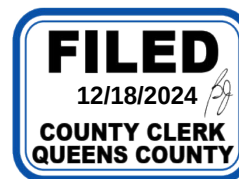


Wicklow v Biscardi
2024 NY Slip Op 35637(U)
December 17, 2024
Supreme Court, Queens County
Docket Number: Index No. 716960/2023
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HONORABLE MOJGAN C. LANCMAN



-----x IAS Part 20
MARTIN WICKLOW,

Index No.: 716960/2023

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 10.30.2024

MICHAEL R. BISCARDI and CONSOLIDATED EDISON
COMPANY OF NEW YORK INC,

Motion Cal. No.: 40

Defendants.

-----x

The e-filed documents listed by NYSCEF document numbers 17-28 were read on the motion of the plaintiff, Martin Wicklow (the "Plaintiff") for summary judgment.

The Plaintiff commenced this action on August 16, 2023, to recover damages for personal injuries allegedly sustained in a motor vehicle accident (the "Accident") that occurred on June 13, 2023. Presently before the Court is the Plaintiff's motion for an Order (1) granting summary judgment on the issue of liability, (2) dismissing certain affirmative defenses, (3) holding the Plaintiff free of any comparative fault, and (4) allowing this matter to proceed with discovery as to damages only. For the following reasons, this motion is granted in part and denied in part.

I. Factual Background

The Accident occurred on June 13, 2023, at the intersection of the Van Wyck Expressway and Hillside Avenue in Queens, New York. Two vehicles were involved in the Accident. The Plaintiff was the operator the front vehicle, which was owned by non-party New York Police Department ("NYPD"). The rear vehicle was owned by defendant Consolidated Edison Company of New York, Inc. ("Con Edison") and operated by defendant Michael R. Biscardi ("Biscardi") (collectively, the "Defendants").

In support of this motion, the Plaintiff submitted an affidavit of merit, which states as follows:

"3. On June 13, 2023, I was the operator of a vehicle, which was involved in a motor vehicle accident on the Van Wyck Expressway service road at its intersection with Hillside Avenue.

4. At the time of the accident, I was stopped for a red light when I was struck in the rear by the vehicle owned by defendant

Consolidated Edison Company of New York, Inc. and operated by
defendant Michael R. Biscardi.”

The Plaintiff has further submitted a copy of the certified police accident report, which confirms that the rear vehicle was owned by Con Edison and operated by Biscardi. The report further contains an admission from Biscardi that he was stopped behind the Plaintiff’s vehicle when his foot slipped off the brake and that he accidentally rear ended the Plaintiff’s vehicle.

The Defendants did not submit an affidavit in opposition to this motion. Rather, they rely on the affirmation of their attorney and a copy of a subpoena directed to the NYPD.

II. Discussion

A. Summary Judgment Standards

The familiar standards applicable to summary judgment motions are set forth below.

“Summary 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” (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The “function of summary judgment is issue finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “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 from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686 [1984]).

B. Summary Judgment on Liability

Vehicle and Traffic Law § 1129 (a) states that:

“The 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 vehicles and the traffic upon and the condition of the highway.”

“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. 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” (*Quintanilla v Mark*, 210 AD3d 713-714 [2d Dept 2022] [internal quotation marks, brackets and citations omitted]).

“[N]ot every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision” (*Joseph-Felix v Hersh*, 208 AD3d 571, 572 [2d Dept 2022] [internal quotation marks and citations omitted]).

“[A] nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause” (*Grant v Carrasco*, 165 AD3d 631, 632 [2d Dept 2018] [internal quotation marks and citations omitted]).

However, “vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows. Further, evidence that the plaintiff’s vehicle came to a sudden stop, standing alone, is insufficient to rebut the presumption of negligence of the operator of the rear vehicle” (*Quinones v Grace Industries, LLC*, 219 AD3d 765, 766 [2d Dept 2023] [internal quotation marks and citations omitted]).

Here, the Plaintiff has established his *prima facie* entitlement to summary judgment through his affidavit, which demonstrates that his vehicle was stopped for a red light when it was rear ended by the Defendants’ vehicle (see *Martin v Copado-Esquivel*, 226 AD3d 668, 670 [2d Dept 2024]; *Perez v Persad*, 183 AD3d 771, 772 [2d Dept 2020]).

In opposition, the Defendants failed to raise a triable issue of fact. The Defendants did not submit an affidavit from Biscardi, and “[t]he affirmation of defendants’ attorney in opposition to plaintiff[s]’ summary judgment motion ... [is] of no probative value” (*Nationwide General Insurance Company v South*, 223 AD3d 411, 411-412 [1st Dept 2024]; see *Commissioners of the State Ins. Fund v Sanitation Salvage Corp.*, 187 AD3d 537, 537 [1st Dept 2020]; *Lazarre v Gragston*, 164 Ad3d 574, 575 [2d Dept 2018]).

