Mercado-Torres v Macli
2013 NY Slip Op 33986(U)
June 25, 2013
Supreme Court, Bronx County
Docket Number: 307773/11
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti-Hughes

X

DORIS MERCADO-TORRES,

DECISION/ORDER

Plaintiffs,

-against- Index No.: 307773/11

ALFRED MACLI and PEPE INFINITY, INC.,

Defendants.

X

The following papers numbered 1 to 14 read on the below motion noticed on January 10, 2013 and duly submitted on the Part IA15 Motion calendar of **April 24, 2013**:

Papers Submitted	Numbered
Pl.'s Affirmation in support of motion, exhibits	1,2
Pepe's cross-motion, exhibits	3,4
Pepe's Aff. In opp., exhibits	5,6
Macli's aff. In opp., exhibits	7,8
Pl.'s opp to cross-motion, exhibits	9,10
Pepe's aff. In reply, exhibits	11,12
Pl.'s reply aff., exhibits	13,14

Upon the foregoing papers, the plaintiff Doris Mercado-Torres ("Plaintiff") moves for summary judgment on the issue of liability against the defendants Alfred Malci and Pepe Infinity, Inc. pursuant to CPLR 3212. The defendants oppose the motion.

Plaintiff's Notice of Motion had also requested the relief of striking the defendant Alfred Malci's answer for failure to provide certain discovery responses. Defendant Pepe Infinity, Inc., in response, cross-moved to strike Plaintiff's complaint for failure to provide discovery. A stipulation executed by counsel for all parties, dated April 24, 2013, indicates that "Defendant's cross motion to compel discovery is withdrawn," "parties have completed a so ordered stipulation regarding discovery at today's status conference," and that the plaintiff's motion for summary judgment is fully submitted for decision. Accordingly, this Court deems Plaintiff's and

the defendant's discovery-related motions to strike as "withdrawn," and will resolve the Plaintiff's motion for summary judgment on the issue of liability.

I. Background

This action arises from a motor vehicle accident that allegedly occurred on May 1, 2011. At relevant times, Plaintiff was a passenger in a vehicle operated by her husband, Jose Mercado. Plaintiff alleges that her vehicle was stopped at a traffic light on Bartow Avenue near its intersection with Baychester Avenue in the Bronx, New York, when the defendant Alfred Macli rear-ended Plaintiff's stopped car, causing injury.

At deposition, Plaintiff testified that she a passenger in her vehicle, driven by her husband, stopped at a traffic light, when the vehicle was struck in the rear by Defendants' vehicle. Plaintiff's vehicle was stopped with approximately 5-6 cars ahead of it waiting at the traffic light. She testified that the vehicle was waiting at the intersection and traffic light for about "ten minutes" before the impact occurred. She described the impact as "heavy."

Plaintiff also submits the police report, but same is inadmissible since it is uncertified and Plaintiff has not laid an adequate foundation for its admissibility (*Quinones v. New England Motor Freight, Inc.*, 80 A.D.3d 514, 515 [1st Dept. 2011], citing *Figueroa v. Luna*, 281 A.D.2d 204, 205 [1st Dept. 2001]).

Defendants oppose the motion. Defendant Pepe Infinity argues that summary judgment must be denied, since defendant Alfred Macli testified at deposition that he did not see Plaintiffs brake lights as the vehicle was slowing down to stop. Mr. Macli testified that he collided with Plaintiff's vehicle because he didn't see brake lights. He then testified "...[a]nd then I seen brake lights, and I was behind him and I hit him at about two miles an hour." He later testified that the accident occurred after he had completed a left-hand turn and came to a stop three feet behind Plaintiff's vehicle. He testified "I didn't even know it happened. I was braking as the impact happened." Defendant Macli argues that issues of fact as to Plaintiff's comparative fault must preclude entry of summary judgment.

II. Standard of Review

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. (*Muniz v. Bacchus*, 282 A.D.2d 387 [1st Dept. 2001]). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. (*Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 [2nd Dept. 1964]; *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 [3rd Dept. 1988]).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility. (*Knepka v. Tallman*, 278 A.D.2d 811 [4th Dept. 2000]).

If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738,[1993]; *Bronx County Public Adm'r v. New York City Housing Authority*, 182 A.D.2d 517 [1st Dept. 1992]).

III. Applicable Law and Analysis

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident." (*Cabrera v Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010] *citing Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept. 2001]; *see also Dattilo v Best Transp. Inc* 79 A.D.3d 432 [1st Dept.

2010]). However, "not every rear-end collision is the exclusive fault of the rearmost driver. The frontmost driver also has the duty not to stop suddenly or slow down without proper signaling so as to avoid a collision. Thus, where the frontmost driver also operates his vehicle in a negligent manner, the issue of comparative negligence is for a jury to decide."(*Gaeta v. Carter*, 6 A.D.3d 576, 577 [2nd Dept. 2004][citations omitted]).

Here, Plaintiff, has established his prima facie case of negligence on the part of the Defendants, as it is undisputed that his vehicle was struck in the rear by Defendants' vehicle (see *Cabrera v Rodriguez, supra.*) The burden now shifts to Defendants to provide evidence of a "nonnegligent explanation for the accident, or a nonnegligent reason for her failure to maintain a safe distance between her car and the lead car." (*Mullen v. Rigor*, 8 A.D. 3D 104 [1st Dept. 2004] *citing Jean v Xu*, 288 A.D.2d 62, [1st Dept. 2001]; *Mitchell v Gonzalez*, 269 A.D.2d 250, 251 [1st Dept. 2000]).

A bare explanation that the plaintiff's vehicle suddenly stopped, is insufficient to rebut the presumption (*see Francisco v. Schoepfer*, 30 A.D.3d 275 [1st Dept. 2006]; *Ramirez v. Konstanzer*, 61 A.D.3d 837 [2nd Dept. 2009]; *Jumandeo v. Franks*, 56 A.D.3d 614 [2nd Dept. 2008]). Indeed, it is well-settled that "[a] driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and cars ahead of him to avoid collisions with stopped vehicles, taking into account weather and road conditions."(*Malone v. Morillo*, 6 A.D.3d 324 [1st Dept. 2004], quoting *Mitchell v. Gonzalez*, 269 A.D.2d 250 [1st Dept. 2000]).

Here, Defendants have failed to submit a sufficient non-negligent explanation for this rear-end collision. While Mr. Malci did testify that he did not see brake lights shortly before the accident, he did not testify that he could not see the vehicle itself prior to impact. Mr. Malci testified that this accident occurred during the afternoon, and there is no indication on record that Mr. Macli's view of Plaintiff's vehicle was obscured by weather conditions. Under these circumstances, defendants' proffered explanation that Plaintiff's brake lights may have been malfunctioning is insufficient to avoid summary judgment on the issue of liability (*see Waters v. City of New York*, 278 A.D.2d 408 [2nd Dept. 2000]). Accordingly, Plaintiff's motion for summary judgment on the issue of Defendants' liability will be granted.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendants' liability only is granted, and it is further,

ORDERED, that the branch of Plaintiff's motion and the defendants' cross-motions to strike the pleadings for failure to provide discovery are withdrawn, pursuant to the stipulation provided to the Court.

This constitutes the Decision and Order of this Court.

Dated: 6/25, 2013

Hon. Mary Ann Brigantti-Hughes, J.S.C.