SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 15

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VICTOR A. TENESACA HUERTA and MARIA CAZHO,

Plaintiff,

- against -

JOY N. PARKER, CONSOLIDATED BUS TRANSIT, INC., NEW YORK CITY TRANSIT AUTHORITY, AND JUAN TENESACA HUERTA,

Defendants.

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DECISION AND ORDER

Index No. 28734/2017

Mary Ann Brigantti, J.

Upon the foregoing papers, plaintiffs seek summary judgment on the issue of liability against defendants Joy N. Parker, Consolidated Bus Transit, Inc. and New York City Transit Authority (collectively "the Transit defendants"), and defendant Juan Tenesaca Huerta ("Juan") in this hit in the rear motor vehicle accident, that occurred on November 17, 2016 at 11:30 AM, on the Bronx River Parkway. Plaintiffs Victor A. Tenesaca Huerta ("Victor"), the registered owner, and his wife, Maria Cazho ("Cazho"), also seeks dismissal of defendants' affirmative defenses based on plaintiffs' comparative negligence.

In support of summary judgment, plaintiff submitted a certified police accident report from the date of the subject accident, the pleadings and the testimony from plaintiffs' 50-h hearings conducted on March 27, 2017. The plaintiffs' testimony demonstrates that on November 17, 2016 Victor gave permission to defendant Juan, plaintiff Victor's brother, to operate plaintiff Victor's 2013 Nissan sedan ("the Huerta vehicle"). Plaintiff Victor had purchased the Nissan approximately three months earlier, at which time he had the vehicle inspected by a mechanic. The Huerta vehicle was traveling on the southbound side of the Bronx River Parkway, returning home from taking defendant Juan's wife to work. Plaintiff Victor testified that there was no traffic,

the weather was clear and the road was dry. Plaintiff Victor was seated in the rear, driver side seat and plaintiff Cazho was seated in the front, passenger side seat.

Plaintiff Victor testified that defendant Juan was traveling approximately 40 miles per hour in the center lane when he stated that something was wrong with the accelerator and that the vehicle was not accelerating. Plaintiff Victor testified that he told defendant Juan that he "should exit to the right" and then they would call a tow truck. Plaintiff Victor offered conflicting testimony that he told defendant Juan "to park near the right lane." Plaintiffs testified that defendant Juan moved the vehicle to the right lane, stopped the vehicle and activated the emergency lights. Plaintiff Victor testified that the Huerta vehicle was stopped for two minutes while Juan continued to "try" the accelerator, but he could not remember what would happen when Juan tried the accelerator. The plaintiffs then felt two hard, strong impacts to the rear of the Huerta vehicle, within seconds of each other. Plaintiffs testified that an Access-A-Ride bus owned by defendant Consolidated Bus Transit, Inc. and operated by defendant Joy N. Parker ("Parker") was the vehicle that struck the Huerta vehicle in the rear.

The police accident report indicates that defendant Juan stated that he was traveling on the parkway when he wanted to "check something on his vehicle," so he put on his hazard lights and stopped in the right lane. Police accident report further indicated that defendant Parker stated to the police officer that the Huerta vehicle stopped suddenly in the right lane of the parkway, with no hazard lights on, and that she did not have enough time to stop to avoid the collision.

In opposition, defendant Juan and the Transit defendants submit, among other things, the transcript from defendant Juan's 50-h hearing, conducted on July 13, 2017. The Transit defendants contend that plaintiffs' motion is procedurally defective due to plaintiff's failure to annex the parties' answers and should be denied on such ground. The Transit defendants further argue that

defendant Parker was faced with a sudden emergency, that she could not have reasonably anticipated and did not cause or contribute to, and that her response to that emergency was that of a reasonably prudent person. Specifically, the Transit defendants argue that defendant Juan in violation of Vehicle and Traffic Law § 1202, suddenly stopped on the parkway causing an emergency situation for defendant Parker and that such a stop was unlawful because defendant Juan did not have an emergency. Rather, defendant Juan stated to the police officer that he stopped to check something on his vehicle.

