

Delgado v Dominguez
2017 NY Slip Op 33398(U)
August 23, 2017
Supreme Court, Nassau County
Docket Number: Index No. 601011/2017
Judge: Leonard D. Steinman
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X
COURTNEY DELGADO,

Plaintiff,

-against-

**GUSTAVO DOMINGUEZ, CUENCA CORONEL
TRUCKING, INC., CONNOR CLARK, and
SOAPMOBILE, LLC,**

Defendants.

-----X
LEONARD D. STEINMAN, J.

**IAS PART 21
Index No.: 601011/2017
Mot. Seq. No. 001/002**

DECISION AND ORDER

The following papers, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Plaintiff's Notice of Motion, Affidavit & Exhibits.....	1
Defendants' (Clark and Soapmobile) Notice of Cross-Motion, Affirmation & Exhibits	2
Defendants' (Clark and Soapmobile) Affirmation in Opposition	3
Defendants' (Dominguez and Cuenca Coronel Trucking, Inc.) Affirmation in Opposition to Plaintiff's Motion for Summary Judgment and Defendants' Clark and Soapmobile LLC's Motion for Summary Judgment	4
Plaintiff's Reply Affirmation	5
Defendants' (Clark and Soapmobile) Reply Affirmation.....	6

In this action, plaintiff alleges that on May 6, 2016 she was driving her vehicle at or near the intersection of Flatbush Avenue Extension and Fulton Street, Brooklyn when she stopped for a red light. Plaintiff contends that after she was stopped for approximately thirty seconds she was struck in the rear by the vehicle driven by defendant Connor Clark and owned by defendant Soapmobile, LLC. Plaintiff claims that as a result of this collision she sustained serious injuries.

Defendants Clark and Soapmobile do not dispute the location of the accident or that the vehicle driven by Clark struck the rear of plaintiff's vehicle. These defendants contend, however, that Clark did so after being stopped at the red traffic light for 45 seconds and only after he was struck in the rear by the vehicle driven by Gustavo and owned by defendant Cuenca Coronel Trucking, Inc. Clark states in his sworn affidavit that his vehicle moved forward through no fault of his own but instead as a result of the impact made by Gustavo to the rear of his vehicle.

Before the court are two motions for summary judgment. Plaintiff seeks for the court to grant to her summary judgment on the issue of liability (Motion Seq.: 001). Defendants Clark and Soapmobile seek summary judgment dismissing the complaint as against them (Motion Seq. 002). Both applications are opposed by defendants Gustavo Dominguez and Cuenca Coronel.

In opposition to both applications, Gustavo contends that the granting of summary judgment would be premature since discovery has not yet commenced and must be completed. Gustavo further contends that immediately prior to the impact of his car with the vehicle driven by Clark he was operating his vehicle in the middle lane. According to Gustavo, Clark suddenly changed lanes from the left lane to the middle lane without warning, and as a result, he was unable to avoid striking Clark's car.

It is the movant who has the burden to establish his entitlement to summary judgment as a matter of law. *Ferrante v. American Lung Assn.*, 90 N.Y.2d 623 (1997). "CPLR §3212(b) requires the proponent of a motion for summary judgment to demonstrate the absence of genuine issues of material facts on every relevant issue raised by the pleadings, including any affirmative defenses." *Stone v. Continental Ins. Co.*, 234 A.D.2d 282, 284 (2d Dept. 1996). Where that party fails to meet its initial burden as the movant, the motion for summary judgment should be denied. *U.S Bank N.A. v. Weinman*, 123 A.D.3d 1108 (2d Dept. 2014). A party moving for summary judgment in a negligence action "has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident." *Gezelter v. Pecora*, 129 A.D.3d 1021 (2d Dept. 2015) citing *Boulos v. Lerner-Harrington*, 124 A.D.3d 709 (2d Dept. 2015).

Although both movants seek to rely on a police report annexed to their applications, the police report is uncertified and is therefore inadmissible. *Nationwide General Ins. Co. v. Bates*, 130 A.D.3d 795 (2d Dept. 2015).

In her affidavit, plaintiff states that her vehicle was struck in the rear. “A rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator [of the offending vehicle] to rebut the inference of negligence by providing a non-negligent explanation for the collision.” *Delgado v. Bang*, 120 A.D.3d 608, 609 (2d Dept. 2014).

“When a driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle.” *Filippazzo v. Santiago*, 277 A.D.2d 419 (2d Dept. 2000), *see also* Vehicle and Traffic Law 1129(a). “[A] rear-end collision establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision.” *Napolitano v. Galletta*, 85 A.D.3d 881 (2d Dept. 2011). This obligation has even been applied to circumstances where the front vehicle stops suddenly. *See Mascitti v. Greene*, 250 A.D.2d 821 (2d Dept. 1998); *Barba v. Best Sec. Corp.*, 235 A.D.2d 381 (2d Dept. 1997). “Drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident.” *Filippazzo v. Santiago*, 277 A.D.2d 419, 420 (2d Dept. 2000).

