, Jakubowski states she was driving southbound on the Sagtikos Parkway. Due to traffic conditions, she brought her car to a complete stop. After stopping, her car was rear-ended by the vehicle driven by Matthew. According to the police accident report, Matthew was cited for violation of Vehicle and Traffic Law §1129(A), following too closely.

It is well settled that a rear-end collision is sufficient to establish a *prima facie* case of liability against the operator of the offending vehicle and imposes a duty upon said operator to rebut the inference of negligence by providing a sufficient explanation (*see Ayach v. Ghazal*, 25 AD3d 742 [2d Dept. 2006]; *Connors v. Flaherty*, 32 AD3d 891 [2d Dept. 2006]).

Additionally, in a rear-end collision situation, it is the rear driver’s duty to maintain a safe distance between his vehicle and the vehicle in front of his. Failure to do so will

establish a *prima facie* case of negligence, as a matter of law (*Lifshitz v. Variety Polbans*, 278 AD2d 372 [2d Dept. 2000]; *Pena v. Allen*, 272 AD2d 311 [2d Dept. 2000]; *Hernandez v. Burkitt*, 271 AD2d 648 [2d Dept. 2000]). "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 the safe distance between his or her car and the car ahead." (*see Sharma v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2nd Dept. 2001]).

Based upon the evidence presented, Jakubowski has established a *prima facie* showing of entitlement to summary judgment as a matter of law. The burden shifts to Defendants to establish a material issue of fact requiring a trial of the action.

In opposition, Defendants offer Matthew's affidavit. Matthew states he was driving southbound on the Sagtikos Parkway, behind Jakubowski's vehicle, in the right hand lane and he wanted to change lanes. He looked to his left but there was another vehicle there. When he looked forward again, Jakubowski's car was much closer, but her brake lights were not illuminated. He hit his brakes hard but still rear-ended Jakubowski's vehicle. Defendants allege that Jakubowski caused the accident by not having functioning brake lights. Defendants further allege this motion is premature as discovery has not yet taken place.

The court finds that Matthews' affidavit fails to raise an issue of fact. Matthew acknowledges taking his eyes off of the road in front of him, but does not state for how

long he did so. Matthew also fails to describe how far away he was from Jakubowski when he took his eyes off of the road, or for how long he was following her. He further does not state his rate of speed or the traffic conditions, which Jakubowski described as heavy enough to force her to stop on a Parkway. All of these facts are relevant as to whether Matthew was following too closely, rendering the issue of the brake lights inconsequential if that were the case. As a result, the court finds that Matthew's claim of no brake lights does not raise an issue of fact, nor has he established that the alleged failure to have brake lights was a proximate cause of the accident. (*Bene v. Dalessio*, 135 AD3d 679 [2d Dept 2016]).

Jakubowski also moves to dismiss Defendants' affirmative defense alleging comparative negligence or culpable conduct by Jakubowski. Based upon Jakubowski's affidavit, the court finds she has established entitlement to summary judgment as matter of law in dismissing the affirmative defense alleging comparative negligence. Defendants offer no admissible evidence indicating Jakubowski was negligent in any manner. Further, the affirmative defense merely states conclusions of law, without any factual support, rendering it defective. (*Moran Enterprises, Inc. v. Hurst*, 96 A.D.3d 914 [2nd Dept. 2012]),

Finally, Defendants allege this motion is premature. However, Defendants have neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. Instead, Defendants rely solely on speculation that there may be an issue of

fact. "The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion" (*Hanover Ins. Co. v. Prakin*, 81 AD3d 778 [2d Dept. 2011]; *see also Essex Ins. Co. v. Michael Cunningham Carpentry*, 74 AD3d 733 [2d Dept. 2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978 [2d Dept. 2009]; *Gross v. Marc*, 2 AD3d 681 [2d Dept. 2003]). As a result, Defendants are unable to raise an issue of fact on the issue of liability.

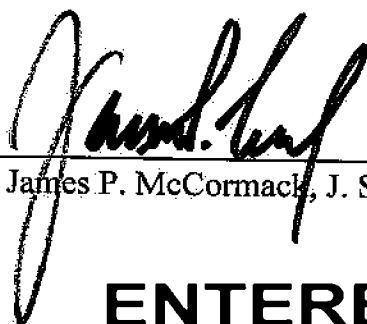
Accordingly, it is hereby

ORDERED, that Jakubowski's motion for summary judgment on the issue of liability is GRANTED; and it is further

ORDERED, that the Affirmative Defense alleging comparative negligence is dismissed.

This constitutes the Decision and Order of the Court.

Dated: March 17, 2021
Mineola, N.Y.


Hon. James P. McCormack, J. S. C.

ENTERED

Mar 23 2021

NASSAU COUNTY
COUNTY CLERK'S OFFICE