The Transit defendants further argue that defendant Juan was negligent in stopping in the right lane instead of using an eight-foot shoulder to the right of the roadway. In this regard, defendant Juan testified that there was an eight-foot area of grass and weeds, but that the vehicle was half in the right lane and half on the shoulder.

The Transit defendants submit accident incident reports from the New York City Transit Authority generated as a result of the subject accident. Such reports include a statement authored defendant Parker that she was traveling approximately 40-45 miles per hour on the southbound side of the Bronx River Parkway "when the car directly in front of [her] quickly changed to the center lane [she] notice[d] there was a vehicle in front of him whose tail lights were not lit up as [she] got closer [she] slowed [she] notice he was not moving [she] pressed hard on the brake the bus slid and impacted the rear of [the Huerta vehicle] that was parked in the right lane of the highway." The Transit defendants argue that evidence that defendant Parker was faced with an emergency demonstrates a defense to the plaintiffs' claims and therefore plaintiffs have failed to establish negligence on the part of the Transit defendants.

The Transit defendants also argue that there is an issue of fact as to the ownership and maintenance of the Huerta vehicle. In this regard, the Transit defendants cite Vehicle and Traffic

Law § 301 (periodic inspections of all motor vehicles), Vehicle and Traffic Law § 375 (every motor vehicle is to be in good working order at all times while driven on public streets) and Vehicle and Traffic Law § 401 (vehicles must be registered by their owners).[1] The Transit Defendants contend that if there was a mechanical issue with the Huerta vehicle, then questions of fact as to the ownership and maintenance of the vehicle would preclude summary judgment on the issue of comparative negligence in favor of the plaintiffs.

Defendant Juan opposes summary judgment on the grounds that plaintiff Victor, as the owner of the vehicle, was responsible for the vehicle's maintenance. Defendant Juan testified that the vehicle experienced a mechanical problem immediately prior to the subject accident in that it would not accelerate, and that plaintiff Victor directed defendant Juan to "go into the right lane." Defendant Juan contends that he took appropriate steps to remove the vehicle from the roadway and there is an issue of fact as to whether plaintiff Victor was negligent in maintaining the vehicle and whether such negligence was a proximate cause of the subject accident. Defendant Juan points out that the undisputed evidence demonstrates that the Huerta vehicle was struck in the rear after it had been stopped for two minutes.

In reply, plaintiffs contend that were innocent passengers in the Huerta vehicle and, therefore, not comparatively liable for the accident or their injuries. Plaintiffs argue that the evidence that the vehicle was turned off and parked for two minutes before the subject accident occurred, demonstrates that plaintiffs were not a proximate cause of the subject accident. Plaintiffs further argue that they had no control over the operation of the vehicle and that Juan exercised exclusive decision-making power in deciding where to "park" the vehicle. Plaintiffs argue that the cause of the mechanical difficulties that precipitated the subject accident was not a proximate

[1] The Huerta vehicle was registered to plaintiff Victor at a Baltimore, Maryland address. Plaintiff Victor testified that he was resident of New York and that the Maryland address was that of his brother-in-law.

cause of the subject accident due to the "intervening and superseding actions" of defendant Juan and defendant Parker in the negligent operation of their respective vehicles.

Plaintiffs acknowledge that there are disputed facts as to the precise location of the stopped Huerta vehicle, presenting triable issues of fact defeating either defendant-drivers' own summary judgment motion for liability. However, plaintiffs argue in reply that they *only* seek a finding that plaintiffs are not comparatively liability for the occurrence of this accident. [2] Accordingly, as plaintiffs have withdrawn the aspects of their motion seeking findings of liability against defendants, the court will only address the comparative negligence arguments. [3]

Plaintiff Cazho, an undisputed innocent passenger in the Huerta vehicle, established as a matter of law her lack of culpable conduct and, therefore, is entitled to summary judgment on the issue of her lack of fault pursuant to CPLR 3212 (g) (*Oluwatayo v Dulinayan*, 142 AD3d 113, 120 [1st Dept 2016]). Accordingly, defendants' affirmative defenses based upon plaintiff Cazho's comparative fault are dismissed.

