

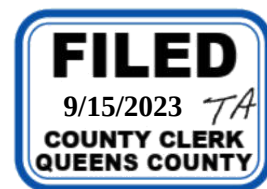
Mahmood v Norberto
2023 NY Slip Op 35106(U)
September 6, 2023
Supreme Court, Queens County
Docket Number: Index No. 713674/2022
Judge: Timothy J. Dufficy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY
Justice

PART 35

-----X
ELMINA K. MAHMOOD,

Plaintiff,

-against-

Index No. 713674/23

Mot. Date: 8/15/23

Mot. Seq. 1

KELLY ANNE NORBERTO, P. RUECK
NORBERTO, and MELISSA SEEPERSAD,Defendants.
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The following papers were read on this motion by plaintiff for an order, *inter alia*, granting summary judgment, pursuant to CPLR 3212, on the issue of liability against defendants Kelly Anne Norberto and P. Reuck Norberto (Norberto), for an order holding that the plaintiff is free from comparative negligence and an order dismissing the affirmative defenses of culpable conduct/contributory negligence/assumption of the risk and failure to use a seatbelt.

PAPERS
NUMBERED

Notice of Motion-Affidavits-Exhibits.....	EF 34-44
Answering Affidavit-Exhibits.....	EF 45-48
Replying Affidavit.....	EF 49

Upon the foregoing papers, it is ordered that the motion by plaintiff is granted.

This action arises out of a motor vehicle accident, that occurred on June 24, 2021, at the intersection of Clinton Road and Garden Street, in Garden City, New York. Plaintiff was a passenger in a vehicle, owned and operated by defendant Melissa Seepersad (Seepersad), that was involved in a collision with the Norberto vehicle, operated by Kelly Anne Norberto. It is undisputed that the Norberto vehicle was turning left from Clinton Road onto Garden Street, at the time of the accident, and the Seepersad vehicle was traveling straight on Clinton Road.

Plaintiff moves for summary judgment on the issue of liability against the Norberto defendants and to dismissing the affirmative defenses of culpable conduct/contributory negligence/assumption of the risk and failure to use a seatbelt.

Plaintiff submits, *inter alia*, her examination before trial (EBT) transcript, the EBT transcript of Kelly Anne Norberto, and the certified police accident report.

Plaintiff testified that she was a seat-belted passenger in the Seepersad vehicle, which was traveling straight in the right lane on Clinton Road, when the Norberto vehicle, traveling in the opposite direction, “made a quick left turn”, causing the two vehicles to collide. The Seepersad vehicle then struck a tree on the side of the roadway.

Norberto testified that she was traveling south on Clinton Road in the left lane. She intended to turn left onto Garden Street. She stopped and waited for northbound traffic to clear. There was an SUV stopped in the left northbound lane of Clinton Road, waiting to make a left turn, which obstructed her view of oncoming traffic in the right lane of Clinton Road. However, she made the left turn, despite her view being obstructed by the SUV. She was turning left at the time of the accident. She never saw the other vehicle before the accident. According to the certified police accident report, Norberto told the responding officer that the stopped SUV “blocked her view.”

A plaintiff moving for summary judgment in a negligence action on the issue of the defendant's liability must establish that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the plaintiff's alleged injuries (*see Detoma v Dobson*, 214 AD3d 948, 949 [2d Dept. 2023]). “A plaintiff's comparative fault, or lack thereof, is not a consideration in determining whether the plaintiff has made a prima facie showing on the issue of the defendant's liability” (*Id.*). However, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moves for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see Poon v Nisanov*, 162 AD3d 804, 808 [2d Dept. 2018]).

“[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se” (*E.B. v Gonzalez*, 208 AD3d 618, 619 [2d Dept. 2020] [internal quotation marks omitted]; *see Orellana v Mendez*, 208 AD3d 888, 889 [2d Dept. 2020]). If one party has established that the other party has committed negligence per se, the burden then falls to the opposing party to submit a nonnegligent explanation for the action” (*Orellana v Mendez*, 208 AD3d at 889).

Vehicle and Traffic Law § 1141(a) provides: “The driver of a vehicle intending to turn to the left within an intersection or into an alley, private road, or driveway shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close as to constitute an immediate hazard.”

Vehicle and Traffic Law § 1163(a)(a) provides, *inter alia*, “No person shall turn a vehicle at an intersection...or otherwise turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety.”

Here, the plaintiff has established a *prima facie* entitlement to judgment as a matter of law against the Norberto defendants by submitting evidence that Norberto, who admitted that her view of the intersection was obstructed and she did not see the other vehicle before the accident, was negligent in violating Vehicle and Traffic Law §§ 1141 and 1163 (a) by making a left turn into the path of oncoming traffic without yielding the right of way when the turn could not be made with reasonable safety (*see Sirlin v. Schreib*, 117 AD3d 819 [2d Dept. 2014]).

In opposition, Norberto fails to offer a nonnegligent explanation to raise a triable issue of fact. The opposition is based largely on the argument that Seepersad has yet to testify at an EBT. However a motion for summary judgment is not premature when the opponent already has personal knowledge of the relevant facts (*see Lidell v Morrison*, 204 AD3d 987 [2d Dept. 2019]; *Deleg v Vinca*, 82 AD3d 1146 [2d Dept. 2011]). The mere hope and speculation that evidence sufficient to defeat the motion might be uncovered during discovery is an insufficient basis to deny a summary judgment motion (*see Hanover Ins. Co. v Prakin*, 81 AD3d 778 [2d Dept. 2011]; *Kimyagarov v Nixon Taxi Corp.*, 45 AD2d 736 [2d Dept. 2007]).

Accordingly, plaintiff’s motion for summary judgment on the issue of liability against defendants Kelly Anne Norberto and P. Reuck Norberto is granted.

A plaintiff moving to dismiss an affirmative defense bears the burden of establishing that the affirmative defense is without merit as a matter of law (*see Gonzalez v Wingate at Beacon*, 137 AD3d 747 [2d Dept. 2016]). Here, the plaintiff has established that she did not engage in any culpable conduct that contributed to the accident (*see Ochoa v Townsend*, 209 AD3d 867, 868 [2d Dept. 2022]; *Morris v Dorota*, 187 AD3d 1174 [2d Dept. 2020]). The affirmative defense of assumption of risk is without merit as that doctrine is generally limited to risks arising from voluntary participation in athletic and recreational activities (*see Depass v. Mercer Sq., LLC*, 2023 N.Y. App. Div. LEXIS 4389 [2d Dept. 2023]; *Thompson v 1241 PVR, LLC*, 104 AD3d

1298, 1299 [4th Dept. 2013]. Thus, the affirmative defenses of culpable conduct/contributory negligence/assumption of the risk is dismissed.

Plaintiff has also established that she was wearing her seatbelt and the defendants have failed to submit any evidence to the contrary. As such, the affirmative defense of failure to use a seatbelt is dismissed.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment on the issue of liability against defendants Kelly Anne Norberto and P. Reuck Norberto is granted; and it is further

ORDERED that plaintiff is deemed an "innocent passenger" free from comparative negligence; and it is further

ORDERED that the branch of the motion to dismiss the affirmative defenses of culpable conduct/contributory negligence/assumption of the risk is granted; and it is further

ORDERED that the branch of the motion to dismiss the affirmative defense of failure to use a seatbelt is granted; and it is further

ORDERED that any arguments or requests for relief not specifically addressed herein have nonetheless been considered by the Court and are denied.

Dated: September 6, 2023



TIMOTHY J. DUFFICY, J.S.C.

