SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 62

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ASTRID RODRIGUEZ,

Plaintiff,

- v -

ROBERT LEE CARSON, NEW YORK CITY DEPARTMENT OF HOMELESS SERVICES, THE CITY OF NEW YORK,

Defendants.

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INDEX NO.	154145/2020
MOTION DATE	03/01/2022
MOTION SEQ. NO.	001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 27, 28, 29, 30, 31, 32

were read on this motion to/for JUDGMENT - SUMMARY.

HON. J. MACHELLE SWEETING, J.S.C.:

This is an action for personal injuries allegedly sustained by plaintiff Astrid Rodriguez (hereinafter, "plaintiff") on July 17, 2019, when the vehicle in which she was a passenger, rear-ended another vehicle while driving southbound on the FDR Drive toward the Battery Park Underpass in New York, New York (hereinafter, "location of accident"). The vehicle in which plaintiff was a passenger was being operated by Robert Lee Carson (hereinafter, "Carson"). At the time of the accident, defendant Carson was employed by the New York City Department of Homeless Services (hereinafter, "DHS"), a co-defendant in this action.[1] DHS is an agency of the City of New York (hereinafter, defendant "the City"), also a co-defendant in this action.

[1] On September 17, 2020, defendants DHS and the City e-filed an Amended Answer and answered for defendant Robert Lee Carson.

In Motion Sequence Number 001, plaintiff moves, pursuant to Civil Practice Law and Rules ("CPLR") Section 3212, for an order granting plaintiff partial summary judgment against defendants Carson, DHS, and the City, on the issue of liability. Plaintiff also moves to dismiss defendants' affirmative defenses alleging comparative negligence, contributory negligence, and culpable conduct of plaintiff, and to place this action on the trial calendar for an assessment of damages.

BACKGROUND

PLAINTIFF'S TESTIMONY

Plaintiff testified that on July 17, 2019, she was a passenger in a dark green van being operated by defendant Carson. (Plaintiff's 50-H hearing, NYSCEF DOC. NO. 20 at 28; NYSCEF DOC. NO. 21 at 9). She was being taken from the "PATH" office in the Bronx to a shelter located at 2520 Tilden Avenue, Brooklyn, New York (NYSCEF DOC. NO. 20 at 30-31; NYSCEF DOC. NO. 21 at 10). She described the weather as being sunny and hot. (NYSCEF DOC. NO. 20 at 26; NYSCEF DOC. NO. 21 at 13).

When asked about traffic conditions on the day of the accident, plaintiff stated that "it wasn't a lot of traffic, but as we were approaching the tunnel then all the cars were at a stand." (NYSCEF DOC. NO. 20 at 38). She also observed that defendant Carson had been texting the entire time while he was driving, and observed him on his cellular phone immediately prior to the impact (*id.*). She clarified that "while he was driving, he was texting. He would answer the phone whenever the phone message notification would come up. He will answer the phone, put the phone down. And then again he would get a new text, he would look at it and answer. Back and forth like that." (*id.* at 39).

Prior to the accident, plaintiff testified she was falling asleep but suddenly woke up because defendant Carson was going too fast. She further stated, "I saw the other car stop and I knew we were going to crash." (NYSCEF DOC. NO. 21 at 14).

According to plaintiff, she saw cars stopped at the entrance of the tunnel on the road for about 10 seconds prior to impact and noted that defendant Carson was going too fast. (NYSCEF DOC. NO. 21 at 41). She believed he was accelerating, which prompted her to look up. (NYSCEF DOC. NO. 20 at 41). Plaintiff testified he then threw his cell-phone away and tried to make a turn, but it was too late and defendant Carson hit the vehicle in front of him. Plaintiff testified that the van she was in hit a Cadillac, and then the Cadillac "hit a jeep or something that was ahead." (NYSCEF DOC. NO. 21 at 15). She testified that she saw lit red rear lights from the vehicle in front of her prior to the accident (NYSCEF DOC. NO. 20 at 42-43). This was the same vehicle that the van ultimately came into contact with. (*id.* at 42).

Plaintiff testified that police arrived at the scene. She told them that defendant Carson "was driving at a high speed. And that he was also texting. And he wasn't paying attention." (NYSCEF DOC. NO. 20 at 51).

DEFENDANT CARSON'S TESTIMONY

At a deposition held on January 24, 2022, defendant Carson testified that on the date of the accident, he was employed by defendant DHS, an agency under defendant City, as a motor vehicle operator. (NYSCEF DOC. NO. 22 at 11-12). He had been employed by DHS since 1986. (*id.* at 13). As a motor vehicle operator, he would drive a van and transport clients and families to various destinations, including shelters. (*id.* at 12). On the day of the accident, defendant Carson had a

valid driver's license with restrictions for corrective lenses. (*id.* at 15). He testified that he was wearing glasses on the day of the accident. (*id.* at 16).

