

<b>Rodriguez v Hampton</b>
2023 NY Slip Op 31759(U)
May 22, 2023
Supreme Court, New York County
Docket Number: Index No. 156940/2019
Judge: Denise M. Dominguez
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
NEW YORK COUNTY

PRESENT: HON. DENISE M DOMINGUEZ PART 21

Justice

INDEX NO. 156940/2019

JUNIOR RODRIGUEZ,

MOTION SEQ. NO. 003

Plaintiff,

- v -

TYRONE HAMPTON, THE CITY OF NEW YORK, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MABSTOA, MTA BUS COMPANY

DECISION + ORDER ON MOTION

Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66

were read on this motion to/for

JUDGMENT - SUMMARY

Upon review of the above listed documents and after hearing oral arguments, Plaintiff JUNIOR RODRIGUEZ's motion for summary judgment is denied.

This personal injury matter arises out of a February 23, 2019 incident that occurred near 2304 Amsterdam Avenue in Manhattan when a bus, #5867, operated by Defendant TYRONE HAMPTON ("HAMPTON"), came into contact with the Plaintiff's double parked Toyota vehicle (New Jersey License Plate N42JMD), which was owned and operated by the Plaintiff.

The Plaintiff's summons with notice and complaint were filed on July 16, 2019 (NYSCEF Doc. #1). Defendants HAMPTON, METROPOLITAN TRANSPORTATION AUTHORITY, NEW YORK CITY TRANSIT AUTHORITY, MABSTOA and MTA BUS COMPANY (collectively "TRANSIT") joined issue by the filing of an answer on or about October 17, 2019; an amended answer was filed on January 2, 2020 (NYSCEF Doc. #8, 10). Defendant THE CITY OF NEW YORK has been dismissed from this action by Order dated March 2, 2020. (NYSCEF Doc. #24). Plaintiff now moves, pre note of issue, and prior to the conducting of party depositions, for summary judgment, dismissing the Plaintiff's complaint pursuant to CPLR §3212.

In support of the motion, the Plaintiff submits an affirmation in support with corresponding exhibits including an affidavit from the Plaintiff and the surveillance camera footage from the bus

(NYSCEF Doc. #46, 47, 48, 49, 50, 52, 53, 54, 55, 56), a statement of material facts (NYSCEF Doc. #45), an amended statement of material facts (NYSCEF Doc. #66), and a reply affirmation (NYSCEF Doc. #64). In opposition to the motion, the TRANSIT submits an affirmation in opposition with corresponding exhibits (NYSCEF Doc. #58, 59, 60) and a response to the statement of material facts (NYSCEF Doc. #62).

### ***Background***

In the complaint, the Plaintiff asserts a cause of action sounding in negligence against the Defendants for their operation and control of the subject bus. Plaintiff also asserts a claim against the Defendants for negligent hiring concerning Defendant HAMPTON (NYSCEF Doc. #48). As set forth in his bill of particulars, the Plaintiff alleges *inter alia* that the Defendants were negligent in failing to keep a proper look out, failing to timely see the other vehicle, failing to yield the right of way and failing to remain in the designated lane for travel. The Plaintiff also asserts that the Defendants violated Vehicle and Traffic Law §§1128, 1163 and 1180(a) (NYSCEF Doc. #47).

In his affidavit, the Plaintiff avers that the accident occurred at approximately 4:15 p.m. in front of 2304 Amsterdam Avenue in Manhattan. The Plaintiff also avers that in that location, Amsterdam Avenue is a two-lane roadway with two lanes of moving traffic in each direction as well as a shared bike lane and a parking lane in each direction. The Plaintiff acknowledges that his Toyota SUV was double parked for two to three minutes in the right lane of moving traffic, which was next to the parking lane. Plaintiff further avers that his vehicle was not in the left lane of moving traffic. Plaintiff first realized he was involved in an accident when he felt and heard and impact to his driver's side (NYSCEF Doc. #55). At his January 19, 2022 50-h hearing the Plaintiff testified that he was double parked in a traffic lane on Amsterdam Avenue during heavy traffic and that his hazard lights were on at the time of the accident. He did not know the rate of speed of the bus at the time of the accident (NYSCEF Doc. #54).

The Defendants' accident report and supervisor's report are submitted by both the Plaintiff in support of the motion (NYSCEF Doc. #56) and the Defendants in opposition to the motion (NYSCEF Doc. #59, 60). The accident report, prepared by HAMPTON, notes that the accident occurred at 4:07 p.m. The report also contains a description of the accident wherein it is stated that, as HAMPTON approached 174<sup>th</sup> Street he noticed that the bus stop was obstructed and he had to service the bus stop from behind the obstruction. When HAMPTON finished servicing the

bus stop, he scanned his surroundings and then proceeded to the next bus stop. It was at this next bus stop that Plaintiff contacted HAMPTON to claim that the bus had struck its vehicle [near the 174<sup>th</sup> Street bus stop]. HAMPTON did not see, hear or feel any contact and he did not notice any damage to his bus (NYSCEF Doc. #59). The supervisor's report also reflects that the accident occurred at 4:07 p.m. and appears consistent with HAMPTON's description (NYSCEF Doc. #60).

