

Nishimura v Dong X. Liu
2022 NY Slip Op 30121(U)
January 17, 2022
Supreme Court, New York County
Docket Number: Index No. 155396/2018
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

JASMINE NISHIMURA, Plaintiff, - v - DONG X.LIU, JUAN C. MUNOZ-ARANGO, and JUAN'S TRANSPORT, LLC Defendant. INDEX NO. 155396/2018 MOTION DATE 09/28/2021, 09/28/2021 MOTION SEQ. NO. 003 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 56, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 93, 94, 96, 97, 98, 105, 107, 109, 122, 124

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 95, 99, 100, 101, 102, 103, 104, 106, 108, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 125, 126, 127, 128

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiff commenced this action as a result of a motor vehicle accident that took place on Friday, March 17, 2017 at Third Avenue and East 83rd Street in New York, NY. In motion sequence number 003, movant-defendant Dong X. Liu (defendant Liu) moves for summary judgment to dismiss all claims and cross claims against him, and plaintiff Jasmine Nishimura (plaintiff Nishimura) cross moves for summary judgment against defendants Juan C. Munoz-Arango (defendant Munoz) and Juan’s Transport, LLC (defendant Juan’s Transport) on the issue of liability. In motion sequence number 004, defendants Munoz and Juan’s Transport move for summary judgment to dismiss all claims and cross claims against them.

Defendant Munoz, who is the sole owner and employee of Juan’s Transport, LLC, alleges that he “was driving [his Peterbilt tractor-trailer] straight ahead when a cab cut him off, forcing him to change lanes,” and collide with defendant Liu’s vehicle. See, NYSCEF Doc. No. 64. Defendant Liu alleges that “he was driving straight ahead when [Munoz’s vehicle] came into his lane and struck his vehicle, causing the accident.” Id. Plaintiff Nishimura was a passenger in defendants Liu’s vehicle at the time of the collision and alleges that she sustained serious injuries as a result of the accident.¹

¹ In a separate action, Liu v. Munoz-Arango, Index No. 160847/2017, Liu seeks to recover damages from Munoz and Juan’s Transport, LLC. In motion sequence number 001 in this case, the court granted a motion for consolidation and joint trial to the extent of directing joint discovery and trial. Because the actions involve different plaintiffs, consolidation was not appropriate (see, Brown v. Cope Bestway Express, Inc., 99 A.D.3d 746, 748 (2d Dep’t 2012)). The parties must make their motions and file their

In support of his motion to dismiss (Motion Seq. 3), defendant Liu argues that summary judgment in his favor is appropriate because he was not the proximate cause of plaintiff's injuries. Defendant Liu contends there is no evidence that he operated his car negligently. Defendant Liu contends that he cannot be considered negligent because he was driving safely in his own lane when defendant Munoz's vehicle swerved and struck him. Defendant Liu also contends that Juan is negligent *per se* as he violated *Vehicle and Traffic Law (VTL) §1128 (a)*, which states that "when there are two or more lanes, a driver must drive her or his vehicle as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."²

Plaintiff Nishimura argues that defendant Munoz acknowledged in his deposition testimony that Munoz veered into the right lane to avoid hitting the taxi and this caused him to collide with the other car. (*See*, NYSCEF Doc. No. 63, p 27 line 24 – p 28 line 10). Defendant Munoz also stated that the mirrors attached to his truck enabled him to see behind the mirrors on both sides. (*Id.*, p 41 lines 7-13). Plaintiff Nishimura also contends that this establishes that Munoz violated *VTL §1128 (a)* and failed to move lanes when it was safe to do so. Further, plaintiff Nishimura argues that defendant Munoz should have seen defendant Liu's vehicle to avoid the collision. Finally, plaintiff states that as an innocent passenger, she is not negligent as a matter of law, and therefore, all affirmative defenses asserted against her should be dismissed.

