

Hopkins v Palace Plumbing Heating Supply Corp.
2022 NY Slip Op 35118(U)
July 25, 2022
Supreme Court, Bronx County
Docket Number: Index No. 34081/2018E
Judge: Mitchell J. Danziger
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

SHENELLE G. HOPKINS,

Plaintiff,

-against-

Index No.: 34081/2018E

DECISION/ORDER

Present:

HON. MITCHELL J. DANZIGER

PALACE PLUMBING HEATING SUPPLY CORP., et. al.,

Defendants,

-----X
Recitation as Required by CPLR §2219(a): The following papers
were read on this Motion to Compel:

Papers Numbered

Notice of Motion, Statement of Material Facts, Affirmation in Support, and Exhibits.....	<u>1</u>
Affirmation in Opposition and Exhibits and Statement of Material Facts.....	<u>2</u>
Affirmation in Opposition and Statement of Material Fact.....	<u>3</u>
Affirmation in Reply.....	<u>4</u>
Affirmation in Reply.....	<u>5</u>

Upon the foregoing cited papers, the Decision/Order of this Court is as follows:

Motion by co-defendants, Eric Dixon (“Dixon”) and Makunda Noel (“Noel”) pursuant to CPLR §3212, seeking dismissal of plaintiff’s complaint and any and all cross-claims as against them, is resolved as follows:

It is undisputed that this incident occurred on May 23, 2018, on the Cross Bronx Expressway. This accident was a chain rear-end accident involving three vehicles. All parties agree that they were in traffic described as “stop and go.” Co-defendants Dixon and Noel were the driver and owner, respectively, of the first or lead vehicle, co-defendants, Palace Plumbing Heating Supply Corp. (“Palace”) and Gajendranauth Cheedie (“Cheedie”) were the owner and driver of the middle vehicle, a box truck, and the last or third vehicle was co-defendants, the City of New York (“City”) and John T. Batista’s (“Batista”) Department of Sanitation garbage truck. Plaintiff was a passenger in the lead/first vehicle driven by Dixon and owned by Noel. Defendant, Noel was not present at the accident.

Plaintiff testified that traffic was heavy. The car she was a passenger in, operated by Dixon, was in the right lane when the accident occurred. There were two impacts to their car. Dixon's vehicle was hit only from the rear and did not run into or hit anything. She stated at her 50-h hearing that Dixon's car was barely moving at approximately 5 miles per hour at the time the incident occurred. Plaintiff testified that Dixon did not change lanes or suddenly change speed right before the accident and wasn't eating, smoking, on his phone, or otherwise distracted at the time of the accident. The Court notes that plaintiff does not submit opposition to this motion.

According to defendant, Dixon, he was in stop and go traffic at the time of the incident. He was in the right lane and had been in that lane the entire time he was on the expressway. He had been traveling along at 10 miles per hour before braking. He was rear-ended. There were two impacts to the Dixon/plaintiff vehicle (lead) because of contact between the garbage truck (rear vehicle) and the box truck (middle vehicle). Dixon testified that he was at a complete stop at the time of the occurrence.

Defendant, Cheedie (driver of the second vehicle) testified that the first time he was hit by the third vehicle garbage truck, he was driving approximately ten miles-per-hour and was about ten feet behind the lead vehicle driven by defendant, Dixon. As a result of that impact, he stopped short. He was then hit a second time by the garbage truck and that it was the second impact that caused his box truck to make contact with the lead vehicle driven by Dixon. Cheedie did not testify that the Dixon vehicle stopped short in front of him, nor did he mention the crash cushion. Cheedie testified that his vehicle made contact with the lead vehicle because the garbage truck hit him twice. Cheedie testified that he did not tell the police that Dixon stopped short in front of him.

Garbage truck driver, Batista (third-vehicle) submits via his affidavit that the accident occurred because Cheedie "stopped short in front" of him causing him to "immediately slam on his brakes." He also testified that he made contact only once with Cheedie's truck. No party testified or attested that the accident occurred as a result of the lead vehicle stopping short. No party mentioned a "crash cushion" in their testimony.