However, plaintiffs motion as to plaintiff Victor's lack of comparative negligence for the subject accident is denied without prejudice and with leave to renew upon the completion of discovery (CPLR 3212[f]). "Where essential facts to justify opposition to a motion for summary judgment might exist, but cannot be stated because they are in the moving party's exclusive knowledge or control, summary judgment must be denied (CPLR 3212 [f])" (*Curry v Hundreds of Hats, Inc.*, 146 AD3d 593, 594 [1st Dept 2017]), as premature, with leave to renew upon the

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[2] Plaintiffs reply asserts that the purpose of their motion is not for a determination of the defendants' liability (reply affirmation of plaintiffs' counsel at ¶ 7), that the motion does not seek a finding of the defendants' culpability (*id.* at ¶ 8) and that the central purpose of the motion is the lack of plaintiffs' culpability (*id.* at ¶ 10).

[3] In view of plaintiffs' withdrawal of the liability aspects of the motions, the court is unable to reconcile the wherefore language contained in plaintiffs' reply affirmation which seeks " (1) summary judgment on liability against the defendants, (2) summary judgment finding plaintiffs innocent of negligence for the occurrence of the subject accident and a determination of liability against defendants; and (3) an order setting the matter down for trial apportioning faults between defendants and on damages."

completion of discovery (*see Lyons v NY City Economic Dev. Corp.*, ___AD3d___, 2019 NY Slip Op 07483, *1 [1st Dept 2019]; *Vitiello v Mayrich Constr. Corp.*, 255 AD2d 182, 184 [1st Dept 1998]).

There can be more than one proximate cause of an accident (*see Forte v Albany*, 279 NY 416 [1939]). In a hit in the rear accident with a stopped vehicle, summary judgment is not warranted where there are issues of fact as to whether the owner or operator of the stopped vehicle was negligent and whether such negligence was also a proximate cause the accident (*see Pillasagua v Losco*, 135 AD3d 843, 843-844 [2d Dept 2016][factual dispute as to the placement of the plaintiff's vehicle within the roadway precluded dismissal of comparative negligence defense]; *Geralds v Damiano*, 128 AD3d 550, 550-551 [1st Dept 2015] [factual dispute as to whether plaintiff stopped on the shoulder or in the active lane of traffic to inspect his trailer hitch precluded summary judgment in plaintiff's favor]; *Gall v Schwed*, 119 AD3d 524, 526 [2d Dept 2014] [triable issue of fact as to whether tow truck driver was negligent in stopping his truck within a travel lane]; *Tannous v MTA Bus Co.*, 83 AD3d 584, 584 [1st Dept 2011] [triable issues of fact as to whether bus operator was negligent in causing rear end accident by double parking bus in a traffic lane on rainy foggy night without headlights or hazards activated]).

"It is the duty of the [owner] of a motor vehicle to use reasonable care to have it in a reasonably safe condition and properly equipped for operation so that the vehicle may be controlled and not be a source of danger to others. It is the [owner's] duty to use such care in the inspection, maintenance and repair of the vehicle that a reasonably prudent [owner] would use under the same circumstances" (PJI 2:86; *see generally Mejia v Coleman*, 168 AD2d 245, 245 [1st Dept 1990]). Here, the parties testified that the Huerta vehicle experience mechanical failure, for unknown reasons, resulting in the vehicle stopping or being stopped partially in the right lane of

