

Froman v Goode
2024 NY Slip Op 35514(U)
March 12, 2024
Supreme Court, Nassau County
Docket Number: Index No. 606880/2023
Judge: Sarika Kapoor
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**SUPREME COURT: STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT: HON. SARIKA KAPOOR
ACTING JUSTICE OF THE SUPREME COURT

-----X
JOSEPH FROMAN,

Plaintiff,

- against -

LEONARD A. GOODE and A.A.A. AMBULETTE SERVICE,
INC.,

Defendants.
-----X

TRIAL/IAS PART 34
Index No.: 606880/2023

**AMENDED
DECISION AND ORDER**

Motion Seq. No.: 001
Motion Submission Date:
12/04/2023

NYSCEF document numbers 13-38 were read and considered in deciding this motion.

Relief Requested

The plaintiff moves for summary judgment on the issue of liability.

Background

The plaintiff was allegedly injured when a vehicle he owned and operated was struck in the rear by a vehicle operated by defendant Leonard A. Goode ("Goode") and owned by defendant A.A.A. Ambulette Service Inc. The plaintiff commenced this action against the defendants to recover damages for personal injuries. In their answer, the defendants denied the material allegations of the complaint and asserted various affirmative defenses, including comparative fault and assumption of risk.

Motion Sequence 001

The plaintiff moves for summary judgment on the issue of liability. Attached as an exhibit to the attorney affirmation submitted in support of the motion is the plaintiff's affidavit wherein Joseph Froman attests that, at the time of the accident, he was slowing down due to traffic that was building up ahead near exit 22S of the Meadowbrook State Parkway. Plaintiff attests that he did not stop short, there was no emergency, nor was there any other factor existing on the roadway prior to impact. In an attorney affirmation submitted in support of the motion, counsel asserts that the plaintiff's affidavit establishes that the accident occurred while the plaintiff was slowing down

due to normal traffic conditions and not because the plaintiff had stopped short. As a result, counsel contends there are no triable issues of fact on the issue of liability.

In an attorney affirmation in opposition, counsel for the defendants asserts that the motion should be denied because there remain questions of fact with respect to how the accident occurred. Attached as a document to the attorney affirmation in opposition was the defendant Goode's "Statement" (doc. 35), wherein defendant stated that traffic was moving smoothly until the plaintiff's vehicle stopped short in front of him. Defense counsel asserts that the defendants' version of the facts rebuts any presumption of negligence.

Discussion

Summary judgment is a drastic remedy only to be granted when the movant proves that there are no issues of fact to be tried (*Vega v Restani Const. Corp.*, 18 NY3d 499 [2012]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

"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" (*Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033–1034 [2d Dept 2018]; see *Rodriguez v City of New York*, 31 NY3d 312 [2018]). "A plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case" (see *Rodriguez v City of New York*, 31 NY3d at 312; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d at 1034).

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Grier-Key v Lyons*, 195 AD3d 798, 799 [2d Dept 2021] quoting *Witonsky v New York City Tr. Auth.*, 145 AD3d 938, 939 [2d Dept 2016] [internal quotation marks omitted]; see Vehicle and Traffic Law 1129[a]). Thus, "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, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Pollet v Charyn*, 200 AD3d 728, 730 [2d Dept 2021], quoting *Drakh v Levin*, 123 AD3d 1084, 1085 [2d Dept 2014]). "A nonnegligent explanation includes, but is not limited to, sudden or unavoidable circumstances" (*Drakh v Levin*, 123 AD3d at 1085, quoting *D'Agostino v YRC, Inc.*, 120 AD3d 1291, 1292 [2d Dept 2014] [internal quotation marks omitted]). "Although a sudden stop of the lead vehicle may constitute a nonnegligent 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'" (*Martin v County of Westchester*, 194 AD3d 1036, 1036–1037 [2d Dept 2021], quoting *Le Grand v. Silberstein*, 123 AD3d 773, 775 [2d Dept 2014] [internal quotation marks omitted]).

Here, the plaintiff established his prima facie entitlement to judgment as a matter of law on the issue of liability through, inter alia, his affidavit, wherein he stated, inter alia, that he was slowing down due to building traffic when he was struck in the rear (see *Policart v Wheels LT*, 221 AD3d 920, 921 [2d Dept 2023]; *Whaley v Carvana N.Y. City*, 219 AD3d at 1562; *Bruce v Takahata*, 219 AD3d 448, 449 [2d Dept 2023]; *An v Abbate*, 213 AD3d 891 [2d Dept 2023]).

In opposition, however, defendant fails to present any admissible evidence sufficient to present a triable issue of fact. Initially, this Court notes that defense counsel's reliance upon a "Statement of Leonard A. Goode" dated April 19, 2023 is entirely misplaced.

The law is clear. On a motion for summary judgment, the nonmoving party is required to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Recently, CPLR 2106 was amended to provide as follows:

The statement of any person wherever made, subscribed and affirmed by that person to be true under the penalties of perjury, may be used in an action in New York in lieu of and with the same force and effect as an affidavit. Such affirmation shall be in substantially the following form:

I affirm this ____ day of _____, _____, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.

(Signature)

(CPLR 2106 [As amended by L.2023, c. 559, § 1, effective January 1, 2024]).

Thus, pursuant to this recently amended statute, while this Court must overlook the fact that defendant fails to offer his sworn affidavit in opposing plaintiff's prima facie showing, this Court cannot overlook that the "Statement" relied upon by counsel is not "subscribed and affirmed by [the defendant] to be true under the penalties of perjury." This is fatal (*see HPH Milano, LLC v Iakouchevitch*, 81 Misc.3d 138[A] [1st Dept 2024]; *see also, Municipal Testing Lab., Inc. v Brom*, 38 AD3d 862 [2d Dept 2007], *lv dismissed* 8 NY3d 1004 [2007]; *Pasquaretto v Long Island University*, 150 AD3d 1129 [2d Dept 2017]).

Notably, defense counsel offers nothing more beyond this "Statement", and his own affirmation, in seeking to defeat plaintiff's motion for summary judgment on the issue of liability.

The law provides that "[i]t is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial" (*Nel Taxi Corp. v Eppinger*, 203 AD2d 438 [2d Dept 2014] quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 [1st Dept 1959], *appeal dismissed* 11 AD2d 660 [1st Dept 1960]). "[A]n opposing affidavit by an attorney without personal knowledge of the facts has absolutely no probative value and should be disregarded" (*Rodriguez v Suffolk County*, 123 AD2d 754, 755 [2d Dept 1986]; *Spearmon v Times Sq. Stores Corp.*, 96 AD2d 552, 553 [2d Dept 1983]).

Accordingly, summary judgment must be granted.

Conclusion

It is hereby,

ORDERED that the plaintiff's motion for summary judgment on the issue of liability is **GRANTED**.

The parties' remaining contentions have been considered and do not warrant discussion.

Any applications not specifically addressed are **DENIED**.

This shall constitute the Decision and Order of the Court.

Dated: March 12, 2024
Mineola, New York

ENTER:



HON. SARIKA KAPOOR, A.J.S.C.

ENTERED

Mar 13 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE