

Mocha v Kipe Ride Inc.
2023 NY Slip Op 30306(U)
January 12, 2023
Supreme Court, Kings County
Docket Number: Index No. 514805/2017
Judge: Wavny Toussaint
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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 12th day of January 2023.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

----- X

RUBEN MOCHA,

Plaintiff,

- against -

KIPE RIDE INC., SERIFDEEN A. MAKUN and
GEORGIA A. GOMEZ,

Defendants.

----- X

The following e-filed papers read herein:

Notice of Motion/Order to Shower Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

Index No. 514805/2017

DECISION AND ORDER

Motion Seq. #06

NYSCEF Doc Nos.

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Upon the foregoing papers, defendant Georgia A. Gomez (“Gomez”) moves for an order granting summary judgment pursuant to CPLR 3212 on the issue of liability and dismissing the complaint and any and all crossclaims on the basis that there are no triable issues of fact (Motion Seq. 6). The plaintiff opposes the application.

BACKGROUND

This is an action for personal injuries allegedly sustained by the plaintiff as a result of a multi-car accident that occurred on March 17, 2017 at the intersection of St. John's Place and Rochester Avenue, Brooklyn, New York. At the time of the accident, the plaintiff and defendant Gomez were each operating a motor vehicle on St. John's Place. They were both stopped at a red traffic light, and defendant Gomez's motor vehicle was allegedly directly in front of the plaintiff. While the plaintiff and defendant Gomez were stopped, codefendant Serifdeen A. Makun ("Makun"), traveling in the opposite direction on St. John's Place, allegedly ran the red traffic light, crossed over the double yellow lines, and hit defendant Gomez's motor vehicle, and subsequently the plaintiff's motor vehicle.

Defendant Gomez's Motion

Defendant Gomez contends that codefendant Makun was the sole proximate cause of the accident because he failed to yield to the right of way to a red traffic light, crossed over the double yellow lines and struck both her vehicle and plaintiff's vehicle. Defendant Gomez further argues that she acted reasonably, as she was allegedly faced with a sudden and emergent situation, not of her making. In support of the motion, defendant Gomez submits copies of the deposition transcripts for plaintiff and herself and a preclusion order with notice of entry dated August 24, 2021. Defendant Gomez testified at her examination before trial that at the time of the accident, her motor vehicle was at a complete stop at a red light on St. John's Place, at the intersection with Rochester Avenue. While she was still stopped, codefendant Makun who was traveling in the opposite direction on St. John's Place, ran a red light, crossed over double yellow lines, and hit her vehicle in the back of

her driver side. She stated she felt a heavy impact from the collision. Defendant Gomez further testified that her motor vehicle did not impact any other motor vehicles after she was struck by codefendant Makun.

The plaintiff testified at his examination before trial that he was stopped at a red traffic light and behind three other motor vehicles. He stated that the motor vehicle directly in front and closest to his motor vehicle was involved in the accident. Prior to the accident, codefendant Makun was allegedly traveling in the opposite direction from him. The accident occurred when another vehicle ran a red light, crossed over double yellow lines, struck the motor vehicle that was directly ahead of the plaintiff, and subsequently hit his motor vehicle. The plaintiff stated there was no contact between his motor vehicle and the motor vehicle directly in front of plaintiff (defendant Gomez) as there was about five meters of distance between the two motor vehicles.

The preclusion order dated August 24, 2021 states that codefendants Kipe Ride Inc. and Makun are precluded from offering evidence, testifying at trial, or submitting an affidavit in response to any dispositive motion regarding liability as a result of their failure to appear for a deposition.

Plaintiff's Opposition

The plaintiff contends that defendant Gomez failed to submit admissible evidence in support of the motion as she proffered an attorney affirmation of defendant Gomez's counsel, who has no personal knowledge of the facts of the case. Moreover, plaintiff argues the submitted defendant deposition transcripts are deficient because they are unsigned and should not be considered in support of defendant Gomez's motion. The plaintiff contends

that there is no proof defendant Gomez's transcript was transmitted 60 days prior to the date of intended use, as the transmission letter was dated September 9, 2021, and defendant Gomez's motion was filed on October 14, 2021.

