

Furbert v Bolling
2022 NY Slip Op 35171(U)
October 11, 2022
Supreme Court, Bronx County
Docket Number: Index No. 24917/2016E
Judge: Bianka Perez
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, PART 14**

-----X

JASMINE FURBERT, individually, and JASMINE
FURBERT, as Parent and Natural Guardian of
Infant, A.H.,

Index No. 24917/2016E

Plaintiffs,

-against-

Hon. Bianka Perez

Justice Supreme Court

DONALD BOLLING, LUILLY LOPEZ, CARLOS
MENDIETA, and HENRY TIRADOQUINTANA,

Defendants.

-----X

The following were read on this motion (NYSEF and CASE MANAGEMENT Seq 7) submitted on **August 8, 2022**.

Notice of Motion – Response to Statement of Material Facts- Exhibits and Affidavits Annexed	Nyscef No(s). 77-81
Answering Affidavit and Exhibits	Nyscef No(s). 23-25
Plaintiff Reply Affidavit and Exhibits	Nyscef No(s). N/A

Upon the foregoing papers, defendants' Carlos Mendieta and Henry Tiradoquintana (Mendieta) motion for an Order pursuant to CPLR 3212, for summary judgment on the issue of liability and dismissing the Complaint and all Cross-Claims against them is denied. Plaintiffs' cross-move for leave to file a cross-motion pursuant to CPLR 3212 granting partial summary judgment against moving defendants on the issue of liability and dismissing the first and sixth affirmative defenses relating to the Plaintiff's alleged culpable conduct and seat belt. Plaintiffs' cross-motion motion is denied in part and granted in part. Plaintiffs oppose the motion. Defendants Mendieta oppose the cross-motion.

Plaintiffs commenced the instant action to recover for injuries allegedly sustained in a motor vehicle accident that occurred on March 21, 2015 on the George Washington Bridge, New York, New York. At the time of this accident, Plaintiffs were passengers in the vehicle owned and operated by Defendant DONALD BOLLING (Bolling). Defendant Bolling's vehicle was stopped against the barrier after it was tapped on the rear drivers side by a vehicle causing. Defendant Mendieta saw defendant Bolling's vehicle stopped against the barrier on the right side and he hit the breaks, his car slid and he went to the left without signaling to go around defendant Bolling's

vehicle when he was struck in the rear by defendant Luilly Lopez (Lopez) vehicle. Defendant Lopez was traveling on the left lane when she saw the hazard lights of defendant Bolling's vehicle in the middle lane and she applied the breaks but her car slid rear ending defendant Mendieta's vehicle.

The claims against defendant Donald Bolling have settled per stipulation of discontinuance dated July 5, 2022 (NYSCEF Doc #143).

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). "A defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident" (*Leak v Hybrid Cars, Ltd.*, 132 AD3d 958 [2d Dept 2018]). Vehicle and Traffic Law § 1128 requires a vehicle to "be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety. Further, Vehicle and Traffic Law § 1129 requires a driver to maintain a safe distance between his vehicle and the one ahead, and it is well established that a collision with a stationary vehicle amounts to *prima facie* evidence of negligence on the part of the operator of the moving vehicle (*see Guzman v Schiavone Constr. Co.*, 4 AD3d 150 [1st Dept 2004]). Defendants' submission fails to prove freedom from negligence as a matter of law, and therefore, is insufficient to meet their *prima facie* burden. Moving defendants admit going around the vehicle plaintiffs were occupying and then being struck by defendant Luilly Lopez vehicle. Thus, it is unclear if moving defendants contributed to the accident by changing lanes without signaling.

Defendants' failure to make a *prima facie* showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]).

The Plaintiff's branch of the motion seeking leave to file a late motion is denied as moot as the Note of Issue was vacated by this Court's Order dated August 18, 2022 (Seq 4).

Even though a plaintiff is no longer required to establish his or her freedom from comparative negligence, the issue of a plaintiff's comparative negligence may be decided in

the context of a summary judgment motion. The plaintiff can move for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Poon v. Nisanov*, 162 A.D.3d 804, 808, 79 N.Y.S.3d 227). Here, it is uncontested that plaintiff was an innocent passenger that was free of comparative fault, (*Anzel v Pistorino*, 105 AD3d 784, 786 [2013], quoting *Medina v Rodriguez*, 92 AD3d 850, 850 [2012]), the court may exercise its discretion pursuant to CPLR 3212(g) and issue an order narrowing the issues that remain in dispute by specifying that plaintiff is free from comparative fault (*see Phillip v D & D Carting Co.*, 136 at 24-25).

Plaintiffs established their prima facie burden that as passengers, they did not engage in any culpable conduct which contributed to the occurring of the accident (*see Medina v Rodriguez*, 92 AD3d 850, 850 [2d Dept 2012]; CPLR 3212[g]). In addition, plaintiff is entitled to the issuance of an order pursuant to CPLR 3212(g) specifying that they were passengers with seat belt fastened as there's nothing in this record to dispute this fact when the accident occurred, and as such was free from comparative fault in the happening of the accident.

However, plaintiff failed to establish that neither defendants are entitled to summary judgment on liability against any particular party since the issue of which vehicle was responsible for the accident remains unresolved as stated above (*see Oluwalayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]).

Accordingly, it is

ORDERED, that defendants, Carlos Mendieta and Henry Tiradoquintana motion on the issue of liability is denied, and it is further

ORDERED, that the aspect of plaintiff's motion seeking summary judgment on the issue of defendants' liability is denied; and it is further

ORDERED, that the aspect of plaintiff's motion seeking to strike defendants' first and sixth affirmative defenses is granted, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of plaintiffs striking defendants' first and sixth affirmative defenses.

This constitutes the decision and order of the Court.

Dated: October 11, 2022

Hon. Bkz?
BIANKA PEREZ, J.S.C.

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