

Lee v Marasco
2024 NY Slip Op 35517(U)
March 4, 2024
Supreme Court, Nassau County
Docket Number: Index No. 608782/2023
Judge: James P. McCormack
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT- STATE OF NEW YORK

Honorable James P. McCormack

Justice

_____x

JAMES LEE,

Plaintiff(s),

-against-

ROSS I. MARASCO and NICOLA MARASCO,

Defendant(s).

_____x

Trial IAS Part 8
Nassau County

Index No.: 608782/23

Motion Seq. No.: 001
Motion Submitted: 1/10/24

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
 Affirmation in Opposition/Supporting Exhibits.....X
 Reply Affirmation.....X

Plaintiff, James Lee (Lee), moves the court for an order granting him summary judgment against Defendants, Ross I. Marasco (Ross) and Nicola Marasco (Nicola), on the issue of liability and striking Defendants' affirmative defenses alleging comparative negligence. Defendants opposes the motion.

According to the moving papers, on August 23, 2022, Lee was driving on Port Washington Boulevard in the Village of Flower Hill, County of Nassau and was stopped in traffic when he was rear-ended by the car driven by Nicola and owned by Ross. Lee commenced this action by summons and complaint dated June 1, 2023. Issue was joined

by service of an answer dated July 11, 2023.

It is well settled that in a motion for summary judgment the moving party bears the burden of making a *prima facie* showing that he or she is entitled to summary judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of a material issue of fact (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980]; *Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]).

The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegard v. New York University Medical Center*, 64 NY2d 851 [1985]). 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 (*see Zuckerman v. City of New York*, 49 NY2d 5557 [1980], *supra*). The primary purpose of a summary judgment motion is issue finding not issue determination, *Garcia v. J.C. Duggan, Inc.*, 180 AD2d 570 (1st Dept. 1992), and it should only be granted when there are no triable issues of fact (*see also Andre v. Pomeroy*, 35 N2d 361 [1974]).

Summary judgment is properly granted even where the possibility of comparative negligence exists. *Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 (2018). Article 14–A of the CPLR contains New York’s codified comparative negligence principles. *Id.* at 317, 901. The legislative history of article 14–A establishes that “a

plaintiff's comparative negligence is not a complete defense and its absence need not be pleaded and proved by the plaintiff, but rather is only relevant to the mitigation of plaintiff's damages and should be pleaded and proven by the defendant." *Id.*

In support of the motion, Lee submits, *inter alia*, his own affidavit. In the affidavit, Lee states that on August 23, 2023 he was driving on Port Washington Boulevard. He was wearing his seatbelt and was stopped in traffic. While stopped, he was rear ended by the car driven by Nicola. He states he could take no action to avoid the accident as he was stopped in traffic.

It is well settled that a rear-end collision is sufficient to establish a *prima facie* case of liability against the operator of the offending vehicle and imposes a duty upon said operator to rebut the inference of negligence by providing a sufficient explanation (*see Ayach v. Ghazal*, 25 AD3d 742 [2d Dept. 2006]; *Connors v. Flaherty*, 32 AD3d 891 [2d Dept. 2006]).

Additionally, in a rear-end collision situation, it is the rear driver's duty to maintain a safe distance between his vehicle and the vehicle in front of his. Failure to do so will establish a *prima facie* case of negligence, as a matter of law (*Lifshitz v. Variety Polbans*, 278 AD2d 372 [2d Dept. 2000]; *Pena v. Allen*, 272 AD2d 311 [2d Dept. 2000]; *Hernandez v. Burkitt*, 271 AD2d 648 [2d Dept. 2000]). "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 the safe

distance between his or her car and the car ahead." (*see Sharma v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2nd Dept. 2001]).

The court finds that Lee has established entitlement to summary judgment as a matter of law on the issue of liability and comparative negligence. The burden shifts to Defendants to raise a material issue of fact requiring a trial of the action.

In opposition, Defendants offer the affirmation of counsel and no admissible evidence. Counsel first argues that the motion should be denied because Lee's affidavit makes no mention of whether his brake lights were working. Leaving out that information does not make Lee's affidavit ineffectual, and the court notes there is no affidavit from Nicola raising such an argument. Counsel next argues that the fact that Lee made an error on the street where the accident occurred raises an issue of fact. Lee states that the accident occurred on Port Washington Boulevard near its intersection with Middle Neck Road, while counsel states that Port Washington Boulevard turns into Middle Neck Road, thus there is no "intersection". The court does not see how such a meaningless error could raise an issue of fact. Lee is still clear the accident occurred on Port Washington Boulevard in Flower Hill. Defendants do not argue that the error fails to put them on notice of where the accident occurred.

Finally Defendants argues that the motion is premature because depositions have not yet taken place. However, Defendants have neglected to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. Instead, their ounsel relies solely on

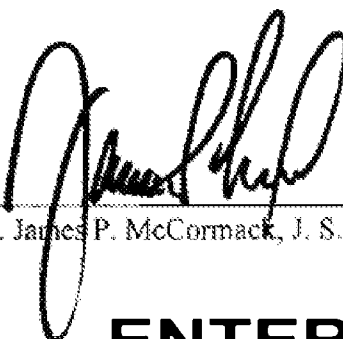
speculation that there may be an issue of fact. “The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion” (*Hanover Ins. Co. v. Prakin*, 81 AD3d 778 [2d Dept. 2011]; *see also Essex Ins. Co. v. Michael Cunningham Carpentry*, 74 AD3d 733 [2d Dept. 2010]; *Peerless Ins. Co. v. Micro Fibertek, Inc.*, 67 AD3d 978 [2d Dept. 2009]; *Gross v. Marc*, 2 AD3d 681 [2d Dept. 2003]). As such, Defendants are unable to raise an issue of fact.

Accordingly, it is hereby

ORDERED, that Lee’s motion for summary judgment on liability is GRANTED in its entirety. Lee is granted summary judgment on liability and the Affirmative Defenses contained in the Seventh and Tenth paragraphs of the answer are dismissed.

This constitutes the decision and order of the court. The court has considered the remaining arguments of the parties and finds them to be without merit.

Dated: March 4, 2024
Mineola, N.Y.



Hon. James P. McCormack, J. S. C.

ENTERED

Mar 07 2024

NASSAU COUNTY
COUNTY CLERK'S OFFICE