

**Ballard v Pena**

2015 NY Slip Op 31762(U)

August 3, 2015

Supreme Court, Bronx County

Docket Number: 300493/15

Judge: Howard H. Sherman

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

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**Tanya R. Ballard**

Decision and Order

*Plaintiff*

-against-

Index No. 300493/15

**Yesenia Pena and  
Claire A. Martas**

*Defendants*

Howard H. Sherman

J.S.C.

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Facts and Procedural Background

Plaintiff Tanya Ballard ("Ballard") seeks recovery for injuries alleged to have been sustained in a three -vehicle chain collision that occurred on March 18, 2014 on the northbound lane of the Bronx River Parkway near its intersection with Tremont Avenue, Bronx, New York.

At that time defendant Yesenia Martas ("Martas") was the driver of a motor vehicle, which while stopped for traffic conditions ahead of her, was impacted in the rear by vehicle owned and then being driven by plaintiff Tanya R. Ballard ("Ballard").

This action was commenced in February 2015, and issue was joined with the service of Martas' answer in the following month. Co-defendant Yesenia Perez, the driver of the third vehicle, interposed her answer in June asserting a cross-claim against the co-defendant.

To date, no Note of Issue has been filed.

Motion

Martas now moves for an order awarding summary judgment on the issue of liability on the grounds that there is no triable issue of fact that the rear-end collision to her vehicle and to that of the plaintiff's car was occasioned in any measure by her culpable conduct. The motion is supported by the moving defendant's affidavit in which she attests that she was traveling in the left lane of traffic and had slowed down to a stop because of traffic conditions when she felt an impact to the rear of her vehicle . While defendant submits a copy of the police accident report of the incident, as the copy is uncertified, it is not considered on the motion (see, Coleman v. Maclas , 61 A.D.3d 569, 877 N.Y.S.2d 297 [1<sup>st</sup> Dept. 2009]).

In opposition , co-defendant Pena contends that the motion must be denied as supported only by the defendant's self-serving affidavit, and as premature.

In a letter addressed to the court and noticed to all parties here, plaintiff's counsel advises that she will not be opposing the motion.

**Discussion and Conclusions**

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact ( Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980] ). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as

the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019) or where the issue is 'arguable' (*Barrett v. Jacobs*, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727). " *Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (*Pace v. International Bus. Mach.*, 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting *Larkin Trucking Co. V. Lisbon Tire Mart*, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, *Torres v. Merrill Lynch Purch.*, 95 A.D.3d 741, 945 N.Y.S.2d 78 [1<sup>st</sup> Dept. 2012]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition ( *Alvarez v. Prospect Hospital* , 68 NY2d 320,324, 501 N.E.2d 572 [1986]; see also, *Smalls v. AII Industires, Inc.*, 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , *rearg.den.* 10 N.Y.3d 885 ).

Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. ( *Romano v. St. Vincent's Medical Center of Richmond*, 178 AD2d 467 , 577 N.Y.S.2d 311 [2d Dept. 1991];*Meridian Mgt.*

Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1<sup>st</sup> Dept. 2010]).

While summary judgment is "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (*Wilson v. Sponable*, 81 AD2d 1, 5; Siegel, Practice Commentaries, McKinney's Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) " Johannsdottir v. Kohn, 90 AD2d 842, 456 N.Y.S.2d 86 [2d Dept. 1982] , such a motion will be granted "where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party." (Morowitz v. Naughton, 150 AD2d 536 [2d Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 , 699 N.Y.S.2d 393 [1<sup>st</sup> Dept. 1999]; Spence v. Lake Service Station, Inc., 13 AD 3d 276, 788 N.Y.S.2d 337 [1st Dept. 2004]).

In the case of a rear-end collision, summary judgment on liability would properly lie " unless the driver of the following vehicle presents 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 [ and ] [a] claim that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of non-negligence on the part of the lead vehicle [emphasis added]." (Woodley v. Ramirez, *supra* at 452 , citing as authority, Malone v. Morillo, 6 A.D.3d 324, 775 N.Y.S.2d 312 [1<sup>st</sup> Dept. 2004]; Mullen v. Rigor, 8 A.D.3d 104, 778 N.Y.S.2d 168 [1<sup>st</sup> Dept. 2004]; Agramonte v. City of New York, 288 A.D.2d 75, 732

N.Y.S.2d 414; see also, Cabrera v. Rodriguez, 72 A.D.3d 553, 900 N.Y.S.2d 29 [1<sup>st</sup> Dept. 2010]; Chowdhury v. Matos, 118 A.D.3d 488, 987 N.Y.S.2d 132 [1<sup>st</sup> Dept. 2014]).

Also, as pertinent here, the rearmost driver in a chain-reaction collision bears a presumption of responsibility ( Mustafaj v Driscoll, 5 AD3d 138, 773 NYS2d 26 [1<sup>st</sup> Dept. 2004])

Upon review of the submissions here, it is the finding of this court that defendant has sustained her burden to prove as a matter of law that she bears no responsibility for the underlying motor vehicle accident. In opposition, the co-defendant comes forward with no probative evidence to raise an issue of fact that Martas was negligent and/or her conduct caused or contributed to the rear end collisions.

The objection that defendant's summary judgment motion was premature because there had not yet been any discovery, is an insufficient basis for denying the motion since the relevant facts would be within co-defendant driver's knowledge and she fails to explain what discovery was needed to oppose the motion (see Soto-Marroquin v Mellet, 63 AD3d 449, 880 NYS2d 279 [1st Dept 2009]; CPLR 3212 [f]).

Accordingly, it is

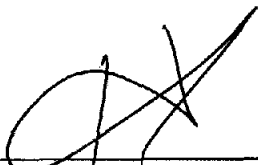
ORDERED that the motion of defendant Claire A. Martas be and hereby is granted, and it is further

ORDERED that summary judgment be entered in favor of defendant Claire Martas

as against plaintiff dismissing the complaint and as against co-defendant Yesenia Pena dismissing the cross-claim .

This constitutes the decision and order of this court.

Dated: August 3, 2015



Howard H. Sherman