Castano v Mateo
2021 NY Slip Op 33060(U)
November 30, 2021
Supreme Court, Bronx County
Docket Number: Index No. 32911/2019E
Judge: Veronica G. Hummel
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 31
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CHRISTINE CASTANO,

Index №. 32911/2019E

-against-

Hon. VERONICA G. HUMMEL

JOSE EDER MATEO, PETER FABREGAS, and
OMONIYI JOHNSON ADEDARE

Acting Justice Supreme Court
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The following papers were read on this motion (NYSCEF Seq. No. 2), for Summary Judgment Liability, noticed Jan 4, 2021 & submitted March 26, 2021.

Notice of Motion–Affirmation and Exhibits	NYSCEF Doc No(s). 29-41
Affirmation in Opposition	NYSCEF Doc No(s). 43

HON. VERONICA G. HUMMEL:

Plaintiff CHRISTINE CASTANO, moves [Mot. Seq. 2] for partial summary judgment in her favor on liability as an innocent passenger against all defendants JOSE EDER MATEO, PETER FABREGAS and OMONIYI JOHNSON ADEDARE; and for related relief.[1]

This is an action to recover damages for alleged personal injuries sustained by Plaintiff in a motor vehicle accident, which occurred on September 26, 2019, at about 4:26 p.m., near the intersection of Franklin Avenue, and East 168th Street, in the Bronx, New York. Plaintiff was a passenger in the vehicle operated and owned by defendant Adedare, which came in contact with the vehicle operated and owned by Defendants Mateo and Fabregas, respectively.

In support of Plaintiff's Motion, the submissions include the pleadings, the affidavit of the Plaintiff, and the police accident report[2].

In opposition, Defendant Adedare's counsel submitted an affirmation.

[1] Plaintiff's motion for a default against defendants Mateo and Fabergas has been previously granted, thus this request for summary judgment against these same defendants is denied as moot.
[2] Plaintiff submits an uncertified police report which is not in admissible form and does not constitute competent evidence under the circumstances (*Dong v Cruz-Marte,* 189 AD3d 613 [1st Dept 2020]; *Yassin v Blackman*, 188 AD3d 62 [2d Dept 2020]).

Alleged Facts:

According to Plaintiff, she was a seat-belted passenger in the vehicle owned and operated by Defendant Adedare; and, as such, she did not contribute to the occurrence of the accident. Plaintiff describes the accident as follows:

> "I was traveling on Franklin Avenue, at or near its intersection with East 168th Street, Bronx, NY. The vehicle I was within approached an intersection and turned left, when all of a sudden it collided with a vehicle that was exiting a parking spot. The vehicle exiting the parking spot was operated by defendant JOSE EDER MATEO and owned by defendant PETER FABREGAS. It all happened very quickly but based on the way our vehicle collided with the other vehicle, and the impact I felt, it seemed like defendant OMONIYI JOHNSON ADERARE was traveling above the speed limit at the time of impact. It did not seem as if any brakes had been applied, as the force of impact was powerful … In addition, defendant OMONIYI JOHNSON ADERARE may have turned left prematurely. Defendant JOSE EDER MATEO may have also failed to wait for a clear path to safely leave his parking spot and may have failed to observe the roadway and/ or recognize the conditions of traffic existing at the time he backed out of his parking spot".

(*See* Plaintiff's Affidavit, dated November 6, 2020).

Applicable Law/Analysis:

Plaintiff as passenger

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]).In *Garcia v. Tri-County Ambulette Service, Inc.,* the court ruled that "plaintiff, as an innocent rear-seat passenger in one of the vehicles who cannot possibly be found at fault under either defendant's version of the accident is entitled to partial summary judgment." (*Id*. at 207).

Of note, there is a significant distinction between granting a plaintiff summary judgment on her lack of culpable conduct on liability and granting a plaintiff summary judgment on defendants' negligence (*Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept. 2016]). A grant of partial summary judgment against a defendant on liability in a negligence case is the equivalent of finding that the defendant owed the plaintiff a duty of care, the defendant breached that duty by its negligence, and such breach proximately caused the plaintiff injury (*Id.; Ortega v Liberty Holdings, LLC*, 111 AD3d 904, 905-906 [2d Dept 2013]). In contrast, a grant of partial summary judgment on the issue of the plaintiff's lack of fault or culpability is a much narrower finding. Such a finding merely establishes as a matter of law that the plaintiff is free of any negligence, as would be the case of an innocent passenger (*Campbell v Mincello,* 184 AD3d 412 [1st Dept 2020]). The pronouncement in *Garcia v Tri County Ambulette Serv., supra* stands only for the proposition that in motor vehicle negligence actions, an innocent plaintiff is entitled to a determination that she had no culpable conduct on the issue of liability irrespective of the unresolved issue of a defendant driver's negligence (*Oluwatayo v Dulinayan*, *supra*).

Here, it is undisputed that Plaintiff was a passenger in defendant's vehicle and there is no claim that Plaintiff contributed to causing the accident. As such, the part of the motion by Plaintiff seeking partial summary judgment on liability is granted to the extent that Plaintiff, as innocent passenger, is found free from culpable conduct for the happening of the accident. Likewise, any affirmative defenses based on culpable conduct and comparative negligence alleged against Plaintiff are dismissed (*Oluwatayo v Dulinayan*, *supra*).

