

Rogers v Five Star El., Inc.
2019 NY Slip Op 34494(U)
October 31, 2019
Supreme Court, Westchester County
Docket Number: Index No. 60117/2018
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
JELANI R. ROGERS,

Plaintiff,

DECISION and ORDER

-against-

Sequence Nos. 1 and 2
Index No. 60117/2018

FIVE STAR ELEVATOR, INC. and THOMAS C.
LEDDEN,

Defendants.
-----X

RUDERMAN, J.

The following papers were considered in connection with plaintiff's motion pursuant to CPLR 3212 for partial summary judgment against defendants on the issue of liability, and defendants' motion for an order pursuant to CPLR 3025(b) permitting them to amend their answer so as to include an affirmative defense under New York State's emergency doctrine:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - E	1
Notice of Cross-Motion, Affirmation, Affidavit, Exhibits 1 - 5	2
Affirmation in Opposition and in Reply, Exhibit A, and Memorandum of Law	3

This is an action for personal injuries allegedly sustained by plaintiff Jelani Rogers on May 31, 2018 at approximately 9:30 a.m. as a result of a two-vehicle collision near the intersection of Columbus Avenue and West 86th Street in Manhattan, New York. In moving for partial summary judgment, plaintiff relies on his deposition testimony, in which he asserts that he was stopped at a traffic signal on 86th Street when the box truck he was driving was struck twice by the box truck owned by defendant Five Star Elevator, Inc. and operated by defendant

Thomas Ledden. Rogers testified that defendants' truck first struck his truck in the rear, on the driver's side, and then, after it backed up, and after plaintiff began to get out of his truck, defendants' truck sideswiped his truck on the rear part of its driver's side. At the second impact, plaintiff asserted, the tailgate of defendants' truck was embedded into the side of plaintiff's truck. Plaintiff claims that both impacts injured his right knee.

Also submitted is the deposition testimony of defendant Ledden. Ledden testified that he was driving southbound on Columbus Avenue when another, unidentified vehicle "swayed" from the left lane into his lane, immediately in front of him, causing him to veer to his right, where his truck struck plaintiff's truck which was in the lane to his right. Specifically, he stated, a metal bar protruding from his truck's hydraulic lift gate on the passenger side, struck plaintiff's truck on the driver's side, toward the back, when he sideswiped it at a speed of no more than ten miles per hour. Ledden said the impact was light, and the damage minor, and he recounted his subsequent interchange with plaintiff:

"I got out to look. What I saw, I was like, do you really want to call the police about it. I don't think it's that much. He said he's got to. I understood. So we pulled over and the games began" (Plaintiff's Exhibit D, Ledden EBT, p 29).

Plaintiff also submits a copy of the police accident report, in which the reporting officer related that defendant Ledden stated that he "was heading southbound on Columbus Avenue when an uninvolved vehicle cut him off, causing him to sideswipe" plaintiff's vehicle.

Plaintiff contends that he has made a prima facie showing of entitlement to summary judgment on the issue of liability, based on his testimony that defendants' vehicle struck his in the rear, establishing a violation of Vehicle and Traffic Law § 1129, which prohibits following another vehicle more closely than is reasonable. He relies on the well-established rule that "[a]

rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Edgerton v City of New York*, 160 AD3d 809, 810 [2d Dept 2018]).

In opposition to plaintiff’s motion, defendant submits his affidavit, in which he specifies that he had been driving at no more than ten miles per hour in heavy traffic when an unidentified vehicle suddenly and without warning veered in front of him from the bus lane on his left, leaving him with no choice but to steer to his right to avoid impact with that unidentified vehicle, at which time the part of the hydraulic lift attached to the rear of his truck, on the passenger side, made contact with the driver’s side of plaintiff’s vehicle in the lane to his right. Based on these asserted facts, defendant cross-moves for leave to amend his complaint in order to assert the defense created by the emergency doctrine.

Plaintiff opposes the cross-motion, observing that since Ledden is unable to identify, or even describe, the vehicle that he claims cut him off, it is reasonable to conclude that he was not paying attention and that he suddenly jerked his vehicle to the right to avoid hitting the rear of a stopped vehicle he belatedly noticed in front of him. Plaintiff also suggests that Ledden’s version of the accident is not credible as a matter of law.

Analysis

Although there is no indication that plaintiff was at fault, that does not necessarily entitle plaintiff to judgment as a matter of law on the issue of defendants’ liability. It is true that plaintiff’s deposition, if considered on its own, would create a prima facie showing of entitlement to summary judgment based on the rule regarding rear-end collisions with stopped vehicles. However, once the other evidentiary materials are considered, including the

submissions with plaintiff's own moving papers, issues of fact preclude summary judgment.

Initially, there is a dispute as to whether this accident involved a rear-end collision. Plaintiff's testimony that defendants' truck first struck him in the rear, then backed up, then proceeded to sideswipe his truck, is contradicted by defendant Ledden's description of the accident, in which he asserted that the contact between the parties' vehicles was limited to that caused by the piece of metal protruding from the passenger side of his truck's hydraulic lift gate, which damaged the side of plaintiff's truck. Furthermore, plaintiff's statement as related in the police report by the reporting police officer referred only to being sideswiped by defendants' vehicle, and includes no reference to being rear-ended. Therefore, the law regarding rear-end collisions with stopped vehicles is not applicable here.

Turning to the agreed-upon occurrence of a sideswipe of plaintiff's vehicle by defendants' vehicle, Ledden offers a reason why he suddenly veered to the right, causing the contact between the two vehicles, namely, an unidentified vehicle that suddenly veered immediately in front of him, causing him to swerve right. That reason, if found to be true, could constitute a basis for holding defendants non-negligent under the emergency doctrine.

"Under the emergency doctrine, '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'" (*Freder v Costello Indus., Inc.*, 162 AD3d 984, 985 [2d Dept 2018], quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]). "However, where the claimed emergency resulted from a defendant's own actions, for example, from the defendant's failure to maintain a safe distance between his or her vehicle and the

vehicle in front of him or her, it will not qualify as an emergency under the emergency doctrine” (*Freder v Costello Indus.*, 162 AD3d at 986).

Plaintiff suggests that defendant Ledden’s claimed need to swerve suddenly must have been caused by his own inattention, and that he must have been caused to swerve by his belatedly noticing a stopped vehicle in front of him. However, this is merely a possible alternative cause of the accident, that may be explored at trial, along with defendant’s claim that he was faced with a sudden and unexpected circumstance, not of his own making, which left him without time for thought. In this instance “the existence of an emergency and the reasonableness of the response to it” present issues of fact (*see Kenney v County of Nassau*, 93 AD3d 694, 696 [2d Dept 2012]).

Based upon the foregoing, it is hereby,

ORDERED that the motion by plaintiff for summary judgment on the issue of liability against defendant is denied, and it is further

ORDERED that defendants’ cross-motion for leave to amend their answer to include the affirmative defense of the emergency doctrine is granted, and the proposed amended answer submitted as Exhibit 5 to defendants’ cross-motion (NYSCEF Doc. No. 34) is deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear on Tuesday, December 3, 2019 at 9:30 a.m. in the Settlement Conference Part of the Westchester Supreme Court in the Courthouse located at 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, 10601, to schedule a trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
October 31, 2019


HON. TERRY JANE RUDERMAN, J.S.C.