

Nocera v Mekhaie
2022 NY Slip Op 35106(U)
May 9, 2022
Supreme Court, Bronx County
Docket Number: Index No. 809925/2021E
Judge: Ben R. Barbato
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
MICHAEL NOCERA,

Plaintiff,

-against-

Index No.: 809925/2021E

NED S. MEKHAIEL, CONSOLIDATED EDISON CO
OF NEW YORK INC., and CONSOLIDATED EDISON,
INC.,

Defendants.
-----X

HON. BEN R. BARBATO:

Plaintiff MICHAEL NOCERA moves for partial summary judgment in his favor on liability, as against Defendants, NED S. MEKHAIEL, CONSOLIDATED EDISON CO OF NEW YORK INC., and CONSOLIDATED EDISON, INC., and for related relief.

This an action to recover damages for alleged personal injuries sustained by Plaintiff in a motor vehicle accident, which occurred on, or about, July 9, 2021, at about 6:30 a.m., on the east bound Cross Bronx Expressway, near its intersection with Castle Hill Avenue, in the County of Bronx, City and State of New York. It is alleged that the motor vehicle operated and owned by Defendants, NED S. MEKHAIEL, and CONSOLIDATED EDISON CO OF NEW YORK INC., and CONSOLIDATED EDISON, INC., respectively, came into contact with the vehicle operated and owned by the Plaintiff.

The submissions on the motion include the pleadings; the Police Accident Report; photographs; the Affidavits of Plaintiff NOCERA and Defendant MEKHAIEL; the repair estimate for Plaintiff's vehicle; and the reports of Plaintiff's investigator, Timothy Smith.

Alleged Facts:

Plaintiff NOCERA describes the happening of the accident, in relevant part, as follows:

"I was travelling behind vehicles on the roadway with normal traffic conditions. As I approach an exit way heading towards the Whitestone Bridge, I began to slow my vehicle due to a little bit of traffic congestion and vehicles in front of me. As I was progressively slowing my vehicle and essentially came to a complete stop, I was suddenly and unexpectedly slammed in the rear portion of my vehicle by the defendant vehicle. The force was extreme and caused a ton of damage to my vehicle as well as the defendant vehicle...

I was not speeding, I did not make an unsafe lane change, I simply slowed my vehicle as I made my way toward the exit and followed normal traffic ahead of me. There was no way for me to avoid the impact and no other third-party vehicle that caused or contributed to this accident. There weren't any emergency circumstances present that caused or contributed to this accident. I did not contribute to the accident occurrence. In my opinion, defendant operator failed to recognize traffic conditions ahead, was travelling at a quick pace, may have been distracted, and was unable to stop his vehicle timely once he saw my vehicle in front of him".

(Plaintiff NOCERA's Affidavit, dated November 5, 2021).

Defendant MEKHAIEL's version of the accident differs from Plaintiff's version of the accident. Defendant MEKHAIEL states as follows:

"Immediately prior to the incident I had been travelling several car lengths behind plaintiff's vehicle and was traveling below the speed limit as it was raining, and the ground was wet. Without warning, the plaintiff's vehicle stopped suddenly in front of my vehicle for no apparent reason. I immediately applied my breaks, but due to the condition of the roadway my vehicle hydroplaned, and I was unable to stop before my vehicle came into contact with the vehicle being operated by plaintiff".

(Defendant MEKHAIEL's Affidavit, dated December 16, 2021).

In the Police Accident Report, the accident is described as follows:

"VEHICLE 1 [MEKHAIEL] & 2 [NOCERA] WERE TRAVELING E/B IN RIGHT

LANE. VEHICLE 2 [NOCERA] SLOWED DUE TO STOPPING VEHICLES AHEAD. VEHICLE 1 [MEKHAIEL] UNABLE TO STOP DID COLLIDE WITH REAR OF VEHICLE 2 [NOCERA]”.

With respect to “Apparent Contributing Factors”, the Police Officer noted “following too closely” for the Defendant. The points of impact are listed therein as the middle front of Defendants’ vehicle, and middle rear of Plaintiff’s vehicle.

Applicable Law/Analysis:

Vehicle and Traffic Law § 1129 (a) “Following too closely”, provides that: “The 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”.

Drivers are expected to maintain enough distance between themselves and the cars ahead of them, so as to avoid collisions with stopped vehicles, taking into account weather and road conditions. (*Matos v Sanchez*, 147 AD3d 585, 586 [1st Dept 2017]).

“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 nonnegligent explanation for the accident (see *Tutrani v County of Suffolk*, 10 NY3d 906, 908, 891 NE2d 726, 861 NYS2d 610 [2008] ... Once such a *prima facie* showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]).

Accordingly, Plaintiff made a *prima facie* showing, of his entitlement to partial summary judgment in his favor on liability, as against the Defendants,

based upon the evidence presented, including the allegations that Defendants' vehicle rear-ended the Plaintiff's vehicle.

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

As to Defendants' liability for the happening of this rear-end collision, Defendants have not made the requisite showing.

It is well-established that a "defendant driver's assertion that plaintiffs' vehicle stopped abruptly does not explain why defendant driver failed to maintain a safe distance, and is insufficient to constitute a nonnegligent explanation" (*Urena v GVC Ltd.*, 160 AD3d 467, 467 [1st Dept 2018]).

Further, the Court of Appeals has recently 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]).

With respect to the issue of Plaintiff's culpable conduct, Plaintiff did not seek dismissal of Defendants' affirmative defense alleging the same, in his instant

Notice of Motion.¹ However, even if relief thereon had properly been requested, said affirmative defense would not be dismissed, on summary judgment, where there are questions of fact as to a plaintiff's comparative fault.

