Salaman v Nel
2022 NY Slip Op 33955(U)
November 9, 2022
Supreme Court, Kings County
Docket Number: Index No. 520687/2021
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of November, 2022.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

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VICTOR L. SALAMAN,

Plaintiff,

-against-

PIETER IZAK NEL,

Defendant.

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Index No.: 520687/2021

DECISION AND ORDER

Motions Sequence #1

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and
Affidavits (Affirmations) Annexed 6-11,
Opposing Affidavits (Affirmations)..... 15-16,
Reply Affidavits (Affirmations) 17

After a review of the papers and oral argument, the Court finds as follows:

The instant action concerns a claim for personal injuries arising from a motor vehicle collision that allegedly occurred on January 6, 2020. Plaintiff alleges that he was injured when the vehicle he was in was struck in the rear by a vehicle owned and operated by Defendant. The incident allegedly occurred on North Conduit Boulevard near the intersection of Crescent Street in Brooklyn, New York.

The Plaintiff now moves (motion sequence #1) for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability. The Plaintiff contends that summary judgment should be granted because the Defendant was negligent and the sole proximate cause of

the collision. Specifically, the Plaintiff contends that summary judgment should be granted given that there is *prima facie* evidence that Plaintiff's vehicle was hit in the rear by the Defendant's vehicle. The Defendant opposes the motion and contends that Plaintiff's application for summary judgment should be denied as there is an issue of fact regarding the comparative negligence of the Plaintiff. Specifically, the Defendant contends that the driver of the Plaintiff's vehicle made a short and sudden stop. The Defendant also contends that the motion is premature as discovery has not been completed.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it "should only be employed when there is no doubt as to the absence of triable issues of material fact." *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent 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. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. "In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party." *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action"

Garnham & Han Real Estate Brokers v. Oppenheimer, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; *see Menzel v. Plotnick,* 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994]. However, "[a] plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case..." if they can show "...that the defendant's negligence was a proximate cause of the alleged injuries." *Tsyganash v. Auto Mall Fleet Mgmt., Inc.*, 163 AD3d 1033, 1034, 83 N.Y.S.3d 74, 75 [2d Dept 2018]; *Rodriguez v. City of New York*, 31 NY3d 312, 320, 101 N.E.3d 366, 371 [2018].

Turning to the merits of the instant motion, the Court finds that sufficient evidence has been presented by the Plaintiff to establish, *prima facie*, that the Defendant's vehicle hit the Plaintiff's vehicle in the rear. In support of his application, the Plaintiff relies upon Plaintiff's Affidavit. In his affidavit, Plaintiff states that "I was in the middle lane when a 2014 Jeep bearing New York State registration number HSV4682 owned and operated by Defendant Pieter Izak Nel, while also traveling in the same lane, suddenly and unexpectedly collided with the rear of my motor vehicle. At the time of the impact, my vehicle was completely within my lane of travel." (See Plaintiff's Affidavit, NYCSEF Document 11, Paragraphs 4-5). This statement is sufficient for the Plaintiff to establish a *prima facie* showing. *See Martinez v. Allen*, 163 AD3d 951, 82 N.Y.S.3d 130 [2d Dept 2018]. This is because "[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence against the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision." *Klopchin v. Masri*, 45 AD3d 737, 737, 846 N.Y.S.2d 311, 311 [2d Dept 2007]. Further, "[w]hen 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 [or her] vehicle, and to exercise reasonable care to avoid colliding with the other vehicle." *Gaeta v. Carter,* 6 AD3d 576, 576, 775 N.Y.S.2d 86 [2d Dept. 2004]; *see* Vehicle and Traffic Law § 1129 [a]; *Williams v. Spencer–Hall,* 113 AD3d 759, 759-760, 979 N.Y.S.2d 157 [2d Dept 2014]; *Taing v. Drewery,* 100 AD3d 740, 741, 954 N.Y.S.2d 175 [2d Dept 2012].

In opposition, the Defendant relies on his attorney's affirmation. First, it should be noted that the "motion was not premature since the defendant[s] failed to demonstrate that discovery might lead to relevant evidence or that facts essential to justify opposition to the motion were exclusively within the knowledge and control of the plaintiff." *Turner v. Butler*, 139 AD3d 715, 716, 32 N.Y.S.3d 174, 175 [2d Dept 2016]. What is more, the Defendant does not submit an affidavit from a person with knowledge of the facts. The conclusory allegation of a sudden stop without more is insufficient. *See Hakakian v. McCabe*, 38 AD3d 493, 494, 833 N.Y.S.2d 106, 107 [2d Dept 2007]. "Conclusory assertions of a sudden and unexpected stop are insufficient to rebut the inference of negligence." *Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564, 719 N.Y.S.2d 287 [2d Dept 2001]; *see Levine v. Taylor,* 268 AD2d 566, 702 N.Y.S.2d 107 [2d Dept 2000]; *Corbly v. Butler,* 226 AD2d 418, 641 N.Y.S.2d 71 [2d Dept 1996]; *Benyarko v. Avis Rent A Car Sys.,* 162 AD2d 572, 556 N.Y.S.2d 761 [2d Dept 1990]; *Young v. City of New York,* 113 AD2d 833, 493 N.Y.S.2d 585 [2d Dept 1985]. Defendant's claim of a sudden stop is insufficient to establish a non-negligent defense or raise an issue of comparative negligence. Accordingly, the Defendant driver was negligent and the sole proximate cause of the accident. *See Tumminello v. City of New York*, 148 AD3d 1084, 49 N.Y.S.3d 739 [2d Dept 2017]; *Cajas-Romero v. Ward*, 106 AD3d 850, 965 N.Y.S.2d 559 [2d Dept 2013]; *Waide v. ARI Fleet, LT*, 143 AD3d 975, 39 N.Y.S.3d 512 [2d Dept 2016].

Insofar as the Defendant has not raised an issue of fact as to Plaintiff's comparative negligence and the Plaintiff has moved for the dismissal of Defendant's affirmative defense in relation to culpable conduct, the Defendants' affirmative defense of culpable conduct on the part of the Plaintiff is dismissed. *See Sapienza v. Harrison*, 191 AD3d 1028, 142 N.Y.S.3d 584, 588 [2d Dept 2021]; *Kwok King Ng v. West*, 195 AD3d 1006, 146 N.Y.S.3d 811, 812 [2d Dept 2021].

Based on the foregoing, it is hereby ORDERED as follows:

The Plaintiff's motion (motion sequence #1) for summary judgment on the issue of liability is granted to the extent that the Defendant driver was negligent and the sole proximate cause of the accident, and the Defendants' affirmative defense of culpable conduct is dismissed. The matter shall proceed on the issue of damages.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino, J.S.C.

KINGS COUNTY CLERK
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