Bryan v Diawara
2020 NY Slip Op 30847(U)
February 28, 2020
Supreme Court, Kings County
Docket Number: 501574/2018
Judge: Lara J. Genovesi
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At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 28th day of February 2020.

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

---x

BUMEE BRYAN,

Plaintiff,

-against-

MAHMOUSSA DIAWARA, YVETTE THOMAS and AARON DOMINIC CATES,

Defendants.

---x

Index No.: 501574/2018

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion/Order to Show Cause and Affidavits (Affirmations) Annexed	16-24, 42-46
Opposing Affidavits (Affirmations)	47, 48
Reply Affidavits (Affirmations)	49, 50

Introduction

Plaintiff, Bumee Bryan moves by notice of motion, sequence number one, for summary judgment, pursuant to CPLR § 3212, on the issue of liability against defendant Mahmoussa Diawara, dismissing his affirmative defenses of comparative negligence and, the cross claims against defendants Yvette Thomas and Aaron Dominic Cates and for

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such further and other relief as may be just and proper. Defendant, Mahmoussa Diawara opposes this motion.

Defendants, Yvette Thomas and Aaron Dominic Cates move by notice of motion, sequence number three, for summary judgment, pursuant to CPLR § 3212, on the issue of liability, dismissing the complaint and the cross claims against them and for such other and further relief as may be just and proper. Defendants motion incorporates and adopts plaintiff's motion. Defendant, Mahmoussa Diawara opposes this motion. Plaintiff does not oppose this application.

Background

Plaintiff allegedly sustained personal injuries on December 9, 2017, two-car rear end collision. Plaintiff was a passenger in the vehicle owned and operated by defendant Mahmoussa Diawara (Diawara). The Diawara vehicle was traveling on Throop Avenue, near the intersection with Vernon Avenue, when the vehicle in front of his vehicle suddenly stopped before the intersection. The front of Diawara's vehicle struck the rear of the vehicle owned by defendant Yvette Thomas (Thomas) and operated by Aaron Dominic Cates (Cates).

Plaintiff appeared for his examination before trial (EBT) on January 8, 2019 (*see* NYSCEF Doc. #22, Exhibit E, Bryan's EBT). Plaintiff testified that he was a passenger in the rear driver side of the Diawara vehicle. At approximately 4:00 p.m. on December 9, 2017, the front of the Diawara vehicle struck the rear of the Cates' vehicle (*see id.* at 16-18, 63-64). It was snowing at the time of the accident and the roadway was wet (*see id.* at 18). The Diawara vehicle traveled behind the Cates' vehicle for several blocks on

Throop Avenue before the accident occurred (*see id.* at 27). Throop Avenue is a one-way street with one lane of travel and two parking lanes (*see id.* at 18-19). At the intersection of Throop Avenue and Vernon Avenue, there is a stop sign governing traffic on Vernon Avenue only (*see id.* at 18-19). The Diawara vehicle was traveling at a rate of speed of thirty-five miles per hour and was "maybe about a car length behind" the Cates' vehicle (*see id.* at 28-29). Plaintiff felt that Diawara was driving fast because the Diawara vehicle was "kind of close to the car in front of [them]" (*see id.* at 28). As both vehicles came within two car lengths of the intersection, the Cates' vehicle abruptly stopped short (*see id.* at 25 and 34). Plaintiff saw the Cates' vehicle engage its brake lights and come to a complete stop (*see id.* at 74-75). Since Cates abruptly stopped his vehicle and Diawara was closely following, Diawara was unable to stop his vehicle before the collision (*see id.* at 35). Plaintiff testified that he was not using his cellphone or conversing with Diawara before and at the time of the accident (*see id.* at 24-25).

