Blaise v Lors
2019 NY Slip Op 32782(U)
August 29, 2019
Supreme Court, Kings County
Docket Number: 512757/2016
Judge: Carl J. Landicino

At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 29th day of August, 2019.

PRESENT:
HON. CARL J. LANDICINO,
Justice.

----------X

SILIANA BLAISE and ROSEMINE DESIR,
Plaintiff,

- against -

BEATRICE LORS and JONATHAN J. CRUZ,
Defendants.

----------X

Index No.: 512757/2016

DECISION AND ORDER

Motions Sequence #8

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

	Papers Numbered
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed.....	1/2, 4
Opposing Affidavits (Affirmations).....	3
Reply Affidavits (Affirmations).....	4

After a review of the papers and after oral argument, the Court finds as follows:

Beatrice Lors[1] (hereinafter "Lors") moves this Court for an Order granting her Summary Judgment, as co-Defendant in Action #2 (motion seq. #8). Defendant in both Actions #1 and #2, Jonathan J. Cruz (hereinafter "Cruz"), opposes the motion and Plaintiffs in Action #2, Silviana Blaise (hereinafter "Blaise") and Rosemine Desir (hereinafter "Desir") support and join Lors' motion for Summary Judgment. Marie Chery, co-Plaintiff in Action #1 (hereinafter "Chery") takes no position on the motion.

[1]Beatrice Lors is the co-Plaintiff in Index No.: 14782/2014 (hereinafter "Action #1") and the co-Defendant in Index No.: 512757/2016 (hereinafter "Action #2"). Actions #1 and #2 were joined for trial and discovery by Order of the undersigned, on default, dated October 5, 2016.

This proceeding concerns a motor vehicle accident that occurred on September 21, 2013. The accident concerned a vehicle owned by Cruz[2] and a vehicle owned and operated by Lors. Blaise, Desir and Chery were purportedly passengers in Lors' vehicle at the time of the accident. Lors contends that the Cruz vehicle crossed over into Lors' lane of oncoming traffic, leaving Lors no time to react. As such Lors contends that Action #2 should be dismissed as against her, pursuant to the Emergency Doctrine. Cruz opposes the motion and avers that Lors' reliance on an inadmissable Police Report is improper and cannot support the motion and that Lors has made material self-contradictory statements concerning the collision, which serve to raise material issues of fact.

It has long been established that "[s]ummary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it 'should only be employed when there is no doubt as to the absence of triable issues of material fact.'" *Kolivas v. Kirchoff,* 14 AD3d 493 [2nd Dept, 2005], *citing Andre v. Pomeroy,* 35 N.Y.2d 361, 364, 362 N.Y.S.2d 131, 320 N.E.2d 853 [1974]. The proponent for the summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate absence of any material issues of fact. *See Sheppard-Mobley v. King*, 10 AD3d 70, 74 [2nd Dept, 2004], *citing Alvarez v. Prospect Hospital*, 68 N.Y.2d320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572 [1986]; *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316, 476 N.E.2d 642 [1985].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, "the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the

[2]The identity of the driver of the Cruz vehicle is apparently unknown and appears as "John Doe", co-Defendant in Action #1.

action." *Garnham & Han Real Estate Brokers v Oppenheimer*, 148 AD2d 493 [2nd Dept, 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. *See Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 A.D.3d 518, 520, 824 N.Y.S.2d 166, 168 [2nd Dept, 2006]; *see Menzel v. Plotnick,* 202 A.D.2d 558, 558–559, 610 N.Y.S.2d 50 [2nd Dept, 1994].

