Allen v Calderon
2020 NY Slip Op 34203(U)
December 15, 2020
Supreme Court, Kings County
Docket Number: 521710/2019
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
----------X
SIMONE ALLEN and SONIA MARSHALLDEAN,

Plaintiff,

-against-

JOSE CALDERON, SEASIDE BEVERAGE CORP., and ANTHONY REID,

Defendant.
----------X

Index No.: 521710/2019
Motion Date: 11-23-20
Mot. Seq. No.: 1-2

DECISION/ORDER

The following papers, which were e-filed on NYSEF as items Nos. 15-45, were read on these motions:

In this action to recover damages for personal injuries, the defendant, ANTHONY REID, moves for an order pursuant to CPLR 3212 award him summary judgment dismissing the complaint and any cross claims (**Mot. Seq. No. 1**). By separate notice of motion, plaintiffs SIMONE ALLEN and SONIA MARSHALL-DEAN move for an order: (i) pursuant to CPLR 3212, granting them summary judgment pursuant to the innocent passenger doctrine; (ii) granting them summary judgment against defendants, SEASIDE BEVERAGE CORP. and JOSE CALDERON; (iii) striking defendants, SEASIDE BEVERAGE CORP. and JOSE CALDERON's, fifth, seventh, ninth, and tenth affirmative defenses; and (iv) striking defendant, ANTHONY REID's, first affirmative defense (**Mot. Seq. No. 2**).

This action arises out of a motor vehicle accident that occurred on September 9, 2019, on Linden Boulevard near its intersection with Lincoln Avenue in Brooklyn, New York. In support of his motion, defendant Reid submitted, *inter alia*, copies of the pleadings, his own affidavit and a copy of the certified Police Report. The accident description contained in the police report is as follows:

> At T/P/O V1 [Mr. Calderon] states while traveling w/b on Linden Blvd @ I/O of Lincoln when the traffic signal turned amber V2 [Mr. Reid] did stop IFO V1 / V1 did strike V2 in rear / V2 states while coming to stop @ red light V1 struck V2 in rear.

In his affidavit, defendant Reid stated that on September 9, 2019, he brought his taxi to a gradual stop at a red light on Linden Boulevard at or near Lincoln Avenue, in Brooklyn, New York. He maintained that after being stopped for approximately ten seconds, his vehicle was impacted in the rear by a truck operated by Mr. Calderon.

In opposition to the motion, defendant Calderon submitted an affidavit stating that he was operating a 2004 International box truck at the time and place of the accident and was traveling westbound behind a 2018 Chevrolet taxi he later learned was operated by the defendant Reid. He maintained that the taxi "stopped abruptly for an unknown reason" and that there "was no indication or reason" for the operator of the taxi to have brought the vehicle to a stop. He admitted that his vehicle collided into the rear of the taxi.

In support of plaintiffs' motion, plaintiff Simone Allen submitted an affidavit stating that at the time and place of the accident, he and plaintiff Sonia Marshall-Dean were passengers in the taxi owned and operated by defendant Reid. He averred Sonia Marshall-Dean was sitting in the back seat and that he was sitting in the front. He stated that it was a clear day and the roads were dry. He first realized that he was involved in an accident when he felt and heard an impact to the rear of the taxi. He had no warning that the accident was about to happened and he did not hear any honking horns or screeching tires or brakes prior to impact. He stated that the truck that hit the taxi was a passenger box truck bearing New York State license plate number 63251JF which he later learned was owned by defendant Seaside Beverage Corp.

"A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that

operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Pollard v. Independent Beauty & Barber Supply Co.*, 94 A.D.3d 845, 845–846, 942 N.Y.S.2d 360; *see Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908, 861 N.Y.S.2d 610, 891 N.E.2d 726; *Giangrasso v. Callahan*, 87 A.D.3d 521, 522, 928 N.Y.S.2d 68; *Scheker v. Brown*, 85 A.D.3d 1007, 1007, 925 N.Y.S.2d 528; *Plummer v. Nourddine*, 82 A.D.3d 1069, 1069, 919 N.Y.S.2d 187; *Vargas v. Luxury Family Corp.*, 77 A.D.3d 820, 820, 908 N.Y.S.2d 744; *Volpe v. Limoncelli*, 74 A.D.3d 795, 902 N.Y.S.2d 152).

Here, the plaintiffs established, prima facie, their entitlement to judgment as a matter of law on the issue of liability against defendants Seaside Beverage Corp. and Calderon by demonstrating that the host taxi was stopped for approximately 10 seconds at a red light when it was struck in the rear by the Seaside/Calderon vehicle (*Cajas-Romero v. Ward*, 106 A.D.3d 850, 851, 965 N.Y.S.2d 559, 561). Defendant Reid established, prima facie, his entitlement to summary judgment dismissing the complaint insofar as asserted against him and any cross-claims for the same reasons (*Fiscella v. Gibbs*, 261 A.D.2d 572, 573, 690 N.Y.S.2d 713, 714, citing *Yusupov v. Supreme Carrier Corp.*, 240 A.D.2d 660, 659 N.Y.S.2d 78; *Rebecchi v. Whitmore*, 172 A.D.2d 600, 568 N.Y.S.2d 423; *Miller v. Irwin*, 243 A.D.2d 546, 663 N.Y.S.2d 110; *Mead v. Marino*, 205 A.D.2d 669, 613 N.Y.S.2d 650).

The affidavit of defendant Calderon failed to raise a triable issue of fact. A nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle (*see Le Grand v. Silberstein*, 123 A.D.3d at 773, 999 N.Y.S.2d 96; *Amador v. City of New York*, 120 A.D.3d 526, 526, 991 N.Y.S.2d 637; *Ramos v. TC Paratransit*, 96 A.D.3d 924, 946 N.Y.S.2d 644). However, "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 A.D.2d 564, 565, 719 N.Y.S.2d 287; *see Le Grand v. Silberstein*, 123 A.D.3d at 773, 999 N.Y.S.2d 96; *Gutierrez v. Trillium USA, LLC*, 111 A.D.3d 669, 671, 974 N.Y.S.2d 563; *Robayo v. Aghaabdul*, 109 A.D.3d 892, 893, 971 N.Y.S.2d 317). Here, defendant Calderone did not dispute that there was a red light at the subject intersection at the time of the accident and therefore he did not demonstrate that taxi came to a sudden stop which was not foreseeable. "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 at 670–671, 974 N.Y.S.2d 563; *see Le Grand v. Silberstein*, 123 A.D.3d at 773, 999 N.Y.S.2d 96; *Robayo v. Aghaabdul*, 109 A.D.3d at 893, 971 N.Y.S.2d 317; *Xian Hong Pan v. Buglione*, 101 A.D.3d 706, 707, 955 N.Y.S.2d 375).

Further, the motions were not premature. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of a movant (*see* CPLR 3212 [f]; *see also Boorstein v. 1261 48th St. Condominium*, 96 A.D.3d 703, 946 N.Y.S.2d 200; *Dietrich v. Grandsire*, 83 A.D.3d 994, 921 N.Y.S.2d 555; *Trombetta v. Cathone*, 59 A.D.3d 526, 874 N.Y.S.2d 169). Defendant Calderon's mere hope or speculation that evidence sufficient to defeat the motions may be uncovered during the depositions is insufficient to deny the motion (see *Lopez v. WS Distrib., Inc.*, 34 A.D.3d 759, 760, 825 N.Y.S.2d 516; *Cajas-Romero v. Ward*, 106 A.D.3d 850, 852, 965 N.Y.S.2d 559, 562).

For the above reasons, plaintiffs' motion for partial summary judgment on the issue of liability against defendants Calderon and Seaside Beverage, Inc. and defendant Reid's motion

the summary judgment dismissing the complaint insofar as asserted against him at all cross-claims and are **GRANTED.**

That branch of plaintiffs' motion for summary judgment against defendant Reed on the issue of liability pursuant to the innocent passenger doctrine is **DENIED** (*Miller v. Sinai Van Serv., Inc.*, 33 Misc. 3d 1237(A), 941 N.Y.S.2d 539).

That branch of plaintiffs' motion seeking an order striking the fifth, seventh, ninth and tenth affirmative defenses of defendants Seaside Beverage Corp. and Calderon is **GRANTED.**

Accordingly, it is hereby

ORDRED that the motions are decided as indicated above.

This constitutes the decision and order of the Court.

Dated: December 15, 2020

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020