Magadino v McCabe
2022 NY Slip Op 30767(U)
February 1, 2022
Supreme Court, Suffolk County
Docket Number: Index No. 617390/2018
Judge: William J. Condon

PUBLISH

SHORT FORM ORDER

INDEX No. 617390/2018
CAL. No. 202100453MV

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY

PRESENT:

Hon. WILLIAM J. CONDON
Justice of the Supreme Court

MOTION DATE 10/5/21
ADJ. DATE 12/14/21
Mot. Seq. # 003 MG
Mot. Seq. # 004 MG
Mot. Seq. # 005 MG; CASEDISP

----------X

TONI ANN MAGADINO,

Plaintiff,

- against -

CHRISTOPHER MCCABE, BROWN'S OF BELLPORT, INC., FRANCISCO X. SILVA-MORALES, PETER AUTO SALES & SERVICE, and ROBERT SEEGER,

Defendants.

----------X

GRUENBERG KELLY DELLA
Attorneys for Plaintiff
700 Koehler Avenue
Ronkonkoma, New York 11779

CERUSSI & SPRING, P.C.
Attorneys for Defendant Brown's of Bellport, Inc.
1 North Broadway
White Plains, New York 10601

AHMUTY, DEMERS & MCMANUS
Attorneys for Defendant Christopher McCabe
200 I.U. Willets Road
Albertson, New York 11507

MILBER, MAKRIS, PLOUSADIS & SEIDEN LLP
Attorneys for Defendants Peter Auto Sales & Service and Francisco X. Silva-Morales
1000 Woodbury Road, Suite 402
Woodbury, New York 11797

Upon the following papers read on the e-filed motions for summary judgment: Notice of Motion/Order to Show Cause and supporting papers by Brown's of Bellport, Inc., filed September 7, 2021, by Peter Auto Sales & Service and Francisco X. Silva-Morales, filed September 9, 2021, and by Christopher McCabe, filed September 10, 2021; Notice of Cross Motion and supporting papers__; Answering Affidavits and supporting papers by plaintiff, filed November 30, 2021; Replying Affidavits and supporting papers by Brown's of Bellport, Inc., filed December 6, 2021, by Peter Auto Sales & Service and Francisco X. Silva-Morales, filed December 13, 2021, and by Christopher McCabe, filed December 13, 2021; Other ____; it is

ORDERED that the motion (003) by defendant Brown's of Bellport, Inc., the motion (004) by defendants Peter Auto Sales & Service and Francisco X. Silva-Morales, and the motion (005) by defendant Christopher McCabe are consolidated for the purpose of this determination; and it is further

ORDERED that the motion by defendant Brown's of Bellport, Inc., for summary judgment dismissing the complaint and cross claims against it is granted; and it is further

ORDERED that the motion by defendants Peter Auto Sales & Service and Francisco X. Silva-Morales for summary judgment dismissing the complaint and cross claims against them is granted; and it is further

ORDERED that the motion by defendant Christopher McCabe for summary judgment dismissing the complaint and cross claims against him is granted.

In this personal injury action, plaintiff, Toni Ann Magadino, alleges that she was injured in a car accident due to the negligence of defendants, Brown's of Bellport, Inc. (Brown's), Peter Auto Sales & Service (Peter's), Francisco X. Silva-Morales (Silva), and Chrisopher McCabe.[1] The incident allegedly happened on the Long Island Expressway near exit 55 on April 26, 2018. Based on the parties' statements of material facts and responses thereto, and the submitted deposition testimony, it is undisputed that plaintiff was driving in the left lane behind a vehicle operated by McCabe and owned by Brown's. It is undisputed that McCabe's vehicle moved from the left lane into the HOV lane. It is also undisputed that plaintiff then rear-ended a vehicle owned by Peter's and operated by Silva, which was then propelled into the rear of Seeger's vehicle. It is further undisputed that plaintiff's vehicle and McCabe's vehicle did not come into contact with each other.

