SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU - PART 19

Scan

PRESENT: HON. WILLIAM R. LaMARCA
Justice

SALVATORE INGLIMA,

Plaintiff,

-against-

YUNG HUAN HSU a/k/a HSU YUNG HUAN,

Defendant.

Motion Sequence # 001
Submitted March 30, 2007

INDEX NO: 17938/06

The following papers were read on these motions:

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

Plaintiff, SALVATORE INGLIMA, moves for an order pursuant to CPLR §3212 granting summary judgment in favor of the plaintiff on the issue of liability. Defendant, YUNG HUAN HSU a/k/a HSU YUNG HUAN, opposes the motion, which is determined as follows:

This action arises out of a three-car automobile accident that occurred on December 8, 2005, when plaintiff was driving his motor vehicle eastbound on the Long Island Expressway, near Exit 41. Plaintiff claims that his car came to a complete stop for traffic, when he was struck in the rear by a vehicle owned and operated by the defendant. He

states that, as a result of the collision, he sustained severe and serious injuries and that defendant was the sole cause of the accident. Counsel for plaintiff contends that defendant violated Vehicle and Traffic Law (VTL) §1129 by following plaintiff's car too closely and by not observing "that which was there to be seen", citing PJI 2:77.1. He urges that plaintiff is entitled to summary judgment on the issue of liability as defendant was the sole proximate cause of the accident.

In opposition to the motion, defendant HSU states that he was traveling within the speed limit in moderate traffic when, all of a sudden, the car in front of him "slammed on its brakes". He states that he applied his braked but his vehicle "did not stop in time" and he came into contact with the car in front of him. He states that the vehicle that he hit also came into contact with another vehicle in front of it, as reflected in the police accident report, but that he is unable to say which collision occurred first- his collision with plaintiff's car in front of him, or the collision of the plaintiff's car with the vehicle in front of it. Defendant claims that, because he does not speak English, he was unable to communicate with the police officer about how the accident occurred or about the information put into the police report. Counsel for defendant suggests that plaintiff's rear end collision with the vehicle he was following could "possibly" have occurred prior to defendant coming in contact with plaintiff and that summary judgment should be denied because defendant is entitled to explore this issue at plaintiff's deposition. Counsel contends that the motion is premature and that issues of fact exist as to the timing of plaintiff's accident with the third vehicle and how it relates to subject accident.

In reply, counsel for plaintiff points out that feigned issues of fact and speculation are insufficient to defeat a motion for summary judgment. Counsel for plaintiff states that

defendant has personal knowledge of the relevant facts underlying the relevant motor vehicle collision and the alleged need to conduct discovery is unavailing, citing *Emil Norsic & Son, Inc. v L.P. Transportation, Inc*, 30 AD3d 368, 815 NYS2d 736 (2nd Dept. 2006), and that defendant has offered no evidence whatsoever to prove that plaintiff's collision with the car in front of him occurred first. Indeed, an affidavit of plaintiff annexed to the reply papers rebuts said speculation and confirms that the first impact with plaintiff's vehicle was by defendant's car and, as a result, plaintiff's vehicle was pushed forward into another vehicle.

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". Summary judgment is appropriate for "hit-in-the-rear" accidents because Vehicle and Traffic Law of the State of New York, § 1129(a) requires a driver to maintain a safe distance between vehicles and to "not follow another vehicle more closely that is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the conditions of the highway". Moreover, a rear end collision with a stopped or stopping vehicle creates a *prima facie* case of liability with respect to the operator of the rear most vehicle, imposing a duty of explanation on the operator to excuse the collision. *Power v Hupart*, 260 AD2d 458, 688 NYS2d 194 (2nd Dept. 1999); *Filippazzo v Santiago*, 277 AD2d 419, 716 NYS2d 710 (2nd Dept. 2000); and *Santarpia, et al, v First Fidelity Leasing Group, Inc.* et al, 275 AD2d 315, 712 NYS2d 57 (2nd Dept. 2000). Court's have held that drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident. (See, *National Interstate v A.J. Murphy Co.*, 9 AD3d 714, 780 NYS2d 430 [3rd Dept. 2004]).

Based upon the foregoing and after a careful reading of the submissions herein, it is the Court's judgment that plaintiff is entitled to judgment as a matter of law on the issue of liability as no question of fact has been raised to require a trial on said issue. Bare allegations are insufficient to create a genuine issue of fact. *Shaw v Time-Life Records,* 38 NY2d 201, 379 NYS2d 390, 341 NE2d 817 (C.A. 1975). Defendant has failed to submit evidence in admissible form to rebut plaintiff's *prima facie* showing that defendant is liable

for his rear end collision with plaintiff's stopped vehicle or to offer a non-negligent explanation for the collision. 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*, 5 AD3d 585, 772 NYS2d 862 (2nd Dept. 2003); *Reid v Brown*, 308 AD2d 331, 764 NYS2d 260 (1st Dept. 2003). Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability is granted as to defendant's fault, only; and it is further

ORDERED, that the parties shall appear for a Preliminary Conference on July 17, 2007, at 2:30 P.M. in Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, for discovery on issues of "serious injury" and damages. A copy of this order shall be served on all parties and on DCM Case Coordinator Richard Kotowski. **There will be no adjournments**, except by formal application pursuant to 22 NYCRR §125.

All further requested relief not specifically granted is denied.

This constitutes the decision and order of the Court.

Dated: June 14, 2007

WILLIAM R. LaMARCA, J.S.C.

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