| **Daverne v Soriano** |
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| 2020 NY Slip Op 34819(U) |
| May 11, 2020 |
| Supreme Court, Suffolk County |
| Docket Number: Index No. 18-616842 |
| Judge: Stephen L. Braslow |
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SHORT FORM ORDER

INDEX No. 18-616842
CAL. No. 19-01961MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 10 - SUFFOLK COUNTY

ORIGINAL

***PRESENT:***

Hon. STEPHEN L. BRASLOW
Acting Justice of the Supreme Court

MOTION DATE 12-5-19
ADJ. DATE 1-16-20
Mot. Seq. # 001 - MotD

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TASHA DAVERNE and JIMMY MANIGAT,

Plaintiffs,

- against -

DONIELLA LYN SORIANO,

Defendant.

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Upon the following papers read on this e-filed motion for summary judgment : Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, filed November 6, 2019 ; Answering Affidavits and supporting papers by defendants, filed January 9, 2020 ; Replying Affidavits and supporting papers by plaintiff, filed January 15, 2020 ; Other _____; it is,

***ORDERED*** that the motion by plaintiffs TASHA DAVERNE and JIMMY MANIGAT for, inter alia, summary judgment in their favor on the issue of liability is granted to the extent set forth herein, and is otherwise denied.

This is an action to recover damages for injuries allegedly sustained by plaintiffs TASHA DAVERNE and JIMMY MANIGAT, as a result of a motor vehicle accident, which occurred on May 7, 2016, at Waverly Avenue near the intersection of Station Avenue in the Village of Patchogue, Town of Brookhaven, New York. The accident allegedly occurred when a vehicle owned and operated by defendant DONIELLA LYN SORIANO struck plaintiff's vehicle in the rear.

Plaintiffs now move for summary judgment in their favor on the issue of liability on the ground that Ms. SORIANO's negligence was the legal and proximate cause of the collision, and for dismissal of several affirmative defenses. Plaintiffs also move to dismiss the following numbered affirmative defenses: first (comparative negligence), second (assumption of risk), third (failure to mitigate damages), fourth (CPLR 4545 collateral source rule), fifth (CPLR Article 16), sixth (failure to utilize seatbelt), seventh (emergency doctrine). Plaintiffs submit, in support of the motion, copies of the pleadings, the

bill of particulars, and deposition transcripts of TASHA DAVERNE and DONIELLA LYN SORIANO. In opposition, defendants argue that even though there are not questions of fact about whether the impact took place, or whether the plaintiff was struck by the defendant's vehicle while the plaintiff was stopped at a red light, there is a question of fact as to how hard the defendant's vehicle impacted the plaintiff's vehicle. See Affirmation in Opposition, Paragraph 10. Furthermore, defendant claims that since there are still questions of fact as to whether the defendant's purportedly negligent acts were the cause of plaintiffs' injuries, the application should be denied. See Affirmation in Opposition, Paragraph 12. The defendant did not offer a non-negligent explanation for the accident.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; ***Alvarez v Prospect Hosp.***, *supra*; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).

The presumption of negligence in rear-end cases arises from the duty of the driver of the following vehicle to keep a safe distance and not collide with the traffic ahead (*see* Vehicle and Traffic Law § 1129 [a]; ***Witonsky v New York City Tr. Auth.***, 145 AD3d 938, 43 NYS3d 505 [2d Dept 2016]; ***Service v McCoy***, 131 AD3d 1038, 16 NYS2d 283 [2d Dept 2015]). A rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on that driver to proffer a non-negligent explanation for the collision (***Clements v Giatas***, 178 AD3d 894, 112 NYS3d 539 [2d Dept 2019]; ***Conroy v New York City Tr. Auth.***, 167 AD3d 977, 91 NYS3d 183 [2d Dept 2018]; ***Tsyganash v Auto Mall Fleet Mgt., Inc.***, 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]; ***Edgerton v City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]). If the driver of the offending vehicle cannot come forward with evidence to rebut the inference of negligence, the driver of the stopped or stopping vehicle is entitled to summary judgment on the issue of liability (***Tsyganash v Auto Mall Fleet Mgt., Inc.***, *supra*; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]).

Plaintiffs made a prima facie case of entitlement to summary judgment in her favor on the issue of liability by demonstrating that DONIELLA LYN SORIANO's negligence was the legal and proximate cause of the accident (*see* ***Lopez v Dobbins***, 164 AD3d 776, 79 NYS3d 566 [2d Dept 2018]; ***Niyazov v Hunter EMS, Inc.***, 154 AD3d 954, 63 NYS3d 457 [2d Dept 2017]). Plaintiff TASHA DAVERNE testified she was completely stopped at a red traffic light behind another vehicle when her car was struck from behind by the vehicle operated by defendant DONIELLA LYN SORIANO. Defendant testified that she had stopped her car behind the plaintiff's car because the traffic light was red, then thought the light turned green and took her foot off of the brakes, allowing her car to strike the plaintiff's car. Defendant admitted she was in error, as the light was still red when the impact took place. Defendant

testified that her car was in good working order, and that the plaintiff's car was completely stopped at the time of the impact.

The burden then shifted to defendants to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident (*see* ***Alvarez v Prospect Hosp.***, *supra*; ***Cortes v Whelan***, *supra*). No non-negligent explanation was offered to rebut plaintiffs' proof. Accordingly, plaintiffs' motion for summary judgment in their favor on the issue of liability is granted.

With respect to the branch of plaintiffs' motion seeking to dismiss defendant's affirmative defenses, when moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law (*see* ***Bank of N.Y. v Penalver***, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; ***South Point, Inc. v Redman***, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed" (***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; *see* ***Greco v Christoffersen***, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

With respect to that portion of plaintiffs' motion seeking an order striking defendant's affirmative defenses, CPLR 3211 (b) authorizes a plaintiff to move, at any time, to dismiss a defendant's affirmative defense on the ground that it has no merit (*see* ***Bank of N.Y. v Penalver***, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]; ***South Point, Inc. v Redman***, 94 AD3d 1086, 1087, 943 NYS2d 543 [2d Dept 2012]). "[W]hen moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law'" (***Greco v Christoffersen***, 70 AD3d 769, 771, 896 NYS2d 363 [2d Dept 2010], quoting ***Vita v New York Waste Servs., LLC***, 34 AD3d 559, 559, 824 NYS2d 177 [2d Dept 2006]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (***Fireman's Fund Ins. Co. v Farrell***, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]).

Plaintiffs' submissions are sufficient to demonstrate, prima facie, that plaintiff TASHA DAVERNE was not at fault for the occurrence of the collision and that the sole proximate cause of the subject collision was defendant driver's failure to stop before colliding with her vehicle (*see* ***Comas-Bourne v City of New York***, 167 AD3d 977, 91 NYS3d 183 [2d Dept 2017]; ***Poon v Nisanov***, *supra*). The burden now shifts to defendant to raise a triable issue of fact (*see generally* ***Vega v Restani Constr. Corp.***, *supra*). As defendant submits no argument in opposition, they fail to raise an issue of fact as to plaintiff's negligence. Therefore, plaintiffs' application to dismiss defendant's first affirmative defense of comparative negligence is granted.

Plaintiffs' submissions have also established, prima facie, entitlement to dismissal of the affirmative defense of assumption of risk. In opposition, defendant fails to raise a triable issue of fact as to any express or implied understanding by the plaintiff to assume the risk of being struck by the defendant in the rear at a red light (see ***Arbegast v. Bd. Of Educ.***, 65 N.Y.2d 161, 165 (1985). Therefore, plaintiffs' application to dismiss defendant's second affirmative defense of assumption of risk

is granted.

As to plaintiffs' application to dismiss defendants' affirmative defense of failure to mitigate damages, the provisions of CPLR 4545, and the provisions of CPLR Article 16, plaintiff has failed to establish entitlement to such relief in its submissions. Therefore, plaintiff's application to dismiss defendants' third, fourth, and fifth affirmative defenses are denied.

As to plaintiffs' application to dismiss defendants' affirmative defense of plaintiffs' failure to use a seatbelt, plaintiff has established, prima facie, entitlement to dismissal as plaintiff testified that she was wearing a seatbelt at the time of the collision. In opposition, defendant fails to raise a triable issue of fact as to whether plaintiff was wearing a seatbelt. Therefore, plaintiffs' application to dismiss defendant's sixth affirmative defense of plaintiffs' failure to use a seatbelt is granted.

As to plaintiffs' application to dismiss defendant's affirmative defense of the emergency doctrine, plaintiff has established, prima facie, entitlement to dismissal as defendant's deposition indicates that there was no emergency immediately preceding the impact. In opposition, defendant fails to raise a triable issue of fact as to whether the emergency doctrine applies. Therefore, plaintiffs' application to dismiss defendant's seventh affirmative defense of emergency doctrine is granted.

Accordingly, as described above, the branch of plaintiffs' motion for summary judgment in their favor on the issue of liability is granted, and the branch of the motion to strike defendant's affirmative defenses of comparative negligence, assumption of risk, plaintiffs' failure to use a seatbelt, and the emergency doctrine are granted. The remainder of the applications are denied.

Dated: 5-11-20

STEPHEN L. BRASLOW Eff S.C.C.
A. J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION