

Grecco v Altice USA, Inc.
2022 NY Slip Op 35218(U)
December 1, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 607551/2021
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK

I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:

INDEX NO.: 607551/2021

HON. DAVID T. REILLY, J.S.C.

 DOMINIC GRECCO,

Plaintiff,

-against-

ALTICE USA, INC. And PHILIP M.
PORTANOVA,

Defendants.

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MOTION DATE: 06/06/22
 SUBMITTED: 08/31/22
 MOTION SEQ. NO.: 2
 MOTION: MD

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff e-filed on June 6, 2022 and supporting papers; (2) Defendants' Affirmation in Opposition e-filed on June 23, 2022 and supporting papers; and (3) Plaintiff's Reply Affirmation e-filed on June 28, 2022 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that plaintiff's motion seeking an Order granting him: (1) leave to renew his prior motion for partial summary judgment as to the issue of liability, pursuant to Civil Practice Law and Rules (CPLR) 2221 and, upon renewal, granting partial summary judgment as to the issue of liability pursuant to CPLR 3212, is determined as set forth below..

This action arises from a motor vehicle accident that occurred on April 5, 2021 at approximately 12:20 p.m. on County Road 39 at its intersection with David Whites Lane in the Town of Southampton, County of Suffolk. According to the plaintiff, at the time of the accident he was a rear seat passenger in a vehicle driven by his wife, Lisa Grecco. She avers that as she approached the intersection she noticed an ambulance to her left with emergency lights and siren activated which was proceeding through the intersection. She states that she immediately stopped her vehicle as she entered the intersection to allow the ambulance to pass. After the ambulance proceeded south on David Whites Lane she was struck in the rear by a utility vehicle owned by defendant Altice USA, Inc.

(Altice) and operated by employee/defendant Philip M. Portanova (Portanova). The collision allegedly caused plaintiff to suffer serious personal injuries.

Plaintiff previously submitted a motion for partial summary judgment on January 24, 2022. That motion was denied with leave to renew in an Order dated June 1, 2022 [Baisley, J.] based on plaintiff's failure to comply with 22 NYCRR §202.8-g, related to the submission of a Statement of Material Facts. The NYSCEF records related to this matter indicate that plaintiff belatedly filed a Statement of Material Facts on May 2, 2022 (*see* NYSCEF Doc. No. 22).

A motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR 2221[e][2]) and "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]; *see Jaspar Holdings, LLC v Gotham Trading Partners #1, LLC*, 186 AD3d 582, 130 NYS3d 19 [2d Dept 2020]; *Land v Forgione*, 177 AD3d 862, 114 NYS3d 464 [2d Dept 2019]). Here, whether the Court overlooked the belated submission of the Statement of Material Facts prior to the issuance of the decision and Order dated June 1, 2022, or if the plaintiff's submission created this procedural anomaly, is of no moment. The Court and defendants have now had the opportunity to review the plaintiff's Statement of Material Facts. Accordingly, that branch of plaintiff's motion seeking renewal of the prior motion is granted.

With respect to the branch of plaintiff's instant application seeking partial summary judgment on the issue of liability, he submits, among other things, a copy of the pleadings, Lisa Grecco's affidavit in support and an uncertified police accident report. In opposition to the application, defendants have submitted, among other things, an affidavit from the defendant driver wherein he claims that as he approached the intersection he maintained a distance of between thirty and forty feet between himself and the plaintiff. Portanova avers that plaintiff's vehicle entered the intersection with a green light and "suddenly slammed on its brakes bringing its vehicle to a sudden stop within the intersection" (*see* NYSCEF Doc. No. 20). Portanova maintains that he attempted to stop his vehicle without success and the front of his vehicle came into contact with the rear of plaintiff's car. Finally, Portanova concludes that he exited his vehicle after the collision and approximately fifteen to twenty seconds later the ambulance proceeded through the intersection. In addition to the foregoing, defendants maintain that plaintiff's motion is premature as depositions had not occurred at the time the instant application was submitted.

The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 87 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Id*). Once the movant demonstrates a *prima facie* entitlement to judgment as a matter of law, the burden shifts to the party opposing the motion 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 Vega v Restani Constr. Corp.*, 18 NY3d 499, 942 NYS2d 13 [2012]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of*

New York, 49 NY2d 557; 427 NYS2d 595 [1980]; *see also* CPLR 3212 [b]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v New York Univ. Med. Ctr.*, *supra*). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see New York City Asbestos Litig. v. Chevron Corp.*, 33 NY3d 20, 2019 NY Slip Op 01259 [2019]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 45 NYS3d 864 [2016]).