Defendants Munoz and Juan's Transport³ do not oppose defendant Liu's motion to dismiss on the condition that their motion is also granted. Furthermore, defendants Munoz and Juan's Transport oppose plaintiff Nishimura's cross motion for summary judgment. Defendants Munoz and Juan's Transport argue that if their motion is denied or Nishimura's motion is granted, there are material factual issues that exist as it pertains to whether defendant Liu was a proximate cause of the accident. Defendant Munoz and Juan's Transport contend that, according to defendant Liu's deposition testimony, Liu was driving on Third Avenue at a speed of 20 to 30 miles per hour. (*See*, NYSCEF Doc. No. 42, p 52 lines 15-19; p 59 lines 12-14). Defendant Liu testified that he did not see the tractor before it struck his car, he added that he "didn't pay attention." (*Id.* at p 88 line 10). Finally, defendant Munoz argues that the sudden approach of the taxi on the left justified his conduct under the emergency doctrine. Under the emergency doctrine, "an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration . . . the actor *may not be negligent* if the actions taken are reasonable and prudent in the emergency context[.]" (*Lifson v. City of Syracuse*, 17 N.Y.3d 492, 497 (2011). [internal quotation marks and citation omitted and emphasis added]).

In reply and in opposition to defendant Munoz's motion, defendant Liu states that because he stayed in his lane and did not violate traffic laws, he cannot be found negligent. Defendant Liu contends that generally, an issue of fact exists as to the applicability of the emergency doctrine, and this precludes summary judgment dismissing the cross claims. Further, defendant Liu argues that even if defendant Munoz could show that Munoz is not liable due to the emergency doctrine, this does not affect defendant Liu's right to summary judgment. In addition to *VTL §1128 (a)*, defendant Liu argues, *inter alia*, that there is an issue of fact as to whether defendant Munoz

papers under the appropriate index number, and they must file separate notes of issue and separate judgments. (*See, e.g., Vargas v. Lancaster*, 44 Misc. 3d 1209 [A], 2014 NY Slip Op 51070 [U], *2 [Sup Ct, Kings County 2014]).

² Defendant Liu also cites *VTL §1126(a)*, which states that "[w]hen official markings are in place indicating those portions of any highway where overtaking and passing or driving to the left of such markings would be especially hazardous, no driver of a vehicle proceeding along such highway shall at any time drive on the left side of such markings."

³ The court considers Munoz's opposition to motion sequence number 003 and the motion papers he submitted in support of motion sequence number 004 together.

violated *VTL §1122(a)*, which states that a driver “overtaking another vehicle proceeding in the same direction shall pass to the left . . . at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.” Defendant Liu argues that his comment that he was “not paying attention” cannot be used because his attorney objected to the form of the question. Defendant Liu also argues that he was not negligent for failing to take evasive action because the accident happened too quickly for him to react. Defendant Liu also argues that any alleged negligence on his behalf did not proximately cause the accident.

Plaintiff Nishimura’s opposition also argues that there are issues of fact as to the existence of an emergency, and the reasonableness of defendant Munoz’s response to the alleged emergency preclude summary judgment.

Finally, in reply, defendant Munoz argues that he has established a *prima facie* case supporting dismissal of the claims and cross claims against him. Defendant Munoz argues that the opposing parties’ challenges to his factual account of the accident are irrelevant because both defendant Liu and plaintiff Nishimura have stated that they did not see the taxi at any point or observe the tractor-trailer prior to the accident. As a result, defendant Munoz contends that his version of the facts cannot be refuted, and thus, he is entitled to summary judgment on the emergency doctrine.

Discussion

The court grants plaintiff’s motion to the extent of dismissing all affirmative defendants asserted against plaintiff. Here, there is no opposition to plaintiff’s application for dismissal and no evidence or even allegations that she failed to use her seatbelt or otherwise was negligent. As an innocent passenger, plaintiff Nishimura was “not at fault in the happening of the accident.” *Ramirez v. Elias-Tejada*, 168 A.D.3d 401, 405 (1st Dep’t 2019), citing, *Oluwatayo v. Dulinayan*, 142 A.D.3d 113, 115 (1st Dep’t 2016). However, plaintiff Nishimura is not entitled to summary judgment against defendant Munoz because she “must still establish a defendant driver’s liability under traditional principles of tort liability.” *Campbell v. Mincello*, 184 A.D.3d 412 (1st Dep’t 2020).

