

Jourbenko v Cox

2022 NY Slip Op 30057(U)

January 10, 2022

Supreme Court, New York County

Docket Number: 154355/2020

Judge: Lisa Headley

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 22

Justice

-----X

LOUIZA JOURBENKO, VAL JURBENCO,

Plaintiff,

- v -

RICHARD COX, JOANN MORTON, MARY FRANCO-
WALTERS, BRIAN ONEILL

Defendant.

-----X

INDEX NO. 154355/2020

MOTION DATE N/A

MOTION SEQ. NO. 001

DECISION + ORDER ON
MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24,
25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 40

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ORDERED that the defendants' motion for an
Order for summary judgment pursuant CPLR §3212, dismissing the complaint and any cross
claims on the basis that the movant-defendants, Richard Cox and Joann Morton, are not liable for
the alleged accident is DENIED. Plaintiff filed a cross-motion for an Order also pursuant to CPLR
§3212, granting summary judgment in favor of plaintiffs on the issue of liability against
defendants, Richard Cox, Joann Morton, Mary Franco-Walters and Brian O'Neill, and setting this
matter down for inquest on damages, as well as dismissing movant- defendants Richard Cox and
Joann Morton's summary judgment motion in its entirety, which is GRANTED. Co-defendants
Mary Franco-Walters and Brian O'Neill filed opposition to the movant-defendants' motion to
dismiss the complaint, and plaintiff's motion for summary judgment on the issue of defendants'
liability. Movant-defendants and plaintiff filed reply/opposition papers.

This action stems from a motor vehicle accident involving three vehicles, that occurred on
the Eastbound Long Island Expressway on October 26, 2018. Plaintiff Louiza Jourbenko contends
in the complaint that she was the operator of a 2015 Toyota (Vehicle 1) which was owned by co-
plaintiff Val Jurbenco; co-defendant Richard Cox was operating a 2006 Volvo (Vehicle 2) that
was owned by co-defendants Richard Cox and Joann Morton; and co-defendant Brian O'Neill was
the operator of a 2012 Toyota (Vehicle 3), that was owned by co-defendant Mary Franco-Walters.
Plaintiff contends that while travelling in "stop and go traffic," she gradually brought her vehicle
(Vehicle 1) to a complete stop , when she felt two heavy impacts to the rear of her vehicle (Vehicles
2 and 3), which she felt occurred within a split second of one another. As a result of the collision,
plaintiff alleges that she sustained serious injuries to her cervical spine.

I. Defendants' Motion to for Summary Judgment to Dismiss the plaintiff's complaint

In support of the movant-defendants motion to dismiss the complaint and cross claims, the movants submit, *inter alia*, defendant Cox's sworn affidavit and the police report. The movant-defendants argue that co-defendant O'Neill (Vehicle 3) was solely responsible for the subject accident. In his affidavit, defendant Cox contends that his vehicle (Vehicle 2) was completely stopped at the time of the accident due to heavy traffic, and the plaintiff's vehicle (Vehicle 1) was also stopped in front of him. In addition, defendant Cox (in Vehicle 2) alleges that he was rear-ended by co-defendant O'Neill (Vehicle 3), and the rear end impact caused him to propel into plaintiff (Vehicle 1). Movant-defendant Cox also contends that he was unable to avoid the accident because the traffic was heavy and the collision happened immediately after he observed vehicle 3 driving at a fast rate towards his vehicle (Vehicle 2).

II. Plaintiff's Cross-Motion for Summary Judgment on the issue of liability against all defendants

Plaintiffs filed a cross-motion for an order granting summary judgment on the issue of liability against defendants and dismissing the movant-defendants' summary judgment motion. In support of the cross-motion, plaintiff argues, *inter alia*, that at the time of the accident, Vehicle 2 was "tailgating" plaintiff (Vehicle 1) and failed to maintain a safe distance in violation of *VTL* §§375, 388, 1101, 1129, 1146 and 1226. Plaintiff Louiza Jourbenko submits her sworn affidavit where she states that she felt two impacts to the rear of her vehicle that occurred within a split second of one another. As a result of the impact, plaintiff contends that she was pushed forward, however, she did not make any contact with the vehicle in front of her as there was sufficient room left between the cars.

