

Salerno v United Rentals (N. Am.), Inc.

2022 NY Slip Op 34839(U)

March 31, 2022

Supreme Court, Queens County

Docket Number: Index No. 711539/2018

Judge: Mojgan C. Lancman

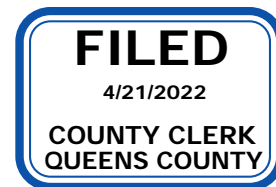
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN



CADRIE SALERNO,

IAS Part 20

Plaintiff,

Index No.: 711539/2018

-against-

Motion Date: 2.16.2022

Motion Seq. No.: 5

UNITED RENTALS (NORTH AMERICA), INC., WDF, INC.,
and JOSEPH E. DANNA,

Motion Cal. No.: 22

Defendants.

The following e-filed papers bearing NYSCEF document numbers 82-92, 116-142 and 149 were read on this motion made by the plaintiff, Cadrie Salerno (the “Plaintiff”), for an Order, *inter alia*, granting partial summary judgment.

The Plaintiff commenced this action seeking to recover monetary damages for personal injuries allegedly sustained in a motor vehicle accident. Presently before the Court is the Plaintiff’s motion: (1) for partial summary judgment on the issue of legal liability against the defendants, United Rentals (North America), Inc. (“United Rentals”), WDF, Inc. (“WDF”) and Joseph E. Danna (“Danna”); and (2) to strike various manner of affirmative defenses interposed in the defendants’ answer. For the following reasons, the motion is granted in part and denied in part.

I. Background

Preliminarily, pursuant to an Order dated March 14, 2022, this Court granted United Rentals summary judgment and dismissed the complaint as to it. This motion is thus denied as moot as to the subject entity. The remaining defendants, WDF and Danna, will be referred to collectively as the “Defendants.”

A. The Accident

The motor vehicle accident giving rise to this cause occurred on May 17, 2018 at the intersection of 160th Avenue and 97th Street, Queens County, New York (the “Accident”). The Accident involved two vehicles.

The Plaintiff was the owner and operator of one of the vehicles, a 2013 Mercedes Benz. Danna was the operator of the other vehicle, a 2014 Dodge truck.

United Rentals, which was previously granted summary judgment based upon 49 U.S.C. § 30106 (the “Graves Amendment”), owned the truck and rented same to WDF. Danna was operating the truck in the course of his employment with WDF when the accident occurred.

The Plaintiff was travelling on 97th Street, which is a one-way northbound road. There are no stop signs on 97th Street.

Danna was travelling eastbound on 160th Avenue, which is comprised of one eastbound lane and one westbound lane. There are painted stop bars and stop signs on both sides of 160th Avenue for vehicles entering 97th Street.

The accident occurred within the intersection of 160th Avenue and 97th Street.

B. The Plaintiff’s Deposition Testimony

The Plaintiff’s deposition testimony that is material to this motion is set forth below.

The Plaintiff was travelling on 97th Street at approximately 20 to 23 m.p.h. while approaching the intersection with 160th Avenue. She did not have a stop sign.

The Plaintiff first saw Danna’s vehicle at a distance of “five, six meters, maybe,” or approximately 16 to 19 feet. The Plaintiff had been slowing down slowly while approaching the intersection, but when reached the corner thereof, she “hit it [the brakes] hard.”

The Plaintiff also turned her wheel away from Danna’s vehicle in an effort to avoid the accident.

C. Danna’s Deposition Testimony

The deposition testimony given by Danna that is material to this motion is set forth below.

A stop sign was located on the northeast corner of the intersection and same governed Danna’s approach. He came to a full stop for several seconds at the stop sign, looking left, straight and to the right for oncoming traffic.

When Danna looked to the right, which was 97th Street and the direction from which Plaintiff was approaching, he observed a large white box truck parked immediately off the northeast corner thereof. The truck was illegally parked in an area adjacent to the intersection that was demarcated with a New York City traffic sign prohibiting vehicles to park near the corner.

With the illegally parked box truck obstructing his view up 97th Street, Danna began to creep slowly out into the intersection to see around the truck. He slowly rolled about 10 feet into the intersection. At that moment, the Plaintiff, who had been travelling on 97th Street, appeared to

Danna's right. The Plaintiff was travelling at a high rate of speed. The Plaintiff slammed on her brakes and skidded, but the collision nonetheless took place.

