Premoli v McMullen
2024 NY Slip Op 35117(U)
November 8, 2024
Supreme Court, Westchester County
Docket Number: Index No. 64955/2022
Judge: Damaris E. Torrent
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To commence the statutory time 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

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SALVATORE PREMOLI,

Plaintiff,

-against-

DONN R. McMULLEN,

Defendant.

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DECISION AND ORDER
Index No.: 64955/2022
Motion Date: 08/06/2024
Seq. No. 1

DAMARIS E. TORRENT, A.J.S.C.

The following papers numbered 1 to 18 were read on this motion by plaintiff for an order granting him summary judgment on the issue of liability and striking defendant's first, second and fifth affirmative defenses:

PAPERS	NUMBERED
Notice of Motion / Affirmation (Henderson) / Exhibits 1 – 11 / Statement of Material Facts / Memorandum of Law	1 – 15
Affirmation in Opposition (Caron)	16
Response to Counterstatement of Material Facts / Reply Memorandum of Law	17 – 18

Upon the foregoing papers, the motion is granted.

In this action for personal injures arising out of a rear-end motor vehicle accident, by Notice of Motion filed on June 19, 2024, plaintiff seeks an order granting him summary judgment on the issue of liability and striking defendant's first (comparative negligence), second (failure to wear seatbelt) and fifth (failure to mitigate damages) affirmative defenses. Plaintiff contends that defendant's negligence in failing to stop before striking plaintiff's vehicle from behind was the sole cause of the accident and that the affirmative defenses are without merit.

In opposition, defendant submits the Affirmation of his attorney, who posits that "triable issues of fact may exist as to the activities of both drivers at the time of the accident" (Caron Aff. at ¶ 5). In reply, plaintiff contends that defendant's opposition was not timely filed and should not be considered.[1] Plaintiff further contends that, even if the opposition is considered, it fails to raise a triable issue of fact, as it offers nothing but speculation.

The Court has fully considered the submissions of the parties.

The court's function on this motion for summary judgment is issue finding rather than issue determination (*Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395 [1957]). "[T]he proponent of a summary judgment motion 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. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . 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" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]) .

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 (*Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]). The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party (*Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824 [2014]). As stated in *Scott v Long Island Power Auth.* (294 AD2d 348, 348 [2d Dept. 2002]):

[1] Plaintiff's contention that the opposition is untimely is correct. However, as plaintiff was afforded an opportunity to reply, no party is prejudiced by the late filing, and the Court thus has considered the opposition in the interest of deciding the instant motion upon a complete record.

> "It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility (*see Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366)."

"When 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 vehicle, and to exercise reasonable care to avoid colliding with the other vehicle. A rear-end collision with a stopped 'or stopping' vehicle creates a prima facie case of liability with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Gaeta v Carter*, 6 AD3d 576 [2d Dept 2004]).

"A nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle" (*Brothers v Bartling*, 130 AD3d 554, 555 [2d Dept. 2015]). Nevertheless, "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 a safe distance between his or her car and the car ahead" (*Shamah v Richmond County Ambulance Serv.*, 279 AD2d 564, 565 [2d Dept 2001]). Moreover, "[a] conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation" (*Gutierrez v Trillium, USA, LLC*, 111 AD3d 669, 670 – 671 [2d Dept 2013]).

Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law by submission of, inter alia, the parties' deposition transcripts, which establish that plaintiff's vehicle was stopped at a red traffic light for approximately ten seconds, and his vehicle was struck from behind by defendant's vehicle. In opposition, defendant points to no evidence of a non-negligent

explanation for the happening of the accident. Defendant did not submit an Affidavit in response to the motion, and defendant's deposition testimony confirms that his inattention and resulting failure to stop was the sole cause of the accident (*see* Exh. 6 at 18-20, 30-31). The challenged affirmative defenses are not raised in opposition to the motion and thus are abandoned (*Wells Fargo Bank, N.A. v Carrington*, 221 AD3d 746 [2023]).

Accordingly, it is hereby

ORDERED that the motion is granted, and plaintiff shall have judgment against defendant on the issue of liability only; and it is further

ORDERED that the first, second and fifth affirmative defenses asserted in defendant's Answer be and hereby are stricken and dismissed; and it is further

ORDERED that evidence at trial shall be limited to the issue of plaintiff's recoverable damages, which shall include the issue of serious injury; and it is further

ORDERED that, within ten (10) days of the date hereof, plaintiff shall serve a copy of this Decision and Order, with notice of entry, upon defendant, and shall file proof of said service via NYSCEF; and it is further

ORDERED that the parties shall appear for settlement conference on December 11, 2024 at 11:30 a.m. in Courtroom 1601.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 8, 2024
White Plains, New York

E N T E R:

HON. DAMARIS E. TORRENT, A.J.S.C.

FILED VIA NYSCEF