

**Durant v L&J Trucking, Inc.**

2020 NY Slip Op 35764(U)

December 21, 2020

Supreme Court, Bronx County

Docket Number: Index No. 20375/2020E

Judge: Ben R. Barbato

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, PART 14

C E# 001

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FRANK DURANT

Index No. 20375/2020E

-against-

Hon. **BEN R. BARBATO**

L&J TRUCKING, INC., KRASDALE FOODS,  
INC. and RAFAEL ROSARIO

Justice Supreme Court

-----X  
The following NYSCEF docs numbered 13-28 were read on this motion (NYSCEF and CASE MANAGEMENT Seq No. 1) for **SUMMARY JUDGMENT LIABILITY** noticed on September 16, 2020 and submitted on October 1, 2020.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF No(s). 13-21
Answering Affidavit and Exhibits	NYSCEF No(s). 22-26
Replying Affidavit and Exhibits	NYSCEF No(s). 27-28

Upon the foregoing papers, plaintiff moves for an order granting plaintiff partial summary judgment on the issue of liability and striking defendants' first and twelfth affirmative defenses. The motion is opposed.

The cause of action is for personal injuries allegedly sustained by the plaintiff in a motor vehicle accident that occurred on January 15, 2019 on the Sheridan Expressway at or near the entrance ramp from the Cross-Bronx Expressway in Bronx County.

In support of the motion, plaintiff submits an affidavit as well as a copy of the police accident report. Plaintiff asserts that prior to the accident, he was traveling southbound on the Sheridan Expressway, within the applicable speed limit. He was traveling in the right lane and vehicles were passing on the left lane. Plaintiff states that he slowed down to almost a stop to allow for vehicles to merge in front of his vehicle when defendants' truck struck the rear of his vehicle. As a result, his vehicle was pushed several car lengths and continued to roll until plaintiff was able to bring it to a stop. Plaintiff avers that the speed limit in the area was 30 mph due to construction and his highest rate of speed was 15 mph. He claims that he was wearing his seatbelt at the time of the accident and his vehicle had no mechanical issues which could have contributed to the collision. Plaintiff also submitted photographs after the accident depicting his vehicle and the scene of the accident.

Plaintiff argues that summary judgment should be granted in his favor on the issue of liability and proximate cause because there are no issues of fact. 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 requires that driver to come up with a non-negligent explanation for the accident. Plaintiff further argues that when a driver approaches another vehicle from the rear, that driver must maintain a reasonably safe speed and use reasonable care to avoid striking another vehicle. Plaintiff contends that he had no time to react in order to avoid the collision and never knew that it was going to happen. Moreover, in the certified police

accident report, defendants claimed that plaintiff's vehicle stopped short in front of them and they could not stop their vehicle in time. Nevertheless, plaintiff argues that even if he did stop short, the defendants had a duty to maintain a safe distance between their vehicle and the vehicle in front of theirs.

Plaintiff further contends that defendants' first and twelfth affirmative defenses must be dismissed. The first affirmative defense is that plaintiff was comparatively negligent for the accident which plaintiff contends he was not. The twelfth affirmative defense is that plaintiff was not wearing a seatbelt but, in his affidavit, plaintiff stated that he was.

Defendants oppose the motion and submit an affidavit from the defendant driver, Rafael Rosario ("Mr. Rosario"), as well as a video depicting the accident. Defendants first argue that the motion is premature and the only evidence submitted in support of the motion is a self-serving "bare bones" affidavit from the plaintiff along with a police accident report. In his affidavit, Mr. Rosario alleges that all vehicles on the road were traveling at approximately 40 mph in the "flow of traffic" contrary to plaintiff's assertion that he was traveling at a speed of approximately 15mph. Defendants point out that the video shows plaintiff traveling at a speed equal to or in excess of Mr. Rosario's truck when plaintiff suddenly and unexpectedly comes to a complete stop on the highway. According to the defendants, this contradicts plaintiff's claim that he slowed down significantly but did not come to a stop.

Moreover, plaintiff claims that he slowed down to allow for potential vehicles to merge in front of his vehicle from the left lane but the video taken from Mr. Rosario's truck and the photographs taken by plaintiff at the scene of the accident, do not show a stop sign or yield sign directing traffic in plaintiff's lane to slow or stop. The video further shows that plaintiff's lane of travel remains clear of any vehicles and at no time does any vehicle merge into plaintiff's lane. In his affidavit, Mr. Rosario states that the entry-ramp lane he was traveling in and the left lane of traffic came together to form a multi-lane highway and the two lanes were separated by concrete barriers. He states that since traffic was "flowing smoothly," he reasonably expected it to continue to "flow" at the rate in which it was moving. Defendants' counsel seeks an opportunity to "cross-examine" the plaintiff as to his "apprehension" of a vehicle merging into his lane when no such merger ever occurred.

