Gibbs v Bartnicki
2022 NY Slip Op 32518(U)
January 7, 2022
Supreme Court, Bronx County
Docket Number: Index No. 803115/2021e
Judge: Veronica G. Hummel
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31

SANTHA GIBBS,

Plaintiff,

-against-

JANUSZ BARTNICKI and JANBAR INC.,

Defendants.

Index No. 803115/2021e

HON. VERONICA G. HUMMEL, A.J.S.C.

Mot. Seq. No. 1

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 plaintiff SANTHA GIBBS's ("plaintiff") motion (Seq. No. 1) seeking an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment as to liability against defendants JANUSZ BARTNICKI and JANBAR INC. ("defendants") and dismissing defendants' fourth affirmative defense alleging plaintiff's comparative negligence , as well as an order setting this matter down for an assessment of damages.

This is a personal-injury action arising out of a two-car rear-end accident that occurred on March 4, 2020, at approximately 5:00 p.m. on the eastbound side of the Jackie Robinson Parkway at its intersection with Myrtle Avenue, in Bronx County (the "Accident").

In support of the motion, plaintiff submits an attorney affirmation, an affidavit, a statement of undisputed facts, copies of the pleadings, a certified copy of the police accident report, and a memorandum of law.

In opposition to the motion, defendants submit only an attorney affirmation. Notably, defendants did not include in their opposition papers a counterstatement of undisputed facts corresponding to plaintiff's statement of undisputed facts, as required by Uniform Trial Court Rule 202.8-g(b). 22 NYCRR 202.8-g (eff. Feb. 1, 2021). Consequently, under Rule 202.8-g(c), each fact stated in plaintiff's statement of undisputed facts is deemed admitted.

The relevant, admitted—and thus undisputed—facts are as follows: The Accident occurred as set forth above on March 4, 2020. Prior to the happening of the Accident, plaintiff was operating the Plaintiff's Vehicle in the eastbound side of the Jackie Robinson Parkway. Plaintiff was slowing down for traffic; at which time she was rear-ended by the Defendants' Vehicle. Defendant driver Bartnicki hit the gas petal instead of the brake petal, thus striking the Plaintiff's Vehicle in the rear and causing the Accident.

In her affidavit, plaintiff further avers that prior to being suddenly struck in the rear, plaintiff did not hear the sound of any horn, screeching brakes or any other warnings that would indicate that the Defendants' Vehicle would rear-end the Plaintiff's Vehicle. At the time of the Accident, the road was well lit and the weather conditions were normal and dry. The Plaintiff's Vehicle was in working order, with no mechanical defects. The Accident was caused by the defendant driver's actions, in failing to keep a safe distance, in failing to properly pay attention to the traffic conditions, and negligently pressing the gas petal instead of the brake petal, and plaintiff's actions did not contribute to causing the Accident. Defendants' actions were the sole cause of the Accident.

"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 Dept 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).

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) (quoting *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 him.

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-Maroquin v. Mellet*, 63 A.D.3d 449, 450 (1st Dep't 2009).

Based on these legal principles and the undisputed facts, plaintiff establishes *prima facie* entitlement to judgment as a matter of law by submitting evidence that she was gradually slowing her vehicle due to traffic when she was struck in the rear by the vehicle driven by the defendant driver. While this showing is made without consideration of the certified police report, as defendant's statement in the certified report that he pressed the gas petal instead of the brake petal is a statement against interest and qualifies for an exception to the hearsay rule, the certified police report also supports plaintiff's position. *Yassin v. Backman*, 188 A.D.3d 53 (2d Dep't 2020)*; see Green v. Fofana*, 2021 N.Y. Slip Op. 30934(U), at *4 (Sup. Ct. N.Y. Cty. Mar. 26, 2021).

Defendants, in turn, fail to come forward with an adequate non-negligent explanation for the accident.[1] Initially, defendants concede, by their failure to submit a counterstatement of undisputed facts, that plaintiff was slowing gradually prior to defendants rear-ending the Plaintiff's Vehicle and that the defendant driver negligently pressed the gas petal instead of the brake petal.

Even without these concessions, however, defendants still fail to satisfy their burden on the motion. Defendants' attorney's affirmation contends that there may be material questions of fact concerning the circumstances of the Accident. All such purported questions of fact, however, are purely speculative, without any support in admissible evidence, and thus are insufficient to raise a question of fact. *See Cabrera v. Rodriguez*, 72 A.D.3d 553, 554 (1st Dep't 2010) (citing *Alvord & Swift v. Muller Constr. Co.*, 46 N.Y.2d 276, 281-82 (1978)); *Garcia v. Verizon N.Y., Inc.*, 10 A.D.3d 339, 340 (1st Dep't 2004).

In any event, 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*, 159 A.D.3d 484, 485 (1st Dep't 2018);

[1] Defendants' contention that plaintiff's motion is premature because depositions have yet to be taken lacks merit. "Depositions are unnecessary [before the court determines the liability motion], since defendants have personal knowledge of the facts, yet failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact." *Thompson v Pizzaro*, 155 A.D.3d 423 (1st Dep't 2017). Here, despite having every opportunity to do so, defendants do not submit *any* admissible evidence in opposition to the motion, including an affidavit from the defendant driver presenting his own, contrary rendition of the circumstances surrounding the Accident.

Bajrami v. Twinkle Cab Corp., 147 A.D.3d 649 (1st Dep't 2017); *Santos*, 126 A.D.3d at 506; *Soto-Maroquin*, 63 A.D.3d at 450; *Woodley*, 25 A.D.3d at 452; *see also Earl v. Hill*, 2021 N.Y. Slip Op. 06948 (1st Dep't Dec. 14, 2021). Thus, the unsupported speculation that plaintiff stopped suddenly is insufficient to rebut the presumption that the defendant driver's actions, in failing to maintain a safe distance between the Defendants' Vehicle and the Plaintiff's Vehicle and pressing the incorrect petal, were a cause of the Accident. Accordingly, the motion is appropriately granted insofar as it seeks an order granting partial summary judgment as to defendants' liability for the Accident.

Additionally, plaintiff makes a *prima facie* showing that she did not negligently contribute to the cause of the Accident, and defendants, in turn, have failed to generate a triable issue of material fact. Accordingly, the motion is also appropriately granted insofar as it seeks an order granting summary judgment dismissing defendants' fourth affirmative defense alleging plaintiff's comparative negligence.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby:

ORDERED the part of the motion by plaintiff SANTHA GIBBS ("plaintiff") (Seq. No. 1) that seeks an order, pursuant to CPLR 3212, granting plaintiff partial summary judgment as to liability against defendants JANUSZ BARTNICKI and JANBAR INC. ("defendants") is granted; and it is further

ORDERED that the part of the motion by plaintiff (Seq. No. 1) that seeks an order, pursuant to CPLR 3212, dismissing defendants' fourth affirmative defense alleging plaintiff's comparative negligence is granted; and it is further,

ORDERED that the Clerk shall mark the motion (Seq. No. 1) disposed in all court records.

This constitutes the decision and order of the Court.

Dated: January 7, 2022 **Hon.** *s/Hon. Veronica G. Hummel/signed 01/07/2022*
VERONICA G. HUMMEL, A.J.S.C.

1.	CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY		☒ CASE STILL ACTIVE	
2.	MOTION IS.....	☒ GRANTED	☐ DENIED	☐ GRANTED IN PART	☐ OTHER
3.	CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE	
		☐ FIDUCIARY APPOINTMENT		☐ REFEREE APPOINTMENT	