

Perez v Public Serv. Truck Renting, Inc.
2022 NY Slip Op 35124(U)
August 5, 2022
Supreme Court, Queens County
Docket Number: Index No. 706931/2019
Judge: Sally E. Unger
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(Perez v. Public Service Truck et. al., J. Unger, 8/4/2022)

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SALLY E. UNGER
Justice

IA Part 24

-----X
MARIA PEREZ,

Index No. 706931/2019

Plaintiff,

Motion Date: 10/14/2021

-against-

Motion Seq. 3

PUBLIC SERVICE TRUCK RENTING, INC., PAINT
APPLICATORS CORPORATION OF AMERICA AND
PATRICK MARTORELLA,



Defendants.
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The following numbered papers read on this motion by plaintiff for summary judgment on the issue of liability and dismissing defendants' Paint Applicator Corporation of America and Patrick Martorella affirmative defenses against her.

Papers
Numbered

Notice of Motion – Affidavits – Exhibits.....	EF 37 – 53
Answering Affidavits – Exhibits	EF 54 – 56
Reply Affidavits – Exhibits	EF 59 – 60

Upon the foregoing papers, it is ordered that the motion is determined as follows:

Plaintiff commenced the instant action to recover for injuries she allegedly sustained in a motor vehicle accident that occurred on November 16, 2018, when a box truck operated by defendant Patrick Martorella (hereinafter "Martorella"), owned by defendant Public Service Truck Renting, Inc., (hereinafter "Public Service") and leased by defendant Paint Applicator Corporation of America (hereinafter "Paint Applicator") struck plaintiff's vehicle. Martorella was Paint Applicator's employee at the time of the subject accident.

By order dated October 28, 2019, the court granted the motion of defendant Public Service for summary judgment dismissing plaintiff's complaint against it. Plaintiff now moves for summary judgment against Martorella and Paint Applicator (hereinafter collectively "defendants") on the issue of liability and dismissing their affirmative defenses.

On a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (see *Weiss v Arunsi*, 184 AD3d 606, 123 NYS3d 498 [2nd Dept 2020], citing *Zuckerman v New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of a triable issue of fact (*id.*). Therefore, where the movant does not satisfy this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (see *Tumminello v City of NY*, 148 AD3d 1084, 49 NYS3d 739 [2nd Dept 2017]).

To establish prima facie entitlement to judgment as a matter of law on the issue of liability, a plaintiff is no longer required to show freedom from comparative fault (see *Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; see *Simon v Rent-A-Center E., Inc.*, 180 AD3d 1100, 120 NYS3d 388 [2nd Dept 2020]; *Samouhi v Retamales*, 180 AD3d 1099, 120 NYS3d 69 [2nd Dept 2020]). A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law (see *Simon*, at 1101; *Edwards v J&D Express Serv. Corp.*, 180 AD3d 871, 116 NYS3d 597 [2nd Dept 2020]; *Spratley v Lafortune*, 176 AD3d 1247, 109 NYS3d 667 [2nd Dept 2019]). Further, a driver is negligent if they fail to see that which, through the proper use of their senses, should have been seen (see *Shvydkaya v Park Ave. BMW Acura Motor Corp.*, 172 AD3d 1130, 100 NYS3d 320 [2nd Dept 2019]; *Aponte v Vani*, 155 AD3d 929, 64 NYS3d 123 [2nd Dept 2017]; *Pivetv v Brusco*, 145 AD3d 806, 43 NYS3d 457 [2nd Dept 2016]).

In support of her motion, among other things, plaintiff submits a copy of the police report, deposition transcripts of plaintiff and Martorella. Plaintiff testified that prior to the accident, her vehicle was traveling on Whitney Avenue, and Martorella was driving on Elbertson Street. She further testified that her vehicle had been at a complete stop, before the crosswalk, at the red traffic signal on Whitney Avenue. Plaintiff asserts that the collision occurred when Martorella made a left turn from Elbertson Street onto Whitney Avenue, crossed over the double yellow line of Whitney Avenue and struck her vehicle. Plaintiff further asserts that Martorella testified to crossing over the double line while making the left turn. Plaintiff alleges that Paint Applicator, by virtue of the respondeat superior doctrine, is vicariously liable for Martorella's negligence.