As to Emergency Doctrine, generally, "...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 is not negligent if the actions taken are reasonable and prudent in the emergency context." "While a driver's actions in an emergency situation usually present a triable issue of fact, 'summary judgment may be granted when the driver presents sufficient evidence to establish the reasonableness of his or her actions and there is no opposing evidentiary showing sufficient to raise a legitimate question of fact on the issue'." *Kandel v. FN; Taxi; Inc.*, 137 A.D.3d 980, 27 N.Y.S.3d 605 (2d Dept, 2016) quoting *Burnell v. Huneau*, 1 A.D.3d 758, 767 N.Y.S.2d 163 (3rd Dept, 2003). "A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic...[i]ndeed, such a scenario presents an emergency situation, which, in this case, was not of [Defendant's] making, and his action must be judged in that context." "However, speculation that the driver in the opposing lane of traffic could have done something to avoid a vehicle crossing over a double yellow line is insufficient to defeat a motion for summary judgement." *Eichenwald v. Chaudhry*, 17 A.D.3d 403, 794 N.Y.S.2d 391 (2d Dept. 2005). See, *Snemyr v. W.A. Morales-Aparcio*, 47 A.D.3d 702, 850 N.Y.S>2d 489 (2d Dept. 2008); *Gute v. Grease Kleeners, Inc.*, 170 A.D.3d 676, 96 N.Y.S.3d 70 (2d Dept, 2019); *Ferebee v. Amaya*, 83 A.D.3d 997, 922 N.Y.S.2d 472 (2d Dept.

2011); *Wade v. Knight Transp., Inc.*, 151 A.D.3d 1107, 58 N.Y.S.3d 458 (2d Dept. 2017). "Mere speculation that [Defendant Driver] may have failed to take some accident avoidance measures, or in some other way contributed to the occurrence of the subject accident, is insufficient to raise a triable issue of fact." *Francis v. Ride*, 169 A.D.3d 771, 92 N.Y.S.3d 381 (2d Dept, 2019). However, "[q]uestions regarding the existence of an emergency and the reasonableness of the response to it will ordinarily present questions to be resolved by the trier of fact." "Plaintiff [has raised] triable issues of fact as to whether [Defendant Driver's] actions were reasonable and prudent under the circumstances, especially given the conflicting statements presented in opposition as to how the subject accident occurred, and whether [Defendant Driver] contributed to the emergency situation by following the [car] too closely." *Welch v. Suffolk Coach, Inc.*, 162 A.D.3d 1097, 80 N.Y.S.3d 114 (2d Dept, 2018). See, *Cosme v. City of New York*, 20 A.D.3d 320, 799 N.Y.S.2d 201 (1st Dept, 2005); *Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648 (2d Dept, 2014).

In support of her motion Lors proffers her own deposition testimony. At deposition Lors testified that the accident occurred in the evening and there was no precipitation. She stated that the collision occurred on Fort Hamilton Parkway ("FHP") after she passed Chester Avenue. It is undisputed that FHP is a two way road with two lanes of travel in each direction and is separated by a double yellow line. Lors stated that she was traveling in the lane abutting the yellow lines at a speed of 10-15 mph. (Lors' Motion, Exhibit "E", Pgs. 19-24) As to the collision, Lors testified that she first became aware of the Cruz vehicle when it hit her, the force was heavy, the point of contact was the front and side of her vehicle and that the force caused her to hit the sidewalk curb. She confirmed that the Cruz vehicle crossed the double yellow line and was traveling "[p]robably around 30, 40" miles per hour. (Lors' Motion, Exhibit "E", Pgs. 24-27)

Chery testified, during her deposition, that the Lors vehicle was wholly within the left lane, the front of the Cruz vehicle crossed over the double yellow line and that it was "[m]aybe a few seconds - - few minutes" from the time she first saw the Cruz vehicle to the time of the accident. (Lors' Motion, Exhibit "F", Pgs. 24-25) Blaise testified at her deposition that "I do not recall seeing a double yellow lines on the floor. What I do recall is the other vehicle had left his side of the street and actually came on to our side." (Lors' Motion, Exhibit "G", Pg. 25)

Cruz initially contends that the Police Report (Lors' Motion, Exhibit "K") is inadmissible as a consequence of it being uncertified. As an initial matter, even assuming its admissibility, Lors' statement purportedly made to the officer, who arrived at the scene after the accident, supports her testimony referenced herein. Notwithstanding this, Cruz avers that self-contradictory testimony by Lors, in any event, serves to preclude summary judgment.