Plaintiff alleges that the defendants were negligent. McCabe and Brown's cross-claimed against Silva and Peter's for common-law indemnification, contribution, contractual indemnification, and failure to procure insurance. Silva and Peter's cross-claimed against McCabe and Brown's for common-law indemnification and contribution.

Brown's, Silva, Peter's, and McCabe seek summary judgment dismissing the complaint and cross claims asserted against them. In support of its motion, Brown's submits, among other things, the pleadings, a certified police report, and transcripts of the depositions of Gary Burke, McCabe, Seeger, Silva, plaintiff, and Robert Keteltas. In support of their motion, Silva and Peter's submit, among other things, the pleadings, a certified police report, and transcripts of the depositions of Silva, McCabe, Seeger, plaintiff, and Robert Keteltas. In support of his motion, McCabe submits, among other things, the pleadings, a certified police report, and transcripts of the depositions of Seeger, Silva, McCabe, plaintiff, and Robert Keteltas. In opposition, plaintiff submits, among other things, transcripts of the depositions of herself, Seeger, Silva, Robert Keteltas, and McCabe.

---

[1] All claims and cross claims against Robert Seeger have been discontinued.

On a motion for summary judgment, the movant has the burden to show that it is entitled to judgment as a matter of law and that there are no disputed issues of material fact (CPLR 3212; ***Matter of New York City Asbestos Litig.***, 33 NY3d 20, 99 NYS3d 734 [2019]). If the movant meets its burden, then the non-movant must show that there is a material issue of fact to be resolved at trial (***Matter of Eighth Jud. Dist. Asbestos Litig.***, 33 NY3d 488, 105 NYS3d 353 [2019]). If the movant does not meet its burden, then the motion must be denied without consideration of any opposing papers (***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). On summary judgment, the Court must view the evidence in the light most favorable to the non-moving party (*id.*).

A driver must maintain a safe distance from other vehicles on the roadway (Vehicle and Traffic Law § 1129; *see e.g.* ***Kelly v Shin***, 171 AD3d 905, 97 NYS3d 225 [2d Dept 2019]). Accordingly, "a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a non[-]negligent explanation for the collision in order to rebut the inference of negligence" (***Lopez v Dobbins***, 164 AD3d 776, 777, 79 NYS3d 566, 566 [2d Dept 2018]; *see e.g.* ***Bloechle v Heritage Catering, Ltd.***, 172 AD3d 1294, 101 NYS3d 424 [2d Dept 2019]). Non-negligent explanations for rear-ending a vehicle include "mechanical failure, a sudden stop of the vehicle ahead, an unavoidable skidding on a wet pavement, or any other reasonable cause" (***Miller v Steinberg***, 164 AD3d 492, 493, 82 NYS3d 597, 599 [2d Dept 2018] [quotation marks and citation omitted]). But a defendant's "assertion that the plaintiff's vehicle came to a sudden stop, standing alone, [i]s insufficient to raise a triable issue of fact" (***Catanzaro v Edery***, 172 AD3d 995, 997, 101 NYS3d 170, 172 [2d Dept 2019]; *see* ***Batashvili v Veliz-Palacios***, 170 AD3d 791, 96 NYS3d 146 [2d Dept 2019]).

The Court will first address McCabe's motion. McCabe has shown that he is entitled to summary judgment dismissing the complaint and cross claims asserted against him. It is undisputed that McCabe was driving in front of plaintiff in the left lane when he moved from the left lane into the HOV lane. It is further undisputed that plaintiff then rear-ended the Peter's vehicle, which, in turn, was propelled into Seeger's vehicle. It is also undisputed that plaintiff's vehicle and McCabe's vehicle did not come into contact with each other. Thus, McCabe has shown that he was not negligent as to plaintiff.