The plaintiff further argues that defendant Gomez failed to take any evasive action to avoid the accident, despite seeing codefendant Makun's vehicle prior to the accident. Plaintiff contends that a question of fact is created as to whether the accident could have been avoided but-for the collision between defendants Gomez's and Makun's vehicle. The plaintiff submits only an attorney affirmation in opposition.

Defendant Gomez's Reply

In reply, defendant Gomez reiterates that she was faced with a sudden emergency, not of her making, as codefendant Makun was the sole proximate cause of the accident and plaintiff's alleged injuries. In addition, plaintiff himself testified that there was no impact between defendant Gomez's vehicle and plaintiff's motor vehicle. Defendant Gomez refutes plaintiff's contentions that an affidavit needs to be submitted with the motion, and that the submitted deposition transcripts are inadmissible. Defendant Gomez argues that a certified transcript submitted on behalf of the party deponent (defendant Gomez) is admissible as it is adopted as accurate by her. As to the plaintiff's transcript, defendant Gomez argues that it is admissible even though it is not signed, as plaintiff's transcript was served with a transmission letter dated August 27, 2021, notifying plaintiff's counsel of defendant Gomez's intended use of the transcript. Plaintiff did not raise any challenges to the accuracy of the plaintiff's transcript. Additionally, defendant Gomez contends that her

statement of material facts is deemed admitted in its entirety, as the plaintiff failed to file a statement of material facts responding to defendant Gomez's statement with his opposition.

Defendant Gomez contends that plaintiff's counsel disregarded the deposition testimony of Gomez and the plaintiff that both were stopped behind other motor vehicles for a red light when codefendant Makun ran the red light, crossed over double yellow lines, and hit both parties. Defendant Gomez argues that she could not have anticipated the sudden actions by codefendant Makun, and that there is no evidence that she was inattentive. Further, it cannot be inferred that she could have avoided the collision. Further, defendant Gomez contends it is mere speculation that she was negligent because she failed to have taken some unspecific accident-avoidance measure or in some way contributed to the accident when the accident was wholly caused by codefendant Makun.

DISCUSSION

A motion for summary judgment shall be granted when the evidence shows there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law (*Manicone v City of New York*, 75 AD3d 535, 537 [2d Dep't 2010]). A defendant moving for summary judgment in a negligent action bears the burden of establishing, prima facie, that he or she was not the proximate cause of the subject accident (*Kim v. Jurado*, 203 AD3d 694, 695 [2d Dep't 2022]). "Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make prima facie showing that he or she is free from fault" (*Sage v. Taylor*, 195 AD3d 971, 972 [2d Dep't 2021]). Generally, the issue of proximate cause is a question for the trier of fact (*Id.*). "However, the issue of proximate cause may be decided as a matter of law where only one

conclusion may be drawn from the established facts” (*Rodriguez v. Palacio*, 199 AD3d 728, 732 (2d Dep’t 2021)). Once the moving party has met its burden, it then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact which require a trial of the action (*Gesuale v. Campanelli & Assocs., P.C.*, 126 AD3d 936, 937 [2d Dep’t 2015]).

Pursuant to CPLR 3116(a), a party seeking to use an unsigned deposition transcript bears the burden of demonstrating that a copy of the transcript had been submitted to the deponent for review and that the deponent failed to sign and return it within 60 days (*Baptiste v. Ditmas Park, LLC*, 171 AD3d 1001, 1001–1002 [2d Dep’t 2019]). The statute provides

“The deposition shall be submitted to the witness for examination and shall be read to or by him or her, and any changes in form or substance which the witness desires to make shall be entered at the end of the deposition with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness before any officer authorized to administer an oath. If the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed. No changes to the transcript may be made by the witness more than sixty days after submission to the witness for examination” (NY CPLR 3116 (McKinney)).

The plaintiff’s objection to the admissibility of defendant Gomez’s deposition transcript is without merit. The Gomez transcript, although unsigned, is admissible, as it was submitted by defendant Gomez as the party deponent, thus acknowledging its accuracy (*Farquharson v. United Parcel Serv.*, 202 AD3d 923, 925 [2d Dep’t 2022]). Likewise, although the plaintiff’s deposition transcript was unsigned, it was nonetheless admissible since it was certified by the stenographer, and its accuracy was not challenged (*Celestin v. 40 Empire Boulevard, Inc.*, 168 AD3d 805, 808 [2d Dep’t 2019]).

