

**Rice v Cuevas**

2019 NY Slip Op 32210(U)

March 18, 2019

Supreme Court, Bronx County

Docket Number: 26534/2018E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: I.A.S. PART 14

-----X  
KESHUN RICE,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 26534/2018E

DORIS CUEVAS and WILSON CUEVAS,

Defendants.  
-----X

John R. Higgitt, J.

This is a negligence action to recover damages for personal injuries plaintiff sustained in a motor vehicle accident. Plaintiff was driving on Morris Park Avenue in Bronx County when the vehicle operated defendant Wilson Cuevas and owned by defendant Doris Cuevas, struck plaintiff's vehicle in the rear. Plaintiff seeks summary judgment on the issue of defendants' liability and dismissal of defendants' affirmative defenses. For the reasons that follow, plaintiff's motion is granted in part.

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Nsiah-Ababio v Hunter*, 78 AD3d 672, 672 [2nd Dept 2010]). Vehicle and Traffic Law § 1129(a) states that a "driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" (*see Darmento v Pacific Molasses Co.*, 81 NY2d 985, 988 [1993]). Based on the plain language of the statute, a violation is clear when a driver follows another too closely without adequate reason and that conduct results in a collision (*id.*).

Plaintiff satisfied his prima facie burden, establishing his entitlement to judgment as a

matter of law (*see* CPLR 3212[b]). Plaintiff submitted a copy of the pleadings and an affidavit. Plaintiff averred that he was driving on Morris Park Avenue when he had to stop due to a red traffic light. After the light turn green, plaintiff started to accelerate his vehicle. At that time, defendants' vehicle struck the rear of plaintiff's vehicle causing injuries. Plaintiff also submit the police report. While the police report is not in admissible form (*see Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]), defendant Wilson Cuevas' statement that the accident occurred when he rear-ended plaintiff's vehicle is admissible as an admission (*see Niyazov v Bradford*, 13 AD3d 501 [2nd Dept 2004]).

In opposition, defendants failed to raise a triable issue of fact on the issue of their liability (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). The affirmation of counsel alone is not sufficient to rebut plaintiff's prima facie showing of entitlement to summary judgment. In addition, bald, conclusory allegations, even if believable, are not enough to withstand summary judgment (*see Ehrlich v American Moninger Greenhouse Mfg. Corp.*, 26 NY2d 255 [1970]).

Defendants argued that the motion is premature because depositions have not been completed. This motion, however, is not premature because "the information as to why the defendants' vehicle struck the rear end of plaintiff's car reasonably rests within defendant driver's own knowledge" (*Rodriguez v Garcia*, 154 AD3d 581, 581 [1st Dept 2017]; *see Castaneda v DO & CO New York Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]). Yet, defendants did not submit an affidavit. The mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment (*see Castaneda, supra; Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]).

Defendants also argue that the motion should be denied because there is a question as to

plaintiff's comparative fault. However, "to obtain partial summary judgment on defendants' liability [plaintiff] does not have to demonstrate the absence of [his or her] own comparative fault" (*Rodriguez v City of New York*, 31 NY3d 212, 223 [2018]).

As to defendants' first affirmative defense alleging plaintiff's culpable conduct, plaintiff made a prima facie showing that he is not liable for the subject accident. Because defendants failed to rebut the presumption of their negligence (*see Dattilo v Best Transp. Inc.*, 79 AD3d 432 [1st Dept 2010]) or plaintiff's comparative fault, the aspects of plaintiff's motion seeking summary judgment on the issue of defendants' liability and dismissal of defendants' first affirmative defense, alleging plaintiff's culpable conduct, are granted.

As to defendants' second affirmative defense alleging plaintiff's failure to wear a seat belt, plaintiff does not provide any admissible evidence demonstrating that, at the time of the accident, he was wearing a seat belt. Thus, this aspect of plaintiff's motion is denied.

The aspect of plaintiff's motion seeking dismissal of defendants' third affirmative defense alleging lack of personal jurisdiction is granted. Defendants failed to make a motion to dismiss the complaint on this ground and thus the defense is waived (*see CPLR 3211[e]*).

As to the aspect of plaintiff's motion seeking dismissal of defendants' fourth affirmative defense of collateral source off-set, plaintiff has not demonstrated that the defense is without merit. Thus, this aspect of plaintiff's motion is denied.

The aspect of plaintiff's motion seeking dismissal of defendants' fifth affirmative defense alleging that plaintiff did not sustained a "serious injury" is denied. Plaintiff has not provided any evidence demonstrating he sustained a "serious injury," and therefore failed to demonstrate that the fifth affirmative defense is without merit.

Accordingly, it is

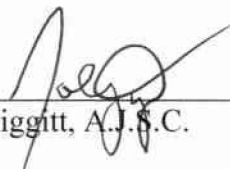
ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject motor vehicle accident and the dismissal of defendants' first and third affirmative defenses is granted; and it further

ORDERED that defendants' first and third affirmative defenses are dismissed; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: March 18, 2019

  
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John R. Higgitt, A.J.S.C.