

Zekri v Porrazzo

2022 NY Slip Op 34962(U)

December 1, 2022

Supreme Court, Westchester County

Docket Number: Index No. 64738/2021

Judge: David S. Zuckerman

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This opinion is uncorrected and not selected for official publication.

DISPO MOTION 1

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
SAID ZEKRI,

Plaintiff,

-against -

JAMES A. PORRAZZO,

Defendant.

-----X
ZUCKERMAN, J.

DECISION/ORDER

Index No:
64738/2021

The papers numbered 1 to 22 in NYSCEF were considered in connection with this motion by Plaintiff Said Zekri for an order, pursuant to CPLR §3212, granting summary judgment on liability and, pursuant to CPLR §3211(b), striking Defendant James A. Porrazzo's First Affirmative Defense (alleging that Plaintiff's injuries were caused by her own culpable conduct, contributory negligence and assumption of the risk). Defendant does not oppose the motion.

FACTS

On October 12, 2021, Plaintiff commenced this action for personal injuries by filing a Summons and Complaint. The Complaint

contains a single cause of action for negligence. In it, Plaintiff alleges that, on April 7, 2021, at approximately 12:15 p.m, in front of 349 Lincoln Avenue, New Rochelle, New York, it was operating a 2014 Nissan automobile which was struck in the rear by an automobile owned and operated by Defendant. Following service of a Summons and Complaint, Defendant interposed an Answer. The Answer contains a general denial and five affirmative defenses.

CONTENTIONS OF THE PARTIES

Plaintiff asserts that the submitted exhibits, including Plaintiff's affidavit and the Police Accident Report, clearly show that Defendant's vehicle struck Plaintiff's in the rear. Thus, Plaintiff argues, it is entitled to summary judgment on its negligence claim and Defendant's first affirmative defense (alleging that Plaintiff's injuries were caused by her own culpable conduct, contributory negligence and assumption of the risk) should be stricken.

DISCUSSION

Pursuant to CPLR §3212(b), a motion for summary judgment "shall be granted if, upon all of papers and proof submitted, the cause of action or defense shall be established sufficiently to

warrant the court as a matter of law in directing judgment in favor of any party." The Court of Appeals has explained that "[s]ummary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law ... when there is no genuine issue to be resolved at trial, the case should be summarily decided, and any unfounded reluctance to employ the remedy will only serve to swell the Trial Calendar and thus deny to other litigants the right to have their claims promptly adjudicated" (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

In a summary judgment motion, the movant bears the initial burden of presenting evidence, in competent and admissible form, establishing the absence of any material issues of fact (*Viviane Etienne Medical Care v Country-Wide Insurance Company*, 25 NY3d 498 [2015]; *Bank of New York Mellon v Gordon*, 171 AD3d 197 [2d Dept 2017]; *Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]). In the event that initial burden is met, the non-moving party must come forward with proof, also in admissible form, that there are material issues of fact which require a trial of the action (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Owens v City of New York*, 183 Ad3d 903 [2d Dept 2020]).

In *Celardo v. Bell*, 222 AD2d 547 [2d Dept 1995], the court

stated:

It is axiomatic that summary judgment is a drastic remedy which should only be granted if it is clear that no material issues of fact have been presented. Issue finding, rather than issue determination, is the court's function (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 (1957.)) If there is any doubt about the existence of a triable issue of fact or if a material issue of fact is arguable, summary judgment should be denied (*Museums at Stony Brook v Village of Pachogue Fire Dept.*, 146 AD2d 572 (1989) ...

In analyzing the contrasting factual allegations, the court may not engage in weighing the evidence. Rather, the court must draw all reasonable inferences in favor of the non-moving party (*Rizzo v. Lincoln Diner Corp.* 215 AD2d 546 [2nd Dept 2000]). Then, the court must determine whether "by no rational process could the trier of facts find for the non-moving party" (*Jastrzebski v. N Shore Sch Dist*, 232 AD2d 677 678 [2d Dept 1996]). Where facts are in dispute, there are issues of credibility, or conflicting inferences may be drawn from the evidence, summary judgment will not lie [*id* at 678]). Further,

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, 1014 [2d Dept 2020]

[internal quotation marks omitted]; see *Rodriguez v. City of New York*, 31 NY3d 312 (2018); *Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2nd Dept 2018]).

