Gee v Dubinsky
2020 NY Slip Op 31692(U)
April 27, 2020
Supreme Court, Queens County
Docket Number: 715188/19
Judge: Robert I. Caloras
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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice

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IKE LEE GEE,
Plaintiff,
-against-
ELEANOR D. DUBINSKY and JOHN DUBINSKY,
Defendants.

Index No. 715188/19
Motion Date: 2/20/20
Motion Cal. No. 16
Seq. No. 1

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The following papers numbered E8-E15, E17-E24 read on this motion by the Plaintiff for an order pursuant to CPLR 3212, granting Plaintiff summary judgment against the Defendants on liability; and striking Defendants' first, sixth, and eleventh defenses of comparative negligence, failure to use seat belt, and unavoidability.

	PAPERS NUMBERED
Notice of Motion-Affirmation-Affidavit-Exhibits.......................	E8-E15
Affirmation in Opposition-Exhibits…………………………….	E17-E21
Reply Affirmation-Exhibit..	E22-E24

Upon the foregoing papers, it is ordered that the motion by the Plaintiff is granted, for the following reasons:

According to the complaint, on March 1, 2019, a motor vehicle accident occurred when the vehicle operated by Defendant Eleanor D. Dubinsky (hereinafter "Ms. Dubinsky"] and owned by Defendant John Dubinsky struck Plaintiff's vehicle, while traveling on the Queensboro Bridge Lower Level Roadway, in Queens County.

In the first branch of the motion, Plaintiff moves for an order granting her summary judgment against Defendants on the issue of liability. Plaintiff has submitted, *inter alia,* the following: Plaintiff's affidavit; Summons and Verified Complaint; Answer; amended uncertified police report; and Verified Bill of Particulars. In his affidavit, Plaintiff stated as he was traveling at a speed of between 15-20 Miles Per Hour on the Queensboro Bridge Lower Level, Defendants' vehicle suddenly changed lanes from the far-left lane into his lane and crashed into his vehicle. At the time of the accident, Plaintiff claims he was wearing his seat belt.

Plaintiff has also submitted a copy of the uncertified police report which contains the following statement:

> Motorist of Vehicle 1 [Ms. Dubinsky] states she was in the left

> turning lane when she realized she needed to change lanes causing her vehicle to collide with Vehicle 2 [Plaintiff]. Motorist of Vehicle 2 [Plaintiff] states he was in the left turning lane going straight when Vehicle 1 [Ms. Dubinsky] attempted to switch lanes from the far left lane colliding into Vehicle 1.

Based upon the foregoing, Plaintiff argues that he is entitled to summary judgment against the Defendants on the issue of liability.

In opposition, Defendants argue that the police report Plaintiff submitted is inadmissible, because it is not certified. Defendants have also submitted an affidavit from Ms. Dubinsky, wherein she stated Plaintiff's vehicle cut off her vehicle suddenly and without warning. Specifically, Ms. Dubinsky claims prior to the accident, she was decelerating and preparing to merge into the right lane from the middle lane. Before she began to merge into the right lane, and while she was still traveling in the center lane, Ms. Dubinsky claims Plaintiff's vehicle accelerated and merged in front of her vehicle from the right lane, cutting off her vehicle and causing the subject accident.

Based upon the foregoing, Defendants argue that issues of fact exist due to the contradictory statements in the parties' affidavits. Defendants also argue that the motion is premature because, the Preliminary Conference was recently held on January 6, 2020, minimal documentary discovery has been exchanged, and depositions of the parties and potential nonparty eyewitnesses have not been deposed.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case (see Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Once this showing has been made, the burden shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution (see Alvarez v Prospect Hosp., supra; Zuckerman v City of New York, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]).

In a motor vehicle action, a driver is negligent if he or she violates Vehicle and Traffic Law 1128(a), which provides that "a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety" (VTL 1128[a]; see Gluck v New York City Transit Auth., 118 AD3d 667, 668; Delgado v Martinez Family Auto, 113 AD3d 426). A violation of VTL 1128 establishes prima facie liability on the part of the driver of the offending vehicle, and imposes a burden on him or her to proffer a non-negligent explanation for the accident (Flores v City of New York, 66 AD3d 599 [1st Dept. 2009]; Williams v New York City Transit Auth., 37 AD3d 827 [2d Dept. 2007]).

