

Burgess v Pombo

2022 NY Slip Op 32388(U)

January 20, 2022

Supreme Court, Queens County

Docket Number: Index No. 702095/2020

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

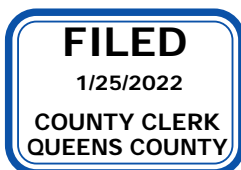
Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

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JOSEPHINE BURGESS,

Index No.: 702095/2020

Plaintiff,



Motion

Date: January 12, 2022

-against-

Motion Cal. No.: 3

PAUL POMBO, ANDREW G. POMBO and
WENDY LARKINS,

Motion Sequence No.: 1

Defendants.
-----X

The following efile papers numbered 15-28 submitted and considered on this motion by plaintiff Josephine Burgess (hereinafter referred to as “Burgess”) seeking summary judgment pursuant to Civil Practice Law and Rules (CPLR) 3212 on the issue of liability against defendants Paul Pombo, Andrew G. Pombo (hereinafter collectively referred to as “Pombo”) and Wendy Larkins (hereinafter referred to as “Larkins”) and striking their defenses of culpable conduct, assumption of risk and contributory negligence.

Papers
Numbered

Notice of Motion-Affidavits-Exhibits..... EF 15-28

Plaintiff’s motion is granted without opposition in its entirety as follows:

Burgess commenced this lawsuit on February 6, 2020 with the filing of a summons and verified complaint which sought damages for alleged serious personal injuries which Burgess alleged were sustained in two separate motor vehicle accidents. The first accident occurred on April 17, 2019 at Roslyn Road, Roslyn Heights, County of Nassau, State of New York and involved Pombo. Burgess claimed that the Pombo vehicle was solely responsible for the accident. Burgess alleged that while driving her 2013 Mercedes vehicle with NY License plates, she was sideswiped by a 2004 Ford with NY License plates, owned and operated by Pombo. The second accident occurred on June 2, 2019 at 114-05 Farmers Boulevard, County of Queens, State of New York, and involved Larkins. Burgess alleged that while operating her 2013 Mercedes vehicle, Larkins’ vehicle, a 2004 Nissan with NY plates Larkins reversed into Burgess’ automobile. Burgess alleged that the lawsuit combined both defendants due to the proximity of the accidents and damages sought in the first accident were exacerbated by the second occurrence. Pombo and Larkins appeared in the action with

the filing of verified answers with affirmative defenses on March 2, 2020 and March 10, 2020, respectively. Burgess filed a Note of Issue on July 14, 2021 certifying this matter as trial ready. Now Burgess moves for summary judgment on the issue of liability against Pombo and Larkins and to strike their defenses of culpable conduct, assumption of risk and contributory negligence. In support of the motion, Burgess submitted the pleadings; statement of material facts; party deposition transcripts; police reports; and a video on CD Rom.

Burgess' Statement of Facts pursuant to Uniform Court Rules for the Supreme Court and County Court Section 202.8-g is the following:

1. The April 17, 2019 incident arises from a motor vehicle accident.
2. The accident occurred on Roslyn Road near N. Service Road. See Police report, attached as Exhibit H.
3. At the time the accident occurred, the plaintiff was stopped due to a red light. Exhibit D, at 25.
4. While plaintiff's vehicle was stopped, the vehicle operated by defendant Andrew Pombo sideswiped the vehicle plaintiff was in while defendant was trying to pass plaintiff on the left; Exhibit F, page 45.
5. Defendant Pombo admitted the April 17, 2019 accident was caused by him due to sideswiping plaintiff's vehicle as he misjudged the distances between the vehicles. Exhibit F, page 45.
6. The April 17, 2019 accident was captured on the dashcam video by the defendant Andrew Pombo and the attached dashcam video shows the contact between the plaintiff's and defendant's vehicle.
7. The June 2, 2019 accident involved a motor vehicle collision between the plaintiff and defendant Wendy Larkin.
8. The June 2, 2019 accident occurred at the BP station located at 114-05 Farmers Boulevard in Queens. Police report Exhibit J.
9. The plaintiff's vehicle was stopped at the time of the June 2, 2019 collision. Exhibit E pages 14-16.
10. The June 2, 2019 collision occurred when defendant reversed her vehicle into plaintiff's stopped vehicle. Exhibit E, page 14-16.
11. Both the April 17, 2019 and the June 2, 2019 accidents occurred through no fault of the

plaintiff.

Plaintiff's Deposition Testimony

Burgess gave sworn testimony in this case on February 4, 2021. Burgess testified in sum and substance that she was involved in an accident on April 7, 2019 at about 4:45 P.M. when she was driving home from work. Burgess stated that she was driving her 2013 Mercedes Benz vehicle on Roslyn Road at the Long Island Expressway ("LIE") service road. She stated that she was stopped at a red traffic light for about three to four minutes when a car hit her vehicle. She testified that the driver of the offending vehicle, was a male.

Then, on June 2, 2019, Burgess testified that she was involved in another accident with her 2013 Mercedes Benz which occurred at a BP gas station located at Farmers and Murdock, Jamaica New York. She was dropping off parts to a mechanic shop located in the gas station. Prior to the occurrence, her car was stopped and the car was not on. The offending vehicle, which she described as a blue sedan driven by a female, backed into her vehicle.

Pombo's Deposition Testimony

Pombo gave sworn testimony in this case on June 29, 2021. Pombo testified in sum and substance that on the date of the accident, April 17, 2019, he was driving a vehicle, a 2004 Ford Taurus owned by his father co-defendant Paul Pombo. He believed the accident occurred about 4:40 P.M. The accident occurred at Roslyn Road near Power House Road. He saw a Black Mercedes SUV in front of him. He stated that he had been stopped behind it for approximately three minutes at a red traffic light at the intersection. He attempted to go around the Mercedes on its left to get into another lane and came into contact with it.

Larkin's Deposition Testimony

Larkin gave sworn testimony in this matter on April 5, 2021. She testified, in sum and substance that on the date of the accident, June 2, 2019 she was getting gas at a BP station located at the corner of Farmers Boulevard and Murdock Avenue. While attempting to exit the gas station, she reversed and backed her vehicle, a 2004 dark blue Nissan Maxima into another vehicle, which was stopped, which she described as a Mercedes Benz SUV.

DISCUSSION

The party moving for summary judgment has the burden of establishing entitlement to judgment as a matter of law by tendering evidence in admissible form, eliminating any material triable issues of fact from the case. (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985].) "[T]o 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" (*Heard v Schade*, 172 AD3d 1335 [2d Dept 2019]; see

Rodriguez v City of New York, 31 NY3d 312 [2018]; *Edgerton v City of New York*, 160 AD3d 809 [2d Dept 2018]). “A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant’s negligence was a proximate cause of the alleged injuries” (see *Shah v MTA Bus Co.*, –AD3d–, 22 WL 164259 [2d Dept 2022] quoting *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020] [internal quotation marks omitted]).

In regards to the merits of the motion as to Pombo, Burgess submitted evidence that on the date of the accident Pombo violated Vehicle and Traffic Law (hereinafter referred to as “VTL”) sections 1122 and 1124 by negligently attempting to pass Burgess’ stopped vehicle on the left side, sideswipping it. VTL §1122 titled “Overtaking a vehicle on the left” states that following:

The following rules shall govern the overtaking and passing of vehicles proceeding in the same direction, subject to those limitations, exceptions, and special rules hereinafter stated:

- (a) The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle.

VTL §1124 titled “Limitations on overtaking on the left” states the following:

- a. No vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction unless authorized by the provisions of this chapter and unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the operation of any vehicle approaching from the opposition direction or any vehicle overtaken. In every event the overtaking vehicle must return to an authorized lane of travel as soon as practicable and in the event the passing movement involves the use of a lane authorized for vehicles approaching from the opposite direction, before coming within two hundred feet of any approaching vehicle.

In regards to the merits of motion as to Larkins, Burgess submitted evidence that on the date of the accident, Larkins violated VTL §1211 titled “Limitations on backing” which states the following:

- (a) The driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.

The violation of the VTL constitutes negligence as a matter of law (*See generally Ramirez v Cruse*, 185 AD3d 1072 [2d Dept 2020]; *Watson v Narayanan*, 149 AD3d 1012 [2d Dept 2017]; *Fratello v County of Suffolk*, 96 AD3d 798 [2d Dept 2012]).

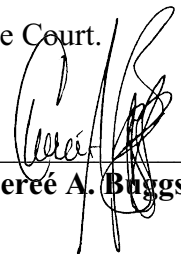
The Court finds that Burgess has established with documentary submissions entitlement to judgment as a matter of law on the issue of liability against defendants Pombo and Larkins. (*See Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Rodriguez v City of New York*, 31 NY3d 312 [2018]; *Portalatin v City of New York*, 165 AD3d 1302 [2d Dept 2018].) The documentary evidence submitted herein demonstrated that Pombo and Larkins violated the Vehicle and Traffic Law and that Burgess was not comparatively at fault. (*See Rodriguez v City of New York*, 31 NY3d 312 [2018].) Pombo admitted that his vehicle came into contact Burgess' vehicle on the date of the accident, April 17, 2019; that he sideswiped Burgess' vehicle as he misjudged the distances. Larkins admitted at her deposition held on April 5, 2021 that on the date of the accident, June 2, 2019, that while she was attempting to exit a BP gas station she backed her car into Burgess' vehicle, which was stopped. (See Larkin EBT pp. 14-16, 18-19.)

Neither Pombo or Larkins have opposed this motion to raise a triable issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Andre v Pomeroy*, 35 NY2d 361 [1974]).

Therefore, plaintiff's motion for summary judgment pursuant to CPLR 3212 on the issue of liability is granted without opposition. Defendants affirmative defenses of culpable conduct, assumption of risk and contributory negligence are stricken. This matter shall proceed to Trial on the issue of damages only.

The foregoing constitutes the decision and Order of the Court.

Dated: January 20, 2022



Hon. Chereé A. Buggs, JSC