Here, the Court finds defendant Gomez established her prima facie entitlement to judgment as a matter of law. Both the plaintiff and Gomez testified that codefendant Makun ran a red traffic light, crossed the double yellow lines, struck defendant Gomez's motor vehicle, and subsequently the plaintiff's motor vehicle. Moreover, they both testified that their motor vehicles never made physical contact with each other after the collisions. Further, defendant Gomez has established that she was confronted with an emergency, which left her with virtually no opportunity to avoid the subject collision (*Francis v. Care Ride*, 169 AD3d 771, 772 [2d Dep't 2019]).

“The emergency doctrine provides that ‘when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context’” (*Anderson v. Metro. Transportation Auth.*, 208 AD3d 742, 743 [2d Dep't 2022]).

Generally, both the existence of an emergency and the reasonableness of a party's response will ordinarily present questions of fact (*Pappas v. New York City Transit Auth.*, 208 AD3d 890, 891 [2d Dep't 2022]). However, summary judgment is appropriate when a party presents sufficient evidence demonstrating the existence of an emergency, as well as the reasonableness of the actor's response to it such that it may be determined as a matter of law (*Id.*). Codefendant Makun's act of having entered the intersection against a red traffic light and crossed the double yellow lines is negligent as a matter of law and the sole proximate cause of the accident (*Kirby v. Lett*, 208 AD3d 1174, 1175 [2d Dep't 2022]). As a driver, defendant Gomez is not obligated to anticipate that codefendant Makun, who was traveling in the opposite direction, would run a red traffic light, cross over traffic, and

collide with her motor vehicle (*Wade v. Knight Transp., Inc.*, 151 A.D.3d 1107, 1109–1110 [2d Dep’t 2017]). Such an event constitutes a classic emergency, thus implicating the emergency doctrine (*Id.*).

In opposition, the plaintiff failed to raise a triable issue of fact. Notably, the plaintiff failed to submit an affidavit in admissible form in opposition to the motion or the transcript to raise challenges to its accuracy, if any, and failed to provide an excuse for such failure (*Zuckerman v. City of New York*, 49 NY2d 557, 563 [1980]). The plaintiff’s mere speculation that defendant Gomez may have failed to take some measure to avoid, or in some other way contributed to the subject accident, is insufficient to defeat defendant Gomez’s motion for summary judgment (*Weber v. Monsey New Square Trails Corp.*, 191 AD3d 929, 930 [2d Dep’t 2021]). Even if the Court were to believe that defendant Gomez failed to take measures to avoid the collision, the emergency doctrine would apply. Codefendant Makun had a duty to use reasonable care to avoid a collision while defendant Gomez, who had only seconds to react to codefendant Makun’s vehicle, is not comparatively negligent for failing to avoid the collision (*Enriquez v. Joseph*, 169 AD3d 1008, 1009 [2d Dep’t 2019]).

It is undisputed that codefendant Makun struck both defendant Gomez’s and the plaintiff’s vehicle, and there was no contact between the two vehicles after the collisions with each vehicle. The evidence demonstrated that defendant Gomez was not at fault in the happening of the subject accident, and consequently neither owed nor breached any duty to the plaintiff (*Han Hao Huang v. Doe*, 169 AD3d 1014, 1015 [2d Dep’t 2019]). Moreover, the evidence was sufficient to establish, *prima facie*, that codefendant Makun’s

own actions were the sole proximate cause of the accident (*Riddell v. City of New York*, 209 AD3d 891, 893 [2d Dep't 2022]).

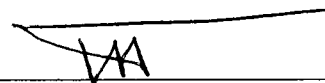
Accordingly, it is hereby

ORDERED that defendant Gomez's motion for summary judgment (Motion Seq. 06) is granted: and it is further

ORDERED that the action is severed and shall continue as against defendants Kipe Ride Inc. and Serifdeen A. Makun.

This constitutes the Decision and Order of the Court.

ENTER,



J. S. C.
Hon. Wavny Toussaint
J.S.C.

2023 JAN 27 AM 10:00
KINGS COUNTY CLERK
FILED