SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 25

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PRESENT: HON. WILLIAM R. LaMARCA
Justice

ANNIE MATTHEWS,

Plaintiff,

-against-

BERNARD BURLEW and LARRY LAND,

Defendants.

Motion Sequence # 001
Submitted September 19, 2005

INDEX NO: 1323/05

The following papers were read on these motions:

Notice of Motion.....1
Affirmation in Opposition.....2
Affirmation in Reply.....3

Plaintiff, ANNIE MATTHEWS, moves for an order pursuant to CPLR §3212 granting partial summary judgment in favor of the plaintiff on the issue of liability. Defendants, BERNARD BURLEW and LARRY RAND (sued herein as LARRY LAND), oppose the motion which is determined as follows:

This action arises out of a two-car automobile accident that occurred on March 27, 2004 at 7:30 A.M. in the morning in the westbound lanes of Astoria Boulevard in Astoria, New York. Plaintiff states that she sustained serious injuries, primarily to her neck and lower back, when her 1983 Mercedes Benz was struck in the rear by the 1999 Nissan Pathfinder truck driven by defendant, BERNARD BURLEW, and owned by defendant,

LARRY LAND. Plaintiff states that, at the time of impact, she was stopped for about one minute at a red traffic light when she was rear ended by defendants' vehicle and pushed 6 to 10 feet into the intersection. It is plaintiff's position that summary judgment is appropriate because "[a] rear-end collision establishes a prima facie case of negligence on the part of the operator of the offending vehicle and imposes a duty of explanation on that operator", citing, *inter alia* , *Belitsis v Airborne Express Freight Corp*. 306 AD2d 507, 761 NYS2d 329 (2nd Dept. 2003), *Sekuler v Limnos Taxi Inc.*, 264 AD2d 389, 694 NYS2d 100 (2nd Dept. 1999) and *Doodnauth v Catholic Medical Center of Brooklyn and Queens, Inc.*, 297 AD2d 781, 747 NYS2d 803 (2nd Dept. 2002). She points out that, at his deposition, BURLEW testified that he observed plaintiff's stopped vehicle 10 seconds before the impact and realized he was about to be in an accident. Plaintiff urges that she is entitled to summary judgment on the issue of liability because BURLEW has failed to rebut the inference of negligence and has not provided a non-negligent explanation for the rear-end impact.

In opposition to the motion, counsel for defendant driver asserts that summary judgment is inappropriate in that there are material facts in dispute. Counsel states that defendant testified at his deposition that, in contrast to plaintiff's allegations, the traffic light was green at the moment of impact and that plaintiff's car was moving forward when she slammed on her brakes and came to a sudden stop. It is defendant's position that when a preceding vehicle comes to an unexplained sudden stop, questions of fact are raised that should be submitted to the jury, citing *Niemiec v Jones*, 237 AD2d 267, 654 NYS2d 163 (2nd Dept. 1997). Counsel urges that the motion be denied because, based on the contradictions in the parties' sworn testimony as to the facts surrounding the accident,

material issues of fact preclude summary judgment, citing *Levine v Dagio Construction Corp.*, 261 AD2d 588, 690 NYS2d 679 (2nd Dept. 1999).

In viewing motions for summary judgment, it is well settled that summary judgment is a drastic remedy which may only be granted where there is no clear triable issue of fact (*see, Andre v Pomeroy*, 35 NY2d 361, 362 NYS2d 131, 320 NE2d 853 [C.A. 1974]; *Mosheyev v Pilevsky*, 283 AD2d 469, 725 NYS2d 206 [2nd Dept. 2001]. Indeed, "[e]ven the color of a triable issue, forecloses the remedy" *Rudnitsky v Robbins*, 191 AD2d 488, 594 NYS2d 354 [2nd Dept. 1993]). Moreover "[i]t is axiomatic that summary judgment requires issue finding rather than issue-determination and that resolution of issues of credibility is not appropriate" (*Greco v Posillico*, 290 AD2d 532, 736 NYS2d 418 [2nd Dept. 2002]; *Judice v DeAngelo*, 272 AD2d 583, 709 NYS2d 817 [2nd Dept. 2000]; *see also S.J. Capelin Associates, Inc. v Globe Mfg. Corp.*, 34 NY2d 338, 357 NYS2d 478, 313 NE2d 776 [C.A.1974]). Further, on a motion for summary judgment, the submissions of the opposing party's pleadings must be accepted as true (*see Glover v City of New York*, 298 AD2d 428, 748 NYS2d 393 [2nd Dept. 2002]). As is often stated, the facts must be viewed in a light most favorable to the non-moving party. *(See, Mosheyev v Pilevsky, supra).*

Vehicle and Traffic Law §1129(a) directs that an operator of a vehicle is "under a duty to maintain a safe distance between his vehicle and the vehicle in front of him and his failure to do so, in the absence of an adequate, non-negligent explanation, constitutes negligence as a matter of law". "When a driver approaches another vehicle from the rear, he is bound to maintain a reasonably safe rate to (sic) speed and to maintain control of his vehicle and use reasonable care to avoid colliding with the motor vehicle". *Young v City of New York*, 113 AD2d 833, 493 NYS2d 585 (2nd Dept. 1985). BURLEW testified that he

saw plaintiff's vehicle 15-20 feet in front of him and that he realized he was going to be in an accident when his vehicle slid 6-8 feet as he tried to turn away.

After a careful reading of the submissions herein, it is the judgment of the Court that defendants have failed to rebut the inference of negligence by providing a non negligent explanation for the collision. While there appears to be a dispute about whether plaintiff's vehicle was completely stopped at the time of impact, Second Department has consistently held that it makes no difference in granting summary judgment whether the vehicle being struck from behind was stopped or stopping. *Filippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 (2nd Dept. 2000); *Gaeta v Carter* , 6 AD3d 576, 775 NYS2d 861 (2 nd Dept. 2004); *Chapel v Meyers*, 306 AD2d 235, 762 NYS2d 95 (2nd Dept. 2002). Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. *Filippazzo v Santiago*, *supra*. BURLEW acknowledged that plaintiff was stopped a full 10 seconds before impact and his explanation that plaintiff had stopped short was insufficient to rebut the presumption that he was negligent. *Levine v Taylor*, 268 AD2d 566, 702 NYS2d 107 (2nd Dept. 2000); *cf.*, *Young v City of New York*, *supra.* Plaintiff was traveling in defendants' lane in full view of defendants' vehicle when she was struck in the rear and the circumstances and evidence in this case leave no triable issues of fact regarding liability. Accordingly, it is hereby

ORDERED, that plaintiff's motion granting partial summary judgment in favor of the plaintiff on the issue of liability is **granted.** However, as the plaintiff has not submitted proof of "serious injury", the Court grants judgment as to fault only, which does not include any finding that the plaintiff has satisfied the "threshold" serious injury requirements. *Shafareko*

v Fu Cheng, 772 NYS2d 862, NY App.Div. Lexis 2687 (2nd Dept. 2003); *Reid v Brown*, 308 AD2d 331, 764 NYS2d 260 (1st Dept. 2003).

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: December 12, 2005

WILLIAM R. LaMARCA, J.S.C.

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