

McGuinn v A Secure LLC
2022 NY Slip Op 35192(U)
October 7, 2022
Supreme Court, Bronx County
Docket Number: Index No. 30375/2020E
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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BEDRIYE MCGUINN, by ROBERT J. MUSSO,
CHAPTER 7 BANKRUPCY TRUSTEE,
Plaintiff,

DECISION/ORDER
INDEX NO. 30375/2020e
Motion Seq. 2

-against-

A SECURE LLC and MARK KOGAN,

Defendants.

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Veronica G. Hummel, A.J.S.C.:

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed in NYSCEF as submitted by the parties regarding the motion by plaintiff BEDRIYE MCGUINN, by ROBERT J. MUSSO, CHAPTER 7 BANKRUPTCY TRUSTEE (plaintiff) [Mot. Seq. 2], made pursuant to CPLR 3212, for an order granting plaintiff partial summary judgment against defendants A SECURE LLC. and MARK KOGAN on the issue of liability and dismissing the first (culpable conduct), second (emergency doctrine), fourth (assumption of risk), fifth (mitigate damages), and seventh (seat belt) affirmative defenses.¹

In this personal injury action, plaintiff claims that plaintiff sustained serious personal injuries in an alleged rear-end collision that occurred on December 20, 2019. Plaintiff was a passenger in a car that was allegedly struck in the rear by defendants' vehicle.

¹ Of note, plaintiff's counsel fails to mention the dismissal of affirmative defenses in the Notice of Motion in violation of the CPLR. As the issue is fully argued in the remaining papers and in the opposition, however, the court will determine the issue. Such an error should be avoided in the future.

In support of the motion, plaintiff submits an attorney affirmation, pleadings, a statement of material facts, a copy of plaintiff's deposition testimony, and a certified police report. On reply, plaintiff submits a copy of a letter from defendants' insurance company.

In opposition, defendants submit an attorney affirmation, a copy of defendant's deposition transcript, and a response to the statement of material facts.

Plaintiff testified that she was wearing a seat belt and was a passenger in Plaintiff's vehicle. When Plaintiff's vehicle was at or near 415 Bruckner Boulevard, it stopped for five seconds. Plaintiff's vehicle was suddenly hit in the rear by Defendants' vehicle.

The certified police report provides that the defendant driver stated that he was going southbound on Bruckner Boulevard when Plaintiff's vehicle stopped short causing the defendant driver to hit the rear bumper of Plaintiff's vehicle.

In opposition, defendants submit the defendant driver's testimony. The defendant driver testified that his vehicle in fact never had contact with Plaintiff's vehicle. The defendant driver also testified that he never told the responding police officer that his vehicle had contact with the rear of Plaintiff's vehicle or that he hit the Plaintiff's vehicle. The defendant driver further testified that, after the alleged accident, the driver of the Plaintiff's vehicle declined to show the defendant driver where any damage existed on the bumper of Plaintiff's vehicle that allegedly occurred as the result of an impact.

A plaintiff in a negligence action moving for summary judgment on the issue of liability must 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. *Tsyganash v. Auto Mall Fleet Management, Inc.*, 163 A.D.3d 1033 (2d Dep't 2018); see *Rodriguez v. City of New York*, 31 NY3d 312 (2018). A plaintiff is no longer required to

show freedom from comparative fault in establishing his or her *prima facie* case. see *Rodriguez v. City of New York*, *supra*. Importantly, once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320 (1986); *Alvarex v. Madeline D'Anthony Enterprises, Inc. v. Sokolowsky*, 101 A.D.3d 606 (1st Dep't 2012).

The part of the motion that seeks partial summary judgment as to liability.

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 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 the driver's vehicle and the vehicle in front of the driver's vehicle and consider weather and road conditions. A violation of VTL § 1129(a) is *prima facie* evidence of negligence, and “[t]his rule has been applied when the front vehicle stops suddenly in slow-moving traffic” or at a red light. *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). In a rear-end collision, there is a presumption of non-negligence of the driver of the lead vehicle. See *Soto-Marquin v. Mellet*, 63 A.D.3d 449, 450 (1st Dep't 2009).

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 A.D.3d 649 (1st Dep't 2017); *Cabrera v. Rodriguez*, 72 A.D.3d 553 (1st Dep't 2010); see *Ly Giap v. Hathi Son Pham*, 159 A.D.3d 484, 485 (1st Dep't 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 A.D.3d 432 (1st Dep't 2017); see *Smyth v. Murphy*, 177 A.D.3d 492 (1st Dep't 2019); *Corrigan v. Porter Cab Corp.*, 101 A.D.3d 471 (1st Dep't 2012); *LaMasa v. Bachman*, 56 A.D.3d 340 (1st Dep't 2008).

