

**Agwu v Rappaport**

2019 NY Slip Op 35165(U)

November 19, 2019

Supreme Court, Bronx County

Docket Number: Index No. 27913/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

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

-----X  
AGWU, NKECHI

Index No. 27913/2018E

- against -

Hon. JOHN R. HIGGITT,

RAPPAPORT, BENJAMIN, et al

A.J.S.C.

The following papers in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (DEFENDANT)**, noticed on **September 17, 2019** and duly submitted as No. **35** on the Motion Calendar of **October 25, 2019**

	NYSCEF Doc. Nos.
Notice of Motion -- Exhibits and Affidavits Annexed	10-18
Notice of Cross-Motion -- Exhibits and Affidavits Annexed	22-28
Answering Affidavit and Exhibits	19, 29-33
Replying Affidavit and Exhibits	34
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, the Rappaport defendants' motion for summary judgment is denied and plaintiff's cross motion for partial summary judgment on the issues of defendants' liability for causing the subject accident and plaintiff's freedom from comparative fault is granted in part, in accordance with the annexed decision and order.

Dated: 11/19/2019

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  
NKECHI AGWU,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 27913/2018E

BENJAMIN RAPPAPORT, COLIN Z. RAPPAPORT,  
VALDIVINO H. PERES and MARCO A. PERES,

Defendants.  
-----X

John R. Higgitt, J.

Upon the August 13, 2019 notice of motion of the Rappaport defendants and the affirmation and exhibits submitted in support thereof; the Peres defendants' September 3, 2019 affirmation in opposition; plaintiff's October 15, 2019 notice of cross motion and the affirmation, affidavit and exhibits submitted in support thereof; the Peres defendants' October 16, 2019 affirmation in opposition and the exhibits submitted therewith; the Rappaport defendants' October 16, 2019 affirmation in reply; and due deliberation; the Rappaport defendants' motion for summary judgment is denied and plaintiff's cross motion for partial summary judgment on the issues of defendants' liability for causing the subject accident and plaintiff's freedom from comparative fault is granted in part.

Plaintiff alleges that the vehicle she was driving was struck in the rear by the Rappaport defendants' and Peres defendants' vehicles.

The Rappaport defendants assert that their vehicle was struck in the rear by the Peres defendants' vehicle, propelling the Rappaport defendants' vehicle into plaintiff's vehicle. In support of their motion, the Rappaport defendants submit the certified police accident report and the transcripts of the parties' deposition testimony.

The Rappaport defendants point to plaintiff's testimony that her vehicle had been stopped

due to a traffic jam for two to three minutes prior to the accident; defendant Benjamin Rappaport's testimony that the vehicle he was driving was struck from behind, propelling his vehicle forward; and the testimony of defendant Valdivino H. Peres ("defendant Peres") that he noticed the Rappaport defendants' vehicle, which was travelling in front of his, slowing down for approximately 10 to 15 seconds before his vehicle struck the Rappaport defendants' vehicle in the rear. The Rappaport defendants also point to plaintiff's testimony that her vehicle was stopped in the rightmost of three lanes of travel, and defendant Peres's testimony that the Rappaport defendants' and Peres defendants' vehicles had been travelling in the center lane.

The Peres defendants assert the parties' deposition testimony is in conflict as to the lanes the various vehicles were travelling in prior to the accident, and that there is a question as to the sequence of impacts between the vehicles.

Plaintiff testified that she had been stopped on an exit ramp for approximately two to three minutes due a traffic jam when she heard two "booms" almost simultaneously, after which there was a single impact to the rear of her vehicle. Through her rearview mirror, plaintiff saw that the vehicle that struck her was traveling at highway speed. The impact propelled her vehicle forward approximately half a car length, and her vehicle did not come into contact with the vehicle in front of hers. After the accident, she saw a sedan behind her vehicle and a truck behind the sedan.

Defendant Benjamin Rappaport testified that while traveling in "medium" traffic, vehicles in front of his started to brake, and he applied his brakes as well. His vehicle was suddenly struck on the rear driver's side, propelling it forward and to the right, into the vehicle that had been travelling in front of him. The front of his vehicle, toward the driver's side, struck the rear of the vehicle in front of his, toward the passenger's side. Both impacts were "heavy."

His vehicle came to rest partially in the lane next the one in which he had been traveling.

Defendant Peres, who was not licensed to operate a motor vehicle, testified that he was traveling in the middle of three lanes of traffic at approximately 50 miles per hour in “full traffic.” The vehicle traveling in front of his “suddenly” stopped; defendant Peres applied his brakes, and the Peres defendants’ vehicle skidded into the vehicle in front of his. (Defendant Peres also testified that all traffic was slowing generally, and that he noticed the vehicle in front of his slowing for approximately 10 to 15 seconds prior to the impact, although he did not notice the brake lights on the vehicle in front of his until the impact.) When defendant Peres first applied the brakes, he was traveling 40 miles per hour approximately one and a half car lengths behind the vehicle in front of his. The Peres defendants’ vehicle started skidding to the left because of the abruptness with which defendant Peres applied the brakes, and the impact with the other vehicle was “very light,” although defendant Peres also testified that the vehicle he was driving continued to travel for another five feet after striking the other vehicle and came to a stop only because defendant Peres applied the brakes.

