SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

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EDGARDO ROMANO,

Plaintiff,

-against-

EAN HOLDINGS LLC, et al.,

Defendants.
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Index No. 718263/19

Motion
Date: June 14, 2021

M# 3

The following papers numbered EF 95-109 read on this motion by the plaintiff for summary judgment on the issue of liability and striking defendant Robindranath Maighoo's first and third affirmative defenses alleging culpable conduct, fourth affirmative defense alleging failure to use a seat belt, fourteenth affirmative defense alleging assumption of risk and fifteenth affirmative defense alleging that defendant was confronted with an unexpected event.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits....	EF 95-104
Affirmation in Opposition Exhibits.....	EF 106-109
Affirmation in Opposition.....	EF 21-22
Stipulation	EF 23

Upon the foregoing papers it is ordered that this motion by the plaintiff for summary judgment on the issue of liability and striking certain affirmative defenses is decided as follow:

Plaintiff allegedly sustained serious injuries as the result of a motor vehicle accident with defendants' vehicle on the eastbound lower level of the George Washington Bridge on October 20, 2018. Plaintiff commenced the instant action to recover damages for negligence. Plaintiff now moves for summary judgment on the issue of liability and striking certain affirmative defenses.

It is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on the operator of the moving vehicle to come forward with an adequate, non-negligent explanation for the accident. (*see Finney v Morton*, 127 AD3d 1134, 1134 [2d Dept 2015]; *Foti v Fleetwood Ride, Inc.*, 57 AD3d 724, 724 [2d Dept 2008]; *Ahmad v Grimaldi*, 40 AD32d 786, 787 [2d Dept 2007]; *Emil Norsic & Son, Inc. v L.P. Transp., Inc.*, 30 AD3d 368, 368 [2d Dept 2006].) If the operator of the moving vehicle cannot come forward with evidence to rebut the inference of negligence, the operator of the stationary vehicle is entitled to summary judgment. (*see Dileo v Greenstein*, 281 AD2d 586, 586 [2d Dept 2001]; *Lopez v Minot*, 258 AD2d 564, 564 [2d Dept 1999].)

In the matter at hand, the plaintiff made a prima facie showing of entitlement to judgment as a matter of law. In his affidavit, plaintiff avers that while he was on the George Washington Bridge, he began to slow his vehicle down and come to a stop due to traffic conditions. Plaintiff further avers that within five to ten seconds of slowing down and stopping, his vehicle was struck in the rear by defendants' vehicle. According to plaintiff, as a result of the impact, his vehicle was propelled forward approximately 10 feet. Plaintiff also states that the tail and brake lights were properly working prior to the accident, and the defendant-operator was completely at fault for the happening of the accident.

In opposition, defendant Meighoo submits sufficient evidence raising a triable issue of fact. In his affidavit, defendant avers that prior to the accident, plaintiff's vehicle switched from the right lane to the center lane, directly in front of his vehicle, without signaling that he was changing lanes. Defendant further states that he then pressed his foot on the brake but was unable to avoid an impact with the plaintiff's vehicle. Such testimony constitutes a non-negligent explanation for the accident and sufficiently rebuts the presumption of negligence established by the plaintiff. (*see Markesinis v Jaquez*, 106 AD3d 961, 961 [2d Dept 2013]; *Scheker v Brown*, 85 AD3d 1007, 1007 [2d Dept 2011].)

In view of this determination, the branch of the motion seeking summary judgment dismissing the affirmative defenses of culpable conduct is denied.

Plaintiff also seeks summary judgment dismissing the fourth affirmative defense of failure to use a seat belt. Plaintiff has failed to make a prima facie showing of his entitlement to

judgment as a matter of law dismissing this affirmative defense. In his affidavit, plaintiff fails to aver whether he was wearing a seat belt at the time of the incident.

The fourteenth affirmative defense alleges assumption of risk. Under the doctrine of primary assumption of risk, a voluntary participant in a sporting or recreational activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. (*Simone v Doscas*, 142 AD3d 494 [2d Dept 2016]; *Tinto v Yonkers Bd. of Educ.*, 139 AD3d 712, 712 [2d Dept 2016].) However, motorists traveling through public streets, as a general rule, do not assume the risk of other motorists negligently striking their vehicle. (*Webb v Scharf*, 191 AD3d 1353 [4th Dept 2021]; *see Custodi v Town of Amherst*, 20 NY3d 83, 89 [2012].)

The fifteenth affirmative defense alleges that defendant was confronted with an unexpected event. This affirmative defense refers to the emergency doctrine. "Under the emergency doctrine, when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context." (*Marks v Robb*, 90 AD3d 863, 864 [2d Dept 2011][internal quotation marks omitted]; *see Parastatidis v Holbrook Rental Ctr., Inc.*, 95 AD3d 975, 976 [2d Dept 2012]; *Evans v Bosl*, 75 AD3d 491, 492 [2d Dept 2010]; *Jones v Geoghan*, 61 AD3d 638, 639 [2d Dept 2009].) The existence of an emergency and the reasonableness of the party's response to it generally present issues of fact. (*Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]; *Pavane v Marte*, 109 AD3d 970, 971 [2d Dept 2013].)

Here, the admissible evidence raises an issue of fact as to whether defendant was faced with a sudden emergency with little or no time for thought. (*see Freder v Costello Indus., Inc.*, 162 AD3d 984, 986 [2d Dept 2018].)

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

The branch of the motion by the plaintiff for summary judgment dismissing the first and third affirmative defenses of culpable conduct is denied.

The branch of the motion by the plaintiff for summary

judgment dismissing the fourth affirmative defense is granted, and the fourth affirmative defense of failure to use a seat belt is dismissed.

The branch of the motion by the plaintiff for summary judgment dismissing the fourteenth affirmative defense is granted, and the fourteenth affirmative defense alleging assumption of risk is dismissed.

The branch of the motion by the plaintiff dismissing the fifteenth affirmative defense of the emergency doctrine is denied.

Dated: September 24 , 2021

CARMEN R. VELASQUEZ, J.S.C.