Initially, the Court finds that Ms. Dubinsky's statements in the uncertified police report are admissible. It is well settled that "[p]arty admissions contained in an uncertified police report are admissible" (Harrinarain v Sisters of St. Joseph, 173 AD3d 983 [2d Dept. 2019]). The Court notes that there appears to be a typo in the Plaintiff's statement in the uncertified police report, which stated the following: "Motorist of Vehicle 2 [Plaintiff] states he was in the left turning lane going straight when Vehicle 1 [Ms. Dubinsky] attempted to switch lanes from the far left lane colliding into Vehicle 1". Since it is physically impossible to collide into one's own vehicle, the Court finds that the Plaintiff most likely stated that Ms. Dubinsky's vehicle collided with his vehicle, rather than her own vehicle. Consequently, the Court finds that the parties' statements in the uncertified police report are admissible.

The Court further finds that, the Plaintiff has established his prima facie entitlement to summary judgment against the Defendants on the issue of liability through the submission of his affidavit and the parties' statements in the uncertified police report. The Court also finds that the Defendants have failed to raise an issue of fact as to their liability for the accident. Ms. Dubinsky's statement in the uncertified police report conflict with her statements in her affidavit regarding whether she switched lanes and caused the accident. Significantly, in Ms. Dubinsky's affidavit, she did not address her conflicting statements in the police report. It appears that this inconsistency was designed as an attempt to raise feigned factual issues to avoid the consequences of her earlier statement contained in the police report. Consequently, Ms. Dubinsky's statements in her affidavit are insufficient to defeat the Plaintiff's motion (Estate of Mirjani v DeVito, 135 AD3d 616 [1st Dept. 2019]; see also Odetalla v Rodriguez, 165 AD3d 826 [2d Dept. 2018]; Buchinger v Jazz Leasing Corp., 95 AD3d 1035 [2d Dept. 2012]). The Court also finds that the Defendants' claim that the motion is premature is without merit, because their claims regarding additional discovery leading to relevant evidence are merely speculative and conclusory (CVC Capital Corp. v Weil, Gotschal, Manges, 192 AD2d 324 [1st Dept. 2013]). Accordingly, the branch of the motion seeking summary judgment against the Defendants on the issue of liability is granted. In the next branches of the motion, the Plaintiff moves to strike the Defendants' first and eleventh affirmative defenses asserting comparative negligence, and that the accident was unavoidable, respectively. Although a plaintiff does not have to demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (see Rodriguez v City of New York, 31 NY3d 312, 324-325 [2018]), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (Poon v Nisanov, 162 AD3d 804, 808 [2d Dept. 2018]). As stated above, defendants failed to raise a triable issue of fact as to the occurrence of the accident (id.; Lopez v Dobbins, 164 AD3d 776 [2d Dept. 2018]), and

have failed to demonstrate that the motion is premature. Accordingly, the branches of the motion seeking to strike Defendants' first and eleventh affirmative defenses are granted.

In the remaining branch of the motion, the Plaintiff seeks to strike Defendants' sixth affirmative defense alleging that the Plaintiff failed to use his seatbelt. In his affidavit, Plaintiff stated that at the time of the accident he was wearing a seat belt. In opposition, Defendants argue summary judgment is premature, because depositions and documentary discovery has not been completed. Defendants assert they have not received the Plaintiff's medical records, which they claim will address whether Plaintiff was wearing a seatbelt at the time of the accident, and these records are entirely in the Plaintiff's possession and control. The Court finds Plaintiff has demonstrated his prima facie entitlement to summary judgment through his submission of his affidavit. The Court also finds that the Defendants' claim that this branch of the motion is premature is merely speculative and conclusory. Accordingly, the branch of the motion seeking to strike the Defendants' six affirmative defense is granted.

Based upon the foregoing, the motion is granted, and this action shall be set down for a trial on the assessment of damages.

DATED: April 27, 2020

ROBERT I. CALORAS, J.S.C.