Abuella v Rasier-NY, LLC
2020 NY Slip Op 34577(U)
November 5, 2020
Supreme Court, Queens County
Docket Number: Index No.: 701299/18
Judge: Richard G. Latin
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable **RICHARD G. LATIN** IA PART 40
Justice

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JASMIN ABUELLA AND MOHAMED A. SHADDAD,

Index No.: 701299/18
Motion Date: 09/24/20
Motion Cal. No.: 2
Motion Seq. No.: 4

Plaintiffs,

-against-

RASIER-NY, LLC, UBER TECHNOLOGIES, INC. UBER USA, LLC, ZAID Y. ALMOMANI AND YOUSEF ALMOMANI,

FILED
1/7/2021
COUNTY CLERK
QUEENS COUNTY

Defendants.

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The following numbered papers read on these motions by plaintiff on the counterclaim Jasmin Abuella and plaintiffs Jasmin Abuella and Mohamed A. Shaddad, inter alia, for summary judgment.

PAPERS	NUMBERED
Notice of Motion-Memorandum of Law-Affidavits-Exhibits.....	1 - 5
Answering-Affidavits-Exhibits.....	5 - 7
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As a preliminary matter, this action was discontinued as to defendant Rasier-NY, LLC.

Upon the foregoing cited papers, it is ordered that these motions by Jasmin Abuella, plaintiff on the counterclaim, and plaintiffs Jasmin Abuella and Mohamed A. Shaddad, pursuant to CPLR 3212, for, inter alia, summary judgment on the issue of liability and to dismiss various affirmative defenses, are determined as follows:

Plaintiffs commenced the instant action to recover for injuries they allegedly sustained in a motor vehicle accident that occurred on July 25, 2016 in front of 112-17 167th Street, Queens, New York. Plaintiff Jasmin Abuella was the driver and Mohamed A. Shaddad was a passenger in Jasmin Abuella's vehicle. Jasmin Abuella alleges she was stopped on 167th Street, while waiting for a parking space, when she was rear-ended by defendant's vehicle. Plaintiff on the counterclaim Jasmin Abuella and plaintiffs Jasmin

Abuella annd Mohamed A. Shaddad now seek summary judgment on the basis that no negligence can be imputed unto them, as their vehicle was struck in the rear.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when a movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

In support of the motion, the movants submit, inter alia, the deposition transcript of Jasmin Abuella as well as the deposition transcript of Mohamed A. Shaddad. On the date of the accident, Jasmin Abuella was wearing her seatbelt and was driving on 167th Street looking for a parking space. Moreover, she testified that it was raining and she turned on her headlights and wipers. She averred that she put her car in park when she observed a white colored vehicle exiting a parking space. She further testified that her vehicle was stopped for maybe two minutes when she was rear ended by defendant's vehicle. She described the impact to the rear of her vehicle as a "heavy hit." Abuella testified that the defendant driver told her he was entering his GPS into his phone and when he looked up, it was too late.

Plaintiff Mohamed A. Shaddad, who was a front seat passenger in his wife's vehicle, also testified and recounted the facts of the accident in the same manner as plaintiff on the counterclaim. Plaintiff Mohamed A. Shaddad was also wearing his seatbelt at the time of the accident.

It is well settled law that the driver of an approaching vehicle must maintain a reasonably safe rate of speed and control over their vehicle, and use reasonable care to avoid colliding with a lead vehicle (*see Denezzo v Joseph*, 95 AD3d 1060, 1060 [2d Dept 2012] [internal quotation marks omitted]), and a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability as to the rearmost vehicle, requiring that driver to rebut this inference of negligence by providing a non-negligent explanation for the collision (*see Harris v Ryder*, 292 AD2d 499, 499 [2d Dept 2002]; *see also* Vehicle and Traffic Law § 1129[a]). Thus, movants established their prima facie burden and it is incumbent on the defendants to raise a triable issue of fact

In opposition, defendants Zaid Y. Almomani and Yousef Almomani and co-defendants Uber Technologies, Inc. and Uber USA, LLC submit, inter alia, the deposition transcript of Yousef Almomani. He testified that 167th Street is a one way street with two moving lane and two parking lanes. He further stated that it was raining heavily at the time

of the accident, and his maximum speed was ten miles per hour. Yousef Almomani averred that he observed a vehicle double parked in the right moving lane thirty feet in front of him. He claimed that he saw the car approximately ten seconds before the accident occurred. He further testified that he applied the brakes and turned his wheel to the left within ten seconds from when he observed plaintiff's vehicle until the accident occurred. Moreover, he stated that at the time of the accident, his foot was on the brake and he skidded for five seconds prior to the accident. Yousef Almomani testified that he told the police that his car skidded and he did not see any exterior lights on the vehicle he rear-ended.

Generally, "an unavoidable skidding on wet pavement…" is a sufficient nonnegligent explanation (*Binkowitz v Kolb*, 135 AD3d 884, 885 [2d Dept 2016]). The driver of the vehicle asserting said explanation must show that the skid was unavoidable (*Tumminello v City of New York*, 148 AD3d 1084, 1086 [2d Dept 2017]). Here, Yousef Almomani alleges that his vehicle skidded due to wet pavement. In cases where the court has precluded summary judgment, there was evidence that the driver was going approximately 5 mph and/or driving cautiously and there was black ice and/or snow (*see Simpson v Eastman*, 300 AD2d 647, 648 [2d Dept 2002]; *DeLouise v S.K.I. Wholesale Beer Corp., et al.*, 75 AD3d 489, 490 [2d Dept 2010]; *Orcel v Haber*, 140 AD3d 937 [2d Dept 2016]). Mr. Almomani failed to rebut the inference of negligence from the rear-end collision, as he testified that he knew the road was wet from the rain and he failed to demonstrate that his skid on known road conditions was unavoidable.

With respect to movants culpability, "liability may not be imposed upon a party who 'merely furnished the condition or occasion for the occurrence of the event' but was not one of its causes" (*see Wechter v Kelner,* 40 AD3d 747 [2d Dept 2007]). Here, movants demonstrated their prima facie entitlement to summary judgment since their vehicle was stopped while waiting for a parking space and merely furnished the condition or occasion for the accident, and was not a proximate cause of the accident. Thus, defendants failed to raise a triable of issue of fact.

Further, movants are not required to show an absence of comparative fault to be entitled to summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]). Nevertheless, movants have demonstrated that they are free from comparative fault (id.; *see also Franco v Breceus*, 70 AD3d 767, 769 [2d Dept 2010])

Since defendants Zaid Y. Almomani and Yousef Almomani did not address any of the affirmative defenses that movants sought to dismiss, including the first affirmative defense as to personal jurisdiction, fifth affirmative defense related to failure to use a seatbelt, and the sixth affirmative defense related to collateral estoppel, they are herein waived.

Similarly, since defendants Uber Technologies, Inc. and Uber USA, LLC also did not address any of the affirmative defenses that movants sought to dismiss, including the second affirmative defense related to assumption of risk, fifth affirmative defense related to culpable conduct of persons unknown, eighth affirmative defense alleging failing to join an appropriate party, ninth affirmative defense related to failure to state a cause of action, thirteenth affirmative defense related to failure to use available seatbelt, and fourteenth affirmative defense related to failure to verify the complaint, they are herein deemed waived.

Accordingly, movants motion for summary judgment on the issue of liability against defendants is granted and the above aforementioned affirmative defenses are stricken and dismissed; and it is further

ORDERED that movants are found to be free of comparative fault; and it is further

ORDERED that within thirty (30) days of the date of this order, a copy of this order with notice of entry shall be served on all parties to the actions and on the Clerk of the Supreme Court, Queens County.

This constitutes the decision and order of the Court.

Dated: November 5, 2020

RICHARD G. LATIN, J.S.C.