Danna did not honk his horn before the accident and did not steer in an effort to avoid the accident. Lastly, he did not see the Plaintiff before the accident.

D. The Defendants' Expert

In opposition, the Defendants also submit the affidavit of Robert Genna ("Genna"), a Forensic Consultant and Collision Reconstruction Analyst, who opines as follows:

the objective evidence establishes to a reasonable degree of certainty in the field of accident reconstruction that [P]laintiff ... failed to exercise reasonable care in the operation of her vehicle...with an illegally parked box truck obstructing the view of respective drivers, [Plaintiff] failed to approach and proceed through the intersection exercising caution not only as to other vehicles but also pedestrians, such as children, crossing the residential street behind the truck. Conversely, ...Danna stopped at the intersection for several seconds, and then slowly and reasonably moved into the intersection. [the Plaintiff] neither observed nor attempted to stop her vehicle until after ...Danna entered the intersection and when he had already crossed into the middle of the intersection. [The Plaintiff] alleges that she was operating her vehicle at 20 mph. If this is true, then a forensic examination of the site which takes into account the presence of the truck establishes that [the Plaintiff] should have been able to observe ... Danna's vehicle 60 feet away and that [the Plaintiff] had ample time and distance to safely brake ... Rather, ... Danna's testimony reflects that [the Plaintiff] applied her brakes hard and skidded before the incident. In all, and to a reasonable degree of forensic certainty, the analysis of this incident demonstrates the lack of reasonable care by [the Plaintiff] in the operation of her vehicle prior to the accident in multiple ways. Moreover, [the Plaintiff's] lack of reasonable care constituted a substantial factor in causing the accident.

III. Discussion

A. The Branch of the Motion for Partial Summary Judgment on the Issue of Legal Liability and to Dismiss the Affirmative Defense of Comparative Negligence

To establish entitlement to summary judgment on the issue of legal liability, the Plaintiff: "... 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. To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of ... her own comparative fault; instead, [a] violation of the Vehicle and Traffic Law constitutes negligence as a matter of law [internal quotation marks and citations omitted] ..." *Shah v MTA Bus Co.*, 201 AD3d 833, 834 [2d Dept 2022].

The Plaintiff establishes *prima facie* entitlement to summary judgment on the issue of liability because Danna's failure to yield the right-of-way was a proximate cause of the accident. Here, the record establishes that: (1) that the Plaintiff had the right of way as there was no traffic control device governing her direction of travel; (2) that Danna stopped at a stop sign and then continued to drive straight ahead; and (3) that Danna did not see the Plaintiff's vehicle before the accident (*see* Vehicle and Traffic Law §§ 1142 [a]; 1172 [a]; *Ashby v Estate of Encarnacion*, 178 AD3d 763 [2d Dept 2019]; *Kerolle v Nicholson*, 172 AD3d 1187 [2d Dept 2019]; *Kaziu v Human Care Servs. for Families & Children, Inc.*, 167 AD3d 588 [2d Dept 2018]; *Kraynova v Lowy*, 166 AD3d 600 [2d Dept 2018]; *Mastricova v Ruderman*, 164 AD3d 1435 [2d Dept 2018]).

In opposition, the Defendants do not raise a triable issue of fact relative to their negligence. Here, as noted, the undisputed facts are that the Plaintiff had the right of way; that Danna stopped at a stop sign and then proceeded into the intersection; and that Danna did not see the Plaintiff's vehicle before the accident (*see* Vehicle and Traffic Law §§ 1142 [a]; 1172 [a]; *Ashby v Estate of Encarnacion*, 178 AD3d 763; *Kerolle v Nicholson*, 172 AD3d 1187; *Kaziu v Human Care Servs. for Families & Children, Inc.*, 167 AD3d 588. As also noted, the Plaintiff does not have to establish freedom from comparative fault to be accorded summary judgment on the issue of legal liability (*Shah v MTA Bus Co.*, 201 AD3d 833).

