

Decelet-Welsh-EI v Molotla
2020 NY Slip Op 32873(U)
August 26, 2020
Supreme Court, Kings County
Docket Number: 503065/2017
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 26th day of August 2020

PRESENT:

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

-----X
LISA DECELET-WELSH-EL, ANGLE DECLET
And BASIL WELSH-EL,

Index No.: 503065/2017

Plaintiffs,

DECISION & ORDER

-against-

MIGUEL ANGLE MOLOTLA and BAMG., INC.,

Defendants.

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

Notice of Motion/Cross Motion/Order to Show Cause and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

NYSCEF Doc. No.:

39-46, 52-63

50, 66-67

51, 79-81, 85-86

Introduction

Plaintiff, Basil Welsh-El, moves by notice of motion, sequence number four, for summary judgment, pursuant to CPLR § 3212, dismissing the counterclaim and for such other relief as this court deems just and proper. Defendants, Miguel Angel Molotla and

BAMG, Inc., oppose this motion. Plaintiffs, Lisa Declet-Welsh-El and Angel Declet do not oppose this motion.

Plaintiffs, Basil Welsh-El, Lisa Declet-Welsh-El and Angel Declet, cross-move, sequence number five, for summary judgment, pursuant to CPLR § 3212, on the issue of liability; to strike the affirmative defenses of comparative negligence, culpable conduct, and failure to wear a seatbelt; and for costs and interest from the date of the decision of the instant motion, and such further and other relief. Defendants oppose this cross motion.¹

Background

Plaintiffs allegedly sustained personal injuries on May 27, 2014, when their vehicle was struck in the rear by the defendants' vehicle. Plaintiffs, Lisa Declet-Welsh-El (Lisa) and Angel Declet (Angel) were passengers in the vehicle owned and operated by plaintiff, Basil Welsh-El (Basil). The Basil vehicle was traveling on Rockaway Boulevard, near the intersection with 146th Street, and came to a stop at a red traffic control signal. Defendant, Miguel Angle Molotla (Molotla) was operating a bus owned by defendant BAMG, Inc. (BAMG) on Rockaway Boulevard at that time. It is uncontested that defendant bus struck the plaintiffs' vehicle in the rear.

¹ Oral argument was initially held on March 11, 2020. At that time, plaintiff was permitted to submit supplemental papers on the limited issue of defendant, Molotla's deposition since the transcript was only available after the submission of their papers. Plaintiff's supplemental papers were to be filed by March 25, 2020 and defendant was to respond by April 1, 2020. Motions sequence four and five were to be marked submitted on April 1, 2020 (*see* NYSCEF Doc. #84, Order). Due to the court closures and the COVID-19 pandemic, the instant motions were not calendared in Part 34 until July 15, 2020. Thereafter, motion sequence number five was marked submitted on July 15, 2020. However, motion sequence number four was marked withdrawn, in error, on July 14, 2020. Motion sequence four is hereby restored and shall be addressed, along with sequence number five, below.

Plaintiff Basil submitted an affidavit in support of his motion. He stated that that traffic conditions were “light” at the time of the accident and that he brought his car to a gradual stop at the red light on Rockaway Boulevard (*see* NYSCEF Doc. #62, Exhibit 9, Basil’s Affidavit). His vehicle was stopped for “several seconds” before he felt an impact to the rear. He did not hear a horn, brakes or screeching tires prior to the impact. After the accident, Basil contends that Molotla admitted that he fell asleep at the wheel.

Defendant Molotla concedes that the bus he operated struck plaintiff’s stopped vehicle in the rear (*see* NYSCEF Doc. #86, Exhibit A, Defendant’s EBT Transcript at 71). There are three different explanations attributed to the cause of this: (1) Molotla stated that his foot slipped off the brake pedal; (2) defendants’ counsel states by affirmation that the bus experienced brake failure; and (3) Basil states by affirmation that Molotla admitted that he fell asleep while driving the bus.

There are two occasions where Molotla is alleged to have stated that his foot slipped off the brake pedal. The first is recorded in the Police Accident Report. The section labeled “Accident Description/Officer Notes”, indicates, in part, that “Driver of veh # 1 [Molotla] states that his foot slipped off of the brake pedal as he was slowing, causing his vehicle to hit veh # 2 [Basil’s vehicle]” (NYSCEF Doc. # 46, Exhibit F, MV-104). Molotla testified that the police did not correctly write his statement. He acknowledges that he did not attempt to amend the police report (*see* NYSCEF Doc. # 86 at 89). However, he also stated that he does not recall what he told the police (*see id.* at 89, ll 8-13). Molotla further testified that he told the police that he “was stopped and [he] was waiting for the light to change and the [bus] was moving slowly while [he] had his

foot on the brake” (*id.* at 85, ll 3-6). “I was waiting for the green light and the bus rolled slowly” (*id.* at 86, ll 4-7).

The second occasion where Molotla stated that his foot slipped off the brake pedal was in his employer’s accident report (*see* NYSCEF Doc. #80, Defendants’ Combined Discovery Responses, Exhibit B, WebRisk Accident Report). In the section labeled “Describe what happened” it indicates “IV [insured vehicle] states traveling on rockaway blvd [*sic*] and his foot slipped off brakes and rear ended OV [other vehicle] that was stopped at a traffic light” (*id.*). Molotla testified that this statement is incorrect; “I hit my foot on the brake and the bus was going very, very slowly. Well, I didn’t feel it, but after a while, you feel that the vehicle had stopped and then this incident happened” (NYSCEF Doc. # 86 at 70-71). He also testified that he signed this accident report, but he did not have a chance to review the report (*see id.* at 71-80). It is the company policy to complete their internal accident report after they receive the police accident report (*see id.* at 62).

Despite these two reports indicating that defendant stated that his foot slipped off the brake, he testified to the contrary (*see id.* at 43). Although not raised by either party, this Court notes that Molotla’s deposition was taken with the use of a Spanish interpreter. When questioned at his deposition and asked to read a portion of the employer’s accident report he indicated that he cannot read the English language (*see id.* at 70).

Next, defendants’ counsel alleges that the defendant had an unanticipated mechanical brake failure (*see* NYSCEF Doc. #50, Affirmation in Opposition). In fact, the defendant testified that the bus moved despite him pressing the brake pedal (*see*

NYSCEF Doc. # 86 at 47). However, when he was asked “[t]he fact that the bus was moving even though you were pressing the brake pedal, was that some kind of mechanical malfunction?” defendant’s sworn testimony was “No.” (*id.*). Defendant further testified that on the day of the accident, prior to driving the bus, he inspected the “[l]ights, oil, transmission, the directional signals, the backup lights, anything and everything that had to do with the bus.” (*id.* at 81). He further testified that he tested the brakes and the brakes were operating properly (*see id.* at 81-82). He testified that he did not recall seeing any repair reports for this bus. Defendants did not provide any inspection or repair reports for this bus prior to or after this accident. Furthermore, defendants’ counsel stated in his Combined Discovery Response under the section **“Repairs to Defendants’ Vehicle Subsequent to Accident”**, that “[t]he defendants’ vehicle did not sustain any damage as a result of the accident and thus no repairs were made to the defendants’ vehicle subsequent to the accident” (NYSCEF Doc # 80).

Lastly, Basil states by affidavit that after the accident, “Molotla said he fell asleep at the wheel prior to the accident” (NYSCEF Doc. # 62 at 17). When asked at his deposition if this was the case, defendant answered “I couldn’t be asleep if I was driving” (NYSCEF Doc. # 86 at 43).

