

**Beasley v Asdotel Enters., Inc.**

2014 NY Slip Op 33192(U)

November 5, 2014

Supreme Court, New York County

Docket Number: 310566/2008

Judge: Mary Ann Brigantti

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11-20-2014

**SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15**

**PRESENT:** Honorable Mary Ann Brigantti-Hughes

-----X  
SHANIQUE BEASLEY,

Plaintiff,

-against-

**DECISION / ORDER**  
Index No. 310566/2008

ASDOTEL ENTERPRISES, INC., et als.,

Defendants.  
-----X

The following papers numbered 1 to 4 read on the below motions noticed on May 20, 2014 and duly submitted on the Part IA15 Motion calendar of **August 11, 2014**:

<u>Papers Submitted</u>	<u>Numbered</u>
Defs.' Notice of Motion, Exhibits	1,2
Pl.'s Aff. in Opp.	3
Defs.' Aff. In Reply	4

Upon the foregoing papers, the defendants S.A. Williamson ("Williamson") and Precious Tyler ("Tyler") move for summary judgment, dismissing the complaint of the plaintiff Shanique Beasley ("Plaintiff") and all cross-claims, pursuant to CPLR 3212. Plaintiff opposes the motion.

**I. Background**

This matter arises out of an alleged motor vehicle accident that occurred on December 13, 2008, at approximately 5:50AM. Plaintiff testified that, at relevant times, she was a rear-seated passenger in a gypsy cab owned by defendant Asdotel Enterprises, Inc., and operated by defendant Henry Brutus ("Brutus"). The vehicle was traveling on Atlantic Avenue in the left lane between Utica and Rochester Avenue in Brooklyn, New York. At this location, Atlantic Avenue is a two-way roadway with two lanes of travel in either direction. The accident occurred near the Rochester Avenue intersection, which is controlled by a traffic light. Plaintiff testified that Brutus was talking on his cell phone before the accident occurred. Plaintiff testified that she told Brutus to make a left turn at this intersection. The driver, however, ignored her request, and made a right turn at the intersection from the left lane, to try to "beat" the traffic light, which was red. When he did so, the gypsy cab started to spin out of control. While it was spinning, the

Plaintiff's vehicle was struck by two other vehicles.

Defendant Tyler testified that at relevant times, she was a passenger in a vehicle operated by defendant Williamson. This accident occurred on a portion of Atlantic Avenue that consisted of a left lane, a middle lane, and a right lane that was occupied by parked vehicles. Tyler's vehicle was in the middle lane, and Plaintiff's gypsy cab was in the left lane. There were no vehicles traveling in front of Tyler's vehicle. She testified that, two or three seconds before the accident, the gypsy cab sped up and turned right, in front of Tyler's vehicle. Tyler's vehicle attempted to stop, but was unable to avoid the impact. The front bumper of her vehicle struck the rear right side of the gypsy cab.

Defendant Williamson submits an affidavit in support of the motion. Williamson states that, at relevant times, she was operating a motor vehicle on Atlantic Avenue in the right lane of travel. Plaintiff's vehicle was proceeding in the same direction, in the left lane of travel. As she approached the street's intersection with Rochester Avenue, she observed Plaintiff's vehicle suddenly move to its right and cut into her lane of travel. Williamson states that at the time of contact, her vehicle was entirely within the right lane, traveling at the speed limit, and was not changing lanes. There was not sufficient time to avoid contact with the Brutus vehicle. Williamson alleges that the accident was solely caused by the actions of Brutus.

Defendants Tyler and Williamson now move for summary judgment, dismissing the complaint and all cross-claims, contending that their vehicle was confronted by a sudden and unexpected emergency and co-defendant Brutus was the sole proximate cause of this accident.

Plaintiff opposes the motion. Plaintiff initially argues that the moving defendants cannot rely on the emergency doctrine since it was not plead as an affirmative defense, and the defendants never moved to leave to amend their answer. Since this accident occurred in 2008, there is no justification for their delay in asserting such a defense.

In the alternative, Plaintiff argues that the emergency doctrine is inapplicable here, since there are issues of fact as to the reasonableness of Williamson's actions under the circumstances. Plaintiff contends that the impact was between the front portion of Williamson's vehicle and the rear portion of Plaintiff's vehicle, and therefore there are issues of fact as to whether the Williamson vehicle "was maintaining a safe distance." Plaintiff argues that the Williamson

affidavit as to the actions of the livery cab are conclusory, and neither Tyler nor Williamson mention a “spinning, or crossing double yellow lines, or actions over multiple lane changes.” The MV-104 (annexed to the opposition papers) states that the Brutus vehicle was “rear-ended” by the Williamson vehicle, pushing it into another vehicle.

Plaintiff also asserts that Tyler’s deposition raises a triable issue of fact, since she admitted that she misrepresented herself as the driver of the vehicle in the police accident report. Plaintiff contends that the motion should be denied since the deposition of the driver, Williamson, has not been held.

## II. Standard of Review

To be entitled to the “drastic” remedy of summary judgment, the moving party “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 from the case.” (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46<sup>th</sup> Street Development LLC.*, 101 A.D.3d 490 [1<sup>st</sup> Dept. 2012]). 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 (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). 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]).