The certified police report indicates that defendant, Batista (MV #1 on police report) "states that he was traveling northbound on the Cross Bx when MV#2 (Cheedie) stopped short in front of him causing him to rear end MV#2. Motorist #2 states he was traveling N/B on Cross Bx

when MV#3 (Dixon) stopped short in front of him causing him to rear end MV#3. All MV crashed due to crash cushion.” The officer lists the as the sole “Apparent Contributing Factors” to the accident, Cheedie and Batista “following too closely.”

Defendants. Dixon and Noel submit that they are entitled to partial summary judgment on liability because they were not the proximate cause of the subject accident, co-defendant, Batista was speeding and is liable for the accident, co-defendants, Batista and Cheedie failed to timely see what should have been seen, and that was the cause of the accident, and lastly, defendant, Dixon was rear-ended and cannot be held liable for the negligent acts of those vehicles behind him.

Defendants, City, Batista, Palace Plumbing and Cheedie oppose Dixon/Noel’s motion on the grounds that there is a question of fact as to whether defendant, Dixon’s vehicle was moving and stopped short prior to impact or if he was stopped at the time of impact. Further, defendants, Palace and Cheedie submit that the motion is premature as defendant, Batista has not been deposed yet.

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issue of fact and the right to entitlement to judgment as a matter of law. (*Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 [1986]; *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]). Summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted and the papers will be scrutinized carefully in a light most favorable to non-moving party. (*Assaf v. Ropog Cab Corp.*, 153 A.D.2d 520 [1st Dept. 1989]). Summary judgment will only be granted if there are no material, triable issues of fact. (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). Once movant has met his initial burden on summary judgment, the burden shifts to the opponent who must then produce sufficient evidence to establish the existence of a triable issue of fact. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). It is well settled that issue finding, not issue determination, is the key to summary judgment. (*Rose v. Da Ecib USA*, 259 A.D. 2d 258 [1st Dept. 1999]). When the existence of an issue of fact is even fairly debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 12 [1960]).

Drivers are under a duty to maintain a reasonable speed, control, and care of their vehicles to avoid an accident. (*Oberman v. Alexanders Rent-A-Car*, 56 A.D.2d 814 [1st Dept.

1977)). Drivers have a duty under VTL §1129(a) to maintain a “safe distance between their cars and cars in front of them and this rule imposes on them a duty to be aware of traffic conditions, including vehicle stoppages.” (*Jones v. K&C Limousines of New York, LLC*, 149 A.D.3d 638 [1st Dept. 2017], *Johnson v. Phillips*, 261 A.D.2d 269, 271 [1st Dept., 1999]). Consequently, 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 rear vehicle to come forward with an adequate non-negligent explanation for the accident. (*Corrigan v. Porter Cab Corp.*, 101 A.D. 3d 471 [1st Dept., 2012]); *Cabrera v. Rodriguez*, 72 A.D.3d 553 [1st Dept., 2010]. Additionally, “[a] claim that the driver of the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence.” *Cabrera v. Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010]. “Even if plaintiff’s vehicle had stopped short in front of defendants’ vehicle, defendants failed to rebut the inference of negligence created by the rear-end collision by showing that [defendant] maintained a safe distance from plaintiff’s vehicle before the accident.” (*Scioli v. Joseph*, 203 A.D.3d 680 [1st Dept. 2022]).