Based on the submissions, Plaintiff demonstrates *prima facie* entitlement to judgment as a matter of law on defendants' liability. Plaintiff's testimony and the certified police report establish that the defendant driver acted with negligence and hit Plaintiff's vehicle in the rear. This evidence sets forth a *prima facie* case.²

Defendants, in turn, fail to raise an issue of material fact as to any non-negligent explanation for the Accident. The attorney affirmation submitted in opposition to the motion has no evidentiary value (see *Conti v. City of Niagara Falls Water Bd.*, 82 A.D.3d 1633, 1634 (1st Dep't 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. In addition, any contention that Plaintiff's vehicle stopped short or suddenly is insufficient to generate an issue of fact as a matter of law. *Bajrami v. Twinkle Cab Corp.*, *supra*; *Cabrera v. Rodriguez*, *supra*; see *Ly Giap v. Hathi Son Pham*, *supra*. Furthermore, any argument that the motion for summary judgment on liability is premature also lacks merit as the mere hope that evidence sufficient to defeat a

² Of note, plaintiff fails to cite any legal authority to support the contention that the submitted letter from the insurance company, as worded, constitutes a legally binding concession that an impact occurred between the vehicles, and as such the evidence is not considered.

motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion. *Downey v. Mazzioli*, 137 A.D.3d 498, 499 (1st Dep't 2016).

Finally, the defendant driver's deposition testimony does not raise a genuine question of fact as to whether an impact occurred between the vehicles. Defendant does not deny that he spoke with the police. Deposition testimony that is materially inconsistent with a party admission in a police accident report does nothing more than raise a feigned issue and is not sufficient to raise an issue of fact in opposition to summary judgment. see *Colon v. Vals Ocean Pac. Sea Food, Inc.*, 157 A.D.3d 462 (1st Dep't 2018); *Estate of Mirjani v. DeVito*, 135 A.D.3d 616 (1st Dep't 2016); *Garzon -Victoria v. Okolo*, 116 A.D.3d 558 (1st Dep't 2014); *Bodi v. Ramlakhan*, 2020 WL 3523727 (Sup. Ct. Bronx County 2020).

The part of the motion that seeks dismissal of affirmative defenses: first (culpable conduct), second (emergency doctrine), fourth (assumption of risk), fifth (mitigate damages) and seventh (seat belt).

The affirmative defense (first) based on culpable conduct and comparative negligence is dismissed as plaintiff was a passenger and there is no evidence showing that plaintiff's actions in any way contributed to causing the Accident. *Oluwatayo v. Dulinayan*, 142 A.D.3d 113 (1st Dep't 2016); *Prudente v. McBride*, 2020 WL 7091334 (Sup. Ct. New York County 2020). "CPLR 3212 (g) permits the court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action." *Garcia v. Tri County Ambulette Serv.*, 282 A.D.2d 206 (1st Dep't 2001).

Furthermore, the affirmative defense based on the emergency doctrine (second) is dismissed as the doctrine is inapplicable here. In requiring drivers to maintain a safe distance between their vehicles and the ones in front of them, Vehicle and Traffic Law 1129 (a) imposes the duty to be aware of traffic conditions, including other vehicles suddenly stopping or slowing down. *Matias v. Grose*, 123 A.D.3d 485 (1st Dep't 2014).

Similarly, the assumption of risk defense (fourth) is also dismissed as the doctrine does not apply to situations such as the one at a hand. *see generally Ashbourne v. City of New York*, 82 A.D.3d 461 (1st Dep't 2011).

In terms of the affirmative defense based on the failure to wear a seat belt (seventh), the motion to dismiss is appropriately granted because defendants provide no evidence to contradict plaintiff's showing that plaintiff was wearing a seat belt at the time of the accident. *see generally Garcia v. Tri-County Ambulette Service, Inc., supra*.

Plaintiff's motion to strike defendants' affirmative defense (fifth) alleging "failure to mitigate damages," however, is granted only to the extent that the affirmative defense pertains to plaintiff's liability for this accident. Plaintiff submits no proof that this affirmative defense is not viable insofar as it pertains to the alleged injuries and treatment that plaintiff sustained as a result of this accident. *see generally New York Pattern Jury Instruction 2:325; Fortunato v. Ortiz*, 2021 WL 1312828 (Sup. Ct., Bronx County 2021).

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

ORDERED that the part of the motion by plaintiff BEDRIYE MCGUINN, by ROBERT J. MUSSO, CHAPTER 7 BANKRUPTCY TRUSTEE (plaintiff) [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order granting plaintiff partial summary judgment against defendants A SECURE LLC. and MARK KOGAN on the issue of liability is granted; and it is further

ORDERED that the part of the motion of plaintiff [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order dismissing the first (culpable conduct), second

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(emergency doctrine), fourth (assumption of risk), and seventh (seat belt) affirmative defenses is granted; and it is further

ORDERED that the part of the motion of plaintiff [Mot. Seq. 2], made pursuant to CPLR 3212, that seeks an order dismissing the affirmative defense of mitigation of damages (fifth) is granted only to the extent set forth herein; and it is further

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

The foregoing constitutes the decision and Order of the Court.

Dated: October 7, 2022

E N T E R,

s/Hon. Veronica G. Hummel/signed 10/07/2022

HON. VERONICA G. HUMMEL

1. CHECK ONE.....

CASE DISPOSED IN ITS ENTIRETY x CASE STILL ACTIVE

2. MOTION IS. is

☐ GRANTED DENIED zx GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE.....

☐ SETTLE ORDER ☐ SUBMIT ORDER x SCHEDULE APPEARANCE

☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT