Rosa v Mahmood
2021 NY Slip Op 30770(U)
March 1, 2021
Supreme Court, Kings County
Docket Number: 519292/2017
Judge: Lara J. Genovesi

At an IAS Term, Part 34 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York on the 1st day of March 2021

PRESENT:

HON. LARA J. GENOVESI,
J.S.C.

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QUATISHA S. ROSA,

Plaintiffs,

-against-

NAUMAN MAHMOOD and MELIA H. CLARKE,

Defendants.

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Index No.: 519292/2017

DECISION & ORDER

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this motion:

	NYSCEF Doc. No.:
Notice of Motion/Cross Motion and Affidavits (Affirmations) Annexed	42-50
Opposing Affidavits (Affirmations)	51, 52
Reply Affidavits (Affirmations)	53, 54

Introduction

Plaintiff, Quatisha S. Rosa, moves by notice of motion, sequence number three, pursuant to CPLR § 3212 for summary judgment on the issue of liability as to defendants and to dismiss the affirmative defenses alleging comparative negligence against plaintiff. Defendants, Nauman Mahmood and Melia H. Clarke oppose this application.

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Background & Procedural History

Plaintiff allegedly sustained personal injuries on March 27, 2017, as a result of a motor vehicle accident which occurred on East 82nd Street near the intersection with Avenue K, in Brooklyn, New York. East 82nd Street is a one-way street, with parking lanes on both sides. Plaintiff was a rear passenger in the vehicle operated by defendant Melia Clarke when it collided with defendant Nauman Mahmood's vehicle.

Mahmood testified at an examination before trial on May 20, 2019 (*see* NYSCEF Doc. # 48). He was working as an Uber driver at the time of the accident. East 82nd Street has two moving lanes of travel and he was parked in the left lane for approximately 4-5 minutes, waiting to pick up a passenger (*see id.* at 14) with his hazards on (*see id.* at 16). His vehicle was parked when the accident occurred (*see id.* at 15). Mahmood did not see the other vehicle involved prior to the accident. He became aware of the accident when he felt the impact (*see id.* at 16).

Clarke testified at an EBT on February 21, 2020 (*see* NYSCEF Doc. # 49). Clarke saw Mahmood's car double parked and attempted to go around his vehicle on the right side, as there was enough space for two vehicles in the driving lane (*see id.* at 23-24). As she drove around the double-parked car, Mahmood simultaneously pulled out into the moving lane, without the use of a turn signal (*see id.* at 25-26). Clarke was conversing with the passengers in her vehicle at the time of the accident (*see* NYSCEF Doc. # 49 at 20). However, she later clarified that all three passengers were not engaged in

conversation; she was speaking to the front seat passenger, who was giving her driving directions (*see id.* at 35).

Plaintiff testified at an EBT on January 14, 2019 (*see* NYSCEF Doc. # 47). She was seated in the back seat of Clarke's vehicle, wearing her seatbelt. She was looking at her cellphone when the accident occurred (*see id.* at 16, 18). There was music playing but, she heard no warning sounds such as screeching tires, brakes, horns or cries (*see id.* at 19). No person in the car was smoking drinking or eating. She cannot recall if anyone was talking (*see id.*).

Plaintiff commenced the instant action by filing a summons and verified complaint on October 5, 2017. Issue was joined by service of Clarke's answer on or about October 25, 2017 (*see* NYSCEF Doc. # 45). Clarke alleged eleven affirmative defenses, including but not limited to:

> 3. In the event the plaintiffs' damages as alleged in the Complaint were caused, in whole or in part, by the comparative negligence of the plaintiff, then the amount of damages otherwise recoverable by the plaintiff, which damages are denied, should be diminished and reduced in the proportion which the comparative negligence bears to the negligence which caused the damages.
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> 6. All the hazards and risks attendant to the circumstances set forth in the Complaint were obvious and apparent and were expressly assumed by the plaintiff.
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> 7. That any damages otherwise recovered by plaintiff shall be diminished in the proportion which the culpable conduct

> attributable to the claimant bears to the culpable conduct which caused the damages and/or injuries alleged.
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> 10. That if the plaintiff failed to wear a seat belt, although the vehicle was equipped with same, such failure was the direct and proximate cause of the alleged injuries.

(*id.*, First, Fourth, Fifth and Eight Affirmative Defenses).

Mahmood filed an answer on November 14, 2017 (*see* NYSCEF Doc. # 46).

Mahmood alleged seven affirmative defenses, including but not limited to:

> If the Plaintiff sustained any injuries and/or damages at the time and place alleged in the complaint, the Plaintiff assumed the risk inherent in the activity in which Plaintiff was then engaged and further such injuries and/or damages were caused by reason of the culpable conduct and/or negligence of the Plaintiff without any negligence on the part of the Defendant contributing thereto.
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> Plaintiff did not use the seat belts provided, and the injuries claimed to have been sustained were caused by the lack of use of the seat belts, and Plaintiff did not avail herself of the protective device to mitigate the injuries, and further, by not fastening the available automobile seat belts, acted unreasonably and disregarded her own best interests and thus contributed to the happening of the injuries.
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> Plaintiff failed to take all reasonable measures to reduce, mitigate and/or minimize the damages alleged.