In opposition, plaintiff failed to raise a material question of fact. Her claim that she did not see brake lights on McCabe's vehicle is not a reasonable excuse for rear-ending the Peter's vehicle (***Bene v Dalessio***, 135 AD3d 679, 22 NYS3d 237 [2d Dept 2016]; ***Santana v Tic-Tak Limo Corp.***, 106 AD3d 572, 966 NYS2d 30 [1st Dept 2013]; ***Cortes v Whelan***, 83 AD3d 763, 922 NYS2d 419 [2d Dept 2011]). Plaintiff mainly contends that she was distracted because McCabe moved—or, as she characterizes it, swerved—from the left lane to the HOV lane. Plaintiff admitted that when McCabe's vehicle moved into the HOV lane, she "was focused on [McCabe's vehicle] that swerved." She acknowledged that she became "disoriented" and "was kind of focused on what [McCabe] was doing." She conceded that by the time she was able to "reorient forward, [her vehicle] was too close to the [Peter's vehicle]." She then rear-ended the Peter's vehicle. Plaintiff had a duty to see what was to be seen (*e.g.* ***Blasso v Parente***, 79 AD3d 923, 913 NYS2d 306 [2d Dept 2010]), and her admitted failure to do so was the sole proximate cause of her collision (***Kelly v Shin***, *supra*). To the extent that plaintiff alleges that there are factual discrepancies in the submitted deposition testimony, such discrepancies are immaterial in light of

plaintiff's concessions and the aforementioned undisputed facts (*see generally* ***Forrest v Jewish Guild for the Blind***, 3 NY3d 295, 786 NYS2d 382 [2004] [explaining that the plaintiff's contentions "reflect a fundamental misapprehension of the law of summary judgment" because, although "plaintiff has identified disputed issues of fact," "factual disputes are not enough; they must relate to *material* issues"]). To the extent that plaintiff relies on the emergency doctrine, it is inapplicable (***Ordonez v Lee***, 177 AD3d 756, 110 NYS3d 339 [2d Dept 2019]; ***Lowhar-Lewis v Metropolitan Transp. Auth.***, 97 AD3d 728, 948 NYS2d 667 [2d Dept 2012]). No codefendant opposes the motion. Thus, so much of McCabe's motion as seeks summary judgment dismissing the complaint against him is granted.

Because McCabe is not liable to plaintiff, he cannot be liable to any co-defendant in common-law indemnification or contribution (***Stone v Williams***, 64 NY2d 639, 485 NYS2d 42 [1984]). Thus, McCabe's motion is granted in its entirety.

Brown's owned the vehicle that McCabe was driving. For the reasons explained above, Brown's motion is granted in its entirety.

Peter's and Silva have also shown that they cannot be liable to plaintiff. To the contrary, plaintiff's negligence in rear-ending their vehicle was the sole proximate cause of the collision (***Kelly v Shin***, *supra*). The fact that the Peter's vehicle, a trailer, was unlawfully in the left lane does not alter this conclusion (***Caro v Chesnick***, 155 AD3d 447, 63 NYS3d 665 [1st Dept 2017]). Plaintiff's claim that she did not see brake lights on the Peter's vehicle is not a reasonable excuse for rear-ending it (***Bene v Dalessio***, *supra*; ***Santana v Tic-Tak Limo Corp.***, *supra*; ***Cortes v Whelan***, *supra*). Accordingly, Peter's and Silva cannot be liable to any co-defendant in common-law indemnification or contribution (***Stone v Williams***, *supra*). Regarding the cross claims asserted by McCabe and Brown's for contractual indemnification and failure to procure insurance, there is no evidence of any contractual relationship between McCabe and/or Brown's on one side and Peter's and/or Silva on the other. No codefendant opposes the motion. Thus, Peter's and Silva's motion is granted in its entirety.

Dated: 2/1/22

J.S.C.

__X__ FINAL DISPOSITION _____ NON-FINAL DISPOSITION