McLean v Maldonado
2021 NY Slip Op 33604(U)
January 4, 2021
Supreme Court, Bronx County
Docket Number: Index No. 20379-2020E
Judge: Veronica G. Hummel
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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 BRONX IAS PART 31

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LINDA MCLEAN,

Plaintiff

Index No. 20379-2020E
DECISION/ORDER
Motion Seq. 2

-against -

ANA Y. MALDONADO and FELIX M. ROMAN,

Defendants.

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FELIX MANUEL ROMAN,

Plaintiff,

-against-

LINDA ELAINE MCLEAN,

Defendant.

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The decision herein is made upon consideration of all papers filed by the parties in NYSCEF relevant to the motion of plaintiff LINDA MCLEAN (plaintiff) (Seq. No. 2) seeking an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment on the issue of liability and striking defendants ANA Y. MALDONADO and FELIX M. ROMAN'S (defendants) first affirmative defense (comparable negligence), second affirmative defense (seat belt), fourth affirmative defense (assumption of risk), and fifth affirmative defense (failure to state a cause of action).

This is a personal injury action arising out of a two-vehicle rear-end accident that occurred on March 16, 2019, at approximately 8:30 p.m. in the southbound lane of I-87 (the Accident). At the time of the Accident, plaintiff was driving her vehicle southbound and non-party Gregory Thorpe was a passenger in the front seat of plaintiff's car. Plaintiff's vehicle was hit in the rear by a car driven by defendant Roman and owned by defendant Maldonado. Plaintiff allegedly suffered serious injuries from the impact.

In support of the motion, plaintiff submits an attorney affirmation, copies the transcripts of the full depositions of the parties, an affidavit from a non-party Thorpe, and a material statement of facts.

In opposition to the motion, defendants submit an attorney affirmation, a counterstatement

of facts, and an uncertified copy of the police report.

Plaintiff testified that her vehicle was traveling southbound on I-87 and the Accident occurred as plaintiff's vehicle just passed the exit for 230th Street. At the time of the Accident, plaintiff was wearing a seat belt. Plaintiff's vehicle was stopped in traffic for a matter of seconds, when there was a heavy impact to the rear of the car. The impact from being hit by defendants' vehicle forced her car forward. Plaintiff testified that plaintiff's vehicle was not in reverse at the time of the Accident, and plaintiff did not attempt to exit I-87 before the impact.

Plaintiff submits an affidavit from non-party Thorpe. Thorpe states that he was a front seat passenger in plaintiff's vehicle. He noticed traffic accumulating in the southbound direction near the exit for I-95/The George Washington Bridge. As a result of the traffic, plaintiff brought the vehicle to a gradual complete stop in the center lane. After the vehicle was stopped for approximately 3-4 seconds, it was struck in the rear by defendants' car. The intention was to stay in the middle lane and continue on to Manhattan. The affiant avers that plaintiff was not backing up in an attempt to enter an exit.

Defendant Roman testified that he was proceeding on I-87 at the speed limit when he approached the 230th street exit. He noticed a car going in reverse with the reverse lights on, and no brake lights. He pushed the brakes and attempted to stop. He almost came to a stop before impact, but plaintiff's car was moving toward him in reverse, causing the collision. When he first saw plaintiff's vehicle, four to six seconds before impact, it was reversing. There were vehicles in the lanes to his right and left. He was almost at a complete stop when plaintiff reversed into his vehicle while travelling over 15 miles per hour. The impact was hard. He told the police officer that plaintiff had been in reverse.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon such a showing, the burden then shifts to the nonmovant to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 503 (2012).

