SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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MARISOL SOTO and EUSTAQUIO LOSADO,

Plaintiffs,

-against- Index No.: 22533/2019E

JESSICA ORTIZ,

Defendant.

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HON. BEN R. BARBATO:

The following two Motions are decided in this same Order: The Motion by Plaintiff on the Counterclaim EUSTAQUIO LOSADO (Seq #5) for summary judgment in his favor dismissing the Defendant's Counterclaim as against him, and for related relief; and the Motion by Plaintiffs, MARISOL SOTO and EUSTAQUIO LOSADO (Seq #7), for partial summary judgment in their favor, as against Defendant, on the issue of liability, and for related relief.

This is an action to recover damages for alleged personal injuries sustained by Plaintiffs in a motor vehicle accident which occurred on, or about, December 15, 2017, at about 6:00 p.m., on Marion Avenue, near its intersection with 198th Street, in the Bronx, New York. The vehicle operated and owned by Defendant, JESSICA ORTIZ, was involved in a collision with the vehicle operated and leased by Plaintiff LOSADO, in which Plaintiff SOTO was a passenger.

The submissions include the pleadings, the Police Accident Report, and the depositions transcripts of Plaintiff LOSADO, Plaintiff SOTO, and Defendant ORTIZ.

In her Answer, Defendant ORTIZ asserts a Counterclaims against Plaintiff LOSADO, seeking a "proportionate contribution and/or indemnity on the basis of the responsibility of the plaintiff". Also, ORTIZ' second affirmative defense alleges culpable conduct on the part of the Plaintiff; and third affirmative defense asserts the emergency doctrine. The Note of Issue was filed in May 2021.

Alleged Facts:

According to Plaintiff LOSADO, he was traveling on Marion Avenue, in the evening. He stopped at a Stop sign, for about five to ten seconds, near the intersection of 198th Street, when Defendant rear-ended his vehicle. There was one heavy impact. At the time of the accident, it was snowing; and there was snow on the road. It had commenced snowing about 30 to 40 minutes prior to the accident. (Plaintiff LOSADO'S deposition, dated September 23, 2020).

Plaintiff SOTO testified that she was a backseat passenger in the vehicle driven by her cousin, LOSADO. Consistent with LOSADO, Plaintiff SOTO testified that they were stopped at the Stop sign, on Marion Avenue, at its intersection with 198th

Street, when their vehicle was hit in the back by Defendant ORTIZ' vehicle. (Plaintiff SOTO's deposition, dated September 15, 2020).

Defendant ORTIZ stated that, as she approached the subject intersection, she saw Plaintiff's small black vehicle stopped at the Stop sign with its brake lights illuminated. ORTIZ stopped behind Plaintiff's vehicle. Then, Plaintiff proceeded to move past the corner, and commenced turning left. At that point, ORTIZ was about five feet behind Plaintiff's vehicle. ORTIZ was asked the following question, and gave the following answer:

> "**Q**. What happened at that time?
> **A**. When he moved, as I was moving down to stop at the stop sign myself, he hit the brakes in front of me, by the time I realized his brakes, that is when I hit my brakes but my car skid just a little bit but managed to tap him in the middle of it [*sic*]".

ORTIZ alleges that her vehicle slipped on ice prior to the impact. Since it was snowing, ORTIZ' windshield wipers were turned on. (Defendant ORTIZ' deposition, dated May 17, 2021).

In the Police Accident Report, the accident is described as follows:

> "AT T/P/O, DRIVER OF VEH 1 [LOSADO] STATES HE WAS TRAVELING S/B ON MARION AVENUE AND STOPPED AT INTERSECTION. HE CONTINUED THROUGH INTERSECTION WHEN ANOTHER VEH ON 198th CUT ACROSS HIM. VEH 1 [LOSADO] STOPPED. HE STATES VEH 2 [ORTIZ] REAR ENDED HIM. DRIVER OF VEH 2 [ORTIZ] STATES VEH 1 [LOSADO] STOPPED SUDDENLY AND

> DUE TO ICE AND SNOW ON THE ROAD [, ORTIZ] SLID INTO BACK OF VEH 1 [LOSADO]. ROAD CONDITIONS ARE HAZANDOUS AT TIME OF REPORT. UNPLOWED AND ICE".

Applicable Law/Analysis:

Vehicle and Traffic Law § 1129(a) "Following too closely", provides that: "The 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."

> "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 (see Tutrani v County of Suffolk, 10 NY3d 906, 908, 891 NE2d 726, 861 NYS2d 610 [2008] ... Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action"

(*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

A "defendant driver's assertion that plaintiffs' vehicle stopped abruptly does not explain why defendant driver failed to maintain a safe distance, and is insufficient to constitute a nonnegligent explanation" (*Urena v GVC Ltd.*, 160 AD3d 467, 467 [1st Dept 2018]).