Summary judgment against Defendant Adedare

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 (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Tsyganash v Auto Mall Fleet Management, Inc.,* 163 AD3d 1033 [2d Dept 2018]). A plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case (*see Rodriguez v City of New York, supra; Tsyganash v Auto Mall Fleet Management, Inc., supra*). A violation of the Vehicle and Traffic Law (VTL)

constitutes negligence *per se* (*Drummond v Perez*, 146 AD3d 645 [1st Dept 2017]; *see Davis v Turner*, 132 AD3d 603 [1st Dept 2015]; *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]).

Vehicle and Traffic Law § 1141 "Vehicle turning left" provides as follows: "The driver of a vehicle intending to turn to the left within an intersection … shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard".

Also, Vehicle and Traffic Law § 1111 "Traffic-Control signal indications" provides that:

> "(a) Green indications:
> 1. Traffic, except pedestrians, facing a steady circular green signal may proceed straight through or turn right or left unless a sign at such place prohibits either such turn. Such traffic, including when turning right or left, shall yield the right of way to other traffic lawfully within the intersection or an adjacent crosswalk at the time such signal is exhibited".

Further, Vehicle and Traffic Law § 1163 "Turning movements and required signals" provides that:

> "(a) No person shall turn a vehicle at an intersection unless the vehicle is in proper position upon the roadway as required in section eleven hundred sixty, or turn a vehicle to enter a private road or driveway, or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety".

Accordingly, Plaintiff made a *prima facie* showing of her entitlement to partial summary judgment on liability as against Defendant Adedare by her testimony that Defendant Adedare, in violation of the Vehicle and Traffic Law, prematurely made a left turn at the intersection while speeding, failed to yield the right of way, and failed to proceed in a safe manner-- resulting in the sudden collision with the other vehicle while it was pulling out of a parking spot.

Thus, the burden shifted to the defendant to set forth evidence to the contrary. Herein, however, Defendant Adedare, a person with knowledge of the relevant facts concerning the circumstances surrounding the happening of the accident, has not submitted his own affidavit or sworn testimony. In his Counsel's affirmation, there is merely a recitation of general principles. Without setting forth a non-negligent explanation for the accident, Defendant Adedare fails to make the requisite showing.

In a recent case addressing a similar issue, the Court stated that:

"Here, the plaintiff [movant] established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting her own affidavit which demonstrated, prima facie, that the defendant made a left-hand turn, without warning or signaling, when it was not reasonably safe to do so, directly into the path of the plaintiff's oncoming vehicle as it approached the intersection (see Vehicle and Traffic Law §§ 1141; 1163[a]; Giwa v Bloom, 154 AD3d 921; Sirlin v Schreib, 117 AD3d 819, 819-820). This evidence demonstrated that the defendant violated Vehicle and Traffic Law § 1141 by failing to yield the right of way to the plaintiff's [movant's] vehicle which was so close to the intersection at the time the defendant attempted to turn left"(Sapienza v Harrison, 191 AD3d 1028, 1030 [2d Dept 2021]).

As in *Sapienza*, in the case at bar, the other parties "did not submit an affidavit describing the events surrounding the accident which rebutted the version of events presented" by the moving party, and summary judgment is appropriately granted (*see Sapienza v Harrison*, *supra*).

Furthermore, it is well-established that where the submission on the part of the party opposing a summary judgment motion "consisted only of the bare affirmation of [his] ... attorney who demonstrated no personal knowledge of the manner in which the accident occurred [s]uch an affirmation by counsel is without evidentiary value and thus unavailing" (*Zuckerman v New York*, 49 NY2d 557, 563 [1980]). A motion for summary judgment on liability was properly granted, where, as here, in opposition to movant's "prima facie showing, defendants failed to submit any evidence to raise a triable issue of fact, and instead relied solely upon ... the arguments of counsel ... [who] claimed no personal knowledge of the accident, his affirmation has no probative value ... [D]efendants have personal knowledge of the facts, yet "failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact" " (*Thompson v Pizzaro*, 155 AD3d 423, 423 [1st Dept 2017]). Hence the affirmation of counsel summitted in opposition to the motion is insufficient to generate a question of fact warranting the denial of the motion.

Conclusion:

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion by Plaintiff CASTANO [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order granting partial summary judgment in her favor based on her lack of culpable conduct since she was an innocent passenger is granted and the affirmative defenses based on culpable conduct are dismissed; and it is further

ORDERED that the part of the motion by Plaintiff [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order granting partial summary judgment on issue of the liability as against Defendant ADEDARE is granted to the extent that Defendant Adedare is found negligent and his negligence was a substantial factor in causing the accident; and it is further

ORDERED that the part of the motion by Plaintiff [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order granting partial summary judgment on issue of the liability as against Defendants Mateo and Fabergas is denied as moot as summary judgment against said defendants was previously granted; and it is further

ORDERED that the Court makes no determination as to other issues herein, including whether Plaintiff's alleged injuries were proximately caused by the negligence of Defendants; the percentage of comparative fault, if any, borne by the Defendants; and whether Plaintiff sustained a "serious injury" within the meaning of the Insurance Law.

This constitutes the decision and order of this Court.

Dated: November 30, 2021 Hon. s/Hon. Veronica G. Hummel/signed 11/30/2021

VERONICA G. HUMMEL, A.J.S.C.

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1. CHECK ONE.................................. √ CASE STILL ACTIVE

2. PLAINTIFF'S MOTION IS .... √ GRANTED TO THE EXTENT