

Sosa v Espinal-Soto
2022 NY Slip Op 35105(U)
May 25, 2022
Supreme Court, Bronx County
Docket Number: Index No. 802190/2021E
Judge: Veronica G. Hummel
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31**

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STARLYN SOSA and GARY SOSA

Index №. 802190/2021E

-against-

Hon. VERONICA G. HUMMEL

**PEDRO J. ESPINAL-SOTO, TRAVIS A.
BROWN and FELICIA L. WILKINSON**

Acting Justice Supreme Court

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The following papers were read on this motion (Seq. No. 1) for dismiss noticed on September 13, 2021 and submitted on October 18, 2021.

Notice of Motion - Affirmation and Exhibits	NYSCEF Doc. # 5-16
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 19-29 and 42
Cross Motion – Affirmation and Exhibits	NYSCEF Doc. # 30-40
Affirmation in Reply and in Opposition to Cross Motion	NYSCEF Doc. # 44-45
Reply Affirmation in further support of Cross Motion and Exhibits	NYSCEF Doc. # 46-50

Upon the foregoing papers, it is ordered that: this motion by defendant FELICIA L. WILKINSON [mot. seq. 1] (movant) for an order dismissing the complaint, pursuant to CPLR §3211 (a) (5) (statute of limitations) and (8) (lack of personal jurisdiction), against her on the grounds that the plaintiffs STARLYN SOSA and GARY SOSA never properly completed service upon movant, or an order, pursuant to CPLR §3212, granting summary judgment to the movant on the issue of liability; and cross-motion by plaintiff for an order extending the time to complete certified mailing portion of service of process pursuant to VTL 253 or deeming the previous certified mailing to be sufficient compliance with the mailing provisions of VTL 253 are decided in accordance herewith.

Defendant Wilkinson contends that service of process which was attempted pursuant to VTL 253 was not done properly and that more than 120 days since the filing of the Summons has passed thus personal jurisdiction was not obtained with respect to her. Additionally, based on the foregoing, defendant Wilkinson argues that the Statute of Limitations has expired. Therefore, the Court lacks *in personam* jurisdiction, the action is time barred and the action must be dismissed.

Alternatively, defendant Wilkinson moves for summary judgment on the ground that, as the lead vehicle which was struck in the rear by the vehicle owned and operated by the co-defendant Espinal-Soto, defendant Wilkinson bears no liability for the accident.

Plaintiff opposes defendant Wilkinson's motion and cross-moves for an extension of time to complete the mailing portion of the service required by VTL 253 or deeming the previous certified mailing sufficient and in substantial compliance with the statute.

The court will resolve the motions in the order that is most logical. If the portion of the motion by Wilkinson that seeks summary judgment with respect to liability is granted, the remainder of the motion that seeks dismissal based the assertion of the expiration of the statute of limitations and/or lack of personal jurisdiction and

plaintiff's cross motion seeking an extension of time to serve would be rendered moot. As such, the motion for summary judgment will be addressed first.

Defendant Wilkinson's Motion for summary judgment on liability.

Plaintiff seeks recovery of compensatory damages for alleged serious personal injuries sustained as a result of a three car motor vehicle accident which occurred on February 20, 2018, in the northbound lanes of the Major Deegan Expressway in the vicinity of Fordham Road in Bronx, New York. Defendant Wilkinson was driving the lead vehicle. The Wilkinson Vehicle was struck in the rear by the vehicle driven by defendant Espinal-Soto. The Espinal-Soto Vehicle was hit in the rear by the vehicle driven by defendant Brown.

Defendant Wilkinson moves for summary judgment dismissing the complaint and cross-claims in relevant part submitting the pleadings, a personal affidavit, an attorney's affirmation, an uncertified police report, a material statement of facts and a reply affirmation. Defendant Brown and plaintiff oppose the motion based on attorney affirmations.

In a personal affidavit, defendant Wilkinson avers that at the time of the accident, she was driving in the right lane on the Major Deegan Expressway and there were three lanes in each direction. When defendant Wilkinson first got onto the roadway, the Wilkinson Vehicle was in the right lane. She then merged into the left lane. The speed limit was 55 mph at the location of the accident. As defendant Wilkinson got close to Fordham Road, traffic started to slow down. The car in front of the Wilkinson Vehicle slowed down to about 40 mph, so the Wilkinson Vehicle slowed down too. The Wilkinson Vehicle was then struck in the rear. Defendant Wilkinson heard from conversations with the other drivers that the car behind hers hit the Wilkinson Vehicle in the rear first and then the third car in the accident hit the middle car. Defendant Wilkinson did not hit the car in front of her vehicle as she slowed down and kept a distance as she was slowing down with the flow of traffic. The Wilkinson Vehicle did not have any operational problems prior to the accident and the brake/ tail lights were on and operational.

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a *prima facie* showing that he or she is free from fault. *see Harrigan v. Sow*, 165 A.D.3d 463 (1st Dep't 2018); *Hilago v. Vasquez*, 187 A.D.3d 683 (1st Dep't 2020). In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor vehicle collision case, therefore, the driver must demonstrate, *prima facie*, that he or she kept the proper lookout, or that his or her alleged negligence, if any, did not contribute to the accident. *see Harrigan v Sow, supra; Hilago v Vasquez, supra.*

Vehicle and Traffic Law §1129(a) provides that, 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 vehicles and the traffic upon and the condition of the highway. *Urena v GVC Ltd.*, 160 A.D.3d 467, 467 (1st Dep’t 2018).

