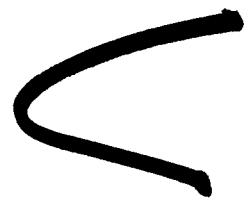


Jaquez v Fullington Trailway LLC
2019 NY Slip Op 32264(U)
June 6, 2019
Supreme Court, Bronx County
Docket Number: 300282/2017
Judge: Mary Ann Brigantti
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15



-----X
ROMA ESCOTO JAQUEZ and ANGIE HERRERA- Index No. 300282/2017
HARRIS

-against-

Hon. MARY ANN BRIGANTTI

FULLINGTON TRAILWAY LLC and JACKLYN
CORMIER

Justice Supreme Court

-----X
The following papers numbered 1 to _____ were read on this motion (Seq. No. 1)
for SUMMARY JUDGMENT noticed on May 24, 2018 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits (Cross-Motions)	No(s). 3, 4, 5, 6
Replying Affidavit and Exhibits	No(s). 7

Upon the foregoing papers and oral argument, the plaintiffs Roma Escoto Jaquez ("Jaquez") and Angie Herrera-Harris ("Herrera-Harris") (collectively, "Plaintiffs") move for summary judgment against the defendants Fullington Trailway LLC and Jacklyn Cormier ("Cormier") (collectively, "Defendants") on the issue of liability. Defendants oppose the motion and cross-move for an order granting them summary judgment on the issue of liability, and dismissing Plaintiffs' complaint. Plaintiffs oppose the cross-motion.

Standard of Review

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs., P.C.*, 76 A.D.3d 927 [1st Dept 2010], citing *Zuckerman v. New York*, 49 N.Y.2d 557, 562 [1980]).

"[T]he opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v. NRX Technologies, Inc.*, 93 A.D.2d 772 [1st Dept 1983], *affd* 62 N.Y.2d 686 [1984]). The evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 [2007]). "It is well settled that a rear-end collision with a stopped or

Motion is Respectfully Referred to Justice:
Dated:

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 N.Y.3d 906, 908 [2008]; see also *Bajrami v Twinkle Cab Corp.*, 147 A.D.3d 649 [1st Dept 2017]). In addition, passengers of the rear-ended vehicle must submit evidence in admissible form as to their involvement in the accident (see generally, *JMD Holding Corp. v. Cong. Fin. Corp.*, 4 N.Y.3d 373, 384 [2005] [citation omitted]).

Background

In support of their motion, Plaintiffs submitted Jaquez's testimony wherein she stated that as she was parked within the vicinity of 52nd Street and Roosevelt Avenue, in Queens, her vehicle was struck from "the rear to the front" along its "side part" by a "big bus" (Jaquez EBT at 28, 36, 44-46). Jaquez explained that Roosevelt Avenue is a two way street, and that prior to this accident she parked her vehicle, with the engine running, approximately one to two (1-2) feet away from the curb (*id.* at 35-36, 43). Jaquez testified that before the bus struck her parked vehicle she did not see or hear anything warning her of an approaching impact (*id.* at 45, 49). The resulting impact broke Jaquez's drivers side mirror (*id.* at 49-50, 64). Jaquez further testified that Herrera-Harris was seated in the front passenger seat at the time of this accident, and that Jaquez was in the process of dropping off Herrera-Harris from work (*id.* at 34, 63).

In addition, Plaintiffs submitted Herrera-Harris's testimony wherein she states that at the time of this accident she was a front seat passenger in Jaquez's vehicle (*id.* at 64). Herrera-Harris explained that prior to this accident Jaquez was in the process of dropping her off at her house, and that Jaquez's vehicle was parked along the curb in front of her house (*id.* at 63-64). Herrera-Harris testified that as Jaquez's vehicle was parked approximately one (1) foot away from the curb, her vehicle was struck along its "left side" by a "tour bus" (*id.* at 65-68, 72). Herrera-Harris did not have any warning or indication that an impact was about to occur prior to its occurrence (*id.* at 67). Both Jaquez and Herrera-Harris acknowledge that Jaquez parked her vehicle along the side of the road at a time when parking was not permitted due to street cleaning (Jaquez EBT at 41, 47; Herrera-Harris EBT at 109).

