Ortiz v Marte
2022 NY Slip Op 35021(U)
December 21, 2022
Supreme Court, Bronx County
Docket Number: Index No. 34684/2019E
Judge: Bianka Perez

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14

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Carmen Ortiz

Plaintiff

-against-

Bernies A. Mercedes Marte, et al.,

Defendants.

Index №. 34684/2019E

Hon. Bianka Perez

Justice Supreme Court

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Juan Perez,

Plaintiff

-against-

Bernies A. Mercedes Marte, et al.,

Defendants.

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The following were read on this motion **(Seq. 6)** for **SUMMARY JUDGMENT** submitted on **October 14, 2022.**

Notice of Motion - Exhibits and Affidavits Annexed	Nyscef No(s). 136-149
Answering Affidavit and Exhibits	Nyscef No(s). N/A
Reply Affidavit	Nyscef No(s). N/A

Upon the foregoing papers, Plaintiff JUAN PEREZ moves pursuant to CPLR 3212, for summary judgment on the issue of liability.

Plaintiff commenced the instant action to recover for injuries allegedly sustained in a motor vehicle accident, which occurred on September 17, 2019 at approximately 1:25 p.m., on the Bruckner Expressway Exit ramp for Whitestone Bridge, Bronx, New York. Plaintiff now seeks summary judgment on the basis that his vehicle was rear-ended as it was stopped by the defendants' vehicle operated by defendant Bernies A. Mercedes Marte and owned by defendant Baldo Express Transportation Co. LLC. Defendants did not oppose.

In support of this motion, Plaintiff provided a copy of the summons and complaint, a copy of the certified police report and the depositions of all parties. Defendants failed to raise a non-negligent explanation for the collision in their affirmation in opposition. Upon review and consideration, the motion for summary judgment is granted in favor of Plaintiff.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72 [2003]; *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact'" (*Alvarez*, 68 N.Y.2d at 324; *Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]; *Chance v. Felder*, 33 A.D.3d 645, 645-646 [2d Dept 2006]). "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 non-negligent explanation for the accident." (*Cabrera v. Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010] citing *Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908 [2008]; *Agramonte v. City of New York*, 288 A.D.2d 75, 76 [1st Dept. 2001]; see also *Dattilo v. Best Transp. Inc* 79 A.D.3d 432 [1st Dept. 2010]). Further, a motorist is under a "duty to see that which under the circumstances he [or she] should have seen by the proper use of his [or her] senses (VTL § 1141). Each driver in the exercise of ordinary prudence ought to have observed and used such care to avoid the collision as an ordinarily prudent person would have used under the circumstances (see *Shea v. Judson,* 283 NY 393 [1940]; *Rennie v. Barbarosa Transp.,* 151 A.D.2d 379, 380 [1st Dept 1989]; *Costalas v. City of New York,* 143 A.D.2d 573 [1st Dept 1988]; also see, 1 NY PJI 2:79 [2d ed]).

In this case, the Plaintiff established a prima facie case of negligence on the part of defendants. In that, while the plaintiff's vehicle was stopped, it was struck in the rear by Defendants' vehicle. (Exh. 6-8). In opposition, defendants failed to submit any non-negligent explanation for this accident as they failed to oppose the instant motion.

As to the branch of the motion seeking to dismiss the Second, Fifth, Ninth, Tenth affirmative defenses of comparative fault, comparative negligence, seat belt defense and mitigate damages, it is uncontested that plaintiff was wearing a seat belt and was rear ended and did not make any sudden unexpected movements and therefore was free of comparative fault, (*Anzel v Pistorino*, 105 AD3d 784, 786 [2013], quoting *Medina v Rodriguez*, 92 AD3d 850, 850 [2012]); the court may exercise its discretion pursuant to CPLR 3212(g) and issue an order narrowing the issues that remain in dispute by specifying that plaintiff is free from comparative fault (see *Phillip v D & D Carting Co*., 136 at 24-25). Defendants failed to submit opposition.

As to the branch of the motion seeking to dismiss the Third and Fourth Affirmative defenses the plaintiff has established no other party is liable other than the defendants herein. Thus, the defendants have failed to raise an issue of fact as to the culpability of any other party herein.

With respect plaintiff's branch of the motion asking this Court to strike defendants' Seventh and Eighth affirmative defense alleging the "emergency doctrine" is also granted. The emergency doctrine recognizes that "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context," provided the actor had not created the emergency (*Rivera v. New York City Tr. Auth.,* 77 N.Y.2d 322, 327, 567 N.Y.S.2d 629, 569 N.E.2d 432 [1991], *rearg. denied* 77 N.Y.2d 990, 571 N.Y.S.2d 916, 575 N.E.2d 402 [1991]; *see also Caristo v. Sanzone,* 96 N.Y.2d 172, 174, 726 N.Y.S.2d 334, 750 N.E.2d 36 [2001]). Here, the defendants failed to oppose the motion and annex an affidavit detailing any sudden move or unexpected circumstances to warrant the assertion of the emergency doctrine defense, and as a result, that branch of the motion is granted.

With respect to plaintiff's branch of the motion asking the Court to dismiss the Twelfth affirmative defense for plaintiff's failure to state a cause of action, for the Court to decide if plaintiff failed to state a cause of action, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (see *Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997] [on amotion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (see, CPLR 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory" (*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept. 1992]). Here, the pleadings clearly state a cause of action recognizable by law as plaintiff was

rear ended while stopped by defendants' vehicle. Thus, the affirmative defense for failure to state a claim is dismissed.

Accordingly, it is hereby

ORDERED, that the branch of Plaintiff's motion for summary judgment on the issue of liability is granted, it is further

ORDERED, that the branch of Plaintiff's motion seeking to dismiss Defendant's Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Twelfth Affirmative Defenses are granted without opposition, and it is further

ORDERED, that all other branches of the plaintiff's motion are otherwise denied, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants on the issue of liability and dismissing the defendants' affirmative defenses Second, Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Twelfth Affirmative Defenses.

This constitutes the decision and order of the Court.

Dated: December 21, 2022 **Hon.** _____
BIANKA PEREZ, 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