

McGuire v Lima Cab Corp.
2015 NY Slip Op 31754(U)
August 6, 2015
Supreme Court, Bronx County
Docket Number: 20974/2013
Judge: Mary Ann Brigantti
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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Brigantti

-----X
GEORGE MCGUIRE and SAID ERAQI,

Plaintiffs,

-against-

DECISION / ORDER

Index No. 20974/2013

LIMA CAB CORP., et als.,

Defendants

-----X
The following papers numbered 1 to 14 read on the below motion noticed on February 5, 2015 and duly submitted on the Part IA15 Motion calendar of **May 7, 2015:**

<u>Papers Submitted</u>	<u>Numbered</u>
Caicedo Notice of Motion, Exhibits	1,2
McGuire Cross-Motion, Exhibits	3,4
Eraqi Cross-Motion, Exhibits	5,6
Lima Aff. In Opp to McGuire	7
Lima Aff. In Opp to Caicedo	8
Lima Aff. In Opp to Eraqi, Exhibits	9,10
Caicedo Aff. In partial opp	11
McGuire Reply Aff.	12
Eraqi Reply Aff., Exhibits	13,14

Upon the foregoing papers, defendant Manuel Caicedo ("Caicedo") moves for summary judgment, dismissing the complaint of the plaintiffs George McGuire ("McGuire") and Said Eraqi ("Eraqi"), along with any cross-claims, pursuant to CPLR 3212. The plaintiffs, as well as co-defendants Renaud Dormeus ("Dormeus") and Lima Cab Corp. ("Lima Cab") oppose the motion. Plaintiffs also cross-move for summary judgment against Dormeus and Lima Cab on the issue of liability. Dormeus and Lima Cab oppose the cross-motions. Caicedo opposes that portion of plaintiff McGuire's cross-motion that seeks denial of Caicedo's motion for summary judgment.

Background

This matter arises out of a motor vehicle accident that allegedly occurred on February 17, 2013, at 4:55 PM, on eastbound West 34th Street at its intersection with 11th Avenue in New

York, New York. The parties involved are: defendant Caicedo, an operator of a private vehicle; defendant Dormeus, the operator of a taxi owned by defendant Lima Cab; and plaintiffs McGuire and Eraqi, who were two of six pedestrians on a nearby sidewalk.

At his deposition, Caicedo testified that his vehicle was stopped at a red light at the subject intersection when it was struck from behind by the Dormeus taxi. He then saw the taxi go up onto the sidewalk. Plaintiff McGuire testified that he was walking on that sidewalk when he was struck by a taxi that had driven onto the sidewalk. Plaintiff Eraqi testified that he was a food vendor at the subject intersection, and he was struck from behind by a taxi as he was standing at his cart located on the sidewalk of West 34th Street. According to the police report submitted, after this accident, the taxi fled the scene. The taxi was later stopped at West 28th Street and 9th Avenue, where the driver, Dormeus, was placed under arrest.

Defendants Dormeus and Lima Cab have failed to appear for depositions in this matter. By Order dated June 23, 2014, those defendants were precluded from testifying at trial if they failed to appear for depositions within 90 days, by September 23, 2014. The movants and cross-movants now advise the Court that defendants Dormeus and Lima Cab never appeared for their depositions.

Defendant Caicedo now moves for summary judgment, dismissing the complaint of plaintiffs McGuire and Eraqi, along with any cross-claims, with prejudice. Caicedo argues that he is entitled to dismissal of the complaint and all cross-claims, since he was the driver of a vehicle that was rear-ended, and was not negligent and did not contribute to this accident in any way.

Plaintiffs McGuire and Eraqi both cross-move for summary judgment on the issue of liability against Lima Cab and Dormeus. McGuire notes that he was an innocent pedestrian who was standing on the sidewalk when he was struck by the defendants' taxi from behind. Eraqi likewise contends that he was simply standing on the sidewalk at his food cart when he was struck from behind by the taxi. Eraqi argues, in the alternative, the answer of Lima Cab and Dormeus should be stricken for failure to produce for examinations before trial. Plaintiff McGuire also argues that defendant Caicedo's motion for summary judgment should be denied, since there is an issue of fact as to whether he was stopped at the red light before this accident

occurred. Caicedo “was unclear in his deposition about how long he was stopped just prior to the accident taking place.” Plaintiff McGuire argues that his “evasive” testimony creates an issue of fact as to whether Caicedo stopped his vehicle abruptly before being struck in the rear by the taxi. Plaintiff Eraqi adds that, the Bronx County clerk should be directed to transfer all papers from Index Number 251659/2014 to the file of index number 20974/2013, pursuant to the previously-entered orders for consolidation and joint trial. In the alternative, if summary judgment is not granted, Eraqi seeks an Order striking the answer of defendants Lima Cab and Dorneus, for failure to produce for examinations before trial.

