Pinales v Toyota Motor Credit Corp.
2015 NY Slip Op 31661(U)
January 6, 2015
Supreme Court, Bronx County
Docket Number: 305262/11
Judge: Sharon A.M. Aarons
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

 FILED Jan 12 2015 Bronx County Clerk

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

LUZ PINALES and MARIA NUNEZ,

Plaintiffs,

-against-

Index No. 305262/11
DECISION AND ORDER

TOYOTA MOTOR CREDIT CORPORATION, CAROL STRAUSS, NYLL MANAGEMENT LTD. and ELIS TORIBIO,

Defendants.

Hon. Sharon A. M. Aarons:

Defendant CAROL STRAUSS (Strauss) moves for summary judgment pursuant to CPLR 3212 dismissing all claims and cross-claims against her. Plaintiffs LUZ PINALES and MARIA NUNEZ oppose the motion, and cross-move for summary judgment in their favor awarding them judgment finding them free of culpable conduct. Defendants ELIS TORIBIO (Toribio) and NYLL MANAGEMENT LTD., represented by the same counsel, oppose defendant Straus's motion.[1] The motion and the cross-motion are granted.

Plaintiff s were allegedly injured as a result of an automobile collision which occurred on the service road of the Cross Bronx Expressway on March 5, 2011. The plaintiffs were passengers in a vehicle owned by defendant NYLL Management , and driven by defendant Toribio (the Toribio vehicle). The Toribio vehicle struck the rear of a vehicle owned by defendant Toyota and driven by defendant Strauss.

[1]Summary judgment was previously granted by this Court dismissing all claims against defendant Toyota Motor Credit Corporation (Toyota). See Judgment of December 12, 2011 (Aarons, J.).

In support of the motion, defendant Strauss submits a copy of the pleadings; the unsigned,[2] certified deposition transcript of the testimony of plaintiff Maria Nunez; the unsigned, certified deposition transcript of the testimony of plaintiff Luz Pinales; the signed, certified deposition testimony of defendant Strauss; the unsigned, certified deposition transcript of the testimony of defendant Toribio; and an uncertified copy[3] of the police accident report.

The testimony of defendant Strauss was that on the date of the accident, she was driving to an automobile body shop, which was in a location unfamiliar to her, and that she became lost. She was then traveling on the service road of the Cross Bronx Expressway. She pulled the car into the extreme right lane of travel, parked, and turned the car off, in order to make a phone call for directions. The accident occurred when she had been stopped for a few minutes.

The testimony of defendant Toribio was that he was on the Bronx River Parkway, and entering the service road, which he stated had three lanes of travel. He stopped at a stop sign, and made a right turn, which placed him in the same lane of travel as that of defendant Strauss. As he was waiting at the stop sign, he had observed the Strauss vehicle moving slowly, and believed "it was going to stop." The impact occurred almost immediately after defendant Toribio made his right turn. He testified that at the moment of impact, he was looking in his rear-view mirror, as he had intended to move across the lanes of travel into the left lane.

---

[2] No objection is raised as to the submission of the unsworn transcripts herein. *Pevzner v. 1397 E. 2nd, LLC*, 96 A.D.3d 921, 947 N.Y.S.2d 543 (2d Dept. 2012) ("Supreme Court providently reviewed the unsworn deposition transcripts submitted in support of the motion, since they were certified by the reporters and the plaintiffs did not challenge their accuracy.")

[3]Uncertified accident reports, even those which contain statements attributable to parties, are generally inadmissible hearsay and totally lacking in probative value. (*See Rivera v. GT Acquisition 1 Corp.*, 72 A.D.3d 525, 526, 899 N.Y.S.2d 46 [1st Dept. 2010]; *Coleman v. Maclas*, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009].)

Plaintiff Maria Nunez, who was seated in the rear of the Toribio vehicle on the driver's side, gave inconsistent and confused testimony. She did not observe the actual impact between the two cars. Plaintiff Luz Pinales testified that defendant Toribio was talking on his cell phone prior to and at the time of the accident. She testified that, "The other car [the Strauss vehicle] [which] had decided not to enter the Cross Bronx cut in front of the car I was in and headed to a different location." The contact was to the back right side of the Strauss vehicle.

Plaintiffs, in opposition to defendant Strauss's motion and in support of the cross-motion, submit only the plaintiffs' bill of particulars. Plaintiffs' counsel contends that the accident occurred due to the negligence of defendant Strauss in changing lanes and striking the Toribio vehicle.[4]

Defendant Toribio contends that defendant Strauss's motion must be denied in view of the irreconcilable versions of the accident advanced by the various parties.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, which should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Consequently, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman,* 3 N.Y.2d at 165).

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

---

[4] Plaintiffs' counsel does not address his own client's testimony that defendant Toribio was negligent in using a cell phone and in failing to keep a proper lookout.

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 2005]; VTL § 1129[a].) 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 [2d Dept. 2004]; *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 [1st Dept. 1999]).

With respect to defendant Straus's motion, it is not possible to resolve the issues of fact raised by the depositions of the various parties. According to defendant Strauss, she was fully stopped and parked when she was rear-ended by the Toribio vehicle. Defendant Toribio in his testimony admits that he rear-ended the Strauss vehicle, but states that she stopped suddenly. The plaintiffs, however, testified that the Strauss vehicle passed in front of the Toribio vehicle, and that in fact the Strauss vehicle struck the Toribio vehicle. It is thus not possible to determine whether in fact this accident involved a rear-end collision, or an allegedly improper lane change. These issues of fact require a trial.

The plaintiffs' cross-motion for judgment finding the plaintiff's not culpable is not opposed. No party contends that the plaintiff-passengers were culpable in any way. Once a passenger-plaintiff

has made a *prima facie* showing that he did not engage in any culpable conduct that contributed to the happening of the accident, summary judgment on the issue of fault may be granted unless defendants raise a triable issue of fact. (*Medina v. Rodriguez*, 92 A.D.3d 850, 851 939 N.Y.S.2d 514, 515 [2d Dept. 2012]). Moreover, a blameless passenger-plaintiff's entitlement to summary judgment on the issue of liability, is not contingent upon the apportionment of liability between defendants who may be at fault. (*Basabe v. Carrozza*, 106 A.D.3d 641, 966 N.Y.S.2d 71 [1st Dept. 2013]). Where the owner and operator of a vehicle involved in a collision in which a blameless passenger was injured, fail to meet their burden of demonstrating issues of fact as to fault through submission of evidence in admissible form, as opposed to mere speculation or conclusory allegations, plaintiff is entitled to summary judgment on the issue of liability. (*Mendez v. Queens Plumbing Supply*, 39 A.D.3d 260, 833 N.Y.S.2d 71[1st Dept. 2007].) While plaintiffs have shown that they are free from fault, however, as noted above, issues of fact exists as to the culpability of the defendants. The facts are sharply disputed, and it has not been shown which defendants were at fault , if at all, for the happening of the accident.

Accordingly, defendant Straus's motion for summary judgment is denied. Plaintiffs' cross-motion for summary judgment as to their freedom from fault is granted. It is hereby

ORDERED that the plaintiffs are granted partial summary judgment finding the plaintiffs LUZ PINALES and MARIA NUNEZ free of culpable conduct; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with Notice of Entry upon counsel for all parties hereto.

Dated: January 6 , 2015

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