

<b>Jiang v Mitacchione</b>
2020 NY Slip Op 30956(U)
April 10, 2020
Supreme Court, New York County
Docket Number: 161362/2017
Judge: Adam Silvera
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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. ADAM SILVERA PART IAS MOTION 22**

*Justice*

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REBECCA JIANG, CATHERINE LO and R.J., an infant by  
Her m/n/g CATHERINE LO

**INDEX NO.** 161362/2017

Plaintiffs,

**MOTION DATE** 3/11/2020

- v -

**MOTION SEQ. NO.** 002 + 003

V.L. MITACCHIONE, "JOHN DOE" name fictitious intended  
to be that of operator, SHIRLEY YU, CHE K. YU, G.L.  
KATHROTIYA and GORAJ KATHROTIYA

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002 + 003) 47- 96,  
were read on this motion to/for SUMMARY JUDGMENT.

Before the Court are motion sequences 002 and 003. In motion sequence 002 plaintiffs move for an order granting summary judgment on the issue of liability and to strike the affirmative defenses as to comparative fault/negligence as to plaintiffs. Defendants oppose the motion and defendant Shirley Yu and Che K. Yu cross-move for summary judgment for an order to dismiss the complaint and any cross claims on the grounds that they bear no liability for the underlying accident. In motion sequence 003 defendant V.L. Mitacchione moves for an order granting summary judgment in favor of defendant on the issue of liability and to dismiss plaintiffs' Complaint as against defendant and any cross-claims against said defendant. The motions are decided as follows:

This action stems from a three car motor vehicle accident which allegedly seriously injured plaintiffs on November 24, 2017, on Commack Road in Huntington, New York, when defendant Shirley Yu was operating a vehicle owned by defendant Che K and transporting plaintiffs R.J. and Rebecca Jiang (hereinafter the "Yu Vehicle") in the northbound lane and

attempted to make a left turn when the Yu Vehicle was struck in the rear by a vehicle owned by defendant V.L. Mitacchione (hereinafter the “Mitacchione Vehicle”) and then entered into the southbound lane of Commack Road and was struck by a vehicle operated by defendant G.L. Kathrotiya and owned by defendant Goraj Kathrotiya (collectively referred to hereinafter as “Kathrotiya”).

“The 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 eliminate any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (*Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009 Vehicle and Traffic Law § 1141 provides that

[t]he driver of a vehicle intending to turn to the left within an intersection . . . shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.

Here, plaintiffs argue that defendant Yu made a left turn without yielding to the vehicle approaching in the opposite direction. However, plaintiff’s own testimony contradicts plaintiffs’ allegation that defendant Yu is liable for the instant accident. Plaintiff Jiang testified that she witnessed defendant Yu’s vehicle get rear-ended by the Mitacchione vehicle (Mot, Exh E at 73-75). Thus, plaintiffs have failed to establish entitlement to summary judgment and plaintiffs’ motion, motion sequence 002 is denied.

The Yu Defendants' cross-motion is granted on the issue of liability. Defendant Yu, plaintiff Jiang, G.L. defendant Kathrotiya, defendant Goraj Kathrotiya all testified that they saw the Yu vehicle get rear ended while it went to make a left turn (Mot, Exh D at 95, Exh E at 73-75, Exh F at 21, Exh G at 27). "A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident" (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep't 2017]).

Being propelled forward in a chain reaction collision is a non-negligent explanation for a rear-end motor vehicle accident (*Arrastia v Sbordone*, 225 AD2d 375 [1st Dep't 1996] finding that [I]nasmuch as there is no dispute that defendant brought her vehicle to a complete stop prior to the accident and was thereafter unexpectedly forced into plaintiff's car by a third, unrelated vehicle, plaintiff has raised no basis for an inference that defendant was negligent or the proximate cause of plaintiff's purported injuries in this matter). The Yu Defendants have established that their vehicle was rear-ended by the Mitacchione vehicle and thus is not liable for the underlying accident. The Yu defendants' cross-motion for summary judgment pursuant to C.P.L.R. 3212, dismissing the complaint and any cross claims on the grounds that they bear no liability for the subject accident is granted.

Lastly, defendant V.L. Mitacchione's motion, motion sequence 003, for an order granting summary judgment in favor of defendant on the issue of liability and to dismiss plaintiffs' Complaint as against defendant and any cross-claims against said defendant is granted. Defendant Mitacchione has demonstrated that she reported her vehicle as stolen more than five hours before the accident occurred on November 24, 2017. Defendant attaches a Stolen Vehicle Report documenting the information surrounding the stolen vehicle (Mot 003, Exh A).

Defendant testified that she posted on her personal Facebook page about her car being stolen and has attached screenshots from the Facebook page (Mot, Exh H & I). Defendant testified that she realized that her vehicle was missing at approximately 10:15 am on Friday, November 24, 2017, and she called the Police informing them that her car was not in her driveway (Mot, Exh H at 24, 25, 32, 33).

Under VTL § 388(1), an owner of a vehicle is liable and responsible for injuries resulting from negligence in the use or operation of such vehicle if the vehicle involved in the accident is operated "with the permission, express or implied, of such owner." Courts have noted that VTL §388(1) gives rise to a presumption that the vehicle is being operated with the owner's consent (*Carter v. Travelers Insurance Company*, 113 A.D.2d 178, 180 [1st Dep't 1985]). The presumption may be rebutted by substantial evidence to the contrary (*Murdza v Zimmerman*, 99 N.Y.2d 375, 380 [2003]). Evidence that a vehicle was stolen at the time of the accident will rebut the presumption of permissive use (*Adams v Evans*, 283 AD2d 527 [2d Dep't 2001]). Here, defendant Mitacchione has provided ample evidence that the vehicle was stolen at the time of the accident and was not operated with her consent. Thus, defendant Mitacchione's motion is granted.

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment on the issue of liability and to strike the affirmative defenses as to comparative fault/negligence is denied; and it is further

ORDERED that the Yu defendants' cross-motion to dismiss the complaint and any cross claims on the grounds that said defendants bear no liability for the subject accident is granted; and it is further

ORDERED that defendant Mitacchione’s motion pursuant to dismiss the complaint and any cross claims on the grounds that he bears no liability for the subject accident is granted; and it is further

ORDERED that the complaint is dismissed in its entirety as against defendants Shirley Yu, Che K. Yu, and V.L. Mitacchione with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption read as follows:

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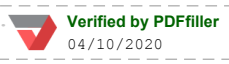
REBECCA JIANG, CATHERINE LO and R.J., an infant by  
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-v-

“JOHN DOE” name fictitious intended to be that of operator,  
G.L. KATHROTIYA and GORAJ KATHROTIYA  
Defendants.

-----x; and it is further

ORDERED that within 30 days of entry, counsel for defendants Shirley Yu, Che K. Yu, and V.L. Mitacchione serve a copy of this decision/order upon all parties with notice of entry



April 10, 2020  
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
			OTHER		
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			REFERENCE		