In opposition to Caicedo’s motion, defendants Lima Cab and Dorneus adopts the arguments set forth by Plaintiff McGuire. In opposition to the plaintiffs’ motions, Lima Cab and Dorneus argue that they have not met their initial summary judgment burden, as the mere fact that they were pedestrians does not mean that they were not at fault. Should this Court grant the plaintiffs’ motions, the Court should indicate that there are questions of fact as to each defendants’ liability with respect to contributory negligence. Lima Cab and Dorneus assert that the “pivotal question” of whether the Caicedo vehicle was actually stopped before the accident, or whether he made a sudden stop, could lead to the conclusion that Caicedo was partially responsible. The defendants argue that an order striking their answer is not necessary because counsel has been unable to locate driver-Dorneus, and has enlisted the aid of a private investigator do to so. Further, the deposition of corporate officer of Lima Cab was scheduled to go forward on May 6, 2015. The defendants therefore argue that there was no wilful or contumacious failure to participate in discovery.

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. 46th Street Development LLC.*, 101 A.D.3d 490 [1st 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]).

Caicedo's Motion for Summary Judgment

"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]).

Here, defendant Caicedo established a prima facie case of negligence on the part of the defendants Dormeus and Lima Cab, as well as his own lack of culpability, as it is not disputed that the Dormeus taxi struck the rear of Caicedo's vehicle (see *Cabrera v Rodriguez, supra.*) The burden therefore shifts to Dormeus and Lima Cab to provide evidence of a "nonnegligent explanation for the accident, or a nonnegligent reason for [his] failure to maintain a safe distance between [his] 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]).

Defendant Dormeus and Lima Cab, as well as plaintiff McGuire, contend that summary judgment in favor of Caicedo must be denied since there is an issue of fact as to whether his

vehicle stopped abruptly. In some circumstances, the Second Department has held that the sudden stop of a lead vehicle can constitute a sufficient explanation for a rear-end collision, such as when it fails to make a proper signal (see *Klopchin v. Masri*, 45 A.D.3d 737 [2nd Dept. 2007]; *Gaeta v. Carter*, 6 A.D.3d 576, 577 [2nd Dept. 2004]). Usually, sudden stops that are coupled with other negligent acts or violations of Vehicle and Traffic Law on the part of the stopped vehicle are sufficient to rebut the presumption of negligence (*Id.*, see also *Abbott v. Picture Cars East, Inc.*, 78 A.D.3d 869 [2nd Dept 2010])[defendant vehicle made improper lane change then stopped suddenly in front of plaintiff's vehicle). The First Department has repeatedly held, however, that a simple 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]; *Androvic v. Metropolitan Transp. Auth.*, 95 A.D.3d 610 [1st Dept. 2012]; *Profita v. Diaz*, 100 A.D.3d 481 [1st Dept. 2012]; *Franco v. Rolling Frito-Lay Sales, Ltd.*, 103 A.D.3d 543 [1st Dept. 2013]). 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]). In this case, the allegations that defendant Caicedo may have stopped abruptly is insufficient to rebut the presumption that Caicedo was not responsible for the collision, and therefore, Caicedo is entitled to summary judgment.

Plaintiffs' Cross-Motions for Summary Judgment

Plaintiff McGuire and Eraqi are also entitled to summary judgment against Lima Cab and Dormeus on the issue of liability. Both plaintiffs testified at deposition that they were innocent pedestrians who remained on the sidewalk at all times before being struck by the taxi that had careened onto the sidewalk after colliding with the Caicedo vehicle. As noted, there is no issue of fact with respect to comparative negligence between the motorists – Lima Cab and Dormeus were solely responsible for this accident. In light of the foregoing, Plaintiff Eraqi's request for alternative relief is denied as moot.

Plaintiff Eraqi's request that the Bronx County Clerk transfer the documents in a related

case, Bronx County Index Number 251649/14, to the instant matter, Bronx County Index Number 20974/2013, is granted unopposed.

Conclusion

Accordingly, it is hereby

ORDERED, that defendant Caicedo's motion for summary judgment is granted, and the plaintiffs' complaint, and any cross-claims asserted against Caicedo are dismissed with prejudice, and it is further,

ORDERED, that plaintiff McGuire and plaintiff Eraqi's cross-motions for summary judgment on the issue of liability only against defendants Lima Cab and Dormeus are granted, and it is further,

ORDERED, that the Bronx County Clerk is directed to transfer any documents filed under Index Number 251649/2014 to Index Number 20974/2013, pursuant to the prior orders for consolidation and joint trial.

This constitutes the Decision and Order of this Court.

Dated: 8/6/15



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