(*Shah v MTA Bus Company*, 201 AD3d 833 [2d Dept 2022]).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (See *Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). As a preliminary matter,

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 [2d Dept 2019]; *Rodriguez v City of New York*, *supra*). Further, it is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence against the operator of the rear vehicle unless the rear-most driver can proffer a non-negligent explanation for the accident (*Tutrani v Suffolk County*, 10 NY3d 906 [2008]; *Pollet v Charyn*, 200 AD3d 728 [2d Dept 2021]; *Xin*, *supra*; *Buchanan v Keller*, 169 AD3d 989 [2d Dept 2019]; *Santos v Booth*, 126

AD3d 506 [1st Dept 2015]). As the court held in *Woodley v Ramirez*, 25 AD3d 451 [1st Dept 2006]:

[U]nless the driver of the following vehicle presents a non-negligent explanation for the accident, or a non-negligent reason for his failure to maintain a safe distance between his car and the lead car [a] claim that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of non-negligence on the part of the lead vehicle.

In addition, a violation of Vehicle and Traffic Law section 1129(a) is *prima facie* evidence of negligence (*Nsiah-Ababio v Hunter*, 78 AD3d 672 [2d Dept 2010]; *Rodriguez v Budget Rent A-Car Sys., Inc.*, 44 AD3d 216, 223-224, [1st Dept 2007]). Vehicle and Traffic Law §1129[a] provides

a driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic upon the condition of the highway).

Thus, a driver must maintain a safe distance between his/her/their vehicle and the one in front (*Byrne v Colagero*, 96 AD3d 704 [2d

Dept 2012]; *Ortiz v Hub Truck Rental Corporation*, 82 AD3d 725 [2d Dept 2011]; *Naiiah, supra*.

Further, as the court stated in *Xia, supra* at 826,

Although a sudden stop of the lead vehicle may constitute a non-negligent 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'" (*Le Grand v. Silberstein*, 123 A.D.3d 773, 774, 999 N.Y.S.2d 96, quoting *Shamah v. Richmond County Ambulance Serv.*, 279 A.D.2d 564, 565, 719 N.Y.S.2d 287).

And, as the court stated in *Byrne, supra*,

A claim of a sudden stop by the leading vehicle, standing alone, is insufficient to rebut the presumption of negligence.

Finally, "[d]rivers also have a duty to see what should be seen, and to exercise reasonable care under the circumstances to avoid an accident" (*Byrne, supra* at 705; see *Filipazzo v Santiago*, 277 Ad2D 419 [2d Dept 2000]).

Here, upon a review of the pleadings, the motion papers, and the submitted documents and exhibits, the court finds that Plaintiff has met its burden of establishing a *prima facie* showing of entitlement to summary judgment on the issue of liability. Plaintiff has clearly shown that it was not negligent in the happening of the accident when the vehicle owned and operated by Defendant rear-ended its vehicle (*Karademir v D.A. Mirando-Jelinek*, 153 AD3d 509 [2nd Dept 2017]; *Mulhern v Gregory*, 161 AD3d 881 [2d Dept 2018]).

In light of this *prima facie* showing, the burden shifted to Defendant to establish a triable issue of fact. Defendant, however, does not oppose the motion.

In sum, Defendant failed to produce evidence of a non-negligent explanation for the accident or a non-negligent reason for failure to maintain a safe distance between his vehicle and Plaintiff's. Nor has Defendant established any negligent conduct by Plaintiff. Therefore, Plaintiff's motion for an order granting summary judgment on the issue of liability and striking Defendant's First Affirmative Defense must be granted.

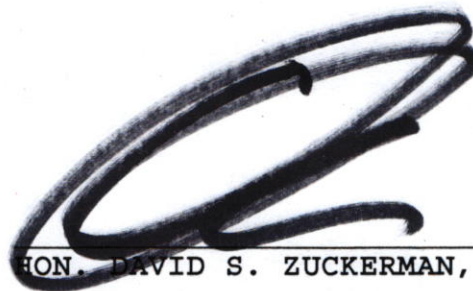
Accordingly, based upon the foregoing, it is hereby

ORDERED, that the motion by Plaintiff for summary judgment on the issue of liability is granted; and it is further

ORDERED, that the motion by Plaintiff striking Defendants' First Affirmative Defense is likewise granted.

The foregoing constitutes the Opinion, Decision & Order of the Court.

Dated: White Plains, New York
December 1, 2022



HON. DAVID S. ZUCKERMAN, A.J.S.C.

To: All Parties via NYSCEF