

McCoy v Virella
2022 NY Slip Op 35164(U)
April 20, 2022
Supreme Court, Bronx County
Docket Number: Index No. 33172/2018E
Judge: Veronica G. Hummel
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IAS PART 31**

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DELANTE DAVID MCCOY,

Plaintiff

-against -

CATHERINE A. VIRELLA and LUIS E. MOSQUEA,
Defendants.

**Index No. 33172/2018E
DECISION/ORDER
Motion Seq. 2**

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

In accordance with CPLR 2219 (a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF regarding the motion by defendant LUIS E. MOSQUEA (defendant Mosquea) [Mot. Seq. 2], made pursuant to CPLR 3212, seeking an order dismissing the complaint of plaintiff DELANTE DAVID MCCOY and all cross-claims against him; or in the alternative, pursuant to CPLR 3212 and 3211, granting summary judgment in favor of defendant Mosquea finding that co-defendant CATHERINE A. VIRELLA was negligent as a matter of law with the percentage of negligence to be determined at trial; or in the alternative dismissing one or more of the causes of action pursuant to CPLR 3211 (a)(1) and 3211 (a)(7); and the cross-motion of plaintiff DELANTE DAVID MCCOY (plaintiff), made pursuant to CPLR 3212 for an order granting plaintiff summary judgment on the issue of liability and dismissing the affirmative defenses based on comparative negligence as against defendant Virella.

The motion is supported by an attorney affirmation, copies of the pleadings, copy of the police report, an affidavit by defendant Mosquea, and a statement of material facts. Plaintiff does not oppose the motion and adopts the facts and legal arguments of movant in support of plaintiff's cross-motion.

The undisputed facts as set forth in the statement of material facts are as follows: This is a personal injury action arising out of a motor vehicle accident that occurred on July 20, 2018 at or near the intersection of East 170th Street and Clay Avenue in Bronx N.Y. Plaintiff was a passenger in the Mosquea Vehicle. The vehicle operated by co-defendant Virella struck the rear of the Mosquea Vehicle.

In his affidavit, defendant Mosquea states that he was in the right lane on the relevant roadway. As the Mosquea Vehicle approached Clay Avenue near East 170th Street, his passenger wanted to stop. As he approached the intersection, the traffic light changed from green to yellow. Defendant Mosquea put on his hazard lights and started to slow down as he crossed the intersection to park on the right side of Clay Avenue. Suddenly and without warnings his vehicle was struck in the rear by co-defendant's vehicle. Defendant Mosquea avers that he got out of the car and observed rear damage. Speaking to co-defendant, co-defendant stated that she was rushing to pick up her kids.

Co-defendant Virella opposes the motion and cross-motion. Co-defendant submits an attorney affirmation, response to statement of material facts, photographs, and an affidavit by an appraiser. Of note, co-defendant Virella does not submit a personal affidavit. In the affidavit by the appraiser, the appraiser estimates that, based on photographs, the damage to the Mosquea vehicle was not the result of a direct rear impact but was instead the result of a contact to the very most left rear area of the Mosquea vehicle.

Defendant Mosquea and plaintiff submit affirmations in reply.

Motion for Summary Judgment

The proponent of a summary judgment motion 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 “ (*Winegrad v New York Univ. Med Ctr.*, 64 NY2d 851 [1985]). The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case (*Winegrad v New York University Medical Center, supra*; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]) If a party makes a *prima facie* showing of its

entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact (*Zuckerman v City of New York, supra*). Only then does the burden shift to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Casper v Cushman & Wakefield*, 74 AD3d 669 [1st Dept 2010]; *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227 [1st Dept (2006)]).

