Yonghong Xia v Zhao Xian Zeng
2021 NY Slip Op 34023(U)
December 27, 2021
Supreme Court, Queens County
Docket Number: Index No. 707164/2020
Judge: Maurice E. Muir

Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

YONGHONG XIA,

Plaintiff,

-against-

ZHAO XIAN ZENG, LI TAN CONSTRUCTION CORP., PAUL GORNIE BRIGGS, ECCO III ENTERPRISE INC.,

Defendants.

IAS Part - 42

Index No.: 707164/2020

Motion Date: 8/19/21

Motion Cal. No. 18

Motion Seq. No. 2

The following electronically filed ("EF") documents read on this motion by Yonghong Xia ("Mr. Xia" or "plaintiff") seeking an order: (a) pursuant to CPLR § 3212, granting plaintiff summary judgment on liability; (b) adjudicating that plaintiff is 100% not liable, as an innocent passenger, for the subject crash; (c) striking defendants Zhao Xian Zeng ("Zang") and Li Tan Construction Corp.'s ("Tan Construction") Fourth, Fifth, and Eleventh affirmative defenses of comparative negligence, seat belt usage, and emergency doctrine; (d) striking defendants Paul Gornie Briggs ("Mr. Briggs") and ECCO III Enterprise Inc.'s ("ECCO") Second affirmative defense of comparative negligence; and (e) granting such other and further relief as to this Court may deem just and proper. Moreover, Li Tan Construction Corp. and Zhao Xian Zeng (collectively, the "cross-movants") cross-move: a) pursuant to CPLR § 3212 granting them summary judgment and dismissing the complaint and any cross-claims on the grounds that no liability exists against the moving defendants; and b) granting such other and further relief as to this Court may deem just and proper.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits-Service.....	EF 25 - 35
Affirmation in Opposition-Exhibits-Service.....	EF 36 - 42

Notice of Cross Motion-Affirmation-Exhibits-Service.....	EF 44 - 50
Affirmation in Opposition-Exhibits-Service.....	EF 51 - 55
Plaintiff's Reply Affirmation.....	EF 56
Li Tan Construction's Reply Affirmation.....	EF 57

Upon the foregoing papers it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action for damages for personal injuries allegedly sustained by Mr. Xia in a motor vehicle collision. On June 10, 2020, the plaintiff commenced the instant action against the defendants. On September 16, 2020, issue was joined by Li Tan Construction Corp. ("Li Tan"), who interposed an answer with thirteen (13) affirmative defenses (e.g., culpable conduct, assumption of risk, seatbelt law, mitigate damages, emergency doctrine, etc.) and a cross claim against the co-defendants. Moreover, on or about January 6, 2021, the cross-movants interposed an answer with five (5) affirmative defenses (e.g., comparative negligence, assumption of risk, and serious injury, etc.) and a crossclaim against Zhao Xian Zeng and Li Tan Construction Corp.

I. *Plaintiff's Summary Judgment Motion on the Issue of Liability*

Now, the plaintiff seeks the above-described relief. In support of the instant motion, the plaintiff avers that on May 3, 2019, at approximately 7:14 a.m., he was a passenger in a van owned by Li Tan Construction Corp. and operated by Mr. Zeng that was traveling southbound on the Van Wyck Expressway near 72nd Avenue in the County of Queens, City and State of New York, when the pick-up truck, owned by ECCO and operated by Mr. Briggs, struck the rear of the van that plaintiff was occupying ("subject accident"). Moreover, the plaintiff alleges that at the time of the subject accident, he was neither engaged in conversation with Mr. Zeng nor did he instruct Mr. Zeng regarding where to go or how to operate the van.

It is well settled law that "[t]he 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 AD3d 590 [2d Dept 2019], citing CPLR § 3212(g); *Jung v. Glover,* 169 AD3d 782 [2d Dept 2019]; *Phillips v. D&D Carting Co., Inc.,* 136 AD3d 18 [2d Dept 2015]; *Anzel v. Pistorinoi,* 105 AD3d 784 [2d Dept 2013]; *Medina v. Rodriguez*, 92 AD3d 850 [2d Dept 2012]; *Silberman v. Surrey Cadillac Limousine Serv.*, 109 AD2d 833 [2d Dept 1985]). Here, the plaintiff made a *prima facie* showing of entitlement to summary judgment on his motion. Moreover, the defendants failed to raise a triable issue of fact. (*Rodriquez v. City of New York*,

31 NY3d 312 [2018]; *Alvarez v. Prospect Hosp.*, 68 NY2d 320 [1986]; *see also Balladares v. City of New York*, 177 AD3d 942 [2d Dept 2019]). It is uncontroverted that the plaintiff was an innocent passenger in Li Tan Construction's van, which was driven by Mr. Zeng. Neither driver submitted an affidavit asserting that the plaintiff engaged in culpable conduct, which contributed to the happening of the subject accident. (*see Phillips v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]; *Lopez v. Suggs*, 186 AD3d 589 [2d Dept 2020]). Moreover, it is well settled law that to be entitled to summary judgment on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault in establishing his or her prima facie case. (*see Rodriquez v. City of New York*, 31 NY3d 312 [2018]; *Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]).

Furthermore, that branch of the plaintiff's motion to strike Zhao Xian Zeng and Li Tan Construction Corp.'s, Fourth, Fifth and Eleventh affirmative defenses and to strike Paul Gornie Briggs and ECCO III Enterprise Inc.'s Second affirmative defense is granted in part. Pursuant to CPLR § 3211(b), it provides that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense'" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]). On a motion pursuant to CPLR § 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR § 3211(a)(7), and the factual assertions of the defense will be accepted as true. (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). Here the courts finds that the defendants' affirmative defenses based upon comparative negligence, contributory negligence, assumption of risk, plaintiff's culpable conduct and/or the emergency doctrine must be dismissed, because said defenses lack merit. (*see New York Commercial Bank v. J. Realty F Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Bosco Credit V Trust Series 2012-4 v. Johnson*, 177 AD3d 561 [1st Dept 2019]).