Here, all parties testified that traffic at the time of the accident was “stop-and-go.” Drivers in stop-and-go traffic must keep a safe distance between their vehicle and the vehicle in front of them. *Miller v. DeSouza*, 165 A.D.3d 550 [1st Dept. 2018] (denying summary judgment to a rear vehicle involved in an accident in heavy stop-and-go traffic). They have a duty to “make reasonable use of [their] senses,” and drive “at a safe speed under existing conditions.” (*Miller*, *Id.*). Allegations “that a vehicle stop[ped] suddenly in stop-and-go traffic is not a sufficient non-negligent explanation for the accident” and do not raise a triable issue of material fact. (*Elihu v. Nicoleau*, 173 A.D.3d 578 [1st Dept. 2019]). The City argues that sudden stops by a vehicle on a highway, with normal traffic conditions, preclude summary judgment. (*Baez-Pena v. MM Truck & Body Repair, Inc.*, 151 A.D.3d 473 [1st Dept. 2017] citing *Tutrani v. County of Suffolk*, 10 N.Y.3d 906 (2008)). However, whether Dixon was stopped or driving five miles-per-hour does not impact the liability of Dixon and Noel because Cheedie had a duty to maintain a reasonable speed and distance from defendant, Dixon’s vehicle and Batista had a duty to do the same with respect to defendant, Cheedie’s vehicle. Further, the cases that the City relies upon to make this point can be distinguished from the within matter. The accident at issue in *Baez-Pena* involved an emergency where the lead truck made contact with a highway overpass while traveling

approximately 35 miles-per-hours. The accident in *Tutrani* involved a car decelerating from approximately 40 miles-per-hour to an almost complete stop while changing lanes on a highway.

The police report does not create a question of fact in light of the testimony and affidavit from the parties. The police report states that “all [vehicles] crashed due to crash cushion.” The report does not state who gave that information or how the officer came to that conclusion. The City submits that because of that statement, a reasonable trier of fact could find that Dixon acted negligently by swerving or stopping short to avoid the crash cushion. However, this is just speculation as no party testified or attested to that scenario. Speculation that does not raise an issue of fact. (*Joseph v. Pitkin Carpet Inc.*, 44 A.D.3d 462 [1st Dept. 2007]). Speculation is insufficient to defeat a motion for summary judgment. (*Justinian Capital SPC v. West LB AG, N.Y. Branch*, 28 N.Y.3d 160, 168 [2016]). Not one party to this action, including plaintiff, testified or even mentioned the crash cushion had anything to do with this incident in their sworn testimony or affidavit. Further, no party testified or attested that Dixon was the cause of the accident and specifically, Cheedie testified that he did not tell the responding officer that Dixon stopped short.

Finally, Palace/Cheedie argues that the motion for summary judgment was filed prematurely because, at the time of the filing, they had not yet had the opportunity to depose Batista. The City submitted Batista’s affidavit in opposition to this motion. Pursuant to CPLR § 3212(f) if essential facts “exist but cannot then be stated” at the time of the motion, summary judgment may be denied. However, to defeat summary judgment pursuant to CPLR § 3212(f), a party must show that there is essential proof in the exclusive knowledge of the moving party. *Voluto Ventures, LLC v. Jenkins & Gilchrist Parker Chapin LLP*, 44 A.D.3d 557 [1st Dept. 2007]. Additionally, “[t]he mere hope that additional discovery may lead to sufficient evidence to defeat a summary judgment motion is insufficient to deny such a motion.” *Island Fed. Credit Union v. I&D Hacking Corp.*, 194 A.D.3d 482 [1st Dept. 2021]. Here, Palace/Cheedie does not set forth any argument that Batista has exclusive knowledge different from what has already been testified to by the plaintiff, other codefendants, and offered by Batista in his affidavit.

The Court finds that Dixon and Noel have made a prima facie showing. The opposition by Palace/Cheedie and the City/Batista fails to raise any triable issue of fact pertaining to the liability of Dixon and Noel. All triable issues of fact pertain to the contact between Cheedie and Batista’s trucks. Accordingly, defendants, Dixon and Noel’s motion for summary judgment is

granted and any and all claims and cross claims against Dixon and Noel are dismissed.

Defendants, Dixon and Noel are directed to serve a copy of this order with notice of its entry upon all parties, within 30 days of the entry date.

This constitutes the order and decision of the Court.

Dated: 7/25/22

Bronx, New York

A handwritten signature in black ink, appearing to read 'M. J. Danziger', is written over a horizontal line.

HON. MITCHELL J. DANZIGER, J.S.C.