Where, as here, a plaintiff was an innocent passenger, and "there is no

basis for finding that plaintiff ... did anything to cause the accident or could have prevented it", the Court properly found no culpable conduct by a plaintiff passenger on the issue of liability (*Mello v Narco Cab Corp.*, 105 AD3d 634, 635 [1st Dept 2013]). "CPLR 3212 (g) permits the court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action" (*Garcia v Tri County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]).

Accordingly, Plaintiff SOTO made a *prima facie* showing of her entitlement to partial summary judgment in her favor, on her lack of culpable conduct, by her testimony that she was an innocent passenger; and, as to the liability of Defendant ORTIZ, by the testimony that ORTIZ' vehicle rear-ended LOSADO's vehicle, in which she was a passenger, while LOSADO's vehicle was stopped at a Stop sign.

Also, Plaintiff LOSADO made a prima facie showing of his entitlement to summary judgment in his favor on the issue of Defendant ORTIZ' liability, and to summary judgment dismissing Defendant's Counterclaim as against him, by the aforesaid testimony, wherein it is alleged, *inter alia*, that Defendant's vehicle rear-ended LOSADO's vehicle while it was stopped at a Stop sign. In this regard, an "innocent ... driver exists in a case where the ... driver did not contribute to the

happening of the accident in any way. A typical example is the case at bar where ... [the] driver, while stopped, was rear-ended by the following driver" [emphasis added] (*Oluwatayo v Dulinayan*, 142 AD3d 113, 119 [1st Dept 2016]).

Thus, the burden shifted to Defendant ORTIZ to advance a non-negligent explanation for the accident.

However, Defendant did not make the requisite showing. ORTIZ essentially alleges that Plaintiff's vehicle had stopped suddenly ahead of her; and that ORTIZ' vehicle skidded on ice and so was unable to stop prior to striking the rear of Plaintiff's vehicle. However, in this regard, in a case having similarities to the instant matter, where there were icy road conditions, the Court held that:

> "Although ... defendants contend that icy road conditions that day provide a valid, non-negligent explanation for why the accident occurred ... a driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions ... Furthermore, defendants' reliance on the emergency doctrine is misplaced, since that defense is unavailable where, as here, defendant driver was aware of inclement weather conditions and should have properly accounted for them"

(*Matos v Sanchez*, 147 AD3d 585, 586 [1st Dept 2017]; *see Caristo v Sanzone*, 96 NY2d 172, 175 [2001]).

In another case where a defendant alleged that the snow created an emergency condition, the Court stated as follows:

> "Defendants' explanation that the taxi slipped on ice was inadequate because a driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions (see LaMasa v Bachman, 56 AD3d 340, 869 NYS2d 17 [1st Dept 2008]). Defendants provide alternative explanations for the accident, including that plaintiff's vehicle stopped short, and that the snow created an emergency condition. ... these defenses are insufficient to rebut the presumption of defendants' negligence. Even if plaintiff's vehicle had stopped short in front of defendants' taxi, defendant driver failed to provide evidence that he maintained a safe distance between his cab and plaintiff's vehicle. Additionally, the emergency doctrine is inapplicable because defendant driver was aware of the icy road conditions and should have accounted for them properly (see Renteria v Simakov, 109 AD3d 749, 972 NYS2d 15 [1st Dept 2013]; Corrigan v Porter Cab Corp, 101 AD3d 471, 955 NYS2d 336 [1st Dept 2012])"

(*Williams v Kadri*, 112 AD3d 442, 442-443 [1st Dept 2013]).

The Court of Appeals held that a defendant who lost control of his vehicle was not entitled to a jury charge on the emergency doctrine where, "at the time of the accident the temperature was well below freezing and it had been snowing, raining and hailing for at least two hours. As such, there was no reasonable view of the evidence that would lead to the conclusion that the ice and slippery road conditions on the ... slope were sudden and unforeseen" (*Caristo v Sanzone*, 96 NY2d 172, 175 [2001]).

Further, the Court of Appeals has established that "that to obtain partial summary judgment on defendant's liability he [plaintiff] does not have to

demonstrate the absence of his own comparative fault" (*Carlos Rodriguez v City of NY*, 31 NY3d 312, 323 [2018]).

Accordingly, the Motion by Plaintiffs SOTO and LOSADO, for partial summary judgment in their favor on liability, is granted, to the extent that Defendant ORTIZ is found liable for the happening of the accident.

The Motion by Plaintiff on the Counterclaim LOSADO for summary judgment in his favor, dismissing Defendant ORTIZ' Counterclaim seeking contribution from LOSADO, is granted to the extent that LOSADO is deemed free from comparative fault for the happening of this rear-end collision; and ORTIZ' second affirmative defense on Plaintiff's culpable conduct, and third affirmative defense, on the emergency doctrine, are dismissed.

However, this Court makes no determination as to other issues herein, including, but not limited to, whether Plaintiffs' alleged injuries were proximately caused by the negligence of the Defendant; and whether Plaintiffs sustained "serious injuries" within the meaning of the Insurance Law.

This constitutes the decision and order of this Court.

Dated: DEC 2 1 2021, 2021

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