II. *Li Tan Construction Cross Motion for Summary Judgment*

Furthermore, Li Tan Construction Corp. and Mr. Zeng cross-move, pursuant to CPLR § 3212, for summary judgment dismissing the complaint and all cross claims on the grounds that that no liability exists against the moving defendant for the occurrence of the incident which gave rise to this action. In particular, the cross-movants argue that while Mr. Zeng was traveling southbound on the Van Wyck Expressway near 72nd Avenue in the County of Queens, City and State of New York, Mr. Briggs, struck his vehicle in the rear. As such, the cross-movants contend that they did not cause or contribute to the happening of the subject accident. In opposition, co-defendants, Paul Gornie Briggs and ECCO III Enterprise Inc., argue that "[t]here are questions of fact as to whether defendant Zeng was negligent in causing or contributing to the accident by stopping short after accelerating in the right lane on the Van Wyck Expressway." Moreover, they argue that the cross-movants' motion should also be denied as premature, because they have not had an opportunity to depose any parties or witnesses to the accident.

It is well settled law that "[a] driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Catanzaro v. Edery*, 172 AD3d 995 [2d Dept 2019], quoting *Witonsky v. New York Tr. Auth.*, 145 AD3d 938 [2d Dept 2016]; *see* Vehicle and Traffic Law § 1129(a)). Furthermore, "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]). Although a sudden stop of the lead vehicle may constitute a nonnegligent explanation for a rear-end collision, "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows" (*Le Grand v. Silberstein*, 123 AD3d 773, 774 [2d Dept 2014], quoting *Shamah v. Richmond County Ambulance Serv.*, 279 AD2d 564 [2d Dept 2001]; *see also Liu v. Lowe*, 173 AD3d 946 [2d Dept 2019]).

Here, the cross-movants established their prima facie entitlement to judgment as a matter of law on the issue of liability by submitting, *inter alia*, Mr. Zeng's affidavit, which demonstrated that he was driving on the Van Wyck Expressway when Mr. Briggs' pick-up truck suddenly and without warning struck his van in the rear. (*see Xiao v. Martinez*, 185 AD3d 1014

[2d Dept 2020]). In opposition, Mr. Briggs failed to provide a non-negligent explanation for the subject accident sufficient to raise a triable question of fact. (*see Pomerantsev v. Kodinsky*, 156 AD3d 656 [2d Dept 2017]; *Strickland v. Tirino*, 99 AD3d 999 [2d Dept 2012)]). It is well settled law that while a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle. However, the claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the rearmost vehicle. (*see Kastritsios v. Marcello*, 84 AD3d 1174 [2d Dept 2011]; *Perez v. Persad*, 183 AD3d 771 [2d Dept 2020]). By Mr. Briggs' own admission, ". . . [he] could not see past (sic) the large van to observe traffic conditions ahead of the van on the highway. . ." Yet, he was driving behind Mr. Zeng's van at 25 mph.

Furthermore, contrary to defendants' contentions, the instant motions are not premature, as they failed to offer an evidentiary basis to suggest that discovery might lead to relevant evidence and that facts essential to justify opposition to the motions is exclusively within the knowledge and control of the plaintiff and/or cross-movants. (*Harrinarain v. Sisters of St. Joseph*, 173 AD3d 983 [2d Dept 2019]; *Theresa Striano Revocable Trust v. Hoffman*, 71 AD3d 993 [2d Dept 2010]). The defendants' contention that discovery is required is baseless. (*Sooklall v. Morisseav-Lafague*, 185 AD3d 1079 [2d Dept 2020]; *Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]). In fact, Ms. Briggs admitted that he struck the plaintiff's van in the rear because, he suddenly stopped. As the Appellate Division has repeatedly held "[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an insufficient basis for denying the motion." (*Kimyagarov v. Nixon Taxi Corp.*, 45 AD3d 736 [2d Dept 2007]; *see also Martinez v. Kuhl*, 165 AD3d 7784 [2d Dept 2018]; *Niyazov v. Hunter, EMS, Inc.*, 154 AD3d 954 [2d Dept 2017]; *Ortiz v. Fage USE Corp.*, 69 AD3d 914 [2d Dept 2010]).

Accordingly, it is hereby

ORDERED that branch of plaintiff's motion for summary judgment, on the issue of liability, pursuant to CPLR § 3212, is granted; and it is further,

ORDERED that branch of plaintiff's motion to strike defendants, Zhao Xian Zeng and Li Tan Construction Corp.'s, Fourth and Eleventh affirmative defenses is granted; and it is further,

ORDERED that branch of plaintiff's motion to strike defendants Paul Gornie Briggs and ECCO III Enterprise Inc.'s second affirmative defense based upon comparative negligence is granted; and it is further,

ORDERED that branch of defendants', Zhao Xian Zeng and Li Tan Construction Corp., cross-motion to dismiss is complaint and crossclaims is granted only as to the cross-movants; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants, via certified and first-class mail, on or before January 31, 2022.

The foregoing constitutes the decision and order of the court.

Dated: December 27, 2021
Long Island City, New York

FILED
1/5/2022
COUNTY CLERK
QUEENS COUNTY

Maurice E. Muir

MAURICE E. MUIR, J.S.C.

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