It is well settled, therefore, 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. *see Cabrera v Rodriguez*, 72 A.D.3d 553 (1st Dep’t 2010); *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 Dep’t 2001). Furthermore, in a chain reaction collision, responsibility presumptively rests with the rearmost driver and there is a presumption of non-negligence of the driver of the lead vehicle. *Mustafaj v Driscoll*, 5 A.D.3d 138 (1st Dept 2004); *Chuk Hwa Shin v Correale*, 142 A.D.3d 518, 519 (2d Dep’t 2016); *Skura v Wojtowski*, 165 A.D.3d 1196, 1199 (2d Dep’t 2018).

First Department case law is also 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. *Bajrami v Twinkle Cab Corp.*, 147 A.D.3d 649 (1st Dep’t 2017); *Cabrera v Rodriguez*, *supra*; *see Ly Giap v Hathi Son Pham*, 159 A.D.3d 484, 485 (1st Dep’t 2018). (“A claim that the lead driver came to a sudden stop, standing alone, is insufficient to rebut the presumption that the rearmost driver was negligent, and the stopped vehicle was not negligent”). Hence, the happening of a rear-end collision with a vehicle slowing in traffic is itself a *prima facie* case of negligence of the rearmost driver. *Vasquez v Chimborazo*, 155 A.D.3d 432 (1st Dep’t 2017); *see Smyth v Murphy*, 177 A.D.3d 492 (1st Dep’t 2019); *Corrigan v Porter Cab Corp.*, 101 A.D.3d 471 (1st Dept 2012); *LaMasa v Bachman*, 56 A.D.3d 340 (1st Dep’t 2008).

Hence, defendant Wilkinson establishes *prima facie* entitlement to judgment as a matter of law by submitting uncontradicted evidence that she was driving safely, and slowing in traffic or stopped when the Wilkinson Vehicle, the first in the chain, was struck in the rear by co-defendant’s vehicle. *Vasquez v Chimborazo*, *supra*; *Smyth v Murphy*, *supra*; *Corrigan v Porter Cab Corp.*, *supra*; *LaMasa v Bachman*, *supra*; *see Martinez v Kuhl*, 165 A.D.3d 774 (2d Dep’t 2018). Furthermore, defendant Wilkinson managed to stop her car without striking the vehicle in front of her vehicle. Defendant Wilkinson therefore demonstrates that she acted entirely without negligence and the movant defendant driver’s actions did not contribute to causing the Accident. Of note, an “innocent ... driver exists in a case where the ... driver did not contribute to the happening of the accident in any way. A typical example is the case at bar where ... [the] driver, while stopped, was rear-ended by the following driver” *Oluwatayo v Dulinayan*, 142 A.D.3d 113, 119 (1st Dep’t 2016).

Co-defendant and plaintiff, in turn, fail to raise an issue of material fact warranting denial of the motion.

The attorney affirmations submitted in opposition to the motion have no evidentiary value. *see Conti v. City of Niagara Falls Water Bd.*, 82 A.D.3d 1633, 1634 (1st Dep’t 2011) (“It is well established . . . that an affirmation submitted by an attorney who has no personal knowledge of the facts is without evidentiary value.”), and are thus insufficient to defeat the motion. Furthermore, any contention that motion is premature also lacks merit. “Depositions are unnecessary [before the court determines the liability motion], since [the parties] 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). Moreover, “[t]he mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion.” *Downey v. Mazzioli*, 137 A.D.3d 498, 499 (1st Dep’t 2016) (internal quotation marks and citation omitted). To the extent that the opposition argues that movant made a sudden stop, such an allegation is insufficient to generate an issue of fact as a matter of law.

Based on the foregoing, the part of the motion that seeks an order, pursuant to CPLR 3212, granting defendant Wilkinson summary judgment dismissing all causes of action and cross-claims against her is granted. The part of the motion that seeks an order dismissing the complaint pursuant to CPLR §3211 (a) (5) (statute of limitations) and (8) (lack of personal jurisdiction) and the cross-motion by plaintiff for an order extending the time to complete certified mailing portion of service of process pursuant to VTL 253 or deeming the previous certified mailing to be sufficient compliance with the mailing provisions of VTL 253 are therefore denied as moot.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

ORDERED that the part of the motion by defendant FELICIA A. WILKINSON [mot. seq. 1] that seeks an order dismissing the complaint, pursuant to CPLR §3211 (a) (5) (statute of limitations) and (8) (lack of personal jurisdiction), against her on the grounds that the plaintiffs STARLYN SOSA and GARY SOSA never properly completed service upon movant defendant is denied as moot; and it is further

ORDERED that the part of the motion by defendant Wilkinson that seeks an order, pursuant to CPLR 3212, granting summary judgment to defendant Wilkinson on the issue of liability and dismissing the complaint and cross-claims against defendant Wilkinson is granted; and it is further

ORDERED that the cross-motion by plaintiff for an order extending the time to complete certified mailing portion of service of process pursuant to VTL 253 or deeming the previous certified mailing to be sufficient compliance with the mailing provisions of VTL 253 is denied as moot; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendant Wilkinson dismissing the complaint and all cross-claims against her and severing the remaining action; and it is further

ORDERED that the caption shall be amended to read as follows:

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STARLYN SOSA and GARY SOSA

Plaintiff,

-against-

PEDRO J. ESPINALSOTO and TRAVIS A.

BROWN,

Defendants.

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This constitutes the decision and order of the court

Dated: May 25, 2022

Hon.



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

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|------------------------------|--|---|---|--------------------------------|
| 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 | | |

AMEND CAPTION