The remainder of the issues before the court are contested. “In determining whether summary judgment is appropriate, the motion court draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility.” *Garcia v. J.C. Duggan, Inc.*, 180 A.D.2d 579, 580 (1st Dep’t 1992) [internal quotation marks and citation omitted]. Even if the facts are not contested, a court may deny summary judgment where these facts “permit conflicting inferences as to whether a party’s conduct contributed in any way to the accident that resulted in plaintiff’s injuries.” *Jaffee v. Davis*, 214 A.D.2d 330, 330 (1st Dep’t 1995) [internal quotation marks and citation omitted].

Furthermore, summary judgment against or in favor of defendant Liu is not proper because defendant Munoz has raised issues of fact as to whether his negligence contributed to the accident. Specifically, defendant Munoz contends that defendant Liu was driving between 20 and 30 miles per hour at the time, and that defendant Liu did not notice that the tractor was veering into his lane until it struck him. Munoz’s own testimony indicates that he was driving around 5 miles per hour and that he used all of his mirrors to check for obstacles, and that he also did not see defendant Liu’s vehicle. (See, NYSCEF Doc. No. 63, p 23 lines 8-9). Here, defendant Munoz has raised a question of fact as to whether defendant Liu was driving at a high rate of speed, and that plaintiff Nishimura and defendant Liu’s testimonies were not dispositive because they acknowledged that they did not see the tractor before the accident. *See, Mack v. Seabrook*, 161 A.D.3d 704, 705 (1st

Dep't 2018) [finding that the passenger did not raise an issue of fact as to the other driver's negligence].

This court finds that summary judgment against or in favor of defendant Munoz is also inappropriate. There are triable issues as to whether defendant Munoz violated VTL §§ 1122(a) and 1128(a) when defendant Munoz headed into the right lane. Defendant Munoz submits only a self-serving testimony in support of the summary judgment motion. Moreover, there are questions as to whether the emergency doctrine applies. "As a general rule, the questions of the existence of an emergency and the reasonableness of the response to it are issues for the trier of fact. Liang-Ying Ren v. Doe, 175 A.D.3d 480, 481 (2d Dep't 2019); see, Maisonet v. Roman, 139 A.D.3d 121, 124 (1st Dep't 2016). Courts only apply the doctrine as a matter of law if defendants' submissions eliminate all triable issues. See, Bailey v. PennDOT Ean Holdings, LLC, 174 A.D.3d 844, 844-845 (2d Dep't 2019). Further, even where the emergency doctrine applies, a factfinder may find that the party's response to the emergency is unreasonable. See, Maisonet v. Roman, supra at 124. Defendant Munoz's testimony, standing alone, does not establish conclusively that "he was afforded little or no time to consider alternative courses of action." See, Romero v. Valdez, 198 A.D.3d 496, 497 (1st Dep't 2021). The cases upon which defendant Munoz relies are distinguishable in that they find that, unlike here, the opposing party did not raise any triable issues or they find that jury questions exist. See, Tarnavska v. Manhattan & Bronx Surface Tr. Operating Auth., 106 A.D.3d 1079 (2d Dep't 2018); see also, Rivera v. New York City Tr. Auth., 77 N.Y.2d 322, 326-327 (1991).

Accordingly, it is

ORDERED that defendant Liu's motion for summary judgment (motion sequence number 003) is DENIED; and it is further

ORDERED that plaintiff Nishimura's cross motion (motion sequence number 003) is GRANTED to the extent of dismissing the affirmative defenses asserted against her and the motion for summary judgment is otherwise DENIED; and it is further

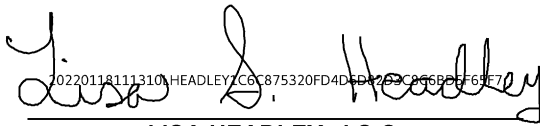
ORDERED that Munoz's motion for summary judgment (motion sequence number 004) is DENIED; and it is further

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

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

1/17/2022
DATE


LISA HEADLEY, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>
				REFERENCE	