The Defendants’ discovery-related argument is without merit. In *Quintanilla v Mark* (210 AD3d at 714-715) the Second Department held as follows with respect to the interplay between a summary judgment motion and open discovery:

“While a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, a party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Here, the defendant’s proffered need to conduct depositions did not warrant denial of the motion, since the defendant already had personal knowledge of the relevant facts, and his mere hope or speculation that evidence might be uncovered was insufficient to deny the motion” (internal quotation marks, brackets and citations omitted).

The Defendants have personal knowledge of the facts because they are the owner and operator of one of the vehicles involved in the Accident. The argument that this motion should be denied due to outstanding discovery is thus baseless (*see id.*; *Elfe*, 219 AD3d at 1306). Further, the Court notes that, as written in the certified police accident report, Biscardi admitted to the responding officer that he struck the Plaintiff’s vehicle in the rear.

The Court finds the Defendants’ contentions relative to any potential video of the Accident to be unavailing. Here, the responding officer wrote in the certified police accident report that he “was unable to recover video of the incident at [that] time.” This statement merely indicates that video of the Accident may exist. It is not, as the Defendants contend, an admission that there is video of the Accident. In any event, the Court notes that the operators of the vehicles involved in the Accident are essentially in agreement as to how the Accident occurred. The Defendants’ contention that a potential video of the Accident may show something different is nothing more than mere hope or speculation, which is insufficient to defeat a motion for summary judgment.

The Defendants’ argument that the Accident was merely a fender bender and that the vehicles experienced minor damages is irrelevant here. This contention relates to the issue of damages, which is not the subject of this motion.

Therefore, the Plaintiff is granted partial summary judgment on the issue of liability.

C. Affirmative Defenses

The Plaintiff also seeks the dismissal of the Defendants’ first and sixth affirmative defenses. The first affirmative defense alleges that the Plaintiff was comparatively negligent. The sixth affirmative defense alleges that the Plaintiff failed to use a seat belt.

The issue of the Plaintiff’s comparative negligence is properly before the Court because: “[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff’s comparative negligence may be decided in the context of a summary judgment motion where, as

here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence” (*Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1014 [2d Dept 2020]; *see also Ng v West*, 195 AD3d 1006 [2d Dept 2021]) [citations omitted]).

Furthermore, CPLR 3212 (g) “permits a motion court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action. The provision recognizes that, notwithstanding the denial or partial grant, one of several facts may nonetheless appear to be conceded or otherwise definitively resolved by the moving and opposing papers” (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 118 [1st Dept 2016]).

Here, the Plaintiff establishes his freedom from comparative negligence through his affidavit, which establishes that he was not at fault in the happening of the accident (*see Martin*, 226 AD3d at 670; *Orlando v Gonzalez*, 222 AD3d 989, 990 [2d Dept 2023]; *Quintanilla*, 210 AD3d at 714).

However, the Plaintiff has failed to establish his entitlement to the dismissal of the sixth affirmative defense of failure to wear a seatbelt. The Plaintiff failed to address this issue in his affidavit, and he failed to submit any other evidence indicating that he was wearing a seatbelt at the time of the Accident.

D. Discovery as to Damages Only

The Plaintiff also seeks an Order directing that discovery shall proceed as to damages only. The law is clear that the Defendants are entitled to discovery on the issue of damages (*see Barr v Raffae*, 96 AD2d 800 [1st Dept 1983]), and the Plaintiff is not relieved of the burden of establishing that he suffered a serious injury within the meaning of Insurance Law § 5102 (d) (*see Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002]). Because the Plaintiff is granted summary judgment on the issue of liability and on his comparative negligence, this branch of the motion is granted.

III. Conclusion

Accordingly, it is hereby:

ORDERED, that the motion is granted in part and denied in part; and it is further

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

ORDERED, that the Defendants’ first affirmative defense of comparative negligence is dismissed; and it is further

ORDERED, that the Plaintiff bears no comparative fault for the Accident; and it is further

ORDERED, that discovery shall proceed as to damages only; and it is further

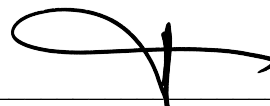
ORDERED, that the trial of this action shall relate to damages only; and it is further

ORDERED, that the motion is otherwise denied; and it is further

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry on the Defendants via NYSCEF by February 7, 2025.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
December 17, 2024



MOJGAN C. LANCMAN, J.S.C.