the parkway in the two minutes prior to the accident. Plaintiff Victor, the owner of the subject vehicle failed to submit evidence addressing the cause of the alleged mechanical failure or that he used reasonable care in keeping the vehicle in a reasonably safe condition (*see Gregson v Terry*, 35 AD3d 358, 360-361 [2d Dept 2006] [summary judgment unwarranted where driver failed to establish, prima facie, that the reason for his vehicle losing power in the left lane of the parkway was lawful, and was not merely the result of a foreseeable problem of the driver's own making, such as running out of fuel]; *compare Rios v Bryant*, 234 AD2d 441, 442 [2d Dept 1996] [prima facie lack of negligence demonstrated through evidence that the subject vehicle, which suddenly and rapidly lost power on the highway, was regularly serviced, had no history of mechanical problems, had close to a full tank of gas and the operator of vehicle could not pull the van off the road]). Although plaintiff Victor testified that this was the first time the Huerta vehicle experienced an issue with acceleration and that he did not have prior repairs done, information as to the maintenance and repair history are within the exclusive knowledge and control of plaintiff Victor and defendants have not had an opportunity for discovery of this information (*see generally Gerse v Neyjovich*, 9 AD3d 384, 385 [2d Dept 2004]).

Moreover, the testimony of the parties fails to demonstrate that the Huerta vehicle was completely disabled and unable to be moved out of the right lane (*Gregson v Terry*, 35 AD3d 358, 360-361 [2d Dept 2006] [summary judgment denied where driver failed to establish that the reason for his vehicle losing power in the left lane of the parkway was lawful, and was not merely the result of a foreseeable problem of the driver's own making such as running out of fuel]; *Gerse v Neyjovich*, 9 AD3d 384, 385 [2d Dept 2004] [issue of fact as to whether vehicle had lost power and therefore whether operator was negligent in not using hazard lights precluded summary judgment]; *cf. Diaz v Green*, 47 AD3d 612, 612 [2d Dept 2008] [prima facie evidence that

respondents vehicles were disabled and could not be moved, demonstrated prima facie absence of negligence]). In this regard, plaintiffs testified that defendant Juan pulled the Huerta vehicle over to the right lane and stopped. Plaintiff Victor could not remember whether the accelerator was functioning after the car was moved to the right lane. On the other hand, defendant Juan testified that the Huerta vehicle came to a stop, due to the "speed" of the vehicle, in between the right lane and the shoulder.[4]

"Except when necessary to avoid conflict with other traffic. . . no person shall . . . [s]top, stand or park a vehicle . . . [o]n a state expressway highway or state interstate route highway, . . . except in an emergency" (Vehicle and Traffic Law §1202; *see Gregson v Terry*, 35 AD3d 358, 360-361 [2d Dept 2006]). If the Huerta vehicle was operable, then a triable issue of fact exists as to whether plaintiff Victor, the owner of the vehicle, negligently directed defendant Juan to stop the vehicle in the right lane, in violation of Vehicle and Traffic Law § 1202, and whether such negligence was a proximate cause of the subject accident (*see Pillasagua v Losco*, 135 AD3d at 843-844; *Gordon v State*, 57 Misc 2d 731, 738 [Ct Cl 1968] [finding the driver's college professor took charge of the situation in his direction that the driver continue driving and that the condition with the vehicle's front wheel would straighten out, thereby assuming responsibility for the injuries resulting from the vehicle overturning]).

Accordingly, it is hereby,

ORDERED, that plaintiffs' motion for summary judgment is granted in part on the issue of plaintiff Cazho's lack of comparative fault only; and it is further

[4] Defendant Juan testified that plaintiff Victor "said go into the right lane, and with the speed of the car [he] went. [He] went to the right. Between the shoulder and the lane. And that's where the car stopped."

ORDERED, that the remainder of the motion is denied without prejudice to renew upon the completion of discovery.

This constitutes the decision and order of the Court.

Dated: 11/26/19

E N T E R,

MARY ANN BRIGANTTI, J.S.C.