Defendant Diawara appeared for his EBT on May 30, 2019 (*see* NYSCEF Doc. #23, Exhibit F, Diawara's EBT). Diawara testified that when he started working that day at 3:00 p.m., there was heavy snowfall (*see id.* at 27). At the time of the accident, the snowfall had abated to a medium intensity and the roads were wet and icy (*see id.* at 27-31). The roads were not plowed but the traffic melted some of the snow or pushed it to the side of the road (*see id.* at 46). Diawara's windshield wipers were engaged and when he was asked "was there anything at all about the visibility that caused or contributed to the happening of the accident?" he responded "no" (*see id.* at 34-37). Diawara saw that the roads were icy (*see id.* at 49). When Diawara was asked "was there anything

preventing you from allowing for a greater following distance or larger following distance, other than the one car length", he responded "no" (*see id.* at 47). As both vehicles approached the intersection, Diawara's rate of speed was twenty miles per hour (*see id.* at 38). Although traffic on Throop Avenue is not governed by a traffic control device, the Cates' vehicle abruptly stopped before the intersection (*see id.* at 26, 42, 45, and 47). Diawara saw the Cates' vehicle stop but did not see the brake lights (*see id.* at 45). Diawara engaged his brakes and attempted to steer his vehicle to the left to avoid the collision (*see id.* at 48-49). Diawara's vehicle skidded on ice as he stepped on his brake (*see id.* at 49). Diawara's vehicle slowed to "about ten" miles per hour but the front of Diawara's vehicle impacted the back of the Cates' vehicle (*see id.* at 50-51).

The police accident report section labeled "Accident Description/Officer Notes" states, in part, that "[Diawara] states he was driving [northbound] on Throop Avenue when [Cates] stopped and caused him to rear end [Cates]" (*see* NYSCEF Doc. #18, Exhibit A, PO Report).

This action was commenced by the filing of the summons and complaint on January 24, 2018. Issue was joined by Diawara on May 4, 2018. Issue was joined by Thomas and Cates on May 10, 2018. The note of issue was filed on July 25, 2019.

Discussion

Summary Judgment

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Stonehill Capital Mgmt., LLC v.*

Bank of the W., 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

Rear-End Collision

"A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*Nsiah–Ababio v. Hunter*, 78 A.D.3d 672, 672, 913 N.Y.S.2d 659; *see* Vehicle and Traffic Law § 1129[a]; *Niyazov v. Hunter EMS, Inc.*, 154 A.D.3d 954, 63 N.Y.S.3d 457)" (*Batashvili v. Veliz-Palacios*, 170 A.D.3d 791, 96 N.Y.S.3d 146 [2 Dept., 2019]).

> A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision.

> A nonnegligent explanation may include evidence of a mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on wet pavement, or any other reasonable cause

(*Clements v. Giatas*, 178 A.D.3d 894, 112 N.Y.S.3d 539 [2 Dept., 2019] [internal citations omitted]; *see Xin Fang Xia v. Saft*, 177 A.D.3d 823, 113 N.Y.S.3d 249 [2 Dept., 2019]; *see also Ordonez v. Lee*, 177 A.D.3d 756, 110 N.Y.S.3d 339 [2 Dept., 2019]).

"While a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, 'vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead' "(*Tumminello v. City of New York*, 148 A.D.3d 1084, 49 N.Y.S.3d 739 [2 Dept., 2017]). "A conclusory assertion by the operator of the following vehicle that the sudden stop of the vehicle caused the accident is insufficient, in and of itself, to provide a nonnegligent explanation" (*Gutierrez v. Trillium USA, LLC*, 111 A.D.3d 669, 670–71, 974 N.Y.S.2d 563 [2 Dept., 2013] [internal citations omitted]).

As an initial matter, Diawara contends that the motions are insufficient since they do not cite which the CPLR or VTL section that defendant allegedly violated. However, the motion papers state that it is a motion for summary judgment which is specific enough to construe the relief being requested by the parties therein. There is "no requirement that a movant identify a specific statute or rule in the notice of motion, only that the notice 'specify ... the relief demanded and the grounds therefor' (CPLR 2214 [a])" (*Blauman-Spindler v Blauman*, 68 A.D.3d 1105, 892 N.Y.S.2d [2 Dept., 2009]). Therefore, this Court rejects Diawara's contention.

In support of their motions for summary judgment on the issue of liability, the plaintiff and defendants, Thomas and Cates, submitted, inter alia, transcripts of the plaintiff and Diawara's deposition testimony, which demonstrated, prima facie, that Diawara was negligent and the injured plaintiff and Cates were not comparatively at fault for the happening of the accident. It is undisputed that plaintiff was a passenger in the rear seat of the Diawara vehicle. Plaintiff was not using his phone or speaking with Diawara at the time of the accident. Plaintiff demonstrated, prima facie, that he was an innocent passenger who did not contribute to the happening of the accident (*see Balladares v. City of New York*, 177 A.D.3d 942, 114 N.Y.S.3d 448 [2 Dept., 2019]). It is also undisputed that Cates was stopped at the time of the collision and the front of Diawara's vehicle impacted the rear of Cates' vehicle (*see Clements v. Giatas*, 178 A.D.3d 894 supra). Cates established a prima facie case of negligence on the part Diawara.