The video footage from the bus was exchanged by TRANSIT in this matter. It has been authenticated by the Plaintiff in his affidavit and submitted in support of the Plaintiff's motion. The footage is from bus #5867 on February 23, 2019 and runs from 16:57:00 (4:57 p.m.) to 17:17:00 (5:17 p.m.).<sup>1</sup> The bus is traveling southbound and pulls into the bus stop at 17:05:39. The bus stop is obstructed by a blue mini-van improperly parked at the stop. The Plaintiff's Toyota is double parked, with its hazard lights flashing, adjacent to the blue mini-van. In this position, the Plaintiff's vehicle is blocking the right most moving traffic lane and bike lane. There is also a vehicle double parked in front of the Plaintiff's vehicle. Additionally, a large box truck is double-parked across the street from where the Plaintiff is double-parked in the northbound lanes. While the bus is servicing the stop, several vehicles traveling northbound veer into to the southbound lanes as they drive past the double-parked box truck. At approximately 17:06:21, an individual [the Plaintiff based upon his own affidavit] gets into the drivers' seat of the Toyota. The rear lights of the Toyota turn on at 17:06:22; no evidence has been submitted as to what these lights turning on indicate with respect to the operation of the Toyota.

At 17:06:26 the bus begins to leave the stop. As the bus does not have clearance due to the obstructed bus stop and the Plaintiff's double-parked vehicle, which is blocking the right travel lane. The bus then moves into the southbound left travel lane to get around the Plaintiff's double-parked vehicle. As the bus begins to move into the left lane, multiple vehicles are traveling northbound in the lane of travel closest to the southbound lanes. As the front of bus begins to pass the Toyota it is traveling at 7 mph. Upon review, the footage does not show the alleged impact between the bus and the Plaintiff's vehicle. Nor does the footage clearly indicate an impact has occurred (i.e. the bus does not appear to significantly alert its position, none of the bus passengers

---

<sup>1</sup> The Court notes that the time stamp on the footage does not appear to coincide with the time of the accident as identified by the Plaintiff (approximately 4:15 p.m.) and noted on TRANSIT's accident reports (4:07 p.m.). It appears that the running time on the footage is approximately an hour ahead as the subject incident is depicted at approximately 5:07 p.m. As the Court was able to identify the subject incident based upon the Plaintiff's own description of the accident as well as his vehicle and its license plate, the Court has reviewed the footage in considering the arguments set forth in the motion and the opposition.

are caused to fall to the floor and they do not appear to be in any distress). The bus continues traveling south on Amsterdam Avenue and reaches the next bus stop at 17:07:15, at which time customers exit and enter the bus. At 17:07:20 the Plaintiff's Toyota pulls in front of the bus and then parks. Plaintiff exits and approaches the driver's window of the bus.

### *Plaintiff's Motion for Summary Judgment*

Plaintiff argues that he is entitled to summary judgment because there is no question of fact with respect to the fault of the accident. Specifically, that the evidence shows that TRANSIT is solely responsible for the accident and its negligence was the proximate cause of the accident, with no comparative fault on the part of the Plaintiff. Plaintiff further argues that he is entitled to summary judgment because he was an "innocent passenger".

CPLR §3212 provides any party in any action, including in a negligence action, to move for summary judgment. (CPLR §3212 [a], *Andre v. Pomeroy*, 35 N.Y.2d 361, 320 N.E.2d 853 [1974]). The party seeking summary judgment, even if unopposed, has the high burden of establishing entitlement to judgment as a matter of law with evidence in admissible form (*see* CPLR §3212 [b], *Voss v Netherlands Ins. Co.*, 22 N.Y.3d 728, 734, 8 N.E.3d 823 [2014], *Giuffrida v Citibank Corp.*, 100 N.Y.2d 72, 81, 790 N.E.2d 772 [2003], *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324–25, 501 N.E.2d 572, 574 [1986], *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]). "Once this showing has been made, however, 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, 324, 501 N.E.2d 572, 574 [1986]).

Upon review, the Plaintiff has not established his right to judgment as a matter of law as there remain triable issues of fact concerning the Defendants' negligence, as well as the Plaintiff's comparative negligence, which precludes judgment as a matter of law.

First, that branch of the Plaintiff's motion which seeks summary judgment against the Defendants asserting that the Plaintiff was an "innocent passenger" is denied as such an argument is patently inapplicable to the facts of this matter as the Plaintiff's own affidavit in support of the motion acknowledges (NYSCEF Doc. #55), and the video of the incident shows, that he was the operator of a double-parked vehicle at the time of the subject incident.

