

<b>Torres-Badillo v Koferi</b>
2022 NY Slip Op 32516(U)
January 12, 2022
Supreme Court, Bronx County
Docket Number: Index No. 802591/2021e
Judge: Veronica G. Hummel
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**To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX IAS PART 31**

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CARLITO TORRES-BADILLO,

Plaintiff,

-against -

**Index No. 802591/2021e  
DECISION/ORDER  
Motion Seq. 1**

ROBERT KOFERL, NAT KAGAN MEAT & POULTRY,INC.,  
And HUDSON VALLEY CATTLE COMPANY, INC.,  
Defendants.

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In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in regard to the motion of plaintiff CARLITO TORRES-BADILLO (Mot. Seq. 1) seeking an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment as to liability against defendants ROBERT KOFERL and NAT KAGAN MEAT & POULTRY (Nat defendants), and dismissing the Nat defendants’ first (comparative negligence) and second (seat belt) affirmative defense. As plaintiff executed a stipulation of discontinuance of his personal injury causes of action as against defendant HUDSON VALLEY CATTLE COMPANY, INC. (Hudson Valley), and the Nat defendants do not allege any cross-claims as against defendant Hudson Valley, the complaint is dismissed as against said defendant.

Based on the parties’ statements of material facts, the following facts are undisputed: This is a personal-injury action arising out of a two-vehicle rear-end accident that occurred at 6:45 a.m. on January 7, 2021, on the Cross-Bronx Expressway, at or near the Exit 3. Plaintiff was driving the lead vehicle (the Plaintiff’s Vehicle). Defendant Koferl was operating a motor vehicle owned by defendant Nat Kagan Meat & Poultry, Inc. (the Defendants’ Vehicle). The vehicles were travelling in the same lane. At the time of the Accident, the Defendants’ Vehicle hit the Plaintiff’s Vehicle in the rear.

“The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case.” *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon such a showing, the burden then shifts to the nonmovant to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact.” *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep’t 2006). A plaintiff in a negligence action moving for summary judgment on the issue of liability must, therefore, 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. *Fernandez v. Ortiz*, 183 A.D.3d 443 (1st Dep’t 2020). A plaintiff is not required to demonstrate his or her freedom from comparative fault in order to establish a *prima facie* entitlement to summary judgment on the issue of liability. *Rodriguez v. City of N.Y.*, 31 N.Y.3d 312, 324-25 (2018).

In support of the motion, plaintiff submits an attorney affirmation, copies of the pleadings, an affidavit by plaintiff, an affidavit by defendant Hudson, a copy of the stipulation of partial discontinuance, and a statement of material facts. The parties have yet to appear for deposition.

In his affidavit<sup>1</sup>, plaintiff avers that at the time of the Accident, the Plaintiff’s Vehicle was in the right hand lane of the Cross-Bronx Expressway. Plaintiff had been driving in the lane for about 15 to 20 minutes. Traffic was heavy. Immediately before the Accident, plaintiff brought the vehicle to a gradual stop due to traffic ahead of it. The Plaintiff’s Vehicle was stopped for 10 to 15 seconds before the Accident occurred. Plaintiff felt the impact in the rear of the vehicle. On the day of the Accident, plaintiff’s brake lights were functioning. Plaintiff learned that the vehicle that rear-ended his car was the Defendants’ Vehicle. Plaintiff in no way contributed to the happening of the Accident.

In opposition to the motion, defendants submit an attorney affirmation, and an affidavit from the defendant driver.

In the affidavit defendant driver Koferl avers that the time of the Accident, he was driving westbound on the Cross-Bronx Expressway, and the vehicle was in good working order. The traffic

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<sup>1</sup> Plaintiff’s affidavit is “duly sworn” and fully notarized. Contrary to defendants’ contention, under the circumstances, plaintiff was not required to recite that plaintiff swore that the contents of the affidavit were true under the penalty of perjury. That is only required in an affirmation (*Buffington v. Catholic School Region of Northwest and Southwest Bronx*, 198 A.D.3d 410 (1<sup>st</sup> Dep’t 2021); *NYCTL 2005-A Trust v. Rosenberger Boat Livery, Inc.*, 96 A.D.3d 425 [1<sup>st</sup> Dep’t 2021])

was stop and go and was bumper to bumper. Vehicles were moving slowly; it was daylight and it was lightly raining at the time of impact. Defendant states that he was driving a safe and proper distance behind the Plaintiff's Vehicle and within the speed limit, about 5 mph. Immediately prior to the Accident, the Plaintiff's Vehicle slowed suddenly, abruptly and without warning. There was no reason for the Plaintiff's Vehicle abrupt slowing under the conditions. As the result of the plaintiff's abrupt stop, defendant did not have an opportunity to stop the Defendant's Vehicle or otherwise take evasive action before impact. There was no traffic signal and the Plaintiff's Vehicle's stop was dangerous and unexpected. Contrary to plaintiff's affidavit, the Plaintiff's vehicle was not stopped at the time of impact. Had not the plaintiff stopped suddenly; the Accident would not have occurred.