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 AD3d 463 [1st Dept 2018]; *Hilago v Vasquez*, 187 AD3d 683 [1st Dept 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 AD3d 467, 467 [1st Dept 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 AD3d 553 [1st Dept 2010]; *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept 2001]). Furthermore, in a chain reaction collision, responsibility presumptively rests with the rearmost driver (*Mustafaj v Driscoll*, 5 AD3d 138 [1st Dept 2004]; *Chuk Hwa Shin v Correale*, 142 AD3d 518, 519 [2d Dept 2016]; *Skura v Wojtowski*, 165 AD3d 1196, 1199 [2d Dept 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 AD3d 649 [1st Dept 2017]; *Cabrera v Rodriguez, supra*; see *Ly Giap v Hathi Son Pham*, 159 AD3d 484, 485 [1st Dept 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 AD3d 432 [1st Dept 2017]; see *Smyth v Murphy*, 177 AD3d 492 [1st Dept 2019]; *Corrigan v Porter Cab Corp.*, 101 AD3d 471 [1st Dept 2012]; *LaMasa v Bachman*, 56 AD3d 340 [1st Dept 2008]).

On this motion, movant defendant Mosquea establishes *prima facie* entitlement to judgment as a matter of law by submitting evidence that the movant defendant driver was driving safely, and slowing in traffic when the movant’s 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 AD3d 774 [2d Dept 2018]). The moving papers therefore demonstrate that the defendant Mosquea acted 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 AD3d 113, 119 [1st Dept 2016]).

The evidence also makes a *prima facie* showing that plaintiff is entitled to summary judgment on liability and dismissal the affirmative defense of comparable negligence as against co-defendant Virella as an innocent passenger in a vehicle that was rear-end by the Virella Vehicle. (*Mello v Narco Cab Corp.*, 105 AD3d 634, 635 [1st Dept 2013]; *Garcia v Tri County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]).

Co-defendant Virella, in turn, fails to raise an issue of material fact warranting denial of the motion or cross-motion. The attorney affirmation submitted in opposition to the motion has no evidentiary value (see *Conti v. City of Niagara Falls Water Bd.*, 82 AD3d 1633, 1634 [1st Dept

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 is thus insufficient to defeat the motion. Any contention that motion and cross-motion are premature also lacks merit. “Depositions are unnecessary [before the court determines the liability motion], since defendants 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 AD3d 423 [1st Dept 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 AD3d 498, 499 [1st Dept 2016] (internal quotation marks and citation omitted). Furthermore, even if considered as competent evidence, the appraiser’s affidavit in fact establishes that the Mosquea vehicle was hit in the rear, and does not in any way generate an issue of fact warranting denial of the motion or cross-motion.

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

ORDERED that the part of the motion by defendant LUIS E. MOSQUEA (defendant Mosquea) [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order dismissing the complaint of plaintiff DELANTE DAVID MCCOY and all cross-claims against him is granted; and it is further

ORDERED that the part of the motion [Mot. Seq. 2] of defendant Mosquea, made pursuant to CPLR 3212 and 3211, that seeks as an alternative relief an order granting summary judgment in favor of defendant Mosquea finding that co-defendant CATHERINE A. VIRELLA was negligent as a matter of law with the percentage of negligence to be determined at trial or dismissing one or more of the causes of action is denied as moot; and it is further

ORDERED that the cross-motion of plaintiff DELANTE DAVID MCCOY (plaintiff), made pursuant to CPLR 3212 for an order granting plaintiff summary judgment on the issue of

liability and dismissing the affirmative defenses based on comparative negligence as against defendant Virella is granted; and it is further

ORDERED that the Clerk shall enter judgment in favor of defendant Mosquea dismissing the complaint of plaintiff and all cross-claims against him; and it is further

ORDERED that the caption of this action shall henceforth read as:

-----X
DELANTE DAVID MCCOY,

Plaintiff

-against -

CATHERINE A. VIRELLA

Defendant.
-----X

;and it is further

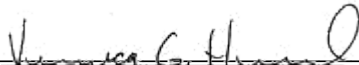
ORDERED that the Clerk shall mark motion seq 2 decided in in all court records.

The foregoing constitutes the Decision/Order of the court.

Dated: Bronx, New York

April 20, 2022

E N T E R,

Hon. 

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

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY

☒ CASE STILL ACTIVE

2. MOTION 2 and cross-motion are granted,

☒ Granted

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3. CHECK IF APPROPRIATE.....

☐ SETTLE ORDER ☐ SUBMIT ORDER SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

☒ AMEND CAPTION