Jerez v Moreno
2019 NY Slip Op 35056(U)
November 25, 2019
Supreme Court, Bronx County
Docket Number: Index No. 325657/2018E
Judge: Mary Ann Brigantti

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CECILE JEREZ and STEPHANIE LARA,

Plaintiffs,

Index No.: 325657/2018E

-against-

CARLOS MORENO and TIME WARNER CABLE NEW YORK CITY, LLC,

Defendants.

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HON. MARY ANN BRIGANTTI:

Plaintiffs move for partial summary judgment in their favor on the issue of liability and dismissal of Defendants' affirmative defenses alleging culpable conduct on the part of the Plaintiffs.

This is an action to recover damages for alleged personal injuries sustained by Plaintiffs, CECILE JEREZ and STEPHANIE LARA, in a motor vehicle accident, which occurred on or about November 27, 2017, at 10:40 p.m., on Amsterdam Avenue, near West 161st Street, in Manhattan, New York. Defendant CARLOS MORENO was the driver of the vehicle owned, and maintained, by his employer, Defendant TIME WARNER CABLE NEW YORK CITY, LLC. In support of their motion, Plaintiffs' submissions include the pleadings and Plaintiffs' Affidavits. In opposition, Defendant MORENO submitted his Affidavit; and Defendant TIME WARNER submitted three Affidavits.

According to Plaintiff LARA, she was stopped at a red light on Amsterdam Avenue, near West 161st Street, when the vehicle operated by

Defendant MORENO and owned by Defendant TIME WARNER, struck her vehicle in the rear. She asserts that she did not contribute to the happening of the accident. (Plaintiff LARA Affidavit, dated February 22, 2019). Consistent therewith, according to Plaintiff JEREZ, she was a passenger in a vehicle which was struck in the rear while stopped at the red light on Amsterdam Avenue. (Plaintiff JEREZ Affidavit, dated February 21, 2019).

Vehicle and Traffic Law § 1129(a) "Following too closely", provides that: "The 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."

The Court of Appeals has reiterated that: "It is well settled that a "rear-end collision with a stopped vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle" " *(Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]).

"Plaintiff established her entitlement to judgment as a matter of law by submitting evidence that her vehicle was stopped at a red light when it was rear-ended by defendants' vehicle" (*Vasquez v Chimborazo*, 155 AD3d 432, 433 [1st Dept 2017]; *see Rodriguez v Garcia,* 154 AD3d 581 [1st Dept 2017]; *see Castaneda v DO&CO NY Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]).

> " "A rear-end collision with a stopped or 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, nonnegligent explanation for the accident" (Matos v Sanchez, 147 AD3d 585, 586, 47 NYS3d 307 [1st Dept 2017])"

(*Urena v GVC Ltd.*, 160 AD3d 467, 467 [1st Dept 2018]).

Accordingly, Plaintiffs made a prima facie showing of their entitlement to partial summary judgment on the issue of Defendants' liability by attesting that Defendants' vehicle rear-ended their vehicle while stopped at a red light. Thus, the burden shifted to Defendants to advance a non-negligent explanation for the accident.

In response, Defendant MORENO alleges that he did not negligently operate the vehicle because the vehicle's brakes unexpectedly failed; and Defendant TIME WARNER alleges that it maintained the subject vehicle and its brake system in good working order; and that its investigation remains ongoing. Defendants state that the motion is premature, since discovery has not been exchanged, and no depositions have been held.

Defendant MORENO acknowledged that he struck the rear of LARA's vehicle, and describes the circumstances as follows: He was driving the 2013 Ford truck owned, and maintained, by his employer, Defendant TIME WARNER, on the evening of November 27, 2017, at about 10:40p.m. MORENA, a field technician, was heading home from his last job. While he was traveling on Amsterdam Avenue, between 161st and 162nd Street, in Manhattan, within the

speed limit, he noticed the car ahead of him was stopped at a red light.

Defendant MORENO alleges that, although he applied his brakes, they failed; he tried to swerve to the left, but could not avoid colliding with the back of LARA's car. Immediately after the accident, he contacted his supervisor at TIME WARNER, and let him know what happened, including that the brakes failed. (MORENO Affidavit, dated March 15, 2019).

In opposition to Plaintiffs' Motion, Defendant TIME WARNER submits the Affidavits of its employees, Mr. Christopher Carrion, Field Operations Supervisor and Mr. Jacek Graczyk, Fleet Management Manager; and of a mechanic, Mr. Andy Maharaj.[1]

Mr. Christopher Carrion, Field Operations Supervisor, was MORENO's supervisor. Mr Carrion alleges that, on the evening of November 27, 2017, at about 10:00 p.m., he received a call from MORENO advising that MORENO was involved in a motor vehicle accident, and had experienced brake failure in his assigned company-issued vehicle, a 2013 Ford Econoline Van. Mr. Carrion alleges that this was the first time that he had received any notification that the subject vehicle was having brake issues. (Christopher M. Carrion Affidavit, dated June

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[1] It is noted that Defendant TIME WARNER's Opposition was not filed until the return date of June 25, 2019, which was subsequent to the time that Plaintiffs filed their Reply – so neither Plaintiffs, nor Co-Defendant MORENO, had the opportunity to respond to it.

19, 2019).