III. Opposition and Reply Papers

In opposition to the motion and cross-motion, co-defendants Mary Franco-Walters and Brian O'Neill filed an attorney's affirmation arguing, *inter alia*, that the motions were made prematurely prior to depositions being conducted, and there are issues of fact regarding comparative negligence. Specifically, defendants Franco-Walters and O'Neill contend that there are questions of fact regarding the weather and traffic conditions, their speed prior to stopping their vehicles and how long they observed any vehicles stopped in front of them. In addition, there are issues of fact as to whether plaintiff felt a single impact, or two impacts.

In reply to plaintiff's cross-motion for summary judgment, the movant-defendants Cox and Morton contend, *inter alia*, that their vehicle was hit in the rear while it was at a complete stop, and was then pushed into plaintiff's vehicle as a result of the first impact. Further, in reply to co-defendants Franco-Walters and O'Neill's opposition papers, the movant-defendants argue that an affidavit disputing their version of events was not submitted as they only submitted an attorney's affirmation, which is insufficient to provide probative value.

In reply, and in further support of plaintiff's cross-motion, plaintiff contends that her vehicle was stopped when she felt the first impact to the rear of her vehicle, and then within a split second, she felt a second impact to her vehicle. Plaintiff argues that she establishes that she was

hit in the rear by defendants' vehicles and thus, have established the *prima facie* burden that she is entitled to summary judgment on the issue of defendants' liability.

IV. Discussion

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *See, Winegrad v. York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]." *See, Zuckerman v. City of New York*, 49 NY2d 557, 560 (1980).

"A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a *prima facie* case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident." *See, Baez v. MM Truck and Body Repair, Inc.*, 15 AD3d 473, 476 (1st Dep't 2017). Further, being propelled forward in a chain reaction collision is a non-negligent explanation for a rear-end motor vehicle accident. *See, Arrastia v. Sbordone*, 225 A.D.2d 375 (1st Dep't 1996).

Plaintiff's cross-motion on the issue of defendants' liability is granted. The plaintiff has made out a *prima facie* case of negligence since she was rear-ended by defendants' vehicles while she was stopped in traffic, and the burden shifts to the defendants to raise a triable issue of fact. *See, Winegrad v. New York University Medical Center, supra*.

The movant-defendants motion for summary judgment to dismiss the complaint is denied. Here, the movant-defendants Cox and Morton argue that they were propelled into plaintiff's vehicle, however, issue of facts exists as to whether defendants Cox and Morton (Vehicle 2) first hit plaintiff, and then were hit by co-defendants Franco-Walter and O'Neill's vehicle (Vehicle 3), or whether vehicle 3 hit vehicle 2, which propelled vehicle 2 into plaintiff (Vehicle 1). Thus, the movant-defendants' motion to dismiss the complaint must be denied as issues of fact exist as to which defendant caused the rear-end collision impacting the plaintiff's vehicle.

Further, the defendants Mary Franco-Walters and Brian O'Neill fail to raise any genuine issues of fact regarding plaintiff's *prima facie* case of negligence with regards to this three-car accident. Co-defendants' Mary Franco-Walters and Brian O'Neill's opposition to both the motion and cross motion failed to annex an affidavit of firsthand knowledge to dispute how the subject accident occurred. "[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge... is without evidentiary value and thus unavailing." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980). Thus, defendants' attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See, GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 968 (1985). Furthermore, defendants' counsel's arguments that the motion is premature are unavailing. Depositions are not needed since the opponents of the motion had personal knowledge of the facts. *CPLR §3212(f)*, and failed to meet their obligation of laying bare their proof and presenting evidence sufficient to

raise a triable issue of fact. *See, Avant v. Cepin Livery Corp.*, 74 A.D.3d 533, 534, 904 N.Y.S.2d 381, 382 (2010), *citing, Morgan v. New York Tel.*, 220 A.D.2d 728, 633 N.Y.S.2d 319 (1995).

Accordingly, it is

ORDERED that the movant defendants, Richard Cox and Joann Morton’s, motion for summary judgment dismissing the complaint and cross claims is DENIED, and it is further

ORDERED that the plaintiff’s cross-motion for summary judgment on the issue of liability against defendants Richard Cox, Joann Morton, Mary Franco-Walters and Brian O’Neill is GRANTED; and it is further

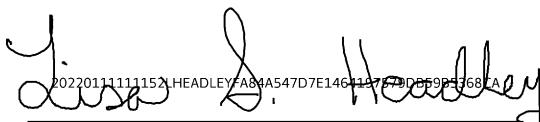
ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, movant-defendants shall serve a copy of this decision/order upon plaintiff and co-defendants with notice of entry; and it is further

This constitutes the Decision/Order of the Court.

1/10/2022

DATE


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LISA HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: