

**Porretto v Curry**

2013 NY Slip Op 30511(U)

March 15, 2013

Supreme Court, Queens County

Docket Number: 17981/2012

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
**Justice**

- - - - - x

MARIA PORRETTO, Index No.: 17981/2012  
Plaintiff, Motion Date: 02/25/13  
- against - Motion No.: 82  
Motion Seq.: 1

MICHAEL CURRY and LORI DISTEFANO,  
Defendants.

- - - - - x

The following papers numbered 1 to 12 were read on this motion by plaintiff, Maria Porretto, for an order pursuant to CPLR 3212(b) granting plaintiff partial summary judgment on the issue of liability and setting the matter down for a trial on damages:

	Papers Numbered
Kong Notice of Motion.....	1 - 6
Abish Affirmation in Opposition.....	7 - 9
Kong Reply Affirmation.....	10 - 12

In this action for negligence, the plaintiff, Maria Porretto, seeks to recover damages for personal injuries she sustained as a result of a motor vehicle accident that occurred on September 2, 2011, in which a vehicle owned by defendant, Lori Distefano, and operated by defendant Michael Curry, rear-ended a vehicle operated by the plaintiff.

The four-vehicle accident took place on the northbound lanes of the belt near Exit 24 at 131<sup>st</sup> Street in Queens County, New York. Plaintiff alleges that she sustained injuries when her vehicle that was stopped in traffic, was struck in the rear by the vehicle operated by defendant Curry causing her vehicle to be propelled into the vehicle in front of it.

This action was commenced by the plaintiff by the filing of a summons and complaint on August 28, 2012. Issue was joined by service of defendant's verified answer on August 22, 2012. Plaintiff now moves, prior to the completion of discovery, for an order pursuant to CPLR 3212(b), granting summary judgment on the issue of liability and setting this matter down for a trial on serious injury and damages.

In support of the motion, the plaintiff submits an affirmation from counsel, Sameer Chopra, Esq; a copy of the pleadings; a copy of the plaintiff's verified bill of particulars; an affidavit of merit from the plaintiff Maria Porretto; photographs depicting damage to the rear of the plaintiff's vehicle; and a copy of the police accident report (MV-104).

In her affidavit, dated January 7, 2013, plaintiff states that on July 14, 2012, she was the operator of a motor vehicle that had been involved in an accident at approximately 5:30 p.m. on the Belt Parkway at or near Exit 24 in Queens County. She states that she stopped her vehicle behind other vehicles ahead of her that had also come to a stop on the parkway due to traffic conditions. She stated that she was stopped for 5 - 10 seconds prior to her vehicle being hit in the rear by the vehicle operated by defendant Michael Curry. Ms. Porretto states that the impact was very hard and jerked her car forward causing her vehicle to impact the vehicle that was stopped in front of hers. Plaintiff alleges that as a result of the accident she sustained serious injuries to her left shoulder, as well as her cervical and lumbar spine.

The police accident report indicates that this was a four vehicle accident. The officer at the scene describes the accident based upon the statements of the drivers as follows:

"At t/p/o Veh #1 (defendant) rear-ended vehicle #2 (plaintiff) causing vehicle #2 to strike vehicle #3(non-party). Vehicle # 3 rear-ended vehicle 4 (non-party). Operator Vehicle #1(defendant) states he tried to brake too late. All other operators state they were stopped in traffic in the left lane...Police Officer did not witness accident."

The plaintiff contends that the defendant driver was negligent in the operation of his vehicle in striking the plaintiff's vehicle in the rear. Plaintiff's counsel contends that the accident was caused solely by the negligence of the defendant driver in that his vehicle was traveling too closely in violation of VTL § 1129(a) and that the driver failed to safely

stop his vehicle prior to rear-ending the plaintiff's vehicle. In addition, defendant Curry admitted to the police officer at the scene that he tried to brake but it was too late. Counsel contends that the evidence indicates that the plaintiff's vehicle was stopped in heavy traffic on the Belt Parkway when it was struck from behind by the defendant's vehicle. Counsel contends, therefore, that the plaintiff is entitled to partial summary judgment as to liability because the defendant was solely responsible for causing the accident while the plaintiff was free from culpable conduct.

In opposition, defendant's counsel, Jonathan Hirschhorn, Esq. contends that the plaintiff's motion is premature as examinations before trial of the parties have yet to be conducted. Defendant's counsel contends that the defendant should have the right to cross-examine the plaintiff herein as to her comparative negligence.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v City of New York, 49 NY2d 557[1980]).