Additionally, in his affidavit, Mr. Rosario claims that he did not recall seeing the brake lights on plaintiff's vehicle and in his affidavit, plaintiff makes no mention as to whether or not his brake lights were working. Mr. Rosario further asserts in his affidavit, that after the accident, he approached the driver and passenger of plaintiff's vehicle to see if they were okay and asked why they came to a stop. Mr. Rosario asserts that the passenger stated that they were "confused" and "didn't know where they were going," which contradicts plaintiff's statement as to why he stopped. Defendants seek to depose plaintiff's passenger, as well as the plaintiff and requests that the motion be denied.

Finally, defendants argue that an unexpected stop on a highway is considered a non-negligent explanation for a rear-end collision where the rear-most driver reasonably expected that traffic would continue unimpeded. Therefore, at the very least, there are issues as to plaintiff's comparative fault.

In reply, plaintiff's counsel takes issue with the fact that the video taken in Mr. Rosario's truck was not disclosed until after plaintiff filed the motion for summary judgment. Plaintiff contends that no further discovery is required to show defendants' negligence and the video shows no further facts are necessary since it depicts the entire collision. Moreover, even though Mr. Rosario claims that he was going with the flow of traffic at a speed of approximately 40mph, photos of the accident scene show that the speed limit was 30 mph due to construction. Therefore, defendants had a duty to maintain a safe distance taking into account all hazardous factors.

Plaintiff argues that it is clear that Mr. Rosario did not maintain a safe speed and distance from plaintiff's vehicle to avoid the collision. Plaintiff further reiterates that plaintiff slowing down his vehicle on the highway was reasonably foreseeable given the hazardous factors. Furthermore, the video is clear that Mr. Rosario failed to maintain a safe speed prior to the collision given the fact that his viewpoint was many feet higher than the surrounding vehicles and he had an unobstructed view of the lane in front of him. The video shows that the only reaction Mr. Rosario had to the oncoming collision was a "long yawn" a second or two prior to impact. Therefore, it shows a lack of attention by Mr. Rosario. Finally, as to the brake lights, plaintiff claims there is no issue as to whether or not they were working because the video shows that plaintiff's brake lights were illuminated just before the impact. Therefore, plaintiff is entitled to summary judgment.

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). The failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*, see also, *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident..." (*Cabrera v. Rodriguez*, 72 A.D.3d 553 [1<sup>st</sup> Dept. 2010]). Vehicle and Traffic Law §1129(a) states that, a "driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

Contrary to defendants' assertion, the motion for summary judgment is not premature since both parties had the opportunity to submit an affidavit attesting to their version of the events. Additionally, the police accident report, the photographs submitted and, importantly, the video of the accident itself taken from defendants' truck, is sufficient to show plaintiff's entitlement to judgment as a matter of law as

against the defendant since the evidence shows that defendants' negligence was a proximate cause of the accident. (see, Jeffrey v. DeJesus, 116 A.D.3d 574 [1st Dept. 2014]). Defendants, in the operation of their vehicle, had a duty to see what there is to be seen and maintain a safe speed given the road conditions. CPLR §1108(a) states that, "No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing."

Defendant takes issue with the fact that plaintiff stopped his vehicle in a moving lane of the roadway thereby causing the accident since Mr. Rosario expected that traffic would continue unimpeded. (see, Tutrani v. County of Suffolk, 10 N.Y.3d 906 [2008]). However, whether or not there may be issues of comparative fault do not affect plaintiff's entitlement to summary judgment on the issue of defendant's liability. A plaintiff's comparative fault, if any, relates to the issue of damages. (see, Rodriguez v. City of New York, 31 N.Y.3d 312 [2018]; see also, Castillo v. Slupecki, 63 Misc. 3d 325 [Supreme Court, Bronx County 2019]).

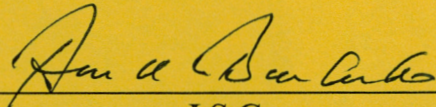
Accordingly, it is hereby,

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendant's liability is granted; and it is further

ORDERED that defendants' twelfth affirmative defense that plaintiff was not wearing a seatbelt is hereby dismissed as it was unopposed.

This constitutes the Decision and Order of this Court.

Dated: 12/21/2020

Hon.   
HON. BEN. R. BARBATO, J.S.C.

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- 1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
  - 2. MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER
  - 3. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE
  - FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT