| **Varbaro v Mass** |
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| 2020 NY Slip Op 35040(U) |
| September 11, 2020 |
| Supreme Court, Westchester County |
| Docket Number: Index No. 54753/2019 |
| Judge: Terry Jane Ruderman |
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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CINDY VARBARO,

Plaintiff,

-against-

CLIFFORD J. MASS,

Defendant.

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DECISION and ORDER

Motion Sequence No. 1
Index No. 54753/2019

RUDERMAN, J.

The following papers were considered in connection with the motion by plaintiff for an order pursuant to CPLR 3212 granting her partial summary judgment against defendant on the issue of liability, and striking defendant's first affirmative defense of culpable conduct on plaintiff's part, and defendant's sixth affirmative defense alleging that plaintiff failed to wear a seatbelt:

| Papers | Numbered |
|---|---|
| Notice of Motion, Affirmation, Exhibits 1 - 7 | 1 |
| Affirmation in Opposition, Exhibits A - B | 2 |
| Reply Affirmation | 3 |

This is an action for personal injuries allegedly sustained in a motor vehicle collision on July 19, 2017, at approximately 8:55 a.m., on I-95 southbound in Port Chester, New York. The action was commenced on March 28, 2019, defendant's answer was filed on April 23, 2019, and plaintiff filed the present motion for partial summary judgment after completion of the depositions of both parties. In support of the present motion for partial summary judgment on the issue of liability, plaintiff submits transcripts of the depositions, as well as a certified copy of

the police accident report and post-collision photographs of the two vehicles.

The roadway of I-95 in the area of the accident is a three-lane highway, and plaintiff testified at her deposition that she was traveling in the right lane, approaching the exit for I-287, at the time of the accident. While traffic in the left two lanes was flowing well, the flow of traffic in the right lane was slowed. Plaintiff testified that as she proceeded in the right lane, at a speed she estimated to be between 35 and 45 miles per hour, a vehicle merged from the middle lane into the right lane directly in front of her and then came to a halt, causing plaintiff to apply her brakes and bring her vehicle to a stop; she did not make contact with the vehicle that had merged in front of her. A few seconds after she stopped, defendant's vehicle struck her vehicle in the rear. She testified that she could see, in her rearview mirror, defendant's vehicle approaching from three to four car lengths behind her, "at a pretty decent speed and it did not look like it was going to stop." She estimated that it had been going 45 miles per hour.

Plaintiff also cites portions of defendant's deposition testimony in which he could not clearly answer where he was looking immediately prior to the accident ("I don't know. My suspicion is I may have checked my blind spot to change lanes and looked straight ahead"), how long he was traveling in the right lane prior to the collision ("I don't remember. But, generally speaking, when I take that route I stay in the middle lane until it's time to move over to exit on 287"), his rate of speed just prior to the collision, or whether on that morning he left enough distrance between his vehicle and the one in front of him.

Plaintiff also relies on the reporting police officer's decision to ticket defendant for following too closely, in violation of Vehicle & Traffic Law § 1129 (a).

In opposition to plaintiff's motion, defendant also submits an affidavit in which he states that he saw plaintiff's vehicle stopped on the highway, unexpectedly, and was unable to stop in

time. Defendant argues that the police accident report on which plaintiff relies is inadmissible, and that based on the admissible evidence, a non-negligent explanation for the collision has been provided, namely, that sole responsibility for the accident rests with the vehicle that cut in front of plaintiff's vehicle and then stopped.

He withdraws his sixth affirmative defense (failure to wear a seatbelt), but maintains that his first affirmative defense (culpable conduct) remains viable.

Discussion

"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" (*Bloechle v Heritage Catering, Ltd.*, 172 AD3d 1294, 1295 [2d Dept 2019], citing *Nsiah-Ababio v Hunter*, 78 AD3d 672, 672 [2d Dept 2010] and Vehicle & 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, requiring that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision" (*Bloechle*, *supra*, citing *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]). Plaintiff has made a prima facie showing with just the parties' testimony, without taking into consideration the contents of the submitted police report.[1]

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[1]While a certified copy of a police report is an admissible business record, its contents are admissible only to the extent the information is based on the officer's personal observations; if it contains reported hearsay, it is only admissible if the information qualifies under a hearsay exception (*see Shehab v Powers*, 150 AD3d 918, 919 [2d Dept 2017]). Here, the portion of the certified copy of the police accident report indicating that the reporting officer issued defendant a ticket for following plaintiff's vehicle too closely, in violation of Vehicle & Traffic Law § 1129 (a), is admissible, although it merely proves that the ticket was issued, not that the officer's assessment was correct.

Defendant's attempt to relieve himself from any liability by placing all the blame for the accident on the unidentified vehicle that cut in front of plaintiff's vehicle, is unavailing. In *Bloechle*, the plaintiff's vehicle stalled in the right lane of the Long Island Expressway, and the defendant's vehicle struck it. The explanation provided by the defendant driver in that action, that there had been a vehicle in front of him that changed out of his lane, leaving him with a view of the plaintiff's vehicle too late to avoid the collision, did not suffice for him to avoid liability, because "[e]ven accepting [the defendant]'s testimony as true, he was following the vehicle[] in front of him too closely" (*Bloechle v Heritage Catering*, 172 AD3d at 1296). Here, too, accepting defendant's explanation as true, it does not establish his nonnegligence. Even if plaintiff's stop was "sudden" or "unexpected," and due to another driver's negligent actions, his inability to stop in time was due to his own negligence, either in following too closely or failing to pay sufficient attention to the vehicle in front of him to stop in time. An assertion that the vehicle in front stopped suddenly "is insufficient, in and of itself, to provide a nonnegligent explanation" since "the driver who follows . . . is under a duty to maintain a safe distance between his or her car and the car ahead" (*Brothers v Bartling*, 130 A.D.3d 554, 556 [2d Dept 2015]). Notably, defendant here did not even assert that he had maintained a safe distance from plaintiff's vehicle, or been traveling at a safe speed, prior to the collision (*see Auguste v Jeter*, 167 AD3d 560, 560-561 [2d Dept 2018]).

Grounds for an award of partial summary judgment on the issue of liability have therefore been established.

Additionally, while plaintiff would be entitled to summary judgment against defendant on the issue of liability even without demonstrating her freedom from comparative fault *(see Rodriguez v City of New York*, 31 NY3d 312 [2018]), here she has made a prima facie showing

that she was not at fault, and defendant has not offered any evidence creating a question of fact on that issue. On the contrary, defendant's admission, that there was nothing plaintiff could have done to avoid the impact between the parties' vehicles, provides a further basis for dismissal of defendant's affirmative defense of culpable conduct.

ORDERED that plaintiff's motion for partial summary judgment against defendant on the issue of defendant's liability, and to dismiss defendant's affirmative defense of culpable conduct on plaintiff's part, is granted, and it is further

ORDERED that the parties are directed to appear in the Compliance Conference Part of the Westchester County Courthouse, on a date and in a manner of which they will be notified by that Part.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York
September 11, 2020

HON. TERRY JANE RUDERMAN, J.S.C.