

Zareinejad v Kryekurti

2023 NY Slip Op 34976(U)

January 20, 2023

Supreme Court, Queens County

Docket Number: Index No. 710630/2019

Judge: Lourdes M. Ventura

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SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY

PRESENT HON. LOURDES M. VENTURA PART 37
Justice

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AMIR ZAREINEJAD,
Plaintiff,

INDEX NO. 710630/2019

- v -

MARLIN KRYEKURTI, EAN HOLDINGS, LLC,
Defendant.

MOTION
SEQ. NO. 002

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The following numbered papers read on the motion by plaintiff for an order (1) granting partial summary judgment on the issue of liability, and (2) dismissing the third and tenth affirmative defenses asserted by defendant in his answer, and the cross motion by defendant for an order (1) granting summary judgment dismissing the complaint on the grounds that defendant bears no liability for the subject motor vehicle accident and that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d), and (2) denying plaintiff's motion for partial summary judgment.

Table with 2 columns: Document Name, Papers Numbered. Includes Notice of Motion - Affidavits - Exhibits, Notice of Cross Motion - Affidavits - Exhibits, Reply Affidavit - Exhibits.

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on October 14, 2018, as the result of a motor vehicle accident. Plaintiff alleges that, before the accident, he was driving his vehicle eastbound on Astoria Boulevard in Queens, New York, in the rightmost lane of a three-lane roadway. He further alleges that defendant was driving a rental vehicle, owned by Ean Holdings, LLC¹, in the center lane, and that defendant made an unsafe lane

¹Ean Holdings, LLC was named as a co-defendant at the commencement of this action. However, in a stipulation signed by counsel for plaintiff and counsel for Ean Holdings, LLC, dated January 7, 2021, this action was discontinued solely as to Ean Holdings, LLC, with prejudice.

change into the rightmost lane, colliding with the right side of plaintiff's vehicle and causing plaintiff's vehicle to collide with a parked vehicle to his right. Plaintiff now moves for partial summary judgment on the issue of liability, and to dismiss defendant's third affirmative defense alleging lack of personal jurisdiction and tenth affirmative defense alleging that the emergency doctrine applies to the subject accident. Defendant cross moves for summary judgment to dismiss the complaint on the grounds that defendant does not bear liability for the subject accident and that plaintiff has not sustained a serious injury within the meaning of Insurance Law § 5102(d), and to deny plaintiff's motion for partial summary judgment.

The court first turns to that branch of plaintiff's motion for partial summary judgment on the issue of liability. "A vehicle shall 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" (Vehicle and Traffic Law § 1128[a]). "A violation of the Vehicle and Traffic Law constitutes negligence as a matter of law" (*Orellana v Mendez*, 208 AD3d 888, 889 [2d Dept 2022], quoting *Vainer v DiSalvo*, 79 AD3d 1023, 1024 [2d Dept 2010]). "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that defendant breached a duty owed to plaintiff and that defendant's negligence was a proximate cause of the alleged injuries" (*Tsyganash v Auto Mall Fleet Mgt. Inc.*, 163 AD3d 1033, 1033-1034 [2d Dept 2018]; see *Rodriguez v City of New York*, 31 NY3d 312 [2018]). "To be entitled to partial summary judgment a plaintiff does not bear the...burden of establishing...the absence of his or her own comparative fault" (*Wray v Galella*, 172 AD3d 1446, 1447 [2d Dept 2019], quoting *Rodriguez v City of New York*, 31 NY3d at 324-325).

Here, the conflicting evidence plaintiff submits in support of his motion for summary judgment fails to establish his prima facie entitlement to judgment as a matter of law (see *Stafford v Allied Bldg. Prods. Corp.*, 164 AD3d 1398 [2d Dept 2018]; *Cruz v Valentine Packaging Corp.*, 167 AD3d 707 [2d Dept 2018]; *Truckenmiller v Duran*, 125 AD3d 639 [2d Dept 2015]). In support of his motion, plaintiff submits, among other things, the transcript of his deposition testimony in which he testified that the accident occurred when defendant attempted to merge into the lane in which plaintiff was driving, when it was unsafe to do so. Plaintiff also submits the transcript of defendant's deposition testimony. Defendant testified that he lawfully changed lanes and had already safely merged into the lane in which plaintiff was traveling, in front of plaintiff's vehicle, when the vehicle defendant was driving was struck by plaintiff's car. As such, plaintiff's own submissions raise triable issues of fact including, but not limited to, how the accident occurred, and whether defendant has a nonnegligent explanation for the accident (see *Harding v Royal Waste Services, Inc.*, 208 AD3d 762 [2d Dept 2022]). As such, that branch of plaintiff's motion for partial summary judgment on the issue of liability must be denied.

Next, the court turns to that branch of plaintiff's motion for summary judgment dismissing defendant's third affirmative defense, asserting a lack of personal jurisdiction. Defendant waived the affirmative defense of lack of personal jurisdiction on the basis of improper service of process, as he failed to move to dismiss the complaint on that ground within sixty days after serving his answer (see CPLR 3211[e]; *Generation Mortg. Co. v Medina*, 138 AD3d 688 [2d Dept 2016]; *JP Morgan Chase Bank v Munoz*, 85 AD3d 1124 [2d Dept 2011]; *Federici v Metropolis Night Club, Inc.*, 48

AD3d 741 [2d Dept 2008]). As such, that branch of plaintiff's motion for summary judgment dismissing plaintiff's third affirmative defense is granted.

