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| Pugh v New York City Hous. Auth. |
| 2017 NY Slip Op 30592(U) |
| March 28, 2017 |
| Supreme Court, New York County |
| Docket Number: 156875/2014 |
| Judge: Paul A. Goetz |
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SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: PART 22

-----X
 CLAYTON H. PUGH,

Index No.: 156875/2014
 Motion Sequence No.: 2

Plaintiff(s),

DECISION and ORDER

-against-

NEW YORK CITY HOUSING AUTHORITY
 and SALVADORE ODDO,

Defendant(s).

-----X
 Recitation, as required by CPLR § 2219(a), the following papers were considered on the motion(s):

| <u>Papers</u> | <u>Numbered</u> |
|---|-----------------|
| Defendants' Notice of Motion for summary judgment, affirmation, with exhibits and memo of law | 1 |
| Plaintiff's notice of cross motion to strike a defense, affidavit, affirmation with exhibits | 2 |
| Defendants' affirmation in opposition to cross motion with exhibits | 3 |
| Plaintiff's reply affirmation with exhibits | 4 |

PAUL A. GOETZ, J.S.C.

Defendants' motion for summary judgment pursuant to CPLR § 3212 and Plaintiff's cross motion "for an order striking the defendant's [sic] emergency defense" are decided as follows:

This case involves a collision that occurred on July 31, 2013, at approximately 3:15 p.m. on East Houston Street, New York, New York. Plaintiff claims he sustained personal injuries after the parked 12 passenger school bus he was sitting in was hit by a vehicle owned by the New York City Housing Authority ("Housing Authority") and driven by its then employee, Salvatore Oddo. Also in the vehicle with Mr. Oddo was another Housing Authority employee, Sunday Idumwonyi.

Mr. Oddo admitted during his deposition that he hit the school bus but claimed he had no choice. When asked to explain, Mr. Oddo testified that a vehicle from his left swung in front of him. He further testified that he applied his breaks, turned to the right to avoid hitting the vehicle that he alleges cut him off and that is when he hit the school bus. Mr. Oddo did not recall his speed at the time of the accident and did not provide any details as to the vehicle that allegedly cut him off.

Mr. Idumwonyi testified at his deposition that at the time of the collision he was a

front seat passenger in the vehicle driven by Mr. Oddo. Prior to the impact, Mr. Idumwonyi was looking straight ahead and he did not see a vehicle come from the left side of the Housing Authority vehicle. Mr. Idumwonyi estimated the highest rate of speed he Mr. Oddo were traveling to be 20 - 25 miles per hour.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants argue that under the emergency doctrine, summary judgment should be granted in their favor and the complaint dismissed.

The emergency doctrine recognizes that 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 had not created the emergency. . . [C]ourts have consistently held that the emergency doctrine may protect a driver from liability where the driver, through no fault of his or her own, is required to take immediate action in order to avoid being suddenly cut off.

(*Maisonet v Roman*, 139 AD3d 121, 123 [1st Dept 2016] [internal quotation marks omitted]).

Defendants' motion for summary judgment is denied based on the conflicting accounts of the collision in their moving papers (*Perris v Maguire*, 2007 NY App Div LEXIS 2087; 2017 NY Slip Op 02139 [1st Dept March 23, 2017][holding defendant's summary judgment motion "should have been denied, due to conflicting accounts of the accident presented in his own moving papers."]). While Mr. Oddo alleges that another driver cut him off causing him to veer into Plaintiff's vehicle, Mr. Idumwonyi, his front seat passenger, testified that he did not see a vehicle cut them off before the impact. Mr. Idumwonyi's testimony supports a reasonable inference that another vehicle did not cut Plaintiff off (*Id.*), especially in the absence of any details concerning the other vehicle. By submitting these inconsistent accounts of the collision, Defendants' have failed to meet their burden of establishing summary judgment as a matter of law by eliminating all triable issues of fact (*Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016][holding plaintiff failed to eliminate all triable issues of fact in its summary judgment motion where plaintiff submitted conflicting deposition transcripts of how the accident happened]).

Accordingly, Defendants' motion for summary judgment is denied.

PLAINTIFF'S MOTION TO STRIKE DEFENDANTS' EMERGENCY DEFENSE

Plaintiff's notice of motion is defective because it fails to state a grounds upon which Plaintiff moves (See CPLR § 2214[a]). The cases chiefly relied on by Plaintiff in support of its cross motion (*Lifson v City of Syracuse*, 17 NY3d 492 [2011]; *Caristo v Sanzone*, 96 NY2d 172 [2001]) do not shed any light on the grounds upon which Plaintiff moves since they stand for the proposition that before charging a jury on the emergency doctrine, the court must make a threshold determination whether a reasonable view of the evidence supports the charge.

To the extent that Plaintiff's motion "for an order striking the defendant's [sic] emergency defense" is a motion to dismiss Defendants' affirmative emergency doctrine defense on the ground that a defense is not stated or has no merit pursuant to CPLR § 3211(b), his motion is denied.

In a motion to dismiss pursuant to CPLR 3211(b), "the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law. The allegations set forth in the answer must be viewed in the light most favorable to the defendant and the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed. Further, the court should not dismiss a defense where there remain questions of fact requiring a trial (*Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479 [1st Dept 2015] [citations and internal quotations marks omitted])."

Defendants' twelfth affirmative defense avers that Mr. Oddo "was faced with a sudden and unexpected circumstance which left little or no time for thought, deliberation or consideration, so that he had to make a speedy decision without weighing alternative courses of conduct." Viewing these allegations in the light most favorable to Defendants, the Court finds Plaintiff sufficiently states a defense based upon the emergency doctrine (*Accord* CPLR § 3211[b]).

Moreover, Plaintiff's moving papers fail to establish that Defendants' emergency doctrine is "without merit as a matter of law" (*Calpo-Rivera v Siroka*, 144 AD3d 568 [1st Dept 2016] *citing Granite State Ins. Co.*, 132 AD3 479]). In support of his motion, Plaintiff offers the affidavit of an accident reconstruction analyst who concludes that Mr. Oddo did not confront an emergency situation leaving little or no time to think of alternative courses of action. Plaintiff's accident reconstruction analyst's findings are not so conclusive as to warrant dismissal of Defendants' twelfth affirmative defense since Mr. Oddo's deposition testimony sufficiently creates questions of fact requiring a trial on the issue (*Id.*).

Similarly and for the same reasons, to the extent Plaintiff's motion is for

summary judgment¹ on the issue of whether the emergency doctrine applies in this case, his motion is denied because there are triable issues of fact as to whether Mr. Oddo was faced with an emergency situation requiring him to collide with the school bus Plaintiff was seated in (*Aponte v City of New York*, 143 AD3d 552 [1st Dept 2016] [holding trial court correctly denied summary judgment where the parties provide conflicting accounts of how the accident occurred]).

Accordingly, Plaintiff's motion is denied.

Based upon the foregoing, it is hereby

ORDERED that Defendants' motion for summary judgment is denied in its entirety; and it is further

ORDERED that Plaintiff's cross motion is denied in its entirety.

This constitutes the Decision and Order of this Court.

Dated: March 28, 2017

ENTER:



HON. PAUL A. GOETZ, J.S.C.

¹Although untimely as a motion for summary judgment since it was not made within 60 days of the filing of the note of issue as required by the Part rules, the Court may properly consider Plaintiff's cross motion since it addressed the same issue that Defendants raised in their motion i.e. the applicability of the emergency doctrine (*Lofraco Belgium v Mateo Productions, Inc.*, 138 AD3d 479 [1st Dept 2016]).