After the impact with the Peres defendants’ vehicle, defendant Peres saw the vehicle in front of his move to the right and strike another vehicle.<sup>1</sup> This second impact occurred either ten seconds or one minute after the first.

While the Rappaport defendants’ deposition testimony would otherwise demonstrate their lack of negligence (*see McCarthy v Art Van Lines USA Inc.*, 144 AD3d 483 [1st Dept 2016]; *Tejeda v Aifa*, 134 AD3d 549 [1st Dept 2015]), plaintiff’s testimony that the vehicle that struck her was traveling at approximately 55 miles per hour, together with defendant Peres’ testimony

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<sup>1</sup> As to the Peres defendants’ assertion of a question of fact as to the lanes in which the parties were traveling, defendant Peres did not testify that when the vehicle in front of his “went to the right,” it actually entered another lane of travel. There is no genuine dispute that the Peres defendants’ vehicle struck the Rappaport defendants’ vehicle in the rear and that the Rappaport’s vehicle struck plaintiff’s vehicle in the rear.

that the impact with his vehicle was “light” and that an appreciable amount of time passed between the two impacts (although at odds with the inference to be gleaned from plaintiff’s testimony that the impacts occurred nearly simultaneously), raises issues of fact as to the Rappaport defendants’ negligence and whether such negligence, if any, contributed to the impact with plaintiff’s vehicle. While plaintiff asserts that defendant Benjamin Rappaport’s failure to take evasive action establishes his negligence, plaintiff’s testimony that the sound of the two impacts was nearly simultaneous raises an issue of fact as to whether defendant Benjamin Rappaport had a reasonable opportunity to attempt an evasive maneuver (*see Rooney v Madison*, 134 AD3d 634 [1st Dept 2015]; *Garcia v Verizon N.Y., Inc.*, 10 AD3d 339 [1st Dept 2004]).

Likewise, while defendant Peres’s failure to maintain a reasonable distance from the Rappaport defendants’ vehicle in heavy traffic demonstrates defendant Peres’s negligence (*see id.*), his testimony regarding the interval between the two impacts raises an issue of fact as to whether such negligence was a proximate cause of the impact with plaintiff’s vehicle (*see e.g. Quiles v Greene*, 291 AD2d 345 [1st Dept 2002]; *Burchette v Aklah*, 2002 NY Slip Op 50455[U] [App Term 1st Dept 2002]).

Viewing the proof in the light most favorable to the non-moving parties (*see Jacobsen v N.Y. City Health & Hosps. Corp.*, 22 NY3d 824 [2014]; *see also Torres v Jones*, 26 NY3d 742 [2016]; *Andre v Pomeroy*, 35 NY2d 361 [1974]), the court finds that the conflicting evidence presents questions of credibility that cannot be resolved on a motion for summary judgment (*see A.L. v N.Y.C. Hous. Auth.*, 169 AD3d 40 [1st Dept 2019]; *Santos v Condo 124 LLC*, 161 AD3d 650 [1st Dept 2018]). “[T]he various parties’ testimony as to the manner in which each driver controlled his [or her] vehicle, the circumstances surrounding their collision[s], and the chain of events leading up to the collision involving plaintiff’s vehicle raise other questions of fact, which

are best left for a jury to decide” (*Odikpo v American Transit, Inc.*, 72 AD3d 568, 569 [1st Dept 2010]).

Given that the court’s role on a motion for summary judgment is merely the identification of genuine issues of fact, and not the determination of factual questions requiring an assessment of witness memory or credibility (*see Lindgren v New York City Hous. Auth.*, 269 AD2d 299 [1st Dept 2000]), the court cannot resolve the conflict between the testimonial and documentary evidence (*see Rhodes v E. 81st, LLC*, 81 AD3d 453 [1st Dept 2011]; *Fenty v 634 Morris Park Assocs., LLC*, 291 AD2d 275 [1st Dept 2002]). This matter does not present a situation where, and neither plaintiff nor the Rappaport defendants asserted that, the evidence submitted by the party opposing summary judgment is incredible as a matter of law (*cf. Moorhouse v Standard, N.Y.*, 124 AD3d 1, 9 [1st Dept 2014] [“While generally credibility determinations are left to the trier of the facts, where testimony is physically impossible [or] contrary to experience, it has no evidentiary value”]). While defendant Peres’s testimony strained credulity at times (*see Thomas v N.Y.C. Hous. Auth.*, 165 AD3d 471 [1st Dept 2018]), the court cannot say that, as a matter of law, it was “manifestly untrue, physically impossible, or contrary to common experience” (*Cruz v N.Y.C. Transit Auth.*, 31 AD3d 688, 690 [2d Dept 2006], *affd* 8 NY3d 825 [2007]).

In view of the uncontradicted testimony that plaintiff’s vehicle was stationary when it was struck, plaintiff is granted partial summary judgment on the issue of her lack of culpable conduct (*see Mittermeier v DeLeonardis*, 17 Misc 3d 127[A], 2007 NY Slip Op 51877[U] [App Term 1st Dept 2007]).

Accordingly, it is

ORDERED, that the Rappaport defendants’ motion for summary judgment is denied; and it is further

ORDERED, that the aspect of plaintiff's cross motion for partial summary judgment on the issue of plaintiff's freedom from comparative fault is granted, and the Rappaport defendants' first affirmative defense and the Peres defendants' third affirmative defense are dismissed; and it is further

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

The parties are reminded of the January 31, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: November 19, 2019

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