## III. Analysis

Plaintiff initially argues that the Court may not consider the “emergency doctrine”

defense since the moving defendants did not plead it affirmatively in their Answer. Upon review of the Answer, however, the moving defendants did plead that the accident was solely the result of the negligence of co-defendants Brutus and Asdotel Enterprises, Inc. Further, the argument that Plaintiff has suffered undue surprise, prejudice, or was “unable to investigate” the “emergency” because of the failure to explicitly plead the defense, is unavailing, since Plaintiff herself testified in 2010 that her vehicle made a sudden right turn and spun out of control before the impact. Accordingly, this court may consider the emergency doctrine as an affirmative defense (*Fatumata B. v. Pioneer Transp. Corp.*, 118 A.D.3d 486 [1<sup>st</sup> Dept. 2014]).

Under the common-law emergency doctrine, “...when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context, provided the actor has not created the emergency” (*Caristo v. Sanzone*, 96 N.Y.2d 172 [2001], citing *Rivera v. New York City Transit Auth.*, 77 N.Y.2d 322, 327 [1991]).

Defendants here satisfied their initial burden of entitlement to summary judgment on the basis of the emergency doctrine, as their vehicle was confronted with an emergency situation not of the driver’s own making (*Pena v. Slater*, 100 A.D.3d 488 [1<sup>st</sup> Dept. 2012]; *Caban v. Vega*, 226 A.D.2d 109 [1<sup>st</sup> Dept. 1996]; *Coleman v. Maclas*, 61 A.D.3d 569 [1<sup>st</sup> Dept. 2009]). Plaintiff testified at her deposition that Brutus was trying to “beat the light” and made the sudden right turn at the intersection, causing the vehicle to lose control and eventually come into contact by two other vehicles. The co-defendants’ testimony confirms that the Brutus vehicle caused this accident by suddenly entering their lane of travel in an attempt to make an abrupt right turn. The mere fact that the co-defendants did not mention that the Plaintiff vehicle was spinning/out of control or traveling at a high rate of speed at the time of impact does not warrant the further inference that co-defendants were comparatively negligent.

The burden therefore shifted to Plaintiff to raise a triable issue of fact sufficient to defeat summary judgment. The First Department has held that “triable factual disputes on the applicability of the emergency doctrine” existed where the conflicting versions of the events

provided by the parties, i.e., the condition and position of the vehicles, and the ability of the defendant to avoid an impact by reducing speed or moving to other lanes (*see Quiles v. Greene*, 291 A.D.2d 345 [1st Dept.2002][truck careened across a median and protruding into the lane of traffic traveling in the opposite direction] *see also Abreu Rabassa v. Caldas*, 306 A.D.2d 137 [1<sup>st</sup> Dept. 2003]).

After review of the opposition papers, this Court determines that Plaintiff has failed to raise a triable issue of fact as to whether the moving defendant contributed to this accident. The unsworn statements found in the uncertified MV-104 report cannot be considered<sup>1</sup> (*see Johnson v. Phillips*, 261 A.D.2d 269 [1<sup>st</sup> Dept. 1999]; *Rue v. Stokes*, 191 AD.2d 245 [1<sup>st</sup> Dept. 1993]).

Plaintiff contends that summary judgment must be denied because she did not have the opportunity to question the driver, co-defendant Williamson, since defendant Tyler had misrepresented to the responding officer that she was the driver at the time of the accident. Even if true, however, the identity of the driver was revealed at the Tyler deposition, Plaintiff does not allege that she thereafter sought the deposition of co-defendant Williamson (*see Rothbart v. S.L.S. Mgt. Corp.*, 185 A.D.2d 806 [1<sup>st</sup> Dept. 1992]). Note of Issue with Certificate of Readiness were filed on December 19, 2013. Under these circumstances, an allegation of incomplete discovery cannot defeat the motion (*see Mot Parking Corp. v. 86-90 Warren Street, LLC.*, 104 A.D.3d 596 [1<sup>st</sup> Dept. 2013]). In this case, all of the admissible evidence reveals that the driver of co-defendants' vehicle was faced with an unexpected emergency not of her own making, and that the collision with the Brutus vehicle could not be avoided. Plaintiff cannot defeat summary judgment or otherwise extend litigation stemming from this 2008 accident based upon the mere hope that 'somehow, somewhere on cross-examination or otherwise,' Plaintiff may uncover a triable issue of fact as to defendant Williamson's alleged comparative fault (*Noonan v. New York Blood Ctr.*, 269 A.D.2d 323 [1<sup>st</sup> Dept. 2000]).

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<sup>1</sup>The uncertified police accident report, likewise, was not considered in support of the defendants' motion (*Figueroa v. Luna*, 281 A.D.2d 204, 206 [1<sup>st</sup> Dept. 2001]).

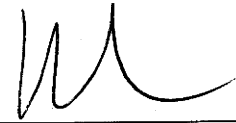
IV. Conclusion

Accordingly, it is hereby

ORDERED, that the motion for summary judgment is granted, and all claims and cross-claims asserted against defendants Tyler and Williamson are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 11 | 5, 2014



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