Plaintiffs also submitted Cormier's testimony wherein she stated that at the time of this accident she was operating a "Coach" bus within the scope of her employment along Roosevelt Avenue, in Queens, when her vehicle "sideswiped" Plaintiffs' vehicle (Cormier EBT at 11, 28, 44). Cormier testified that this accident occurred on Roosevelt Avenue, and that this road is a two-way street with one lane of moving traffic in each direction and parking on each side (*id.* at 28-29). Prior to this accident, Cormier first observed Plaintiffs' vehicle as it was approximately "two car lengths" away, and saw that this vehicle was

"[s]topped" in the "[m]iddle of the block" (*id.* at 34-35). Cormier also observed that Plaintiff's vehicle was not double parked, nor was it parked along the curb, but rather, was stopped approximately "18 inches" to "two feet away from the curb" (*id.* at 35-36). As Cormier's vehicle approached Plaintiffs' parked vehicle, she also noticed from approximately "two car lengths" away, on the opposite side of Roosevelt Avenue, a double-parked vehicle and another oncoming vehicle traveling toward her (*id.* 41-43). Cormier testified that the oncoming vehicle was attempting to drive around the double-parked vehicle on its side, and as a result, was partially "on [her] side" of the road, or in other words, was "over the double yellow line" (*id.* at 42-43). Cormier was within "one vehicle [sic] length" when she first noticed the oncoming vehicle cross over the double yellow line into her lane of travel (*id.* at 43).

Cormier further testified that the oncoming vehicle was "heading towards" her, and that she attempted to stay "as close to the yellow lines" as she could, but then "sideswiped" Plaintiffs' vehicle (*id.* at 43-44). Cormier claimed that the "right-hand side" "rear fender" of her vehicle made contact with the "the driver's side" and "[r]ear driver's side" of Plaintiffs' vehicle (*id.* at 45, 58). When Cormier drove by Plaintiffs' vehicle, and as she approached Plaintiff's vehicle following the accident, she continuously noticed that there were only "[t]wo" people located within Plaintiff's vehicle; one man and one woman, and that one person was located in the "[d]river's seat," and the other person was located in the "rear seat directly behind the driver's seat" (*id.* at 47-50). Cormier asserted that Jaquez was not in the vehicle at the time of this accident, but rather, that she "came out of a building, yelling, screaming" and identified herself as "Rona" (*id.* at 50-51). Cormier did not "speak to anyone besides those two women" (*id.* at 51). Thus, based on Cormier's testimony, Herrera-Harris was in the driver's seat at the time of this accident, and Jaquez was not located in the vehicle at all.

Plaintiffs' Motion

At the outset, Court notes that any admission by Plaintiffs as to the potential illegal parking of their vehicle would not result in the denial of their motion. Following the Court of Appeals's decision in *Rodriguez v City of New York* (31 N.Y.3d 312 [2018]), the First Department held on remand that a plaintiff is no longer "required to demonstrate absence of h[er] own comparative fault to obtain partial summary judgment on issue of liability" (*Rodriguez v City of New York*, 161 A.D.3d 575, 576 [1st Dept 2018]). In other words, post-*Rodriguez*, the core question in a plaintiff's liability motion for summary judgment is "whether material issues of fact exist as to defendant's negligence, which bar plaintiff from obtaining partial summary judgment" (*id.*). Here, Plaintiffs have demonstrated prima facie that Cormier was negligent by striking their vehicle in the rear and on its side as it was parked alongside the road (*see id.* at 567-577, citing *Guzman v. Schiavone Constr. Co.*, 4 A.D.3d 150 ["A collision with a stationary vehicle amounts to

prima facie evidence of negligence on the part of the operator of the moving vehicle"]; *see also Cabrera*, 72 A.D.3d 553 [1st Dept 2010]; *De La Cruz v. Ock Wee Leong*, 16 A.D.3d 199, 200 [1st Dept 2005]). Thus, the burden shifted to Defendants to provide "a non-negligent explanation for the accident" (*id.* at 577).

In opposition to the motion, Defendants have raised a triable issue of fact with respect to Jaquez only. Defendants also submitted an expert report by John Desch, a Professional Engineer and accident reconstructionist.¹

With respect to Jaquez, Cormier's testimony that Jaquez was not in the vehicle at the time of this accident, but rather, that she was coming out of a nearby building, raises an issue of fact as to Jaquez's alleged involvement in this motor vehicle accident. With respect to Herrera-Harris, Defendants have failed to raise any triable issue of fact. Defendants oppose Plaintiffs' motion primarily arguing that issues of fact exists as to whether Plaintiffs were contributorily negligent in causing their own injuries by illegally parking their vehicle where it should not have been parked, and that Cormier faced an emergency situation not of her making (*see Galvin* affirmation, ¶39). However, notwithstanding Defendants' contentions, any "argument that there is an issue of fact as to plaintiff's comparative negligence goes to damages and is not a defense to plaintiff's prima facie case" (*Bokum v Sera Sec. Servs., LLC*, 165 A.D.3d 535 [1st Dept 2018], citing *Rodriguez*, 31 N.Y.3d at 317-319)).