Mr. Jacek Graczyk, Fleet Management Manager, oversees the service and maintenance of the company vehicles. Mr. Graczyk alleges that he was not aware of any issues relative to the brake system prior to the subject accident. He stated that employees are assigned a vehicle upon commencement of their employment; and are responsible to inspect it on a daily, weekly, and monthly basis; and advise their supervisor if there are any issues. Subsequent to the subject accident, in response to MORENO's allegation of brake failure, Mr. Graczyk requested that the brake system be inspected by vendor Amerit Fleet Solutions. Thereafter, Blue Star Brothers repaired the right front suspension and radiator. Mr. Graczyk also reviewed the subject vehicle's "Service History" maintenance records from May 2013 to April 22, 2019, and believes that they do not reflect that the vehicle experienced mechanical issues relative to the brake system in 2017. Prior to the date of the accident, the last inspection of the vehicle was performed on April 20, 2017, which was 7 months before the accident, when it passed NYS Safety and Emissions inspection. (Jacek Graczyk Affidavit, dated June 19, 2019).

Mr. Andy Maharaj, a licensed and certified mechanic employed by Amerit Fleet Solutions as Fleet Manager, inspected the subject vehicle's brake system within about one week subsequent to the accident. He describes the results of his visual and mechanical inspection of the brake system, including that the brake

pads were not worn down beyond their useful life; and that the brake fluid was the proper color. Under the circumstances, Mr. Maharaj concluded that the vehicle's brake system was in good working order. (Andy Maharaj Affidavit, dated June 19, 2019).

In a case where a defendant driver had alleged an unexpected brake failure, the Court denied a plaintiff's motion for partial summary judgment on the issue of a defendant's liability, where, in opposition, defendants raised a triable issue of fact as to whether "defendant driver's truck suffered an unexpected brake failure, inasmuch as he testified that although he had checked the brakes in the morning and found them to be in good working order, the brakes failed to hold prior to the accident, and he was uncertain whether they had malfunctioned." (*Osborne v NY City Dept. of Parks & Recreation*, 111 AD3d 465, 466 [1st Dept 2013]).

Likewise, in the case at bar, the six Affidavits submitted herein and supporting documents, raise issues of fact on, for instance, whether the accident was caused by the sudden and unexpected failure of the vehicle's brakes, and whether defendant exercised reasonable care to maintain its vehicle in good working order; and these would be matters for the determination of a jury (*see Tat Sang Kwong v Budge-Wood Laundry Serv., Inc.*, 97 AD2d 691, 691-692 [1st Dept 1983]). "Conflicting evidence ...created valid questions of fact as to whether the brake failure was unexpected" (*LaSalle v J & T Sand & Gravel, Inc.*, 177 AD2d

265, 265 [1st Dept 1991]).

Moreover, the motion for summary judgment is deemed premature because no discovery has been exchanged; and, from the affidavits submitted, it appears that essential facts may exist, which cannot yet be stated, within the meaning of CPLR 3212 (f) "Facts unavailable to opposing party", which provides that:

> "Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

The parties herein should have the "opportunity to develop the record regarding the factual basis of defendants' [allegations,] ... the applicability of which is generally an issue of fact." (*Nelson v Bestway Coach Express*, 36 AD3d 488, 488 [1st Dept 2007]; *see Diaz v Jadan*, 116 AD3d 600 [1st Dept 2014]); *see Belziti v Langford*, 105 AD3d 649 [1st Dept 2013]; *see Yant v Mile Sq. Transp., Inc.*, 89 AD3d 492 [1st Dept 2011]). Thus, the parties herein should have the opportunity, for example, to conduct depositions; exchange all relevant documents; and perform expert mechanics' examinations of the vehicle, and its "Service History", if warranted.

However, Plaintiffs, an innocent passenger, and driver, respectively, are entitled to a determination that they have no culpable conduct on the issue of liability – irrespective of the unresolved issues of fact on defendants' negligence.

Where, as here, a plaintiff was an innocent passenger, and "there is no basis for finding that plaintiff ... did anything to cause the accident or could have prevented it", the Court properly found no culpable conduct by a plaintiff passenger on the issue of liability (*Mello v Narco Cab Corp.*, 105 AD3d 634, 635 [1st Dept 2013]). "CPLR 3212 (g) permits the court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action" (*Garcia v Tri County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]).

Also, an "innocent plaintiff *driver* exists in a case where the plaintiff driver did not contribute to the happening of the accident in any way. A typical example is the case at bar where plaintiff driver, while stopped, was rear-ended by the following driver" [emphasis added] (*Oluwatayo v Dulinayan*, 142 AD3d 113, 119 [1st Dept 2016]).

Therefore, Plaintiffs' Motion, for partial summary judgment in their favor on liability, is granted only to the extent that Plaintiffs, an innocent passenger and innocent driver, respectively, are found free from comparative fault for the happening of this rear-end collision. However, this Court makes no determination as to other issues herein, such as whether Defendants, respectively, are liable for the happening of the accident, whether Plaintiffs' alleged injuries were proximately caused by the negligence of the Defendants, and whether Plaintiffs

sustained "serious injuries" within the meaning of the Insurance Law.

This constitutes the decision and order of this Court.

Dated: 11/25, 2019

HON. MARY ANN BRIGANTTI, J.S.C.