This action was commenced by the filing of a summons and complaint on February 15, 2017. Issue was joined by service of an answer with counterclaims on July 11, 2017. In their answer, defendants plead eighteen affirmative defenses. Plaintiffs move herein to dismiss all affirmative defenses related to plaintiff’s comparative negligence and culpable conduct on the issue of liability (*see* NYSCEF Doc. # 5). In

their answer, defendants further plead a counter-claim that the accident and any “damages complained of were entirely by reason of the wrongful conduct” of plaintiff Basil Welsh-El and there “being no active or primary wrong-doing” on the part of defendants (*id.*). A reply to the counterclaim was filed on February 20, 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” (*Batashvili v. Veliz-Palacios*, 170 A.D.3d 791, 96 N.Y.S.3d 146 [2 Dept., 2019], quoting *Nsiah–Ababio v. Hunter*, 78 A.D.3d 672, 913 N.Y.S.2d 659 [2 Dept., 2010]; see also Vehicle and Traffic Law § 1129[a]).

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]).

“When the driver of the offending vehicle in an automobile accident lays blame for the accident on brake failure, it is incumbent upon that party to show that the brake problem was unanticipated” (*D'Augustino v. Bryan Auto Parts, Inc.*, 152 A.D.3d 648, 59 N.Y.S.3d 104 [2 Dept., 2017], citing *Ballatore v. Hub Truck Rental Corp.*, 83 A.D.3d 978, 992 N.Y.S.2d 180 [2 Dept., 2011]). The offending vehicle must also show “that reasonable care was exercised to keep the brakes in good working order” (*Ballatore v. Hub Truck Rental Corp.*, 83 A.D.3d 978, *supra*, quoting *Vidal v. Tsitsiashvili*, 297 A.D.2d 638, 747 N.Y.S.2d 524 [2 Dept., 2002]).

“The right of the plaintiffs, as innocent passengers, to summary judgment is not ‘restricted by potential issues of comparative negligence’ which may exist as between the defendant driver and the driver of the host vehicle (*Balladares v. City of New York*, 177 A.D.3d 942, 114 N.Y.S.3d 448 [2 Dept., 2019], quoting *Medina v. Rodriguez*, 92 A.D.3d 850, 939 N.Y.S.2d 514 [2 Dept., 2012])

Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, 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 (*id.*).

In the instant case, plaintiffs move for summary judgment on the issue of liability and to dismiss defendants' affirmative defenses of comparative negligence. Plaintiff Basil also moves to dismiss defendants' counterclaim that Basil is the sole cause of the accident. Here, plaintiffs met their burden and established entitlement to summary judgment as a matter of law. In support of their motion, the plaintiffs Basil, Lisa and Angle, submitted Basil's affidavit and a certified police report that established, prima facie, that the defendant driver was negligent when he struck the rear of the plaintiff's stopped vehicle. It is undisputed that Basil was stopped at the time of the collision and the front of defendant's vehicle impacted the rear of Basil's vehicle. Further, defendant Molotla admitted in two separate reports that his foot slipped off the brake pedal (*see* NYSCEF Doc. # 46; *see also* NYSCEF Doc. # 80 at 15). “The police officer who prepared the report was acting within the scope of his duty in recording the defendant driver's statement and, contrary to the defendants' contention, the statement is admissible

as an admission of a party” (*Jackson v. Donien Tr.*, 103 A.D.3d 851, 962 N.Y.S.2d 267 [2 Dept., 2013]; *see also Pivetz v. Brusco*, 145 A.D.3d 806, 43 N.Y.S.3d 457 [2 Dept., 2016]). Furthermore, Molotla’s employer’s accident report is signed by Molotla. He is bound by the statement that contains his signature (*see generally Nerey v. Greenpoint Mortg. Funding, Inc.*, 144 A.D.3d 646, 40 N.Y.S.3d 510 [2 Dept., 2016] [“A party who executes a contract is presumed to know its contents and to assent to them. An inability to understand the English language, without more, is insufficient to avoid this general rule. It is incumbent upon such parties to make a reasonable effort to have the contract read to them and they will be bound by their signatures unless the contents of the document were misread or misrepresented to them]).²

There are multiple explanations attributed to the defendants for the happening of this accident. Molotla does not deny his admission to Basil that he fell asleep at the wheel, but he does state in his deposition that he could not drive if he was asleep. Although he does directly refute the statement that he allegedly made on two separate occasions that his foot slipped off the brake, Molotla is bound by the written statement that he signed. The deposition testimony is “a belated effort by the defendant to avoid the consequences of his earlier admissions by raising what appeared to be a feigned issue of fact, which was insufficient to defeat the motion” (*Batashvili v. Veliz-Palacios*, 170 A.D.3d 791, *supra*).