In order to establish his or her *prima facie* entitlement to judgment, a plaintiff is no longer required to show freedom from comparative fault (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Catanzaro v Ederly*, 172AD3d 995, 101 NYS3d 170 [2d Dept 2019]; *Buchanan v Keller*, 169 AD3d 989, 95 NYS3d 252 [2d Dept 2019]). A driver of an automobile approaching another automobile from the rear must maintain a reasonably safe rate of speed and control over his or her vehicle and exercise reasonable care to avoid colliding with the other vehicle (*see Schmertzler v Lease Plan U.S.A., Inc.*, 137 AD3d 1101, 27 NYS3d 648 [2d Dept 2016]; *Gallo v Jairath*, 122 AD3d 795, 996 NYS2d 682 [2d Dept 2014]). A rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, and imposes a duty upon that operator to proffer a non-negligent explanation for the collision (*see Buchanan v Keller*, *supra*; *Binkowitz v Kolb*, 135 AD3d 884, 24 NYS3d 186 [2d Dept 2016]). A non-negligent explanation may include evidence of a mechanical failure, a sudden, unexplained stop of the vehicle ahead, or any other reasonable cause (*see Binkowitz v Kolb*, *supra*; *Ortiz v Hub Truck Rental Corp.*, 82 AD3d 725, 918 NYS2d 156 [2d Dept 2011]). However, stops of the lead vehicle which are foreseeable under prevailing traffic conditions must be anticipated by the driver who follows (*see Catanzaro v Ederly*, *supra*; *Buchanan v Keller*, *supra*).

Here, plaintiff has established his *prima facie* entitlement to summary judgment. The submissions in support of the motion demonstrates that Lisa Grecco had stopped her vehicle for the purpose of allowing an ambulance to pass through the intersection with its emergency lights and siren activated, as she is required to do pursuant to the Vehicle and Traffic Law. She states that she had sufficient time upon entering the intersection to allow the ambulance to pass through before she was struck from behind. It stands to reason then that Portanova, had he been maintaining a reasonable rate of speed and exercising reasonable care, would have had sufficient time to stop his vehicle prior to the collision.

The burden, then, shifted to defendants to offer a non-negligent explanation for the accident sufficient to raise a triable issue of fact (*see Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368, 815 NYS2d 736 [2d Dept 2006]). In opposition, Portanova argues that Lisa Grecco abruptly stopped her vehicle for no apparent reason after entering the intersection. He maintains that the ambulance was of such distance from the intersection that it took some fifteen to twenty seconds for the ambulance to enter the intersection and this was after the collision of the vehicles. Indeed, Portanova avers that he did not see or hear the ambulance approaching the intersection and that it was only after he exited his vehicle, post accident, when he first saw the ambulance. He concludes that Lisa Grecco's act of suddenly applying her brakes within the intersection for no discernable reason while traveling through an intersection with the benefit of a green traffic signal was the cause of the

accident.

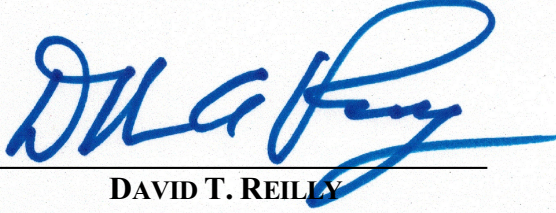
In viewing the evidence before it in a light most favorable to defendant the Court credits the statements made in the affidavit in opposition and finds that Portanova has submitted a sufficient non-negligent explanation for the accident. Although Portanova was under a duty to maintain a safe distance between his vehicle and the plaintiff's vehicle, the asseveration that Lisa Grecco was required to stop suddenly and without warning is somewhat belied by defendants' claim that the emergency inherent with the ambulance approaching the intersection did not materialize until after the accident occurred. These conflicting presentations regarding the timing of the accident and the passage of the ambulance necessitate the denial of summary judgment at this stage of the proceedings as these issues must be determined by a jury at trial (*see generally Harding v Royal Waste Servs., Inc.*, 208 AD3d 762, 174 NYS3d 414 [2022]).

Based on the sum of the foregoing, the plaintiff's motion is denied.

This shall constitute the decision and Order of the Court.

Dated: December 1, 2022
Riverhead, New York





DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION