SCAN

SHORT FORM ORDER

# SUPREME COURT - STATE OF NEW YORK

Present:

**HON. JOSEPH COVELLO**

Justice

---

**TRIAL/IAS, PART 29**
**NASSAU COUNTY**

**STACEY A. DELLOMO,**

Plaintiff,

**Index #: 9206/99**

-against-

**Motion Seq. #: 004**

**ENRIQUE W. DELSOLAR, EDWARD R. WILLIAMS, JR. and AMA THRIFT SHOP,**

Defendants.

**Motion Date: 06/10/01**

---

The following paper read on this motion:

| | |
|---|---|
| Notice of Motion | 1 |
| Affirmations in Opposition | 2, 3 |
| Reply Affirmation | 4 |

Motion by defendant, Edward R. Williams, Jr., for an order pursuant to CPLR 3212 granting him summary judgment dismissing the complaint and any and all cross-claims asserted against him is granted.

This is an action to recover damages for personal injuries sustained in a three-car accident on November 7, 1998. The accident occurred on Jerusalem Avenue, at or near its intersection with Cool Lane, in Levittown, New York.

At his examination before trial, defendant Williams, testified that while he was stopped or rolling to a stop at less than 1 mile per hour, and waiting to make a left turn with his left turn signal on, he was struck in the rear by a van owned by AMA Thrift Shop and operated by defendant, Enrique W. Delsolar. As a result of this impact, defendant Williams, claims that he was knocked into on-coming traffic and was hit by a car operated by plaintiff.

Plaintiff opposes this application arguing, **inter alia**, that even if defendant, Williams, was struck in the rear, a question of fact still exists as to whether defendant, Williams, could have done anything with regard to the operation of his vehicle to avoid contact with plaintiff's

vehicle. In other words, a factual issue exists as to whether the rear-end collision was the cause of Williams' contact with plaintiff's vehicle.

In their opposition papers, defendants, Enrique W. Delsolar and AMA Thrift Shop, assert that the motion is premature since their depositions haven't been conducted. In response thereto, counsel for defendant, Williams, notes that: a) defendant, Delsolar, was never produced for an examination before trial, has never given testimony and is, therefore, effectively precluded from offering testimony; and b) a representative from AMA, namely, Jeewan Itwarie, AMA's Secretary, did appear and gave testimony on October 4, 2001. These defendants further argue that issues of fact exist regarding defendant, Williams', liability in this case particularly since defendant, Williams, admitted that the road conditions were a little damp. They further speculate that defendant Delsolar would testify that defendant, Williams, stopped suddenly to make a left turn from the right lane. (See copy of Delsolar's MV 104 accident report.)

Irrespective of whether defendant, Williams', vehicle was stopped or rolling to a stop, defendant, Delsolar, still had a duty to maintain a reasonably safe distance between the two vehicles [Vehicle and Traffic Law, §1129(a)] and to be aware of traffic conditions, including vehicle stoppages. (**Johnson v Phillips**, 261 AD2d 269; **Barba v Best Security Corporation**, 235 AD2d 381.) As we have noted, drivers are under a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident". (**DeAngelis v Kirschner**, 171 AD2d 593.)

It is equally well established that a rear-end collision with a stopped vehicle establishes a **prima facie** case of negligence on the part of the operator of the moving vehicle and imposes a duty on that operator to provide an adequate, non-negligent explanation, in evidentiary form, for the collision. (See **Girolamo v Liberty Lines Transit, Inc.**, 284 AD2d 371; **Cacace v**

**DiStefano**, 276 AD2d 457; **Tricoli v Malik**, 268 AD2d 469.)

Hence, the operator of the moving vehicle must rebut the inference of negligence created by the unexplained rear-end collision (see **Pfaffenbach v White Plains Exp. Corp.**, 17 NY2d 132, 135) since he or she is in a better position to explain the cause of the collision either through a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable excuse (see **Power v Hupart**, 260 aD2d 458; **Hurley v Izzo**, 248 AD2d 674, 675-676; **Barile v Lazzarini**, 222 AD2d 635, 636).

This rule has been applied when the first vehicle comes to a sudden stop in slow-moving traffic (**Mascitti v Greene**, 250 AD2d 821), and even if the sudden stop was repetitive (**Leal v Wolff**, 224 AD2d 392). In **Barba v Best Security Corp., supra**, the court even applied this rule where the front vehicle, although in stop-and-go traffic, stopped while crossing an intersection.

Based upon the record submitted, this Court finds that defendant, Williams, is entitled to summary judgment on the issue of liability. It is undisputed that Williams' vehicle was stopped or rolling to a stop when it was rear-ended by Delsolar. Hence, the requisite **prima facie** case of negligence has been established.

Contrary to co-defendants' contention, they have failed to rebut the inference of negligence. No concrete evidence has been offered that Williams' vehicle stopped suddenly or that he was in the wrong lane. Equally unavailing is plaintiff's counsel's conclusory allegation that Williams might have been able to avoid the impact with plaintiff's vehicle. Further, the fact that Williams testified that the road was a little damp is insufficient to rebut the inference of negligence created by the rear-end collision.

Nor can co-defendants avoid this result by claiming that the motion is premature because Delsolar's deposition hasn't been conducted. Notably, Mr. Itwarie testified that Delsolar left

AMA's employ in 1999.

Moreover, "(t)he determination of a motion for summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence". (**Parisi v Leppard**, 237 AD2d 419, citing **Auerharch v Bennett,** 47 NY2d 619.) "Speculation as to what might be produced if discovery were to be had is not enough to defeat a motion for summary judgment". (**Carrington v City of New York,** 201 AD2d 525, 527.)

In view of the foregoing, Williams is entitled to summary judgment on the issue of liability.

This constitutes the decision and order of the court.

Dated: July 11, 2002

JOSEPH COVELLO, J. S. C.