With respect to that branch of plaintiff's motion for summary judgment dismissing defendant's tenth affirmative defense asserting that defendant was faced with an emergency, "[u]nder the emergency doctrine, '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 the alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context'" (*Shin v New York City Tr. Auth.*, 210 AD3d 717, 717 [2d Dept 2022], quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322 [1991]). "Both the existence of an emergency and the reasonableness of a party's response thereto will ordinarily present questions of fact" (*Aiken v Liotta*, 167 AD3d 826, 828 [2d Dept 2018], quoting *Pavane v Marte*, 109AD3d 970, 971 [2d Dept 2013]). Here, based on the conflicting deposition testimony of plaintiff and defendant regarding how the accident occurred, triable issues of fact exist as to the applicability of the emergency doctrine (*see Shin v New York City Tr. Auth.*, 210 AD3d at 718; *Aiken v Liotta*, 167 AD3d at 827-828; *Levy v Braman Motorcars*, 119 AD3d 530 [2d Dept 2014]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]). As such, plaintiff is not entitled to dismissal of defendant's tenth affirmative defense asserting the emergency doctrine.

The court now turns to defendant's cross motion for summary judgment on the grounds that defendant bears no liability for the subject accident, and that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d). Plaintiff contends, among other things, that defendant's cross motion should be denied as untimely. Here, the cross motion for summary judgment was made more than 120 days after the note of issue was filed and, therefore, is untimely (*see CPLR 3212[a]*; *Brill v City of New York*, 2 NY3d 648 [2004]). "A court may, however, entertain an untimely cross motion for summary judgment if the court is deciding a timely motion for summary judgment made on nearly identical grounds" (*Paredes v 1668 Realty Assoc., LLC*, 110 AD3d 700, 702 [2d Dept 2013]). Thus, because plaintiff made a timely motion for partial summary judgment on the issue of liability, that branch of defendant's cross motion for summary judgment dismissing the complaint on the ground that defendant bears no liability for the subject accident can be entertained (*see Alexander v Gordon*, 95 AD3d 1245 [2d Dept 2012]). In contrast, that branch of defendant's cross motion for summary judgment on the issue of serious injury cannot be entertained insofar as it was not raised in plaintiff's timely motion for summary judgment and "as the issue of liability is a 'matter separate from the issue of' serious injury" (*Alexander v Gordon*, 95 AD3d at 1247, quoting *Reid v Brown*, 308 AD2d 331, 332 [1st Dept 2003]). As such, that branch of defendant's cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d) must be denied as untimely.

Contrary to defendant's contention, he fails to establish that he was not at fault in the happening of the accident. In support of his cross motion, defendant also submits the deposition transcripts of himself and plaintiff. As discussed above, the conflicting deposition testimony

regarding the manner in which the accident occurred fails to eliminate triable issues of fact as to that issue (*see Cho v Demelo*, 175 AD3d 1235 [2d Dept 2019]). As such, that branch of defendant's motion for summary judgment dismissing the complaint on the ground that he was not liable for the subject accident must also be denied.

Finally, in addition to filing the abovementioned cross motion, defendant filed an opposition to plaintiff's motion and, in effect, a reply in further support of his cross motion. Via stipulation signed by counsel for the parties dated May 10, 2022, it was agreed that opposition papers to plaintiff's motion were to be delivered to plaintiff's attorney no later than May 25, 2022, and that reply papers on defendant's cross motion were to be delivered to plaintiff's attorney by June 1, 2022.

However, defendant's opposition to plaintiff's motion was mailed to plaintiff's attorney on June 1, 2022, and defendant's reply on his cross motion was served on plaintiff's attorney via e-filing through NYSCEF on June 6, 2022. Defendant fails to provide any excuse for the late service of his papers, and plaintiff, who previously filed a reply in support of his motion and in opposition to defendant's cross motion, is prejudiced, as he has no opportunity to serve reply papers to defendant's late opposition. As such, this court, in its discretion, declines to consider defendant's opposition papers and, in effect, his reply in further support of his cross motion (*see Tec-Crete Tr. Mix Corp. v Great Am. Ins. Co. of N.Y.*, 167 AD3d 806 [2d Dept 2018]; *Lin v City of New York*, 117 AD3d 913 [2d Dept 2014]; *Risucci v Zeal Mgt. Corp.*, 258 AD2d 512 [2d Dept 1999]).

Accordingly, plaintiff's motion is granted only to the extent that defendant's third affirmative defense asserting a lack of personal jurisdiction is dismissed. Defendant's cross motion is granted only to the extent that that branch of plaintiff's motion seeking partial summary judgment on the issue of liability is denied. Any other requested relief not expressly addressed herein has nonetheless been considered by this Court and is hereby denied.

This shall constitute the Decision and Order of the Court.

Dated: January 20, 2023



LOURDES M. VENTURA, J.S.C.