

Rosario v Delgado

2020 NY Slip Op 32626(U)

August 10, 2020

Supreme Court, Kings County

Docket Number: 516563/2019

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

_____X

ARELIZ ROSARIO,

Plaintiff,

-against-

**FRANCHESCA DELGADO and
HOYT TRANSPORTATION,**

Defendants.

_____X

DECISION / ORDER

**Index No. 516563/2019
Motion Seq. No. 1 & 2
Date Submitted: 7/21/20**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendants' motion and plaintiff's cross motion for summary judgment

Papers	NYSCEF Doc.
Order to Show Cause, Affirmation (affidavit) and Exhibits Annexed	<u>17-25</u>
Notice of Cross Motion, Affirmation (affidavit) and Exhibits Annexed	<u>38, 35-36</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>28-30, 32</u>
Reply Affirmation.....	<u>39</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising from a motor vehicle accident which took place on March 26, 2019 on 25th Avenue near the intersection of Astoria Boulevard in Queens, NY. Plaintiff Areliz Rosario was driving a car owned by her husband, Rafael Rosario, which came into contact with a yellow school bus driven by defendant Delgado and owned by defendant Hoyt Transportation.

Defendants move for summary judgment on the issue of liability and an order dismissing the complaint. Defendant Delgado provides an affidavit which states that the bus had slowed down and came to a gradual stop to wait for traffic to clear when it was rear-ended by plaintiff. She states that she did not put the bus into reverse and back up. She

also provides an affidavit from the bus matron, who states that she was seated at the back of the bus, and states that the bus had been stopped for five seconds when it was rear-ended by plaintiff, and it did not stop short or back up. Defendants also provide a copy of defendant driver's MV104, which is consistent with her affidavit. Finally, defendants provide a certified police report in which plaintiff Areliz Rosario is reported as having told the responding officer that the bus "suddenly stopped causing [her] to collide into [the bus]." The officer wrote on the report that the cause of the accident was plaintiff's following too closely [box 21]. On defendants' motion papers, defendants make a prima facie case for summary judgment. The burden then shifts to plaintiff to offer evidentiary proof demonstrating the existence of a material issue of fact requiring a trial.

Plaintiff opposes the motion with a cross motion for summary judgment on the issue of liability. Plaintiff supports her motion with an affidavit from Rafael Rosario, who was a passenger in the car, and an unsigned EUO transcript. Defendants argue that it should not be considered as defendant was not there to cross-examine her and since it is unsigned, argues that it is inadmissible. Mr. Rosario states in his affidavit that the bus was stopped, waiting for traffic to clear, then, when it started moving, it hit a construction sign, and it then backed up to reposition itself, but plaintiff had moved forward when the bus moved forward, and so the bus hit the car when it backed up. He states that he saw the back-up lights on the bus and heard the backup beeping sounds from the bus.

A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (see *Gutierrez v Trillium USA, LLC* 111 AD3d 669 [2d Dept 2013]; *Pollard v Independent Beauty & Barber Supply Co.*, 94 AD3d 845, 846 [2d Dept 2012]; *Le Grand v*

Silberstein, 123 AD3d 773, 774 [2d Dept 2014]). The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the rear vehicle (see *Kastritsios v Marcello* 84 AD3d 1174 [2d Dept 2011]; *Franco v Breceus*, 70 AD3d 767 [2d Dept 2010]). Further, "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" (*Shamah v Richmond County Ambulance Serv.*, 279 AD2d 564, 565 [2d Dept 2001]; see *Gutierrez v Trillium USA, LLC*, 111 AD3d at 671; *Robayo v Aghaabdul*, 109 AD3d 892, 893 [2d Dept 2013]).

Here, the rear driver is the plaintiff, and she fails to provide an affidavit, instead providing one from her passenger. EBTs have not been held yet, and the EUO provided is not in admissible form, and even if it were, it does not provide a non-negligent explanation. Instead, she states that the bus backed up and struck her car [Pages 19 and 20], which contradicts the statement she gave to the police at the scene.

The court finds that plaintiff's husband's affidavit, which is inconsistent with the police report, raises feigned issues of fact and is insufficient to overcome the defendants' prima facie case for summary judgment and raise a triable issue of fact (see *Curl v Schiffman*, 183 AD3d 415 [1st Dept 2020]). Defendant driver provides the MV104 [exhibit E to defendants' motion] which she completed on the day of the accident, which is consistent with her affidavit. Plaintiff does not provide, and presumably did not file, an MV104. Plaintiff's EUO was five months after the accident, and, as stated above, is inadmissible.

To be clear, in the Second Department, a statement on a certified police report is admissible if it is an exception to the hearsay rule, such as an admission. Here, plaintiff

admitted that she rear-ended the bus, but said it “stopped suddenly.” In a recent case (*Batashvili v Veliz-Palacios*, 170 AD3d 791, 792 [2d Dept 2019]) the court states:

[T]he portion of the uncertified police accident report that contained his admission that he changed into the lane at issue and did not see the plaintiffs' vehicle in time to avoid the impact was admissible (see *Lesaldo v Dabas*, 140 AD3d 708, 709, 32 NYS3d 321 [2016]; *Gezelter v Pecora*, 129 AD3d 1021, 1022-1023, 13 NYS3d 141 [2015]). In opposition, the defendant failed to raise a triable issue of fact. The defendant submitted an affidavit wherein he averred that he did not change lanes and that the accident occurred when the plaintiffs' vehicle made a sudden stop. The affidavit was a belated effort by the defendant to avoid the consequences of his earlier admission by raising what appeared to be a feigned issue of fact, which was insufficient to defeat the motion [citations omitted].

In conclusion, the defendants' motion is granted, the cross motion is denied and the complaint is dismissed.

This constitutes the decision and order of the court.

Dated: August 10, 2020

ENTER :



Hon. Debra Silber, J.S.C.