It is well settled that “[a] rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident.” *Urena v. GVC Ltd.*, 160 A.D.3d 467, 467 (1st Dep’t 2018); *Matos v. Sanchez*, 147 A.D.3d 585, 586 (1st Dep’t 2017); *Santos v. Booth*, 126 A.D.3d 506, 506 (1st Dep’t 2015); *Woodley v. Ramirez*, 25 A.D.3d 451, 452 (1st Dep’t 2006). Under New York Vehicle and Traffic Law (“VTL”) § 1129(a), “a driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and traffic upon the condition of the highway.” In other words, a driver must maintain a safe distance between his vehicle and the one in front of her. A violation of VTL § 1129(a) is *prima facie* evidence of negligence, and “[t]his rule has been applied when the front vehicle stops suddenly in slow-moving traffic.” *Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216, 223-24 (1st Dep’t 2007) (quoting *Johnson v. Phillips*, 261 A.D.2d 269, 271 (1st Dep’t 1999); *Mascitti v Greene*, 250 A.D.2d 821, 822 (2d Dep’t 1998). In a rear-end collision, there is a presumption of non-negligence of the driver of the lead vehicle. *See Soto-Marouquin v. Mellet*, 63 A.D.3d 449, 450 (1st Dept 2009).

First Department caselaw is also clear that a claim by the rear driver that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the rear driver. *Ly Giap v. Hathi Son Pham*, 159 A.D.3d 484, 485 (1st Dep’t 2018); *Bajrami v. Twinkle Cab Corp.*, 147 A.D.3d 649 (1st Dep’t 2017); *see also Earl v Hill*, 2021 N.Y. Slip Op. 06948 (1st Dep’t 2021).

Here, based on the undisputed affidavit testimony, plaintiff establishes *prima facie* entitlement to partial summary judgment against defendants as plaintiff demonstrates that the Plaintiff's Vehicle was stopped or stopping in heavy traffic conditions when it was hit by the Defendants' Vehicle in the rear, in violation of VTL §1129(a). *Darmento v. Pacific Molasses Co.*, 81 N.Y.2d 985, 988 (1993). Of note, the Plaintiff's Vehicle was able to stop without impacting the car in front of it.

In opposition, defendants fail to come forward with an adequate non-negligent explanation for the Accident. First Department caselaw is clear that a claim by the rear driver that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the rear driver. *Ly Giap v. Hathi Son Pham, supra*. A claim of a sudden stop in "stop-and-go traffic is not a sufficient non-negligent explanation for [the Accident]." *Elihu v Nicoleau*, 173 A.D.3d 578, 578 (1st Dep't 2019).

Furthermore, the affirmation by the attorney in opposition to the motion fails to generate an issue of fact as to the cause of the accident as the affirmation has no probative value. *Thompson v. Pizzaro*, 155 A.D.3d 423 (1st Dep't 2017). Moreover, any contention by the opposing attorney that the driver of the Plaintiff's Vehicle negligently failed to evade the collision is purely speculative (*Harrigan v Sow*, 165 A.D.3d 463 (1st Dep't 2018); *Hilago v Vasquez*, 187 A.D.3d 683 [1st Dep't 2020]; *Jenkins v. Alexander*, 9 A.D.3d 286, 288 (1st Dep't 2018)), and no other evidence was proffered to support a claim that said driver failed to take reasonable steps to avoid the collision. As such, there are no facts showing that the driver of Plaintiff's Vehicle's failure to avoid being hit in the rear was negligence. *Harrigan v. Sow, supra*; *Gonzalez v. Bishop*, 157 A.D.3d 460 (1st Dep't 2018). Nor is the motion premature, as all parties have submitted statements of material facts and personal affidavits.

Furthermore, as there is no evidence showing that the plaintiff driver acted negligently or that any of his actions contributed to causing the Accident and the evidence establishes that the defendants were solely responsible for the Accident, the affirmative defense based on comparative negligence is dismissed. Moreover, defendants fail to rebut plaintiff's showing that plaintiff was wearing a seat belt at the time of the Accident and, consequently, the affirmative defense of seat belt is dismissed.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of motion of plaintiff CARLITO TORRES-BADILLO (Mot. Seq. 1) seeking an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment as to liability against defendants ROBERT KOFERL and NAT KAGAN MEAT & POULTRY (Nat defendants) is granted; and it is further

ORDERED that the part of the motion of plaintiff (Mot. Seq. 1) that seeks an order dismissing the Nat defendants' first (comparative negligence) and second (seat belt) affirmative defenses is granted; and it is further

ORDERED that as plaintiff executed a stipulation of discontinuance of his personal injury causes of action as against defendant HUDSON VALLEY CATTLE COMPANY, INC. (Hudson Valley), and the Nat defendants do not allege any cross-claims as against defendant Hudson Valley, the complaint is dismissed as against said defendant; and it is further

ORDERED that the caption of this action shall hence forth read as:

<p>CARLITO TORRES-BADILLO,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">-against-</p> <p>ROBERT KOFERI and NAT KAGAN MEAT &amp; POULTRY, INC.,</p> <p style="text-align: right;">Defendants.</p>
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and it is further

ORDERED that the Clerk shall mark the motion [Mot. Seq. 1] disposed in all Court records.

This constitutes the decision and order of the Court.

**Dated: January 12, 2022**

**Hon. s/Hon. Veronica G. Hummel/signed 01/12/2022**  
**VERONICA G. HUMMEL, A.J.S.C.**

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1. CHECK ONE.....  CASE DISPOSED IN ITS ENTIRETY  CASE STILL ACTIVE
2. MOTION IS.....  **GRANTED**  DENIED  GRANTED IN PART  OTHER
3. CROSS-MOTION IS.....  GRANTED  DENIED  GRANTED IN PART  OTHER  
AMEND CAPTION
4. CHECK IF APPROPRIATE.....  SETTLE ORDER  SUBMIT ORDER  SCHEDULE APPEARANCE  
 FIDUCIARY APPOINTMENT  REFEREE APPOINTMENT  
 CONVERT TO ELECTRONIC FILING  **EDIT CAPTION**