Mayo v Goulbourne
2019 NY Slip Op 35037(U)
November 6, 2019
Supreme Court, Bronx County
Docket Number: Index No. 34125/2018E
Judge: John R. Higgitt
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: **PART 14**

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MAYO, BRENDA

Index №. **34125/2018E**

- against -

Hon. **JOHN R. HIGGITT**, A.J.S.C.

GOULBOURNE, JALEESA, et ano

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The following papers numbered **10** to **16** in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on **September 10, 2019** and duly submitted as **No. 41** on the Motion Calendar of **October 18, 2019**

	NYSCEF Doc. Nos.
Notice of Motion – Exhibits and Affidavits Annexed	10-15
Notice of Cross-Motion – Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	17
Replying Affidavit and Exhibits	18
Filed Papers	
Memoranda of Law	
Stipulations	16

Upon the foregoing papers, plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject accident and dismissal of defendants' affirmative defenses alleging plaintiff's culpable conduct and assumption of risk is granted, in accordance with the annexed decision and order.

Dated: **11/06/2019**

Hon. _____
JOHN R. HIGGITT, A.J.S.C.

Check one:
□ Case Disposed in Entirety
■ Case Still Active

Motion is:
■ Granted □ GIP
□ Denied □ Other

Check if appropriate:
□ Schedule Appearance □ Settle Order
□ Fiduciary Appointment □ Submit Order
□ Referee Appointment

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

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BRENDA MAYO,

Plaintiff,

- against -

JALEESA GOULBOURNE and CRAIG GOULBOURNE

Defendants.

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DECISION AND ORDER

Index No. 34125/2018E

John R. Higgitt, J.

Upon plaintiff's September 27, 2019 notice of motion and the affirmation, affidavit, and exhibits submitted in support thereof; defendants' October 10, 2019 affirmation in opposition; plaintiff's October 11, 2019 affirmation in reply; and due deliberation; plaintiff's motion for partial summary judgment on the issue of defendants' liability for causing the subject accident and dismissal of defendants' affirmative defenses alleging plaintiff's culpable conduct and assumption of risk is granted.

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained in a motor vehicle accident that took place on December 5, 2017. In support of her motion, plaintiff provides the pleadings, the police accident report and her affidavit. Plaintiff averred that she was stopped at a red traffic light for approximately 10 seconds when defendants' vehicle struck the rear of her vehicle. Plaintiff also submits the police accident report that contains the following party admission by defendant Jaleesa Goulbourne: "while approaching the intersection, she looked down to retrieve a water bottle and rear-ended [plaintiff's vehicle]" (*see Thompson v Coca-Cola Bottling Co.*, 170 AD3d 588 [1st Dept 2019]; *Niyazov v Bradford*, 13 AD3d 501 [2d Dept 2004]).

"A rear-end collision with a stationary vehicle creates a prima facie case of negligence requiring a judgment in favor of the stationary vehicle unless defendant proffers a nonnegligent

explanation for the failure to maintain a safe distance . . . A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself [or herself] and cars ahead of him [or her] so as to avoid collisions with stopped vehicles, taking into account weather and road conditions" (*LaMasa v Bachman*, 56 AD3d 340, 340 [1st Dept 2008]). A rear-end collision constitutes a prima facie case of negligence against the rearmost driver in a chain confronted with a stopped or stopping vehicle (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st 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 (*see id.*).

Plaintiff made a prima facie showing that defendants violated Vehicle and Traffic Law § 1129 and that such violation was a proximate cause of the accident.

In opposition to plaintiff's prima facie showing of entitlement to judgment as a matter of law, defendants failed to raise a triable issue of fact as to their liability. 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 argue that the motion should be denied because plaintiff failed to submit evidence in admissible form, relying solely on a "self-serving" affidavit. However, an affidavit

submitted by an interested party is competent evidence and may be sufficient to discharge the interested party's summary judgment burden (*see Miller v City of New York*, 253 AD2d 394, 395 [1st Dept 1998]). Moreover, as noted above, the police report contains a party admission by defendant Jaleesa Goulbourne supporting summary judgment in plaintiff's favor.

Defendants further assert 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]). 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]). Notably, defendants did not provide an affidavit in connection with this motion, and no reason was given for their failure to do so.

Thus, because plaintiff made a prima facie showing of entitlement to judgment as a matter of law, and defendants failed to raise a triable issue of fact as to their liability, the aspect of plaintiff's motion for summary judgment as against defendants is granted.

As to the aspect of plaintiff's motion seeking dismissal of defendants' second affirmative defense alleging plaintiff's comparative fault, plaintiff made a prima facie showing that she bears no such fault (*see Soto-Maroquin v Mellet*, 63 AD3d 449 [1st Dept 2009]). Because defendants failed to raise a triable issue of fact, the aspect of plaintiff's motion seeking dismissal of defendants' second affirmative defense alleging plaintiff's comparative fault is granted.

As to the aspect of the second affirmative defense alleging plaintiff's assumption of risk, that aspect is also dismissed because the doctrine of primary assumption of risk does not apply to the facts of this matter (*see Custodi v Town of Amherst*, 20 NY3d 83 [2014]; *Valder v Weston*, 57 AD2d 862 [2nd Dept 1977]).

Accordingly, it is

ORDERED, that the aspect of plaintiff's motion seeking partial summary judgment on the issue of defendants' liability is granted; and it is further

ORDERED, that the aspect of plaintiff's motion seeking dismissal of defendants' second affirmative defense is granted and that defense is dismissed.

The parties are reminded of the November 22, 2019 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: November 6, 2019

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