The next issue is whether the Plaintiff should be granted summary judgment dismissing the Defendants' affirmative defense alleging comparative negligence. This issue is properly before the Court because "[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence [citations omitted]" (*see Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]; *see also Ng v West*, 195 AD3d 1006 [2d Dept 2021]).

The Plaintiff bears the burden of establishing *prima facie* that she is free from comparative fault (*see Higashi v M&R Scarsdale Rest., LLC*, 176 AD3d 788 [2d Dept 2019]; *Wray v Galella*, 172 AD3d 1446, 1447 [2d Dept 2019]; *Hai Ying Xiao v Martinez*, 185 AD3d 1014 [2d Dept 2020]); *Paget v PCVST-DIL, LLC*, 186 AD3d 1162 [1st Dept 2020]).

The Defendants raise triable issues of fact as to whether the Plaintiff was comparatively negligent "... inasmuch as [P]laintiff[s] own submissions raise an issue of fact whether [P]laintiff met [her] duty to see what should be seen and to exercise reasonable care under the circumstances to avoid the accident [internal quotation marks and citations omitted]" (*Webb v Schraf*, 191 AD3d 1353, 1355 [4th Dept 2021]). The Plaintiff testified at her deposition that she first saw Danna's vehicle "five, six meters, maybe," which is a distance of approximately 16-19 feet; however, the impact nonetheless took place. Furthermore, Genna, the Defendants' expert, opines that the Plaintiff should have been able to: (1) see Danna's vehicle from a distance of 60 feet; and (2) brake safely so as to avoid the accident.

B. The Remaining Branches of the Plaintiff's Motion

The Plaintiff also moves for partial summary judgment dismissing the following affirmative defenses: second (assumption of the risk); fourth (culpable conduct); fifth (failure to use seat belts); sixth (proximate causation); ninth (phantom vehicle/defendant defense); eleventh (intervening/superseding causes defense); twelfth (gross negligence); thirteenth (failure to state cause of action); fourteenth (justification); and sixteenth (failure to join parties).

The application to dismiss the affirmative defense of culpable conduct, the fourth, is denied for the same reasons that require the denial of the application to dismiss the affirmative defense of comparative fault.

The branch of the motion to dismiss the other affirmative defenses is granted because same are factually and legally without.

The second, fifth, ninth, twelfth, thirteenth, fourteenth and sixteenth affirmative defenses are also dismissed on the additional ground that they have been abandoned. The Defendants advance no opposition to the request that same be dismissed. The law is settled that: (1) where a party fails to oppose some or all matters advanced on a motion for summary judgment, the facts as alleged in the movant's papers may be deemed admitted as there is, in effect, a concession that no question of fact exists (*see Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539 [1975]; *Madeline D'Anthony Enter., Inc. v Sokolowsky*, 101 AD3d 606 [1st Dept 2012]); (2) the failure to raise pleaded affirmative defenses in opposition to a motion for summary judgment renders those defenses abandoned and thus without any efficacy (*see New York Commercial Bank v J. Realty F Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]); and (3) where a party does not oppose a motion or branches thereof, he or she is deemed to have acquiesced in the relief sought by the motion (*see Flake v Van Wagenen*, 54 NY 25 [1873]; *Mixon v TBV, Inc.*, 76 AD3d 144 [2d Dept 2010]).

IV. Conclusion

For the reasons stated above, it is hereby:

ORDERED, the branch of the Plaintiff's motion for partial summary judgment on the issue of legal liability is granted against WDF and Danna; and it is further,

ORDERED, that the branch of the Plaintiff's motion for partial summary judgment dismissing certain affirmative defenses asserted by WDF and Danna is granted to the extent that the second, fifth, sixth, ninth, eleventh, twelfth, thirteenth, fourteenth and sixteenth affirmative defenses are dismissed; and it is further,

ORDERED, that the Plaintiff's motion as to WDF and Danna is otherwise denied; and it is further,

ORDERED, that the Plaintiff's motion against the defendant United Rentals (North America) Inc. is denied in its entirety as academic; and it is further

ORDERED, that inasmuch as the Plaintiff has filed a Note of Issue on July 30, 2021 the Clerk of the Court is hereby directed to place this matter on the trial calendar.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
March 31, 2022



MOJGAN C. LANCMAN, J.S.C.