

Alsarabi v Colon
2022 NY Slip Op 35159(U)
March 30, 2022
Supreme Court, Bronx County
Docket Number: Index No. 30485/2020E
Judge: Veronica G. Hummel
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31**

YEHIA ALSARABI,

Plaintiff,

-against-

JONATHAN COLON and FLAT RATE MOVERS,
LTD.

Defendants.

Index No. 30485/2020E**HON. VERONICA G. HUMMEL, A.J.S.C.****Mot. Seq. No. 1**

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to the motion of plaintiff YEHIA ALSARABI (“Plaintiff”) (Seq. No. 1) seeking (a) an order, pursuant to CPLR 3212, granting Plaintiff summary judgment as to liability against defendants JONATHAN COLON and FLAT RATE MOVERS LTD. (Defendants”) and dismissing Defendants’ first (statute of limitations), second (lack of jurisdiction), third (failure to state a cause of action), sixth (waiver and estoppel), eighth (third-party negligence), ninth (lack of standing), tenth (lack of service) and thirteenth (reservation to plead) affirmative defenses.

This is a personal injury action arising out of a two-vehicle rear-end accident that occurred on July 29, 2020. Defendant Colon was driving a truck which collided with the driver-side of a parked vehicle. Plaintiff was seated in the parked vehicle, with a seat belt on, in the driver’s seat. The accident occurred on 102 East 183rd Street between Morris Avenue and Creston Avenue.

In support of the motion, Plaintiff submits an attorney affirmation, an affidavit, a material statement of facts, medical records, an uncertified copy of the police report, and copies of the pleadings. Plaintiff also submits a reply. In opposition to the motion, Defendants submit an attorney affirmation and a counterstatement of material facts.

Plaintiff avers that at the time of the Accident, he was sitting in the driver’s seat of the Plaintiff’s Vehicle. The car was legally parked on East 183rd Street. The engine was turned off and not more than six inches from the curb. Plaintiff was waiting to pick up a passenger.

While parked the Plaintiff’s Vehicle was struck by the Defendants’ Vehicle on the driver’s side. After the impact, the Defendants’ Vehicle continued forward without stopping. The impact caused glass to enter plaintiff’s eye. Plaintiff’s passenger arrived and they followed the Defendants’ Vehicle, caused it to stop and the police arrived.

Defendants' attorney submits an affirmation in opposition but no affidavit from the defendant driver. The attorney argues that there are inconsistencies in plaintiff's affidavit and that the sufficient facts as to the cause of the accident are missing from plaintiff's submissions.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon such a showing, the burden then shifts to the nonmovant to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006). A plaintiff in a negligence action moving for summary judgment on the issue of liability must, therefore, establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. *Fernandez v. Ortiz*, 183 A.D.3d 443 (1st Dep't 2020). A plaintiff is not required to demonstrate his or her freedom from comparative fault in order to establish a *prima facie* entitlement to summary judgment on the issue of liability. *Rodriguez v. City of N.Y.*, 31 N.Y.3d 312, 324-25 (2018).

It is well settled that 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. *Urena v. GVC Ltd.*, 160 A.D.3d 467, 467 (1st Dep't 2018) (quoting *Matos v. Sanchez*, 147 A.D.3d 585, 586 (1st Dep't 2017)); *Santos v. Booth*, 126 A.D.3d 506, 506 (1st Dep't 2015); *Woodley v. Ramirez*, 25 A.D.3d 451, 452 (1st Dep't 2006). Under New York Vehicle and Traffic Law ("VTL") § 1129(a), "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 vehicle and traffic upon the condition of the highway." In other words, a driver must maintain a safe distance between his vehicle and the one in front of the driver.

A violation of VTL is *prima facie* evidence of negligence. *Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216, 223-24 (1st Dep't 2007) (quoting *Johnson v. Phillips*, 261 A.D.2d 269, 271 (1st Dep't 1999)); *Mascitti v. Greene*, 250 A.D.2d 821, 822 (2d Dep't 1998). Vehicle and Traffic Law § 1129 [a]) imposes a duty to be aware of traffic conditions, including vehicle stoppages. *Guzman v. Schiavone Construction Co.*, 4 A.D.3d 150 (1st Dep't 2004); *Johnson v. Phillips, supra*. Hence, a collision with a stationary vehicle amounts to *prima facie* evidence of

negligence on the part of the operator of the moving vehicle. *see Leal v. Wolff*, 224 A.D.2d 392, 393 (2d Dep't 1996); *Salodkaya v. City of New York*, 193 A.D.3d 604 (1st Dep't 2021). It is well-established that a collision with a properly parked vehicle creates a rebuttable presumption of negligence. *Horn v. McCurdy*, 163 A.D.2d 663 (3d Dep't 1990); *Robertson v City of New York*, 21 A.D.3d 939 (2d Dep't 2005); *see Thompson v City of New York*, 60 N.Y. 2d 948 (1983); *Peralta v Soto*, 2021 WL 3863889 (Supreme Court N.Y. County 2021).

Based on the moving papers, Plaintiff establishes *prima facie* entitlement to judgment as a matter of law by submitting evidence that his vehicle was stopped and legally parked when it was struck in the side by the Defendants' Vehicle.

Defendants, in turn, fail to come forward with an adequate non-negligent explanation for the Accident. Contrary to defense counsel's assertion, the motion is not premature since the defendant himself could have submitted an affidavit attesting to his version of the events. Defendants fail to submit such an affidavit and has failed to raise an issue of fact which would preclude summary judgment in Plaintiff's favor. *see, Delgado v. Martinez Family Auto*, 113 A.D.3d 426 (1st Dep't 2014); *Avant v. Cepin Livery Corp.*, 74 A.D.3d 533 (1st Dep't 2010). Moreover, the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to warrant denying such a motion. *see, Flores v. City of New York*, 66 A.D.3d 599 (1st Dep't 2009). Furthermore, the purported questions of fact are purely speculative. *See Cabrera v. Rodriguez*, 72 A.D.3d 553, 554 (1st Dep't 2010); *Garcia v. Verizon N.Y., Inc.*, 10 A.D.3d 339, 340 (1st Dep't 2004). Accordingly, the motion is appropriately granted insofar as it seeks an order granting partial summary judgment as to Defendants' liability for the Accident.

Furthermore, Plaintiff sets forth a *prima facie* showing warranting the dismissal of the listed affirmative defenses. Defendants' unsubstantiated counter that the motion is premature does not generate an issue of fact warranting denial of the part of Plaintiff's motion that seeks to dismiss said defenses. To the extent that Defendants imply that they may seek in the future to amend the answer to allege new affirmative defenses, the dismissal of the listed affirmative defenses does not prevent such an amendment.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby:

ORDERED that the part of the motion by motion of plaintiff YEHIA ALSARABI (“Plaintiff”) (Mot. Seq. 1) seeking (a) an order, pursuant to CPLR 3212, granting Plaintiff partial summary judgment as to liability against defendants JONATHAN COLON and FLAT RATE MOVERS LTD. (Defendants) is granted; and it is further

ORDERED that the part of the motion of Plaintiff [Mot. Seq. 1] that seeks an order dismissing Defendants’ first (statute of limitations), second (lack of jurisdiction), third (failure to state a cause of action), sixth (waiver and estoppel), eighth (third-party negligence), ninth (lack of standing), tenth (lack of service), and thirteenth (reservation to plead) affirmative defenses is granted; and it is further

ORDERED that the Clerk shall mark the motion (Seq. No. 1) disposed in all court records.

This constitutes the decision and order of the Court.

Dated: March 30, 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 |