Vehicle and Traffic Law §388(1) provides that,

[e]very 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. (*Gray v Air Excel Serv. Corp.*, 171 AD3d 1026, 98 NYS3d 259 [2nd Dept 2019]).

“To establish liability pursuant to Vehicle and Traffic Law § 388(1), the plaintiff must show negligence in the use or operation of the vehicle, and that the negligence was a cause of the injury” (*Gray*, at 1028, quoting *Ciminello v Sullivan*, 65 AD3d 1002, 885 NYS2d 118 [2nd Dept 2009]). Here, Paint Applicator does not deny that it was the lessee of the vehicle or that Martorella was acting within the scope of his employment.

While the police accident report is certified, it does not state whether the information is based upon the police officer’s personal observations or whether it was provided by someone under a business duty to relay the facts to the said officer (see *Shehab v Powers*, 150 AD3d 918, 54 NYS3d 104 [2nd Dept 2017]; *Wynn v Motor Vehicle Acc. Indemnification Corp.*, 137 AD3d 779, 26 NYS3d 558 [2nd Dept 2016]). The court finds the information within the police accident report is inadmissible for purposes of this motion (see *Shehab* at 919; *Wynn* at 780).

Nonetheless, plaintiff has demonstrated her prima facie showing of entitlement to summary judgment on the issue of liability by showing that the sole proximate cause of the subject accident was the Martorella’s violation of Vehicle and Traffic Law §§1160(b) and 1163(a) by making an improper left turn in the intersection (see *Murphy v Epstein*, 72 AD3d 767, 899 NYS2d 319 [2nd Dept 2010]). Additionally, plaintiff also met her prima facie burden for summary judgment by submitting evidence establishing that Martorella’s act of crossing over the double yellow line into the oncoming lane of traffic was the sole proximate cause of the collision (see *Ciraldo v County of Westchester*, 147 AD3d 813, 47 NYS3d 95 [2nd Dept 2017]; *Snemyr v W.A. Morales-Aparicio*, 47 AD3d 702, 850 NYS2d 489 [2nd Dept 2008]; *Biscardi v Ciampa*, 27 AD3d 681, 815 NYS2d 588 [2nd Dept 2006]). “Crossing a double yellow line into the opposing lane of traffic, in violation of Vehicle and Traffic Law §1126, constitutes negligence as a matter of law, unless justified by an emergency situation not of the driver’s own making”, (*Foster v Sanchez*, 17 AD3d 312, 792 NYS2d 579 [2nd Dept 2005]; see also *Browne v Logan Bus Co., Inc.*, 156 AD3d 856, 65 NYS3d 780 [2nd Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 31 NYS3d 97 [2nd Dept 2016]; *Barbaruolo v Difede*, 73 AD3d 957, 900 NYS2d 671 [2nd Dept 2010]).

Although a driver with the right-of-way is entitled to anticipate that other drivers will obey traffic laws requiring them to yield to them, a driver with the right-of-way still has a duty to use reasonable care to avoid a collision (see *Ballentine v Perrone*, 179 AD3d 993, 114 NYS3d 696 [2nd Dept 2020]; *Fernandez v Am. United Transp., Inc.*, 177 AD3d 704, 113 NY.3d 145 [2nd Dept 2019]; *Jeong Sook Lee-Son v Doe*, 170 AD3d 973, 96 NYS3d 302 [2nd Dept 2019]). However, a driver with the right-of-way, who only has seconds to react to a vehicle which has failed to yield, is not comparatively negligent for failing to avoid the collision (see *Balladares v City of NY*, 177 AD3d 942, 114 NYS3d 448 [2nd Dept 2019]; *Enriquez v Joseph*, 169 AD3d 1008, 94 NYS3d 599 [2nd Dept 2019]).

