

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

ROBERT M. GICK and JENNIFER O'ROURKE,

TRIAL/IAS PART 19

Plaintiff(s),

INDEX NO. 6335/01

- against -

MOTION SEQUENCE
NO. 1 & 2

IDA M. KELLY, TIMOTHY J. KELLY and THERESA A.
ZANELLO,

MOTION SUBMISSION
DATE: November 8, 2002

Defendant(s).

The following papers read on this motion:

- | | |
|---------------------------|---|
| Notice of Motion | X |
| Notice of Cross Motion | X |
| Affirmation in Opposition | X |
| Reply Affirmation | X |

Upon the foregoing papers, the motion by the defendant Teresa A. Zanello for an Order granting the defendant Teresa A. Zanello, summary judgment pursuant to CPLR 3212 dismissing the complaint the basis that the defendant vehicle was stopped when it was struck in the rear and the cross-motion by the plaintiffs for an Order granting plaintiffs cross-motion for summary judgment attributing liability to defendants, Ida M. Kelly and Timothy J. Kelly as a matter of law, are both determined as hereinafter provided:

This personal injury action arises out of a motor vehicle accident involving four cars that occurred on November 21, 2000 on Port Washington Boulevard at or near its intersection with Park Avenue In Flower Hill, New York. The accident in issue was a chain collision. The party/parties in the first vehicle in line are not involved in this action. The second car was owned and operated by the plaintiff Robert M. Gick and had the plaintiff Jennifer O'Rourke as a passenger in the vehicle. The defendant Teresa A. Zanello owned and operated the third vehicle. The defendant Timothy Kelly owned the fourth vehicle which was operated by the defendant Ida M. Kelly. The respective moving parties contend that the first three vehicles were stopped for a traffic light at the intersection in question when the defendant Ida Kelly's vehicle struck the defendant Zanello's vehicle causing a chain collision driving the Zanello vehicle into the Gick vehicle into the first vehicle.

The plaintiff Robert M. Gick testified that at the time of the alleged accident that he had stopped for a red light at the intersection (see deposition transcript of Robert M. Gick at pg. 22) and that he had been

stopped for approximately thirty to forty seconds before the accident occurred (see deposition transcript of Robert M. Gick at pgs. 23- 24). The defendant Teresa A. Zanello testified at her deposition that she was "completely stopped" behind the Gick vehicle (see deposition transcript of Teresa A. Zanello at pg. 9) and that she had been stopped for approximately thirty seconds prior to the accident (see deposition transcript of Teresa A. Zanello at pg. 14). The defendant Ida Kelly testified at her deposition that at the time of the accident the car in front of her was stopped (see deposition transcript of Ida Kelly at pgs. 22 and 40). Ida Kelly testified that at the time of impact her vehicle's rate of speed was 5 to 10 MPH (see deposition transcript of Ida Kelly at pgs. 22 and 23)

In examining a rear-end collision, the Court in **Leal v Wolff**, 224 AD2d 392, 638 NYS2d 110 (Second Dept., 1996) stated:

"A rear-end collision with a stopped automobile establishes a prima facie case of negligence on the part of the operator of the moving vehicle to explain how the accident occurred (see, *Gambino v City of New York*, 205 AD2d 583, 613 NYS2d 417; *Starace v Inner Circle Qonexions*, 198 AD2d 493, 604 NYS2d 179; *Edney v Metropolitan Suburban Bus Auth.*, 178 AD2d 398, 577 NYS2d 102; *Benyarko v Avis Rent A Car Sys.*, 162 AD2d 572, 573, 556 NYS2d 761). The operator of the moving vehicle is required to rebut the inference of negligence created by an unexplained rear-end collision (see, *Pfaffenbach v White Plains Express Corp.*, 17 NY2d 132, 135, 269 NYS2d 115, 216 NE2d 324) because he or she is in the best position to explain whether the collision was due to a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or some other reasonable cause (see, *Carter v Castle Elec. Contr. Co.*, 26 AD2d 83, 85, 271 NYS2d 51). If the operator of the moving vehicle cannot come forward with any evidence to rebut the inference of negligence, the plaintiff may properly be awarded judgment as a matter of law (see, *Starace v Inner Circle Qonexions*, *supra*, at 493, 604 NYS2d 179; *Young v City of New York*, 113 AD2d 833, 834, 493 NYS2d 585).

Leal v Wolfe, supra at pgs. 111-112

The defendant Ida Kelly in opposition to the respective applications has offered no explanation to rebut the inference of negligence as to why her vehicle struck the Zanello vehicle thereby starting the chain collision.

Based upon the foregoing, the defendant Teresa A. Zanello's application for an Order granting the defendant Teresa A. Zanello, summary judgment pursuant to CPLR 3212 dismissing the complaint the basis that the defendant vehicle was stopped when it was struck in the rear, is **granted**.

The plaintiffs Robert M. Gick and Jennifer O'Rourke's motion for an Order granting plaintiffs cross-motion for summary judgment attributing liability to defendants, Ida M. Kelly and Timothy J. Kelly as a matter of law, is **granted**.

This matter is respectfully referred to the Calendar Control Part for inquest subject to the approval of the Justice there presiding. Plaintiff shall serve a Notice of Inquest, together with a copy of this Order and the Note of Issue upon counsel for the defendant(s), by certified mail, return receipt requested, and shall serve copies of same together with receipt of payment, upon the Calendar Clerk of this Court, no later than ten (10) days prior to the date of inquest. The directive with respect to an inquest is subject to the right of the Justice presiding in CCP II to refer the matter to a Justice, Judicial Hearing Officer, or a Court

Attorney/Referee as he or she deems appropriate.

SO ORDERED.

DATED:

1/9/2003

Ray S. Malon

J.S.C.

ENTERED

JAN 13 2003

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**