

**Garcia v Franciscovolquez**

2019 NY Slip Op 35159(U)

January 3, 2019

Supreme Court, Bronx County

Docket Number: Index No. 23835/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX: PART 14

-----X  
GARCIA, ANTHONY

Index No. 23835/2018E

- against -

Hon. JOHN R. HIGGITT,

FRANCISCOVOLQUEZ, PAMELA, et ano.  
-----X

A.J.S.C.

The following papers numbered 9 to 29 in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on October 19, 2018 and duly submitted as No. 28 on the Motion Calendar of October 19, 2018

|  | NYSCEF Doc. Nos. |
|--|------------------|
| Notice of Motion – Exhibits and Affidavits Annexed       | 9-17             |
| Notice of Cross-Motion – Exhibits and Affidavits Annexed | 19-24            |
| Answering Affidavit and Exhibits                         | 18, 25-26, 28    |
| Replying Affidavit and Exhibits                          | 27, 29           |
| Filed Papers   |                  |
| Memoranda of Law   |                  |
| Stipulations   |                  |

Upon the foregoing papers, defendant Dorsett’s motion for summary judgment is granted and plaintiff’s cross motion for summary judgment is granted in part, in accordance with the annexed decision and order.

Dated: 01/03/2019

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
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

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

-----X  
ANTHONY GARCIA,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 23835/2018E

PAMELA FRACIS FRANCISCOVOLQUEZ and  
DANIEL DORSETT,

Defendants.  
-----X

John R. Higgitt, J.

This negligence action arises out of a rear-end collision that occurred at the intersection of Park Avenue and East 112th Street in the Bronx on September 29, 2016. Defendant Dorsett, the operator of the front vehicle, seeks summary judgment and dismissal of all claims as against him and cross claims against him on the ground that he bears no liability for the accident. Plaintiff, a passenger in the Dorsett vehicle, cross-moves for partial summary judgment on the issue of defendants' liability and for dismissal of defendants' affirmative defenses as to plaintiff's comparative negligence and culpable conduct. The motions are determined as follows:

As to defendant Dorsett's motion for summary judgment, "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, non-negligent explanation for the accident" (*Matos v Sanchez*, 147 AD3d 585, 586 [1st Dept 2017]; see *Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]; *Agramonte v City of New York*, 288 AD2d 75 [1st Dept 2001]). Furthermore, "Vehicle and Traffic Law § 1129 imposes a duty to be aware of traffic conditions, including vehicle stoppages" (*Corrigan v Porter Cab Corp.*, 101 AD3d 471, 472 [1st Dept 2012]).

Defendant Dorsett established his prima facie entitlement to judgment as a matter of law

on the issue of liability (*see* CPLR 3212[b]; *Matos v Sanchez, supra*; *Corrigan v Porter Cab Corp., supra*). Defendant Dorsett submits a copy of the pleadings, his affidavit, and an uncertified police accident report. Defendant Dorsett avers that his vehicle, in which plaintiff was a passenger, was stopped behind two other vehicles already waiting at the traffic light. Defendant Dorsett further avers that he had been stopped at the red light for 45-60 seconds when defendant Franciscovolquez's vehicle impacted the rear end of his vehicle.

In opposition, neither plaintiff nor defendant Franciscovolquez raises a triable issue of fact to justify denial of summary judgment in favor of defendant Dorsett. While defendant Franciscovolquez asserts that defendant Dorsett backed his vehicle into defendant Franciscovolquez's, she cites only to her hearsay statement in the uncertified police report to support this claim. The First Department has consistently held that an "uncertified police report attached to counsel's affirmation constitutes inadmissible hearsay" (*Silva v Lakins*, 118 AD3d 556, 557 [1st Dept 2014]; *see Raposo v Robinson*, 106 AD3d 593 [1st Dept 2013]; *Rivera v GT Acquisition 1 Corp.*, 72 AD3d 525 [1st Dept 2010]; *Coleman v Maclas*, 61 AD3d 569 [1st Dept 2009]). A police accident report containing hearsay statements regarding the ultimate issue of fact may not be considered for the purpose of determining the manner in which an accident occurred (*see Jenkins v Maggies Paratransit Corp.*, 151 AD3d 484 [1st Dept 2017]; *Kajoshaj v Greenspan*, 88 AD2d 538 [1st Dept 1982]; *see also People v McClean*, 69 NY2d 426 [1987]). Notably, neither plaintiff nor defendant Franciscovolquez submitted an affidavit in opposition.

Plaintiff's and defendant Franciscovolquez's further argument that the motion is premature inasmuch as no discovery has taken place is unavailing. Defendant Dorsett's motion is not premature because "the information as to why [defendant Franciscovolquez's vehicle] struck the rear end of [defendant Dorsett'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 v DO & CO New York Catering, Inc, 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]).

Plaintiff’s cross-motion for partial summary judgment on the issue of defendants’ negligence is denied. Plaintiff’s proof established his freedom from negligence contributing to the accident (*see Perez v Steckler*, 157 AD3d 445 [1st Dept 2018]). His papers, however, failed to establish the negligence of any defendant as a matter of law (*see Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]). As the *Oluwatayo* court observed, cases such as *Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206 [1st Dept 2001]), “stand[] only for the proposition that in motor vehicle negligence actions, an innocent plaintiff is entitled to a determination that she [or he] had no culpable conduct on the issue of liability irrespective of the unresolved issue of a defendant driver’s negligence” (*Oluwatayo*, 142 AD3d at 119 [emphasis added]). A passenger plaintiff is not relieved of the duty of affirmatively establishing the negligence of any defendant (*Guzman v Desantis*, 148 AD3d 580 [1st Dept 2017]).

Defendant Franciscovolquez failed to raise an issue of fact to plaintiff’s negligence; accordingly, defendant Franciscovolquez’s affirmative defense alleging plaintiff’s culpable conduct is dismissed.

For the foregoing reasons, it is hereby

ORDERED that defendant Dorsett’s motion for summary judgment is granted; and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Dorsett dismissing the complaint as against him and all cross claims against him; and it is further

ORDERED, that the aspect of plaintiff's cross motion for dismissal of defendant Franciscovolquez's affirmative defenses alleging plaintiff's comparative negligence and culpable conduct is granted; and it is further

ORDERED, that defendant Franciscovolquez's first affirmative defense alleging plaintiff's comparative negligence is dismissed; and it is further

ORDERED, that plaintiff's cross motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: January 3, 2019

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