As previously discussed, following the Court of Appeal's decision in *Rodriguez*, a plaintiff is no longer "required to demonstrate her own freedom from comparative negligence nor to show that [D]efendants' negligence was the sole proximate cause to be entitled to summary judgment as to [D]efendants' liability" (*Ayala v Pascarelli*, 168 A.D.3d 613, 614 [1st Dept 2019] [citations omitted]; *see also Silverio v Ford Motor Co.*, 168 A.D.3d 608, 609 [1st Dept 2019] [same]). Thus, Defendants' allegation that Plaintiffs' vehicle was illegally parked, that this alleged illegal parking "caused this accident" (*Galvin* affirmation, ¶32), and that such parking violated several Vehicle and Traffic Laws (*Galvin* affirmation, ¶32-33; *see generally* *Desch* affirmation), is an issue of comparative negligence, which goes to damages. Moreover, it was Cormier's "responsibility to take into account... road conditions and to tailor [his] actions accordingly to avoid collisions" (*Rodriguez*, 161 A.D.3d at 577). It is of no moment whether Herrera-Harris was sitting in the passenger's seat or the driver's seat when this accident occurred as it is undisputed that she was located in Jaquez's vehicle at the time that this accident took place. As Plaintiffs' have demonstrated on this motion for summary judgment that Defendants were negligent as a matter of law, the Court grants

¹ While Desch's affidavit is not in proper form, as it was signed under penalty of perjury in the State of New Jersey, and fails to include a certificate of conformity, pursuant to CPLR 2309 (c), the Court may still consider this out-of-state affidavit. Where, as here, the oath is duly given, the "absence of such a certificate is a mere irregularity, and not a fatal defect" (*Matapos Technology Ltd. v. Compania Andina de Comercio Ltda.*, 68 A.D.3d 672, 673 [1st Dept. 2009] [citation omitted]); *see also American Cas. Co. of Reading, Pennsylvania v. Motivated Sec. Servs., Inc.*, 148 A.D.3d 521 [1st Dept 2017]).

Plaintiffs' motion to Herrera-Harris only.

These conclusions are reached without considering the police accident report as "it recites hearsay and was prepared by an officer who had not observed the accident" (*Roman v Cabrera*, 113 A.D.3d 541, 542 [1st Dept 2014], citing *Singh v Stair*, 106 A.D.3d 632, 633 [1st Dept 2013]). The Court further notes that while the emergency doctrine may be relevant to the issue of Defendants' liability, it has no bearing on the issue of Plaintiffs' liability (*see Lifson v City of Syracuse*, 17 N.Y.3d 492, 497 [2011]; *Caristo v. Sanzone*, 96 N.Y.2d 172, 175 [2001] [explaining the emergency doctrine]).

Defendants' Motion

The Court now turns to Defendants' cross-motion for summary judgment on the issue of their liability. In light of the previously discussed and relevant testimony by Cormier, Defendants' contention regarding the emergency doctrine is an issue for the jury to determine, as Cormier testified that she first saw the entire scene of events encompassing Plaintiffs' parked vehicle, as well as the double parked vehicle and the oncoming vehicle on the opposite side of the street, all within approximately one to two car lengths away (Cormier EBT at 34-35, 41-43). Thus, there are factual issues as to whether Cormier could have avoided this accident or whether Cormier was confronted with a sudden and unexpected emergency not of her own making (*see Lifson*, 17 N.Y.3d at 497; *Caristo*, 96 N.Y.2d at 175; *Markowitz v. Lewis*, 40 A.D.3d 371, 372 [1st Dept 2007]; *see also Hines v New York City Tr. Auth.*, 139 A.D.3d 534 [1st Dept 2016]; *Hotkins v. N.Y. City Transit Auth.*, 7 A.D.3d 474 [1st Dept 2004]).

Accordingly, it is hereby,

ORDERED, that Herrera-Harris's motion for summary judgment is granted and Jaquez's motion for summary judgment is denied, and it is further,

ORDERED, that Defendants' motion for summary judgment dismissing the complaint is denied.

This constitutes the Decision and Order of this Court.

Dated: 6/6/19

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

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT