

Dacosta v Baylor

2023 NY Slip Op 35097(U)

November 24, 2023

Supreme Court, Queens County

Docket Number: Index No. 710804/2022

Judge: Maurice E. Muir

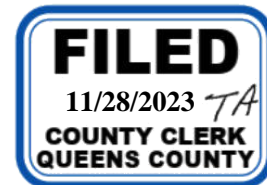
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



JAMILAH DACOSTA and JANICE BROWN-GREAVES,

IAS Part - 42

Plaintiff,

Index No.: 710804/2022

-against-

Motion Date: 6/1/23

ROBERT BAYLOR,

Motion Cal. No. 8

Defendant.

Motion Seq. No. 1

The following electronically filed documents read on this motion by plaintiffs for an order pursuant to CPLR § 3212 granting summary judgment on the issue of liability in favor of the plaintiffs Jamilah Dacosta and Janice Brown-Greaves against defendant Robert Baylor, Jr., and dismissing all affirmative defenses which allege culpable conduct or fault on the part of plaintiff Jamilah Dacosta, and granting such other, further and different relief as to this Court deems just and proper.

	Papers <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits.....	EF 24 - 32
Affirmation in Opposition-Exhibits-Service.....	EF 38 - 41
Affirmation in Reply-Service.....	EF 43 - 44

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries, which plaintiffs allegedly sustained in a motor vehicle accident. On May 19, 2022, the plaintiff commenced this action against; and on October 27, 2022, issue was joined. Now, the plaintiff seeks the above-described relief, in support of the instant motion, the plaintiff avers on January 12, 2022, at approximately 2:10 p.m., she was the driver of a motor vehicle stopped on Jewel Avenue at or near its

intersection with 140th Street, Queens County, New York, wherein Janice Brown-Greaves (“Ms. Brown-Greaves”) was a front-seat passenger. Moreover, the plaintiff avers that while they were stopped, for approximately five seconds, they were suddenly struck in the rear by a vehicle owned and operated by Robert Baylor, Jr. (“Mr. Baylor” or “defendant”). Moreover, Ms. Brown-Greaves also avers that “[o]n January 12, 2022, at approximately 2:10 p.m., [she] was a front-seat passenger in a motor vehicle operated by Jamilah Dacosta when she stopped the vehicle on Jewel Avenue at or near its intersection with 140th Street, Queens County, New York. [They] came to a gradual stop to allow a vehicle in front of us to exit his driveway. Our vehicle was stopped for approximately five seconds when we were suddenly struck in the rear by a vehicle owned and operated by the defendant Robert Baylor, Jr.”

According to the Court of Appeals, a plaintiff is no longer required to show freedom from comparative fault in order to establish his or her *prima facie* entitlement to judgment as a matter of law on the issue of a defendant's liability (*see Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Sooklall v. Morisseav-LaFague*, 185 AD3d 1079 [2d Dept 2020]; *Dolores v. Grandpa's Bus Co., Inc.*, 189 AD3d 1539 [2d Dept 2020]; *Capuozzo v. Miller*, 188 AD3d 1137 [2d Dept 2020]). Furthermore, it is well settled law that “[a] driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle” (*Catanzaro v. Edery*, 172 AD3d 995 [2d Dept 2019], quoting *Witonsky v. New York Tr. Auth.*, 145 AD3d 938 [2d Dept 2016]; *see also Grier-Key v. Lyons*, 195 AD3d 798 [2d Dept 2021]; Vehicle and Traffic Law § 1129(a)). Moreover, “[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]; *Arslan v. Costello*, 164 AD3d 1408 [2d Dept 2018]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]).

Here, the plaintiffs established their *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting, *inter alia*, their own uncontroverted affidavit, which demonstrated that Mr. Baylor struck their vehicle in the rear while they were waiting for another motorist to exit his driveway. (*see Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Xiao v. Martinez*, 185 AD3d 1014 [2d Dept 2020]). Moreover, Mr. Baylor failed to submit affidavit refuting the plaintiffs' contentions. Furthermore, the affirmation of defense counsel has no

probative value: It is well settled law that an attorney's affirmation that is not based on personal knowledge or supported by documentary evidence is of no probative value and cannot defeat a motion for summary judgment. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]; *Amato v. Fast Repair, Inc.*, 15 AD3d 429 [2d Dept 2005]; *Roche v. Hearst Corp.*, 53 NY2d 767 [1981]).

Lastly, that branch of the plaintiff's motion to strike the defendants' sixth affirmative defense, based upon plaintiff's alleged culpable conduct, is granted. "CPLR § 3211(b) provides that '[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.'" When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense'" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]; see also *Lewis v. U.S. Bank National Association*, 186 AD3d 694 [2d Dept 2020]). Additionally, on a motion pursuant to CPLR § 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR § 3211(a)(7), and the factual assertions of the defense will be accepted as true. "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed." (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). Here, the court finds that the defendant's sixth affirmative defense, based upon the plaintiffs' alleged culpable conduct, lacks merit. It is well settled law that failure to raise plead defenses in opposition to a motion for summary judgment rendered those defenses abandoned and subject to dismissal. (*Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539 [1975]; *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757 [2d Dept 2019]; *New York Commercial Bank v. J. Realty F. Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v. City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]; *Katz v. Miller*, 120 AD3d 768 [2d Dept 2014]).

Accordingly, it is hereby

ORDERED that branch of plaintiffs' motion for summary judgment, in their favor and against the defendant, on the issue of liability, pursuant to CPLR § 3212, is granted; and it is further,

ORDERED that branch of plaintiff's motion to strike the defendants' sixth affirmative defense, pursuant to CPLR § 3211(b), is granted; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants, via certified mail and NYSCEF, on or before January 5, 2024.

The foregoing constitutes the decision and order of the court.

Dated: November 24, 2023
Long Island City, New York


MAURICE E. MUIR, J.S.C.

