

Walsh v Warren

2023 NY Slip Op 32496(U)

July 19, 2023

Supreme Court, Kings County

Docket Number: Index No. 526103/2021

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of July 2023

HONORABLE FRANCOIS A. RIVERA

-----X
MAUREEN D. WALSH and DOROTHEA WALSH,

Plaintiff,

- against -

RACHEL R. WARREN,

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on September 22, 2022, under motion sequence number one, by Maureen D. Walsh and Dorothea Walsh (hereinafter plaintiffs) for an order pursuant to CPLR 3212: (1) granting summary judgment in plaintiffs' favor on the issue of liability; striking all affirmative defenses as to liability, and the affirmative defense for failure to wear a seatbelt. This motion is opposed.

- Notice of Motion
- Affirmation in support
 - Exhibits A-C
- Statement of Material Facts
- Affirmation in Opposition
- Affirmation in Reply

BACKGROUND

On October 13, 2021, the plaintiffs commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's Office (KCCO). On December 12, 2021, the defendant interposed and filed an answer with the KCCO. As relevant to the instant motion the first affirmative defense

alleged that the plaintiffs' injuries were caused by their comparative negligence, assumption of risk and failure to wear a seatbelt.

The verified complaint alleges the following salient facts. On July 7, 2018, plaintiff Dorothea Walsh (hereinafter the injured driver or Dorothea W.) was operating a motor vehicle bearing New York State license plate with plaintiff Maureen D. Walsh (hereinafter the injured passenger or Maureen W.) as a passenger. The injured driver was proceeding on State Street, a public roadway, towards its intersection with Boerum Place in Brooklyn, New York.

At the same date, time, and place, defendant Rachel R. Warren (hereinafter defendant) was operating a motor vehicle bearing New York State license plate on Boerum Place, a public roadway, towards its intersection with State Street in Brooklyn, New York. The motor vehicle operated by the defendant collided with the motor vehicle operated by Dorothea W. (hereinafter the subject accident). The subject accident was caused solely by defendant's negligent operation of her vehicle. The subject accident caused the injured driver and the injured passenger to sustain serious physical injury.

LAW AND APPLICATION

The plaintiffs seek an order granting summary judgment in their favor on the issue of liability and striking the affirmative defense of culpable conduct and failure to use a seat belt.

A plaintiff moving for summary judgment on the issue of liability in a negligence action must establish, prima facie showing that the defendant breached a duty owed to the plaintiff and the defendant's negligent actions were a proximate cause of the alleged injuries (*Hall v Powell*, 183 AD3d 576 [2d Dept 2020]). A rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision (*Witonsky v New York City Transit Authority*, 145 AD3d 938 [2d Dept 2016]; *Hall v Powell*, 183 AD3d 576 [2d Dept 2020]; *Tsyganash v Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033 [2d Dept 2018]).

A motion for summary judgment shall be supported by an affidavit, by a copy of the pleadings and by other available proof, such as, depositions and written admissions (CPLR 3212 [b]; *Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Marriot v Jackson*, 67 Misc 3d 1211[A] [Sup Ct Kings County 2020]).

In support of their motion, the plaintiffs submitted, the pleadings, an affirmation of their counsel and the affidavit of the injured driver. The affidavit of Dorothea W., the injured driver, has alleged the following facts. On July 17, 2018, Dorothea W. was driving a motor vehicle. At that time, she was wearing a seat belt and had Maureen W. as a passenger. At that time, Maureen W. was also wearing a seat belt. On that date and time, her vehicle was struck by a vehicle owned and operated by defendant (hereinafter the Warren vehicle). The collision occurred at the intersection of Boerum Place and State Street in Brooklyn, New York (hereinafter the intersection). The intersection was

controlled by a traffic light. Dorothea W. was proceeding East on State Street and the defendant was travelling on Boerum Place. Prior to the accident, Dorothea W. observed the traffic light that was controlling the direction that she was traveling, and the light was green in her favor. The traffic light remained green from the time she first observed it up until the time of the subject accident. She proceeded to travel into the intersection. Prior to entering the intersection, she saw the Warren vehicle proceeding on Boerum Place. She believed that Warren vehicle would stop for the red light, and she proceeded into the intersection. Her vehicle entered the intersection before the Warren vehicle. After her vehicle had already entered the intersection and the light was still green for travel in her direction, she noticed the Warren vehicle was not slowing for the red-light controlling traffic in its direction, so she attempted to stop to avoid the collision. The Warren vehicle did not slow at all and struck her vehicle.

A rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle, requiring that operator to come forward with evidence of a non-negligent explanation for the collision to rebut the inference of negligence (Vehicle and Traffic Law § 1129 [a]; *Jimenez v Ramirez*, 171 AD3d 902 [2d Dept 2019]).

The defendant did not submit an affidavit setting forth a non-negligent explanation for the rear end collision of the plaintiffs' vehicle. Instead, the defendant's counsel argued that the motion was premature. A party who contends that a summary judgment motion is premature is required to demonstrate that discovery might lead to relevant

evidence or the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant (*Cajas-Romero v Ward*, 106 AD3d 850, 852 [2d Dept 2013]). The mere hope or speculation that evidence to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny a motion for summary judgment (*Paul v Village of Quogue*, 178 AD3d 942, 944 [2d Dept 2019]). *Kagan v Ameriprise Financial Services Inc* 191 AD3d 654 [2d Dept 2021].

The plaintiffs' evidentiary submissions established entitlement to judgment as a matter of law. The defendant's negligent operation of her motor vehicle was the sole proximate cause of the subject accident. Accordingly, the plaintiffs are entitled to summary judgment on the issue of liability in their favor.

Regarding the plaintiffs' request to strike the affirmative defense of culpable conduct and a seat belt defense, the defendant contended that the plaintiffs improperly moved for this relief pursuant to CPLR 3212 rather than CPLR 3211(b). The contention is correct, but the defect is a mere irregularity which does not prejudice the defendant and therefore may be disregarded pursuant to CPLR 2001. The affidavit of Dorothea W. demonstrated entitlement to the striking of the affirmative defense of culpable conduct and failure to use a seat belt. The defendant did not raise triable issue of fact.

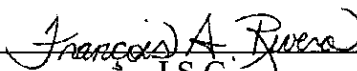
CONCLUSION

The motion by Maureen D. Walsh and Dorothea Walsh for an order pursuant to CPLR 3212 granting summary judgment in the plaintiffs' favor on the issue of liability is granted.

The motion by Maureen D. Walsh and Dorothea Walsh for an order striking the first affirmative defense alleging culpable conduct, assumption of the risk and failure to use a seat belt is granted.

The foregoing constitutes the decision and Order of the Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.