Contrary to Diawara's contention, his deposition testimony did not reveal a triable issue of fact as to whether he demonstrated a nonnegligent explanation for the rear-end collision into the other vehicle. Furthermore, Diawara's deposition testimony did not rebut the inference of negligence from the rear-end collision, as he testified that he knew that the road was wet from the heavy to medium ongoing snowfall and he failed to demonstrate that his skid on known icy road conditions was unavoidable (*see Tumminello v. City of New York*, 148 A.D.3d 1084, 49 N.Y.S.3d 739 [2 Dept., 2017]; *see also Catanzaro v. Edery* 172 A.D.3d 995, 101 N.Y.S.3d 170 [2 Dept., 2019]). Diawara testified at his deposition that he was one car length behind the Cates vehicle, traveling

20 miles per hour, on the icy roadway as they both traveled in the same lane. Diawara testified that there was nothing preventing him from allowing for a greater following distance. He makes a conclusory assertion that the Cates vehicle sudden stop caused the collision, which alone, is insufficient to provide a non-negligent explanation (*see Gutierrez v. Trillium USA, LLC*, 111 A.D.3d 669, *supra*). Even accepting Diawara's testimony as true, he was following the vehicle in front of him too closely (*see* Vehicle and Traffic Law § 1129[a]; *see also Bloechle v. Heritage Catering, Ltd.*, 172 A.D.3d 1294, 101 N.Y.S.3d 424 [2 Dept., 2019]). Under these circumstances, Diawara's contention that the Cates vehicle came to a sudden stop and that his car skidded on ice was insufficient to raise a triable issue of fact as to whether there was a nonnegligent explanation for the accident.

Contrary to the defendant's contention, the emergency doctrine is not applicable to this case. "[T]he emergency doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead" (*Lowhar–Lewis v. Metropolitan Transp. Auth.*, 97 A.D.3d 728, 729, 948 N.Y.S.2d 667)." (*Ordonez v. Lee*, 177 A.D.3d 756, 757, 110 N.Y.S.3d 339, 340 [2 Dept., 2019]). "A trailing driver's conduct in failing to leave reasonable distance creates the possibility that a sudden stop will be necessary (*see Pappas v. Opitz*, 262 A.D.2d at 471, 692 N.Y.S.2d 127; *Sass v. Ambu Trans.*, 238 A.D.2d 570, 657 N.Y.S.2d 69; *Gage v. Raffensperger*, 234 A.D.2d 751, 751–752, 651 N.Y.S.2d 214)." (*Shehab v. Powers*, 150 A.D.3d 918, 920, 54 N.Y.S.3d 104, 107 [2 Dept., 2017]).

Here, Diawara is not entitled to the emergency doctrine because the situation with which he was confronted was partially of his own making - his failure to maintain a safe distance between his vehicle and the vehicle in front of him. Also, Diawara negligently failed to observe traffic and weather conditions on the road ahead of him. Where a defendant driver fails to maintain a safe distance between his vehicle and the vehicle in front of his and also be aware of the potential hazards presented by traffic and weather conditions the emergency doctrine is inapplicable (*see Freder v. Costello Indus., Inc.*, 162 A.D.3d 984, 80 N.Y.S.3d 371 [2 Dept., 2018]; *see also Cascio v. Metz*, 305 A.D.2d 354, 356, 759 N.Y.S.2d 502 [2 Dept., 2003]).

Conclusion

Plaintiff, Bumee Bryan's motion for summary judgment on the issue of liability as to defendant Diawara, dismissing his affirmative defenses of comparative negligence, and cross claims against defendants Thomas and Cates is granted. Thomas and Cates' motion, sequence 3, for summary judgment dismissing the complaint and Diawara's cross claims is granted.

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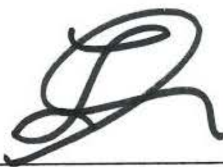

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