In opposition to the motion, Defendants allege that Plaintiff bears liability for the happening of the collision, for suddenly braking his vehicle in a travel lane of the Cross Bronx Expressway, in the rain, and stopping suddenly, for no reason--where it was expected that traffic would continue unimpeded.

Based upon the different versions of the accident presented in the parties' Affidavits, there appear to be issues of fact, herein, as to whether Plaintiff may have, also, been negligent.

In this regard, the Court of Appeals established that, where a front-most driver "abruptly slowed his vehicle to a near stop in a travel lane of a busy highway [namely, the service road of the Long Island Expressway] where vehicles could reasonably expect that traffic would continue unimpeded... [,that] the jury could have rationally found, as it did here, that his conduct "'set into motion an eminently foreseeable chain of events that resulted in [the] collision'" between the vehicles" (*Tutrani v County of Suffolk*, 10 NY3d 906, 907 [2008]).

Following *Tutrani*, the First Department held that the sudden stop of the front vehicle was sufficient to raise an issue of fact, to be decided by a jury, as to whether the actions of its driver were a proximate cause of the rear-end collision, in an accident which occurred on the Major Deegan Expressway, where the

¹ Rather, Plaintiff sought an order "having apportionment of fault determined during the damages phase of the trial". (See Plaintiff's Notice of Motion, dated Nov. 8, 2021, at NYSCEF Doc No 26).

evidence suggested that the rear-ending driver could have reasonably expected that traffic would continue unimpeded, since traffic was flowing smoothly. (*Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d 473, 477 [1st Dept 2017]). Further, the *Baez-Pena* Court noted there were no cases cited “where a sudden stop by a vehicle on a highway, with normal traffic conditions, resulted in summary judgment in favor of that vehicle. Indeed, Court of Appeals precedent suggests that summary judgment is unwarranted in such a case” (*Baez-Pena v MM Truck & Body Repair, Inc.*, 151 AD3d at 476. *See Taveras v Ortiz*, 192 AD3d 611 [1st Dept 2021]).

In another recent case, where the accident had, also, occurred on the Cross Bronx Expressway, the First Department held that a defendant raised “a triable issue as to whether he was entitled to expect that traffic would continue unimpeded” on the said expressway, under the circumstances. (*Richards v Mitchell*, 172 AD3d 439, 440 [1st Dept 2019]; *see Richards v Mitchell*, [Sup Ct, Bronx County Oct. 24, 2018, No. 303620/2016]).²

The contours of a driver’s duty to other motorists “in a given situation depend[s] on the prevailing conditions (e.g., density of traffic, condition of roadway, weather)”, the visibility, the speed of the vehicles, the distance between

² However, it is noted that “[t]he expectation of a driver operating a motor vehicle on a highway with normal conditions—that traffic will continue unimpeded—is not shared by one operating a motor vehicle on a local public municipal roadway, particularly within the City of New York. The operator of a motor vehicle traveling on a local public roadway within the City of New York must anticipate a variety of events, including a sudden stop by a vehicle in front of the operator’s vehicle. Put simply, sudden stops on local public roadways within the City of New York are immanently foreseeable, and the operator of a vehicle travelling on such a roadway should therefore expect that the flow of traffic will be interrupted” (*Animah v Agyei*, 63 Misc 3d 783, 790 [Sup Ct, Bronx County 2019]).

the vehicles, etc. (*Animah v Agyei*, 63 Misc 3d 783, 786 [Sup Ct, Bronx County 2019]).

In addition, Defendants argue that, since Plaintiff was employed by Defendant CONSOLIDATED EDISON CO OF NEW YORK INC, there are questions of fact regarding whether Plaintiff's claims herein would be barred, pursuant to the Worker's Compensation Law §29(6), if Plaintiff was acting within the scope of his employment. However, Plaintiff did not seek dismissal of Defendants' affirmative defense alleging the same. Neither party submits an Affidavit addressing the matter. Nonetheless, even if relief thereon had been properly requested, said affirmative defense would not be dismissed, on summary judgment, when it would be premature, because discovery had not been exchanged, and essential facts may exist, which cannot yet be stated within the meaning of CPLR 3212 (f) "Facts unavailable to opposing party", which provides that:

"Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just."

The parties should have the "opportunity to develop the record regarding the factual basis of defendants' [allegations,] ... the applicability of which is generally an issue of fact." (*Nelson v Bestway Coach Express*, 36 AD3d 488, 488 [1st Dept 2007]; see *Diaz v Jadan*, 116 AD3d 600 [1st Dept 2014]); see *Belziti v Langford*, 105 AD3d 649 [1st Dept 2013]; see *Yant v Mile Sq. Transp., Inc.*, 89 AD3d 492 [1st Dept 2011]).

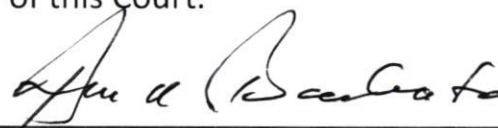
Conclusion

Accordingly, Plaintiff NOCERA'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 the accident, and Defendant MEKHAIEL's negligence was a substantial factor in causing the accident.

However, this Court makes no determination as to other issues herein, including, but not limited to, the percentage of fault, if any, attributable to Plaintiff; whether Plaintiff's alleged injuries were proximately caused by the negligence of the Defendants; whether Plaintiff sustained a "serious injury" within the meaning of the Insurance Law; and whether Plaintiff was acting within the scope of his employment within the meaning of the Workers' Compensation Law.

This constitutes the decision and order of this Court.

Dated: MAY 09 2022, 2022



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