On the date of the accident, he was operating a Chevy economy van. (*id.* at 16). Defendant Carson testified that it was light out at the time of the accident, the weather was clear and the roadway was dry. (*id.* at 20-21). On that day, he personally inspected his vehicle prior to taking it out and he observed no mechanical issues with the van. (*id.* at 23-24).

Prior to the accident, defendant Carson had picked up plaintiff from the "PATH" shelter, located at 151st Street and Walton Avenue. (*id.* at 25-26). He was driving the van on the FDR Drive near South Street and was headed in the south-bound direction. (*id.* at 28). When asked to describe the traffic on the FDR South that day, defendant Carson stated, "it was stop and go, most of it was stop and go, and then every so often it broke, you know, it cleared up, but then all of a sudden, boom, it stopped, that's when I had the, you know, accident." (*id.* at 35).

Defendant Carson testified that he observed the vehicle in front of him when "all of a sudden it stopped." (*id.* at 43). He then testified that he was "not totally sure if it was completely at a stop" but that he knew "that all of a sudden everything just stopped and [he] didn't....notice no brake lights." (*id.* at 43-44). However, defendant Carson also noted that he "wasn't looking for" the brake lights. (*id.* at 44). When he saw the traffic suddenly stop, he slammed his brakes. (*id.* at 43). At the point of impact, defendant Carson testified that his foot was on the brakes (*id.* at 41-42).

He did not recall being distracted by anything or anyone prior to the accident. (*id.* at 60-61). There was no sun glare or anything that distracted him (*id.*). Defendant Carson described the impact as medium (*id.* at 37) and testified that, as a result of the impact, his airbags deployed (*id.* at 65).

CERTIFIED POLICE ACCIDENT REPORT

The certified police accident report, dated July 17, 2019, states in part:

> "At T/P/O Vehicle #3 was traveling S/B on the FDR toward the Battery Park Underpass, at which time traffic was stopped. Vehicle #3 attempted to stop and ended up colliding with Vehicle #2 who in turn collided with Vehicle #1. Both drivers of vehicle #'s 1 and 2 stated they were stopped in traffic when the accident occurred. Vehicle #3 had 3 other occupants in the vehicle, one of which sustained injury to her left temple...."

(NYSCEF DOC. NO. 23.)

Vehicle #3 refers to the vehicle driven by defendant Carson. The location of accident is identified as "907L S/B FDR Drive" at the "start of Battery Park Underpass."

DISCUSSION

It is well settled that "[t]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Once the movant has made a *prima facie* showing, the burden shifts to the opposing party to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669, 669 [1st Dept 2010], *lv dismissed* 16 NY3d 766 [2011] [internal quotation marks and citation omitted]). The court's function on summary judgment is "issue-finding rather than issue-determination" (*Mayo v Santis*, 74 AD3d 470, 471 [1st Dept 2010]). In deciding the motion, "the court should draw all reasonable inferences in favor of the nonmoving party" and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Assaf v Ropog Cab Corp.*, 153 AD2d 520, 521 [1st Dept 1989] [citations omitted]). "'[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient'" to

defeat a motion for summary judgment (*Siegel v City of New York*, 86 AD3d 452, 455 [1st Dept 2011], quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Here, plaintiff argues that she is entitled to summary judgment as a matter of law because she was an innocent passenger in a vehicle driven by defendant Carson. Plaintiff further argues that defendant Carson rear-ended the vehicle in front of him, during stop-and-go traffic, and that defendant has failed to provide a non-negligent defense for causing the accident.

In support of her motion, plaintiff first submits her own testimony. According to plaintiff, the van she was in was being driven by defendant Carson. (NYSCEF DOC. NO. 20 at 28; NYSCEF DOC. NO. 21 at 9). As the van approached the tunnel entrance on the FDR drive, plaintiff saw "that all the cars were at a stand." (NYSCEF DOC. NO. 20 at 38). She also saw cars stopped at the entrance of the tunnel on the road for about 10 seconds prior to impact and noted that defendant Carson was operating the van at a high rate of speed. (*id.* at 41). Despite seeing cars stopped at the entrance of the tunnel, plaintiff believed defendant Carson was accelerating the speed of the vehicle. (*id.*). She testified that the van eventually rear-ended a Cadillac vehicle, which then caused the Cadillac to hit another vehicle ahead of it. (NYSCEF DOC. NO. 21 at 15).

Second, plaintiff relies on the testimony of defendant Carson in support of her motion. Defendant Carson testified that the traffic pattern on the day of the accident was "stop and go…but then all of a sudden, boom, it stopped, that's when I had the…accident." (NYSCEF DOC. NO. 22 at 35). Defendant Carson testified he did not recall being distracted by anything or anyone while he was operating the van. (*id.* at 60-61).