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." *Urena v. GVC Ltd.*, 160 A.D.3d 467, 467 (1st Dep't 2018) (quoting *Matos v. Sanchez*, 147 A.D.3d 585, 586 (1st Dep't 2017)); *Santos v. Booth*, 126 A.D.3d 506, 506 (1st Dep't 2015); *Woodley v. Ramirez*, 25 A.D.3d 451, 452 (1st Dep't 2006). Under New York Vehicle and Traffic Law ("VTL") § 1129(a), "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 vehicle and traffic upon the condition of the highway." In other words, a driver must maintain a safe distance between his vehicle and the one in front of her. A violation of VTL § 1129(a) is *prima facie* evidence of negligence, and "[t]his rule has been applied when the front vehicle stops suddenly in slow-moving traffic." *Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216, 223-24 (1st Dep't 2007) (quoting *Johnson v. Phillips*, 261 A.D.2d 269, 271 (1st Dep't 1999)); *Mascitti v. Greene*, 250 A.D.2d 821, 822 (2d Dep't 1998). In a rear-end collision, there is a presumption of non-negligence of the driver of the lead vehicle. *See Soto-Maroquin v. Mellet*, 63 A.D.3d 449, 450 (1st Dep't 2009).

Applying these legal principles to the submitted evidence, plaintiff sets forth a *prima facie* case of negligence on the part of defendants based on plaintiff's and the non-party's testimony that plaintiff was stopped in traffic when the defendant driver rear-ended plaintiff's car. Consequently, defendants are required to come forward with evidence of a non-negligent explanation for the collision in order to rebut the inference of negligence.

In opposition, defendants generate an issue of fact warranting the denial of the motion. Defendant Roman's testimony that plaintiff was backing up on an interstate highway, in violation of the VTL, causing his vehicle to hit plaintiff's car, creates an issue of fact as to whether the defendant driver has a non-negligent explanation for the collision. The testimony that plaintiff made a stop on an expressway and began to back up to reach an exit, even under traffic conditions, creates an issue of fact as to whether the defendant's actions were a contributing cause of the accident. *see Taveras v. Ortiz*, 192 A.D.3d 611 (1st Dep't 2021). As for the differing accounts as to the constellation of circumstances that gave rise to the Accident, the resulting issues of credibility are not "appropriately resolved on a motion for summary judgment". *Santos v. Temco Service Industries, Inc.*, 295 A.D.2d 218 (1st Dep't 2002); *see Delarosa v. Soler*, 2021 WL 2696830 (Sup. Ct. Bronx County 2021); *Nunez v. Tucker*, 2021 WL 2696870 (Sup. Ct. Bronx County 2021). Moreover, in light of these questions of fact, plaintiff's motion to dismiss the affirmative defense based on contributory negligence is denied.

In contrast, plaintiff's showing that plaintiff was wearing a seat belt at the time of the Accident is uncontradicted, and therefore the second affirmative defense is dismissed. Furthermore, the affirmative defense of assumption of risk is inapplicable to the circumstances presented in this motor vehicle case, and is therefore dismissed. *See Ashbourne v City of New York,* 82 A.D.3d 461 (1st Dep't 2011). Finally, defendant does not oppose the dismissal of the defense based on the failure to state a cause of action, and the defense is also dismissed.

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

ORDERED that the part of the motion of plaintiff LINDA MCLEAN (plaintiff) (Seq. No. 2) that seeks an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment on the issue of liability and striking defendants ANA Y. MALDONADO and FELIX M. ROMAN'S first affirmative defense (comparable negligence) is denied; and it is further

ORDERED that the part of the motion of plaintiff (Seq. No. 2) that seeks an order, pursuant to CPLR 3212, dismissing the defendants' second affirmative defense (seat belt), fourth affirmative defense (assumption of risk), and fifth affirmative defense (failure to state a cause of action) is granted and said defenses are dismissed; and it is further

ORDERED that the Clerk shall mark the motion (Seq. No. 2) disposed in all court records.

This constitutes the decision and order of the Court.

Dated: January 4, 2021 **Hon.** *s/Hon. Veronica G. Hummel/signed 01/04/2022*
VERONICA G. HUMMEL, A.J.S.C.

1.	CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY	☒ CASE STILL ACTIVE	
2.	MOTION IS.....	☐ GRANTED DENIED	x GRANTED IN PART	☐ OTHER
3.	CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE
		☐ FIDUCIARY APPOINTMENT		☐ REFEREE APPOINTMENT
		☐ CONVERT TO ELECTRONIC FILING		