Cruz generally contends that negligence cases do not usually call for a summary determination and that there can be more than one proximate cause of a collision. Cruz more specifically refers to Lors' testimony. When asked whether she saw the Cruz vehicle before the impact, Lors stated "no". (Lors' Motion, Exhibit "E", Pg. 24) Cruz argues that Lors' testimony thereafter, that the Cruz vehicle crossed the yellow line (Lors' Motion, Exhibit "E", Pg. 27) and that she only had seconds to react to the Cruz vehicle crossing over (Lors' Motion, Exhibit "E", Pg. 57), contradicts her representation that she did not see the Cruz vehicle before the impact. Moreover, Cruz argues that Lors' statement as to the approximate speed of the Cruz vehicle is contradicted by her statement she did not see the Cruz vehicle before impact. Cruz contends that these representations by Lors are necessarily a product of speculation on the part of Lors.

Cruz similarly challenges Blaise's and Chery's testimony concerning what they observed and the contradictory nature of their testimony. In addition to her testimony previously

referenced, Blaise testified that she did not recall whether she saw the Cruz vehicle prior to the accident. (Blaise's Deposition Transcript, Motion Exhibit "G", Pg. 27, Lines 10-12) In addition to her prior statements referenced, Chery's testimony in relation to seeing the Cruz vehicle is as follows:

> "Q: Did you see the white vehicle that hit you at any time before it hit you?
>
> A: Yes, I saw the car going that way, but the thing is, I don't know how that happened. It just hit my daughter car.
>
> Q: Did you see the white vehicle approaching from the opposite direction?
>
> A: No."

(Chery's Deposition Transcript, Motion Exhibit "F", Pg. 19, Lines 15-20).

As to Desir, Cruz contends that her testimony reflects that she had no observation of what occurred. Desir stated in her deposition, the following:

> "Q: Did you see the accident occur?
>
> A: No.
>
> Q: Where were you looking at the time when the accident occurred?
>
> A: My eyes were looking on one side. The accident was on the other side."

(Desir Deposition Transcript, Motion Exhibit "J", Pg. 54, Lines 11-16)

> Q: Did you ever see the other vehicle that was involved in the accident with the vehicle you were in before the accident occurred?
>
> A: No.

(Desir Deposition Transcript, Motion Exhibit "J", Pg. 55, Lines 9-13)

> Q: When did you first observe the vehicle that struck your vehicle?
>
> A: I don't understand.

Q: Did you ever see the other vehicle?

A: No."

(Desir Deposition Transcript, Motion Exhibit "J", Pg. 75, Lines 17-22).

Cruz argues conjecture and conflicting testimony on the part of these individuals. He argues that the inconsistency impacts credibility which can only be resolved by the trier of fact. Further, Cruz contends that these contradictions call into question Lors' actions and he avers that the Emergency Doctrine defense sought by Lors cannot be determined without a trial in this matter.

Although crossing over double yellow line raises, as a matter of law, the existence of an emergency situation, the testimony referenced herein lacks clarity and calls into question whether, even assuming the crossover, the event was so sudden as to prevent Lors' time to react. See, *Welch v. Suffolk Coach, Inc.*, 162 A.D.3d 1097, 80 N.Y.S.3d 114 (2d Dept, 2018). See also, *Cosme v. City of New York*, 20 A.D.3d 320, 799 N.Y.S.2d 201 (1st Dept, 2005); *Barrocales v. New York Methodist Hosp.*, 122 A.D.3d 648 (2d Dept, 2014). Accordingly, the Lors motion for summary judgment is denied.

Based upon the foregoing, it is hereby ORDERED as follows:

Defendant Lors (Action #2) motion for summary judgment (motion seq. #8) is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:

Carl J. Landicino
J.S.C.

2019 SEP 16 AM 9:51
KINGS COUNTY CLERK
FILED