² This Court again notes that Molotla does not raised the issue that there was a language barrier. This Court addresses this issue only because Molotla testified that he did not read English.

In any event, even if this Court relies on defendants' latest explanation for the cause of the accident, unanticipated mechanical failure, the defendants fail to raise an issue of fact. Where, as in this case, the defendants lay the blame for the accident on brake failure, it is incumbent upon the defendants to show that the brake problem was unanticipated and that reasonable care was exercised to keep the brakes in good working order (*see Ballatore v. Hub Truck Rental Corp.*, 83 A.D.3d 978, *supra*). Here, defendants merely proffered brake failure as an excuse for the accident with the limited explanation that they worked before the accident. Defendants tendered little indicia that the accident was the result of brake failure, at times Molotla even testified that there was no malfunction. Even assuming, *arguendo*, there was a malfunction, defendants' sole evidence that the brake failure was unanticipated is that Molotla checked the brakes before driving that day. Defendants failed to demonstrate that reasonable care was exercised to keep the brakes in good working order (*see generally Schuster v. Amboy Bus Co.*, 267 A.D.2d 448, 700 N.Y.S.2d 484 [2 Dept., 1999]). Defendants do not submit any evidence regarding the maintenance or inspection schedule for the bus. An averment of an inspection by the driver on the day of the accident alone is insufficient to demonstrate that reasonable care was taken to keep the brakes in good working order (*see generally Reid v. Rayamajhi*, 17 A.D.3d 557, 795 N.Y.S.2d 56 [2 Dept., 2005]). Further, and curiously, defendants' counsel stated in the discovery response that no repairs were required after the accident. Inasmuch as the plaintiffs stopped vehicle was struck in the rear by the defendants and the defendants failed to provide an adequate nonnegligent

explanation for the collision, there is insufficient evidence to raise a triable issue of fact as to the defendants' liability.

As to the issue of comparative negligence, the plaintiffs Lisa and Angel “demonstrated, prima facie, that they were innocent passengers who did not contribute to the happening of the accident. The right of the plaintiffs, as innocent passengers, to summary judgment is not ‘restricted by potential issues of comparative negligence’ which may exist as between the defendant driver and the driver of the host vehicle” (*Balladares v. City of New York*, 177 A.D.3d 942, *supra*, quoting *Medina v. Rodriguez*, 92 A.D.3d 850, 939 N.Y.S.2d 514 [2 Dept., 2012]). In opposition, defendants failed to raise a triable issue of fact.

With respect to comparative negligence between the defendant driver and the plaintiff driver, Basil met his burden and established entitlement to summary judgment, striking defendants' affirmative defenses of comparative negligence and dismissing defendants' counter claim. Although a plaintiff is no longer required to show freedom from comparative fault in establishing his prima facie case, Basil specifically raised this issue and moved to strike the counterclaim (*see generally Rodriguez v. City of New York*, 31 N.Y.3d 312, 76 N.Y.S.3d 898 [2018]). Here, Basil provided his affidavit, wherein he demonstrated that he was free from fault in the accident. In opposition to the plaintiff's prima facie showing, the defendants' sole contention, that its bus had an unanticipated brake failure, was insufficient to raise a triable issue of fact, as discussed above. Here, the defendants' failed to provide an adequate nonnegligent explanation for Molotla's

conduct or raise a triable issue of fact as to whether the plaintiff was comparatively at fault (*see Lopez v. Dobbins*, 164 A.D.3d 776, 79 N.Y.S.3d 566 [2 Dept., 2018]).

Conclusion

Basil's motion, motion sequence four, for summary judgment dismissing the counterclaim is restored and granted. Plaintiffs' cross motion, motion sequence five, for summary judgment on liability and striking defendants' affirmative defenses is granted. Anything not addressed herein is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



Hon. Lara J. Genovesi
J.S.C.

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