"When the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle" (Macaulley v ELRAC, Inc., 6 AD3d 584 [2d Dept. 2003]). It is well established law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rearmost vehicle, requiring the operator of that vehicle to proffer an adequate, non-negligent explanation for the accident (see Klopchin v Masri, 45 AD3d 737 [2d Dept. 2007]; Hakakian v McCabe, 38 AD3d 493 2d Dept. 2007]; Reed v New York City Transit Authority, 299 AD2 330 [2d Dept. 2002]; Velazquez v Denton Limo, Inc., 7 AD3d787 [2d Dept. 2004]).

Here, plaintiff presented an affidavit stating that her vehicle was completely stopped in traffic on the Belt Parkway when it was struck from behind by defendant's motor vehicle. Thus, the plaintiff satisfied her prima facie burden of establishing entitlement to judgment as a matter of law on the issue of liability by demonstrating that his vehicle was stopped when it was struck in the rear by the vehicle operated by

defendant Michael Curry(see Volpe v Limoncelli, 74 AD3d 795 [2d Dept. 2010]; Vavoulis v Adler, 43 AD3d 1154 [2d Dept. 2007]; Levine v Taylor, 268 AD2d 566 [2d Dept. 2000]).

Having made the requisite prima facie showing of entitlement to summary judgment, the burden then shifted to defendant to raise a triable issue of fact as to whether plaintiff was also negligent, and if so, whether his negligence contributed to the happening of the accident (see Goemans v County of Suffolk, 57 AD3d 478 [2d Dept. 2007]).

This court finds that the defendant failed to submit an affidavit in opposition to the motion and failed to provide any other evidence as to any negligence on the part of plaintiff or to provide a non-negligent explanation for the accident sufficient to raise a triable question of fact (see Lampkin v Chan, 68 AD3d 727 [2d Dept. 2009]; Gomez v Sammy's Transp., Inc., 19 AD3d 544 [2d Dept. 2005][the defendants failed to raise a triable issue of fact by only interposing an affirmation of their attorney who lacked knowledge of the facts]). If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the occupants and owner of the stationary vehicle are entitled to summary judgment on the issue of liability (see Kimyagarov v. Nixon Taxi Corp., 45 AD3d 736 [2d Dept. 2007]). The evidence demonstrated that the plaintiff was in a stopped vehicle, and no evidence was presented to show that she contributed to the happening of the injury-producing event (see Aikens-Hobson v. Bruno, 97 AD3d 709 [2d Dept. 2012]; Daramboukas v Samlidis, 84 AD3d 719 [2d Dept. 2011]; Franco v Breceus, 70 AD3d 767[2d Dept. 2010]; Shirman v Lawal, 69 AD3d 838 [2d Dept. 2010]; Katz v Masada II Car & Limo Serv., Inc., 43 AD3d 876 [2d Dept. 2007]). Further, the defendant admitted to the police officer at the scene that the accident was the result of his failing to brake in sufficient time to stop prior to striking the plaintiff's vehicle.

Accordingly, this court finds that in opposition to plaintiff's motion, defendant failed to submit any evidence sufficient to raise a triable issue of fact (see Arias v Rosario, 52 AD3d 551 [2d Dept. 2008]; Smith v Seskin, 49 AD3d 628 [2d Dept. 2008]; Campbell v City of Yonkers, 37 AD3d 750 [2d Dept. 2007]). The defendants' contention that the plaintiff's motion for summary judgment is premature is without merit. The defendants failed to offer any evidentiary basis to suggest that discovery may lead to relevant evidence. The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis upon which to deny the motion (see CPLR 3212[f]; Hanover Ins. Co. v

Prakin, 81 AD3d 778 [2d Dept. 2011]; Essex Ins. Co. v Michael Cunningham Carpentry, 74 AD3d 733 [2d dept. 2010]]; Peerless Ins. Co. v Micro Fibertek, Inc., 67 AD3d 978 [2d Dept. 2009]; Gross v Marc, 2 AD3d 681 [2d Dept. 2003]).

As the evidence in the record demonstrates that the defendant failed to provide a non-negligent explanation for the collision and as no triable issues of fact have been put forth as to whether plaintiff may have borne comparative fault for the causation of the accident, and based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion is granted, and the plaintiff, Maria Porretto, shall have partial summary judgment on the issue of liability against the defendants, Michael Curry and Lori Distefano, and the Clerk of Court is authorized to enter judgment accordingly; and it is further,

ORDERED, that upon completion of discovery on the issue of damages, filing a note of issue, and compliance with all the rules of the Court, this action shall be placed on the trial calendar of the Court for a trial on serious injury and damages.

Dated: March 15, 2013  
Long Island City, N.Y.

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**ROBERT J. MCDONALD**  
**J.S.C.**