Lastly, plaintiff relies on a certified copy of the police report, which states "Vehicle #3 attempted to stop and ended up colliding with Vehicle #2 who in turn collided with Vehicle #1. Both drivers of vehicle #'s 1 and 2 stated they were stopped in traffic when the accident occurred."

(NYSCEF DOC. NO. 23). The police report identifies the van operated by defendant Carson's van as vehicle #3.

In opposition to plaintiff's motion, defendants argue that a question of fact exists as to whether the vehicle that defendant Carson's van struck had operable brake lights and whether the vehicle complied with New York State Vehicle and Traffic Law Section 1163(c) to properly signal a stop. Defendants further contend that there is a non-negligent explanation in that the lead vehicle in stop and go traffic on the FDR did not have brake lights to signal a sudden deceleration. Additionally, defendants contend that plaintiff's motion is procedurally defective as it does not refer to the City's operative pleadings, namely the City's Amended Answer.

In reply, plaintiff contends that defendants' argument that the lead vehicle in stop and go traffic did not have brake lights to signal a deceleration does not constitute a non-negligent defense.

"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." (*Sapienza v Harrison*, 191 AD3d 1028, 1029 [2d Dept 2021] quoting *Tsyganash v Auto Mall Fleet Mgt., Inc.,* 163 AD3d 1033, 1033-1034 [2d Dept 2018]. Pursuant to section 1129(a) of the Vehicle and Traffic Law "[t]he 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 vehicles and the traffic upon and the condition of the highway."

"The law is well established that a rear-end collision with a stopped vehicle, or with a vehicle that is coming to a stop creates a prima facie case of negligence by the operator of the rear vehicle unless the operator proffers an adequate nonnegligent explanation for the accident." (*Kalair v Fajerman*, 202 AD3d 625, 626 [1st Dept 2022]). The failure of an opposing party to

rebut the presumption of negligence will entitle the moving party to summary judgment on the issue of fault. (*Toulson v Young Han Pae*, 6 AD3d 292, 293 [1st Dept 2004]). Therefore, a non-moving party must proffer a non-negligent explanation to defeat the motion. (*Mitchell v Gonzalez*, 269 AD2d 250 [1st Dept 2000]. Additionally, the Appellate Division First Department has held that drivers must maintain safe distances between their cars and cars in front of them. (*Urena v GVC Ltd*. 160 AD3d 467, 467 [1st Dept 2018]); *see also* (Vehicle and Traffic Law § 1129[a]). Specifically, drivers have a "duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident." (*DeAngelis v Kirschner*, 171 AD2d 593, 595 [1st Dept 1991]).

Here, plaintiff has made a *prima facie* showing of her entitlement to summary judgment on the issue of liability. Plaintiff has established that defendant Carson, as the operator of the van in which plaintiff was a passenger, was negligent. It is undisputed that plaintiff was a passenger in a van being operated by defendant Carson. There is also no dispute that the van rear-ended another vehicle, which abruptly stopped, on the FDR Drive during stop and go traffic, which defendant Carson saw at one point prior to the collision. As a result of defendant Carson's negligence in operating the vehicle, plaintiff suffered injuries as a result of the accident. The rear-ending of the vehicle sufficiently establishes a *prima facie* case of negligence.

As the opposing party, defendants are tasked with rebutting the presumption of negligence by providing a nonnegligent excuse for the accident. (*Woodley v Ramirez*, 25AD3d 451, 452 [1st Dept 2006]). Here, defendants have failed to rebut any presumption of negligence on behalf of defendant Carson, and the record is devoid of any testimony establishing why defendant Carson was unable to avoid the accident. In fact, he specifically observed that there was stop and go traffic on the FDR Drive, which would occasionally clear up. He also did not know how fast he was

operating his van on the day of the accident. At one point, traffic abruptly stopped, and defendant Carson ultimately struck the vehicle directly in front of his van.

Section 1129[a] of the New York State Vehicle and Traffic Law requires the operators of motor-vehicles to maintain safe distances between their cars and the cars in front of them and imposes a duty on drivers to be aware of traffic conditions and vehicle stoppages. Despite both observing a stop and go pattern of traffic along the FDR Drive and having seen the vehicle at one point prior to the accident, defendant Carson rear-ended another vehicle, which demonstrates that he did not maintain a safe distance between him and the vehicle in front of him. As the driver of the van, defendant Carson had an obligation to maintain a safe distance from the vehicles in front of him. The record establishes that defendant Carson failed to do so and thus acted in contravention of Section 1129[a] of the Vehicle and Traffic Law.

Moreover, defendants have failed to proffer a non-negligent explanation as to why the accident occurred. While defendants in their opposition to this motion speculate that the tail lights were malfunctioning, defendant Carson testified that he did not observe any brake lights from the vehicle in front of him. He also testified "I never seen it, but I really wasn't looking for that." (NYSCEF DOC. NO. 23 at 44). By his own testimony, it is clear that defendant Carson was not looking for brake lights. In any event, whether or not he saw lights, defendant Carson was still required to maintain a reasonably safe distance between himself and any cars in front of him, which he failed to do. (*see Francisco v Shoepfer*, 30 AD3d 275, 275 [1st Dept 2006] [holding that the driver was traveling 30 miles per hour, and when he observed a vehicle stop approximately 32-40 feet in front of him, was negligent in rear-ending that vehicle, regardless of his unsubstantiated allegations that brake lights of the rear-ended vehicle were not in working order, or that the vehicle

had stopped suddenly]). This court finds that defendants have failed to sufficiently raise a triable issue of fact to defeat summary judgment.

With regard to defendants' affirmative defenses, plaintiff also established, *prima facie*, that she is entitled to summary judgment as a matter of law dismissing the affirmative defenses which allege comparative negligence, contributory negligence, and culpable conduct. Plaintiff demonstrated through her testimony that she was not at fault in causing the accident, did not contribute to its occurrence and that defendant Carson's negligence was the sole proximate cause of the accident. Furthermore, defendant Carson testified that he was not distracted by anything, including plaintiff, during his drive. (NYSCEF DOC NO. 23 at 60-61); *Garcia v. Tri-County Ambulette Serv*. 282 AD2d 206, 207 (1st Dept 2001) (holding "it is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of two vehicles"); *Davis v Turner*, 132 AD3d 603, 603 (1st Dept 2015); *Mello v Narco Cab Corp.*, 105 AD3d 634, 634 (1st Dept 2013) (holding "[p]laintiff established that, as a back-seat passenger in a taxi cab that rear-ended a second vehicle, she was free of negligence as a matter of law."); *Giwa v Bloom*, 154 AD3d 921, 922-923 (2d Dept 2017) ("plaintiff also demonstrated that the defendant's negligence was the sole proximate cause of the accident, and that she was not comparatively at fault in the happening of the accident."). As defendants fail to demonstrate that plaintiff caused or contributed to the accident, such affirmative defenses are dismissed.

Lastly, in opposition, defendants argue that plaintiff's motion is defective as it does not refer to the City's operative pleadings, namely an amended answer dated September 17, 2020 (NYSCEF DOC. NO. 5). Defendants argue that this is a substantive issue as plaintiff is seeking

to dismiss affirmative defenses. Defendants offer no additional explanation or proffer any legal basis regarding their assertion.

It is well settled that service of an amended answer supersedes the original as a party's operative pleading. (*OneWest Bank, FSB v Deutsche Bank Natl. Trust Co.*, 186 AD3d 92, 99 [1st Dept 2020]). The record supports that defendants' amended answer dated September 17, 2020, is the operative pleading in this action. However, it is noteworthy that a plain reading of plaintiff's motion does not specifically refer to either of defendants' answers.[2] Nevertheless, here there is no substantive issue to defeat a summary judgment motion. In reviewing both the August 16, 2020 answer (NYSCEF DOC. NO. 4) and the September 17, 2020 amended answer (NYSCEF DOC. NO. 5), defendants answered for defendant Carson and raise only one additional affirmative defense in their amended answer, namely, that "plaintiff(s)' complaint fails to allege a prima facie case against the defendant answering hereby." (*id.* at ¶ 12). This single affirmative defense is insufficient in establishing that a material issue of fact exists necessitating a denial of this motion. As has been discussed above, plaintiff has, demonstrated that defendant Carson, an employee of defendant DHS, operated the van on the day of the accident and was negligent in his operation of the van, causing her to suffer injuries. Accordingly, defendants have failed to establish that plaintiff's motion is defective or that a material issue of fact exists.

[2] It appears that defendants' argument stems solely from the fact that plaintiff annexed only a copy of defendants' original answer, and not the amended answer, to the affirmation in support.

CONCLUSION

For all the aforementioned reasons, this court finds that plaintiff is entitled to summary judgment on the issue of liability. Accordingly, it is hereby

ORDERED that plaintiff Astrid Rodriguez's motion for summary judgment regarding liability against defendants Robert Lee Carson, New York City Department of Homeless Services and the City of New York, is **GRANTED**; and it is further

ORDERED that plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with the Clerk a note of issue and statement of readiness and shall pay the fee therefor, and the Clerk shall cause the matter to be placed upon the trial calendar for a trial on the issue of damages; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

Dated: December 14, 2022

ENTER:

HON. J. MACHELLE SWEETING, J.S.C.