In his affidavit, Clark asserts facts that rebuts the presumption that he was negligent. Clark attests that he was stopped for approximately forty-five seconds before he was struck in the rear by Gustavo and propelled into plaintiff’s car. His assertions shift the burden to Gustavo. “In a chain-reaction collision, as here, responsibility presumptively rests with the rear-most driver.” *Motaleb v. Arora*, 2017 WL 2730155 (Sup. Ct. New York Co. 2017).

Gustavo contends that Clark quickly and without warning changed lanes in front of his vehicle. He states that, as a result, he was unable to avoid the collision with Clark’s vehicle as that vehicle was in the process of the lane change. Clark denies this. Nonetheless, whether Clark contributed to the accident by making an unsafe lane change in front of

Gustavo's vehicle raises triable issues of fact. *See Abbott v. Picture Cars East, Inc.*, 78 A.D.3d 869 (2d Dept. 2010).

While plaintiff and Clark established *prima facie* that they struck in the rear, the liability for the collision remains in question at this time. *See Hudson v. Cole*, 264 A.D.2d 439 (2d Dept. 1999); *Pittari v. Williams*, 70 A.D.2d 904 (2d Dept. 1979). Accordingly, both applications for summary judgment as to the complaint as a whole are denied.

Plaintiff further seeks to strike Clark and Soapmobile's Fourth, Seventh, Eighth, Ninth and Eleventh Affirmative Defenses. "[W]hen moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is "without merit of law." *Greco v. Christoffersen*, 70 A.D.3d 769 (2d Dept. 2010). "[A]n affirmative defense should not be dismissed if there is any doubt as to its availability." *Thy Trans v. Avis Rent A Car Inc.*, 289 A.D.2d 731 (3d Dept. 2001). Clark and Soapmobile do not oppose that portion of plaintiff's application.

In all events, the Seventh and Eighth Affirmative Defenses are jurisdictional and are unsupported. The Ninth Affirmative Defense states that the complaint fails to state a cause of action. It does. The Eleventh Affirmative Defense states that Clark was confronted by an emergency situation, but his affidavit reflects none. Finally, the Fourth Affirmative Defense alleges that plaintiff contributed to the happening of the accident through her "culpable conduct." Plaintiff has sufficiently demonstrated that she was stopped at a red light at the time of the accident for a sufficient period of time prior to the collision. Clark and Soapmobile have provided no evidence to even suggest otherwise. Accordingly, all of these affirmative defenses are dismissed.

Plaintiff also seeks to dismiss the First, Second and Third Affirmative Defenses set forth by Gustavo. Gustavo's First Affirmative Defense alleges plaintiff contributed to the accident and the Third Affirmative Defense alleges that the complaint fails to state a cause of action. For the reasons set forth with respect to Clark's affirmative defenses above, these defenses are dismissed. With regard to Gustavo's allegation that plaintiff in some way assumed the risk and therefore liability cannot be imposed (Second Affirmative Defense), the doctrine of assumption of risk as a complete defense has no applicability to a routine car collision action. *See CPLR §1411; Custodi v. Town of Amherst*, 20 N.Y.3d 83 (2012)

(assumption of risk has been limited to “sporting events, sponsored athletic and creative activities, or athletic and recreational pursuits that take place at designated venues”). As a result, this defense is likewise dismissed.

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for summary judgment on the issue of liability is denied; and it is further

ORDERED, that defendant Clark and Soapmobile’s application for summary judgment is denied; and it is further

ORDERED, that defendant Clark and Soapmobile’s Fourth, Fifth, Eighth, Ninth and Eleventh Affirmative Defenses are dismissed; and it is further

ORDERED, that defendant Gustavo’s First, Second and Third Affirmative Defenses are dismissed; and it is further

ORDERED, that this matter is set down for a Preliminary Conference to be held on September 12, 2017 at 9:30 a.m.; and it is further

ORDERED, that counsel for plaintiff shall serve a copy of this order on defendants within seven days of receipt.

Any relief requested not specifically addressed herein is denied.

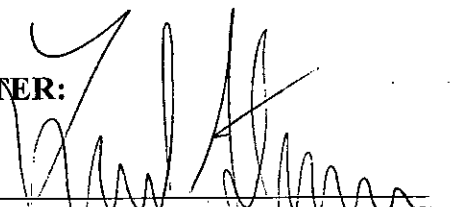
This constitutes the Decision and Order of this court.

Dated: August 23, 2017
Mineola, New York

ENTERED

AUG 29 2017

NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTER: 
LEONARD D. STEINMAN, J.S.C.