Plaintiff also claims that HAMPTON is negligent as a matter of law for the subject accident because HAMPTON violated Vehicle and Traffic Law §1128 (keeping a vehicle in a single lane until it is safe to move), §1163 (turning a vehicle on/from a roadway) and §1180 (driving at a reasonable and prudent speed) (“VTL”). However, Plaintiff has not established with admissible evidence that the proximate cause of the subject accident was due to any violation of the VTL by HAMPTON. No evidence has been submitted that HAMPTON was issued any tickets or citations concerning any VTL violations, let alone the VTL provisions alleged to have been violated in connection with the subject accident. Nor has any evidence been submitted that conclusively establishes that HAMPTON violated the provisions of the VTL alleged by Plaintiff. The video footage submitted in support of the motion does not conclusively show that HAMPTON violated VTL §1180 as there is no indication that the bus was being operated at “a speed greater than is reasonable and prudent”; the Plaintiff himself testified at the 50-h hearing that he did not know the bus’ rate of speed and the video reflects that the bus was traveling at 7 mph as it left the bus stop. Nor does the video conclusively show that the bus was turning improperly along the roadway in violation of VTL §1163 or that the bus changed lanes in an unsafe manner in violation of VTL §1128(a). Instead, Plaintiff relies upon the attorney affirmation in support of this position to claim that HAMPTON violated the VTL. This is not sufficient on a motion for summary judgment. As there remain material questions of fact as to whether HAMPTON violated any VTL provision, Plaintiff has not met his *prima facie* burden for judgment of as a matter of law.

Plaintiff also argues that HAMPTON is negligent as a matter of law based upon his alleged “admission” in the police report submitted in support of the motion (NYSCEF Doc. #53). The Plaintiff’s reliance upon the police report as evidence of the Defendant’s negligence is unavailing as the submitted police report, (NYSCEF Doc. #53), does not appear to be certified. An “...uncertified police accident report prepared by an officer who did not witness the accident is not admissible for the purpose of establishing the cause of the accident.” (*Garcia v. BLS Limousine Serv. of New York, Inc.*, 199 A.D.3d 612, 154 N.Y.S.3d 758, 759 1<sup>st</sup> Dept 2021]; *Coleman v. Maclas*, 61 A.D.3d 569, 569, 877 N.Y.S.2d 297, 298 [1<sup>st</sup> Dept 2009]). Even if the police report was certified, it does not establish that the Defendants were negligent as there is in fact no admission of fault nor admission of any VTL violation attributed to HAMPTON. (*See Cordero v. Escobar*, 186 A.D.3d 1315, 1316, 129 N.Y.S.3d 8, 9 [2d Dept 2020] where the plaintiff’s reliance upon the police report as an admission of negligence was found not to be an admission of fault,

but simply an acknowledgement that the collision occurred; *see Concepcion v. City of New York*, 202 A.D.3d 403, 403, 158 N.Y.S.3d 560, 561 [1<sup>st</sup> Dept 2022]).

Finally, there remains a material question of fact as to whether the Plaintiff's own double-parked vehicle caused or contributed to the accident, which precludes judgment as a matter of law. It has long been held that "... issues of proximate cause are fact questions to be decided by a jury. While it is appropriate to decide the question of legal cause as a matter of law 'where only one conclusion may be drawn from the established facts', where there is any doubt, confusion, or difficulty in deciding whether the issue ought to be decided as a matter of law, the better course is to leave the point for the jury to decide." (*White v. Diaz*, 49 A.D.3d 134, 139, 854 N.Y.S.2d 106 [1<sup>st</sup> Dept 2008] quoting *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315, 414 N.E.2d 666 [1980]). A triable issue of fact exists as to whether the Plaintiff's own vehicle, which was admittedly double-parked in a travel lane and in violation of 34 RCNY 4-08 (f) (1), was a proximate cause of the subject accident. (*see Brito v. RDJ Express Transp.*, 135 A.D.3d 651, 23 N.Y.S.3d 572 [1<sup>st</sup> Dept 2016] wherein the plaintiff's partial summary judgment award was reversed as it was found that the "[p]laintiff failed to show that his own negligence in double-parking his car in the traveling lane was not a proximate cause of the accident... [and that the plaintiff's] ...assertion that the fact that his vehicle was double-parked merely furnished the occasion for the accident" was rejected; *cf. Cervera v. Moran*, 122 A.D.3d 482, 997 N.Y.S.2d 39 [1<sup>st</sup> Dept 2014] and *Pagan v. Ouattara*, 115 A.D.3d 605, 984 N.Y.S.2d 590 [1<sup>st</sup> Dept 2014]).

For these same reasons, that branch of the Plaintiff's motion which seeks to strike the Defendants' affirmative defenses is likewise denied.

Accordingly, it is hereby

ORDERED that Plaintiff's motion seeking summary judgment on the issue of liability and for an order finding that the Plaintiff is free of contributory negligence is denied; and it is further

ORDERED that Plaintiff shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

5/22/2023

DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

HON. DENISE M. DOMINGUEZ  
J.S.C.