Baxter v Port Auth. of N.Y. & N.J.
2022 NY Slip Op 34975(U)
April 25, 2022
Supreme Court, Bronx County
Docket Number: Index No. 31679/2017E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15
---X

ADRIAN BAXTER,

Index №. 31679/2017E

-against-

Hon. BEN R. BARBATO
Justice Supreme Court

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and DOREEN MORAN,
---X

The following papers, were read on this motion (NYSCEF **Seq. No. 3)**, for **Summary Judgment**, noticed October 19, 2021& submitted January 28, 2022.

Notice of Motion–Affirmation & Exhibits- **by Plaintiff**	NYSCEF Doc No(s). 55-59
Answering Affirmation & Exhibits – Opp by Defendant Moran	NYSCEF Doc No(s). 61-70
Answering Affirmation & Exhibits-Opp by Defendant Port Authority	NYSCEF Doc No(s). 71-77
Replying Affirmation & Exhibits – by Plaintiff	NYSCEF Doc No(s). 78-80

Upon the foregoing papers, Plaintiff's Motion for partial summary judgment in his favor on liability, and dismissal of Defendants' affirmative defenses alleging Plaintiff's culpable conduct, and for related relief, is decided in the annexed memorandum decision and order.

Dated: APR 2 5 2022 **2022**

Hon. **BEN R. BARBATO, J.S.C.**

1. CHECK ONE............................ ✓ CASE STILL ACTIVE
2. MOTION IS .... ✓ GRANTED IN PART
3.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
---X
ADRIAN BAXTER,
Plaintiff,
-against- Index No.: 31679/2017E
THE PORT AUTHORITY OF NEW YORK AND
NEW JERSEY and DOREEN MORAN,
Defendants.
---X
HON. BEN R. BARBATO:

Plaintiff, ADRIAN BAXTER, moves for partial summary judgment in his favor on the issue of liability, and dismissal of Defendants' affirmative defenses alleging Plaintiff's culpable conduct, and for related relief.

This is an action to recover damages for alleged personal injuries sustained by Plaintiff in a motor vehicle accident, which occurred on, or about, July 5, 2017, at about noon or 12:15 p.m., at JFK Airport, on a service road in the "Airport Operations Area" (AOA), in the County of Queens, New York. The motor vehicle owned and operated by Defendants, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and DOREEN MORAN, respectively, came in contact with the truck operated by Plaintiff.

The submissions include the pleadings; the deposition transcripts of Plaintiff BAXTER, Defendant MORAN, and witness Michael Hynes; Plaintiff's

Notice of Claim; the Port Authority's Motor Vehicle Crash Report; photographs; a video of the accident; and Verizon records.

The Note of Issue was filed on, or about, January 11, 2021. Defendants' motion to vacate the Note of Issue was resolved by Stipulation, wherein the parties agreed that the action remain on the calendar, that the parties exchange certain discovery, and that the time to make dispositive motions be extended to September 17, 2021. (*See* Stipulation, dated March 17, 2021, at NYSCEF Doc No 52). The instant motion was filed on September 17, 2021.

Alleged Facts

Plaintiff, a Delta Airlines Mechanic/Technician, was operating a six-wheel Delta "big boom truck" on a service road, in an "Airport Operations Area" (AOA), which was accessible to authorized personnel, and not open to the general public. He describes the road as having "one lane going and one lane coming and it winds just a little bit". The speed limit there is ten miles per hour, and he was traveling under the limit. Plaintiff was on his way to handle a maintenance call; it was a sunny day. According to Plaintiff, while he was driving within the marked roadway, the Defendants' vehicle, which was not following the path of the road, came up from behind Plaintiff's truck, and sideswiped the right (passenger side)

front quarter panel of Plaintiff's truck. The contact occurred with the left (driver side) doors of Defendants' vehicle. Afterwards, Defendant asked Plaintiff where he came from, and Plaintiff replied "I'm in a giant truck. How did you not see me?" (*See* Plaintiff BAXTER's depositions, dated December 5, and 19, 2018, and June 13, 2019).

Defendant MORAN was employed by the PORT AUTHORITY as an Aircraft Rescue Firefighter; and, at the time of the accident, she was operating a fire rescue vehicle, for her annual "airport familiarization" training. The service road within the "Airport Operations Area" (AOA) is a two-way road which goes around the whole airport, and has one lane of travel in each direction. The speed limit there is ten miles per hour.

In pertinent part, Defendant MORAN testified that, in the five seconds prior to the accident, she was looking straight ahead, and she was *not* driving her vehicle within the lane of travel. Prior to the accident, she did not see the Delta truck, and she did not become aware of the accident until she felt the impact. At the time of the impact, she was looking straight ahead; and she had her lights on, but not her sirens. Her vehicle was damaged on the driver's side.

Also, MORAN testified that she did not recall certain matters, such as her rate of speed at the time of the impact, and, whether, at the moment of impact, the vehicles were entirely within one of the lanes.

Defendant MORAN acknowledged that the video depicted the subject accident. (*See* Defendant MORAN's deposition, dated August 20, 2019).

Applicable Law/Analysis

In a case having similarities to the one at bar, a plaintiff's vehicle was suddenly struck in the right (passenger) side, by a defendants' truck which came "from the right lane into the left lane"; the Court held that plaintiff had met his prima facie burden on summary judgment:

> "by demonstrating that defendant driver entered the left lane when it was not safe to do so, ... and that plaintiff driver did not contribute to the accident... In opposition, defendants failed to raise a triable issue of fact. They submitted the affidavit of their driver, defendant Stroud, who averred that there was no vehicle to his left when he began to go through a traffic circle in the right lane, but that, after he signaled his intention to turn left and was bearing left, he felt a catch on the rear tire and saw in the mirror that a vehicle was "squeezed in" on his left. Defendants also submitted a police accident report that contained Stroud's statement that he was unaware that he had struck a vehicle at all until he was stopped by an officer, which undermined Stroud's affidavit purporting to describe how the accident occurred (see Garzon-Victoria v Okolo, 116 AD3d 558, 983 NYS2d 718 [1st Dept 2014]). **These submissions do not provide any nonnegligent explanation for the accident, but instead indicate that Stroud was**

> **negligent in failing to see what was there to be seen, namely plaintiffs' car"** [emphasis added]

(*Steigelman v Transervice Lease Corp.*, 145 AD3d 439, 439-440 [1st Dept 2016]).

In a motor vehicle accident which also occurred on a roadway within JFK Airport, the Court held that plaintiff had "established his prima facie entitlement to judgment as a matter of law on the issue of the defendants' negligence by demonstrating that [defendant] Tang's **failure to see that which he should have seen through the proper use of his senses** was a proximate cause of the accident" [emphasis added] (*Francois v Tang*, 171 AD3d 1139, 1139-1140 [2d Dept 2019]).

It has been established that a driver has the duty to operate his vehicle with reasonable care, that is, the driver should maintain a reasonably safe rate of speed, have his vehicle under proper control, and keep a proper lookout, under the existing circumstances, to see and be aware of what is in his view and to use reasonable care to avoid an accident. A driver is charged with the duty to see that which, under existing circumstances, he should have seen by the proper use of his senses. If he does not observe that which is there to be seen, he is negligent in failing to look, or in not looking carefully. (*See* NY PJI 2:77). It is noted that "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". (*See* VTL § 1122(a) "Overtaking a vehicle on the left").

Accordingly, herein, Plaintiff made a prima facie showing of her entitlement to partial summary judgment on the issue of Defendants' liability by the testimony, and video, evidencing that Defendants' vehicle sideswiped Plaintiff's truck. It appears therefrom that Defendant MORAN was negligent in failing to see what was there to seen, namely, Plaintiff's big truck.

Thus, the burden shifted to Defendants to advance a non-negligent explanation for the happening of the accident.

Defendant MORAN acknowledged that the happening of the accident is portrayed in the video. Inexplicably, Defendant MORAN did not see Plaintiff's truck prior to the accident.

The video supports Plaintiff's position, in that Plaintiff's vehicle is shown to be traveling, at a cautious pace, within the service road. Defendant MORAN is shown, traveling fast behind Plaintiff's vehicle, at a much higher rate of speed, and then moving forward, towards the right side of Plaintiff's vehicle, cutting into its path.

Under the circumstances, since she came up from behind him, Defendant MORAN was in a position to have seen Plaintiff's truck, in broad daylight; and her failure to see that which she should have seen, through the proper use of her senses, was a proximate cause of the resulting collision.

It is noted that Defendants maintain that the VTL does not apply to the area where the accident occurred, namely, the PORT AUTHORITY "Airport Operations Area", since it is not open to public motor vehicle traffic. (*Kawalsingh v Champion*, 67 Misc 3d 378, 384 [Sup Ct, Queens County 2020]).

However, even assuming that the VTL does not apply, this Court is relying "upon common law negligence liability - not seeing what should have been seen - not negligence based upon a violation of the VTL" (*Cf. Kawalsingh v Champion*, 67 Misc 3d 378, 384 [Sup Ct, Queens County 2020]; *see Francois v Tang, supra*).

It is noted that, as far as the liability of Defendant PORT AUTHORITY, the owner of the Defendants' vehicle, it is based upon VTL § 388(1) "Negligence in use of operation of vehicle attributable to owner", which provides that:

> "**Every owner of a vehicle used or operated in this state shall be liable and responsible for** death or **injuries to person** or property **resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.** Whenever any vehicles as

> hereinafter defined shall be used in combination with one another, by attachment or tow, the person using or operating any one vehicle shall, for the purposes of this section, be deemed to be using or operating each vehicle in the combination, and the owners thereof shall be jointly and severally liable hereunder".

The Court of Appeals has now established that "that to obtain partial summary judgment on defendant's liability he [plaintiff] does not have to demonstrate the absence of his own comparative fault" (*Carlos Rodriguez v City of NY*, 31 NY3d 312, 323 [2018]).

The First Department recently held as follows:

> "plaintiff was not required to demonstrate the absence of fault on her part in support of her motion (see Rodriguez v City of New York, 31 NY3d 312, 76 N.Y.S.3d 898, 101 N.E.3d 366 [2018]). Nor was she required to establish that defendants' conduct was the sole proximate cause of the accident (see Benny v Concord Partners 46th St. LLC, 189 AD3d 572, 573, 139 N.Y.S.3d 15 [1st Dept 2020]). Any discrepancies between plaintiff's testimony and the ... [other evidence] may be considered by the jury in determining comparative fault (CPLR 1411)"

(*Simmons v Bergh*, 192 AD3d 547, 548 [1st Dept 2021]).

A remaining issue is whether Defendants' affirmative defenses alleging Plaintiff's culpable conduct should be dismissed.

In this regard, Defendants argue that Plaintiff was, at least, partially at fault, for failing to yield the right-of-way; and that Defendant MORAN's vehicle had the right-of-way within the AOA, since she was operating a PORT AUTHORITY fire

rescue truck with the emergency lights allegedly flashing– even though she was not responding to an emergency, but merely engaged in a training exercise.

However, the Court of Appeals has established that, even if a driver has the right-of-way, that gives him "no authority to operate his truck carelessly and negligently and without consideration of the circumstances and conditions existing at the time" (*Lee v City Brewing Corp.*, 279 NY 380, 389 [1939]).

Indeed, "a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision, to see what there is to be seen through the proper use of his or her senses, and to drive at a speed that is reasonable and prudent under the conditions, having regard to the actual and potential hazards then existing" (*Guo v Efkarpidis*, 185 AD3d 949, 951-952 [2d Dept 2020]).

Under the particular circumstances existing herein, as evidenced by the video, Defendants failed to raise a genuine issue of fact regarding Plaintiff's culpable conduct. By the sudden manner in which Defendant MORAN maneuvered, it appears that Plaintiff had no time to react.

<u>Conclusion</u>

Accordingly, Plaintiff's Motion, for partial summary judgment in his favor on liability, is granted, to the extent that Defendants are found liable for the

happening of this accident and Defendant MORAN's negligence was a substantial factor in causing the accident; and Defendants' affirmative defenses alleging Plaintiff's culpable conduct are dismissed.

However, this Court makes no determination as to other issues herein, such as whether Plaintiff's alleged injuries were proximately caused by the negligence of the Defendants, and whether Plaintiff sustained a "serious injury" within the meaning of the Insurance Law.

This constitutes the decision and order of this Court.

Dated: APR 2 5 2022, 2022

HON. BEN R. BARBATO, J.S.C.