

**Valera v Ramos**

2015 NY Slip Op 30844(U)

April 27, 2015

Supreme Court, Bronx County

Docket Number: 307237/2013

Judge: Sharon A.M. Aarons

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5/6/15

**SUPREME COURT OF THE STATE OF NEW YORK**  
**COUNTY OF BRONX** Part 24

SANTO VALERA,

Plaintiff,

Index No. 307237/2013

-against-

**Present:** Hon. Sharon A. M. Aarons

RIGOBERTO RAMOS and SL BENFICA,

DECISION AND ORDER

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

<b>Papers</b>	<b>Numbered</b>
<b>Notice of Motion/ Order to Show Cause and Affidavits Annexed</b>	<b>1</b>
<b>Answering Affidavits</b>	<b>2</b>
<b>Replying Affidavits</b>	<b>3</b>
<b>Others:</b>	

Plaintiff moves for summary judgment pursuant to CPLR 3212 as to liability only against defendants. Defendants file written opposition. The motion is granted.

On September 23, 2013, on Bruckner Boulevard near the intersection of E. 141<sup>st</sup> Street, the vehicle which plaintiff was driving, which was stopped for a red light, was struck in the rear by a vehicle owned and operated by the defendants.

In support of the motion, plaintiffs submit the pleadings; the affidavit of the plaintiff; and an uncertified copy of the police accident report. The plaintiff's affidavit recites that she came to a gradual stop for a red light, and was fully stopped prior to being struck by defendants' vehicle. The police accident report indicates that the defendant driver was "making an adjustment" in his vehicle when he struck the plaintiff's vehicle in the rear.

The defendants submit no evidence in opposition, but argue, through counsel, that the "self-

serving” affidavit of the plaintiff is not sufficient, and that the admission of the defendant driver may not be considered as the driver had no duty to speak, and thus his statement does not qualify under the business records exception to the hearsay rule.

It is well established 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 offending vehicle and imposes a burden on him or her to proffer a non-negligent explanation for the accident. (*Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 [1st Dept. 2006]; *Mullen v. Rigor*, 8 A.D.3d 104, 778 N.Y.S.2d 168 [1st Dept. 2004]; *Malone v. Morillo*, 6 A.D.3d 324, 775 N.Y.S.2d 312 [1st Dept. 2004]; *Singh v. Sanders*, 286 A.D.2d 256, 729 N.Y.S.2d 119 [1st Dept. 2001]; *Mitchell v. Gonzalez*, 269 A.D.2d 250, 703 N.Y.S.2d 124 [1st Dept. 2000]). A driver is expected to drive at a sufficiently safe speed and maintain enough distance between himself and cars ahead of him so as to avoid a rear-end collision, taking into account the weather and road conditions. (*Francisco*, 30 A.D.3d at 275; *Garcia v. Bakemark Ingredients (E.) Inc.*, 19 A.D.3d 224, 797 N.Y.S.2d 467 [1st Dept. 2005]; VTL § 1129[a]). The presumption in rear-end cases arises not from act of the lead vehicle in stopping or breaking, but, instead, from the duty of the driver of the vehicle behind to keep a safe distance and to not collide with traffic ahead. (*Leguen v. City of New York (Dept. of Sanitation)*, 30 Misc. 3d 1235(A), 2011 WL 873554, at \*2 [N.Y. Sup. Ct., Queens Cnty. Mar. 14, 2011]). Therefore, in order to survive summary judgment on the issue of liability, the driver of the rear-ending vehicle is expected to provide a non-negligent explanation, in admissible evidentiary form, for the collision, whether or not the lead vehicle was moving at the time of the accident. (*Id.*; *Macauley v. ELRAC, Inc.*, 6 A.D.3d 584, 775 N.Y.S.2d 78 [2nd Dept. 2004]; *Johnson v. Phillips*,

261 A.D.2d 269, 271, 690 N.Y.S.2d 545 [1st Dept. 1999]). The failure of an opposing party to rebut the presumption of negligence will entitle the moving party to summary judgment on the issue of fault. (*Toulson v. Young Han Pae*, 6 A.D.3d 292, 774 N.Y.S.2d 706 [1st Dept. 2004]).

As to the defendant driver's admission in the police accident report, it is not necessary that the driver be under a business duty to speak in order for his statements to be admissible as admissions against interest. (*See Scott v. Kass*, 48 A.D.3d 785, 851 N.Y.S.2d 649 [2d Dept. 2008] ["The police accident report submitted by the appellants in support of their cross motion for summary judgment contained a statement by the defendant Bryan Kass that he had fallen asleep while driving and that his vehicle had crossed over a double yellow line into oncoming traffic and struck a telephone pole on the opposite side of the road. The police officer who prepared the report was acting within the scope of his duty in recording Kass's statement, and the statement is admissible as the admission of a party."]) Nevertheless, the defendant's statement in the present case is not admissible on the separate ground that uncertified police accident reports, even those which contain statements attributable to parties, constitute inadmissible hearsay and are thus lacking in probative value (*see Rivera v. GT Acquisition I Corp.*, 72 AD3d 525, 526, 899 N.Y.S.2d 46 [1st Dept. 2010]; *Coleman v. Maclas*, 61 AD3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009].)

The affidavit of the plaintiff, however, albeit "self-serving," is a sufficient predicate for the granting of summary judgment in her favor. (*Soto-Marroquin v. Mellet*, 63 A.D.3d 449, 880 N.Y.S.2d 279 [1st Dept. 2009] ["It does not avail defendants to argue that summary judgment was prematurely granted prior to plaintiff's deposition, where defendants' passenger provided no information concerning road conditions other than plaintiff's alleged sudden stop, defendant driver

did not submit an affidavit in opposition to the motion, and defendant driver is the party presumably with knowledge of any non-negligent reasons for the accident.”) Plaintiff has established a prima facie case, and defendant fails to provide a non-negligent explanation for the collision. In short, there is no countervailing evidence to refute the fact that the accident was caused by the sole negligence of defendant driver.

The parties have not litigated the issue of whether the plaintiff-driver sustained serious injuries pursuant to Insurance Law § 5102 (d). The issue of “serious injury” remains to be determined during the damages trial. (*Zecca v. Riccardelli*, 293 A.D.2d 31, 742 N.Y.S.2d 76 [1<sup>st</sup> Dept. 2002]; *Reid v. Brown*, 308 A.D.2d 331, 764 N.Y.S.2d 260 [1st Dept. 2003]).

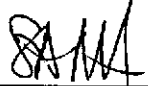
Accordingly, plaintiffs’ motion for summary judgment as to liability only against the defendant is granted. It is hereby

**ORDERED** that the motion of plaintiff is granted with regard to liability only against defendants; and it is further

**ORDERED** that a trial of the issues of damages and “serious injury” shall be had before the Court; and it is further

**ORDERED** that plaintiffs’ counsel shall serve a copy of this order with notice of entry upon counsel for defendant.

Dated: April 27, 2015

  
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SHARON A. M. AARONS, J.S.C.