The burden now shifts to the defendants to raise an issue of fact or non-negligent explanation for the collision (see *Weiss* at 607; *Ramos v TC Paratransit*, 96 AD3d 924, 946 NYS2d 644 [2nd Dept 2012]). In opposition, defendants' contentions that issues of fact are present as to plaintiff's negligence, are based entirely on speculation and are insufficient to overcome plaintiff's prima facie showing of entitlement to summary judgment (see *Ciraldo v. County of Westchester*, 147 AD3d 813, 47 NYS3d 95 [2nd Dept., 2017]). Contrary to defendants' assertion, plaintiff was not required to anticipate that defendants' vehicle would attempt to pass her by crossing over the double yellow line into oncoming traffic, and as such, the collision was not caused by any failure by her to "see that which could be seen" (see *Ciraldo* at 813; *Rodriguez* at 967).

Defendants have failed to proffer evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which they rest their claim; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient to defeat this motion for summary judgment (see *Zuckerman* at 562). Without any non-negligent explanation in evidentiary form to support their position, defendants' opposition is insufficient to raise an issue of fact that would prevent this court from granting summary judgment to the movant (see *Tumminello v City of NY*, 148 AD3d 1084, 49 NYS3d 739 [2nd Dept 2017]). As such, Paint Applicator is vicariously liable for Martorella's negligence in the use and operation of the vehicle (see Vehicle and Traffic Law §388 [1]; *Gray* at 1027-1028).

As to the third affirmative defense alleging carelessness, negligence, assumption of risk, and culpable conduct, plaintiff is entitled to an order striking the defendants' affirmative defense of comparative negligence. Even though a plaintiff is no longer required to establish their freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*Wray v Galella*, 172 AD3d 1446, 101 NYS3d 401 [2nd Dept 2019], citing *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2nd Dept 2018]). Inasmuch as plaintiff indicates she was unable to avoid the collision and has otherwise demonstrated she was not at fault in the happening of the collision and defendants have not offered any evidence in admissible form to raise a triable issue of fact in that regard, the affirmative defense of comparative negligence is stricken (see *Wray* at 1448).

Pursuant to CPLR 1412, an affirmative defense is to be pleaded and proved by the party asserting it and the defendants have offered only speculation in support of the assertion that the plaintiff failed to use reasonable care to avoid the collision (CPLR 1412; see *Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 895 NYS2d 389 [1st Dept 2010]). In opposition to plaintiff's prima facie showing of entitlement to summary judgment dismissing defendants' affirmative defense of assumption of risk, defendants failed to raise a triable issue of material fact as to the applicability of the assumption of risk doctrine (see *Alvarez* at 324-325). Thus, plaintiff's application to dismiss defendants' third affirmative defense alleging carelessness, negligence, assumption of risk, and culpable conduct is granted.

As to the sixth affirmative defense that plaintiff's claims are barred by the emergency doctrine, under the emergency doctrine,

those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency,

(*Shehab v Powers*, 150 AD3d 918, 54 NYS3d 104 [2nd Dept 2017], quoting *Bello v Tr. Auth.*, 12 AD3d 58, 783 NYS2d 648 [2nd Dept 2004]). Here, defendants are not entitled to an emergency doctrine affirmative defense relief, since plaintiff has demonstrated that Martorella was not reacting to an emergency, but rather, to a common traffic occurrence (see *Shehab* at 920; *Comas-Bourne v City of NY*, 146 AD3d 855, 45 NYS3d 182 [2nd Dept 2017]).

As to seventh affirmative defense that the causes of action are barred by Workers' Compensation Law §§11 and 29,

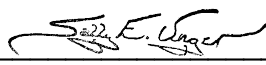
under the Workers' Compensation Law, an employee's recovery of workers' compensation benefits is his or her exclusive remedy against his or her employer or coworkers for injuries sustained in the course of his or her employment arising from the negligence of a coworker in the course of their employment,

(See *Caputo v Brown*, 196 AD3d 456, 150 NYS3d 733 [2nd Dept 2021]). Here, plaintiff is entitled to dismissal of the affirmative defense by Workers' Compensation Law §§11 and 29, since plaintiff testified that she was not driving during the course of her employment, but rather, she was on her way to work. Moreover, defendants' opposition papers are silent on this issue.

Accordingly, plaintiff's motion for summary judgment on the issue of liability is granted. Upon the completion of discovery on the issue of damages, and the filing of a Note of Issue along with the appropriate fees, this matter shall proceed to trial on the issue of damages only.

Dated: August 5, 2022




SALLY E. UNGER, A.J.S.C.