(*id.*, First, Third and Sixth Affirmative Defenses.).

A note of issue and certificate of readiness for trial has not yet been filed.

Discussion

Summary Judgment

"[T]he proponent of a summary judgment motion 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" (*Stonehill Capital Mgmt., LLC v. Bank of the W.*, 28 N.Y.3d 439, 68 N.E.3d 683 [2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, 501 N.E.2d 572 [1986]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Chiara v. Town of New Castle*, 126 A.D.3d 111, 2 N.Y.S.3d 132 [2 Dept., 2015], citing *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 965 N.E.2d 240 [2012]; *see also Lee v. Nassau Health Care Corp.*, 162 A.D.3d 628, 78 N.Y.S.3d 239 [2 Dept., 2018]). Once a moving party has made a prima facie showing of its entitlement to summary judgment, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*see Fairlane Fin. Corp. v. Longspaugh*, 144 A.D.3d 858, 41 N.Y.S.3d 284 [2 Dept., 2016], citing *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320, *supra; see also Hoover v. New Holland N. Am., Inc.*, 23 N.Y.3d 41, 11 N.E.3d 693 [2014]).

"A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries" (*Sanders v. Sangemino*, 185 A.D.3d 617, 124 N.Y.S.3d 820 [2 Dept., 2020], *lv.*

dismissed, 35 N.Y.3d 1110, 157 N.E.3d 679 [2020], quoting *Tsyganash v. Auto Mall Fleet Mgt., Inc.,* 163 A.D.3d 1033, 83 N.Y.S.3d 74 [2 Dept., 2018]). In the instant case, plaintiff failed meet her burden and establish entitlement to summary judgment on the issue of liability. The evidence submitted by plaintiff failed to eliminate any triable issues of fact; it is unclear whether East 82 Street had one or two moving lanes of traffic and whether Mahmood's vehicle was moving at the time of the accident.

Accordingly, that branch of plaintiff's motion for summary judgment on the issue of liability is denied.

Plaintiff further moves for summary judgment, dismissing defendants' affirmative defenses alleging comparative negligence. "A plaintiff is no longer required to show freedom from comparative fault in order to establish his or her prima facie entitlement to judgment as a matter of law on the issue of a defendant's liability" (*Sooklall v. L. Morisseav-Lafague*, 185 A.D.3d 1079, 128 N.Y.S.3d 266 [2 Dept., 2020], citing *Rodriguez v. City of New York,* 31 N.Y.3d 312, 76 N.Y.S.3d 898 [2018]). "Even though a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence and culpable conduct on the part of the plaintiff (*Sapienza v. Harrison,* -- A.D.3d --, 2021 N.Y. Slip Op. 08210 [2 Dept., 2021], *citing Higashi v. M & R Scarsdale Rest., LLC,* 176 AD3d 788, 789; *Wray v. Galella,* 172 AD3d

1446, 1447). "The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers" (*Romain v. City of New York*, 177 A.D.3d 590, 112 N.Y.S.3d 162 [2 Dept., 2019]).

In the instant case, plaintiff met her burden and established that she was an innocent passenger, free from comparative fault in the accident. Plaintiff provided her testimony that she was a rear passenger, wearing her seatbelt, and looking at her phone when the accident occurred. In opposition, defendants failed to raise a triable issue of fact. Defendant Mahmood's contention that plaintiff was a proximate cause of the accident because she was talking at the time of the accident is without merit (*see* NYSCEF Doc. # 51 at para 7). As an initial matter, although Clarke testified that she and the passengers in her car were engaged in a conversation, she later clarified that she was speaking to the front passenger who was giving her directions, not to plaintiff. Further, even assuming that plaintiff was engaged in conversation, such an allegation alone does not rise to the proximate cause of the accident (*see generally Romain v. City of New York*, 177 A.D.3d 590, *supra; cf. Mallory v. City of New York*, 69 Misc. 3d 640, 130 N.Y.S.3d 263 [Sup. Ct., 2020] [where "Plaintiff testified at an EBT that she may have distracted the driver by saying 'something smart we were laughing' just prior to the accident").

Further, Clarke's contention that the motion to dismiss the affirmative defenses is premature is without merit (*see* NYSCEF Doc. # 52 at ¶ 3). EBT testimony of all parties

was provided herein. Here, "the defendants failed to offer an evidentiary basis to suggest that additional discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the plaintiff" (*Gooden v. EAN Holdings, LLC*, 189 A.D.3d 1552, 135 N.Y.S.3d 303 [2 Dept., 2020]).

Conclusion

Accordingly, the plaintiff's motion for summary judgment is granted to the extent that plaintiff is not comparatively negligent in the action. Mahmood's first, third and sixth affirmative defenses are stricken. Clarkes first, fourth, fifth and eight affirmative defenses are stricken.

The foregoing constitutes the decision and order of this Court.

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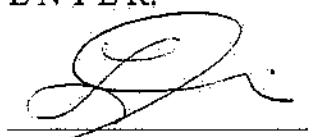

Hon. Lara J. Genovesi
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