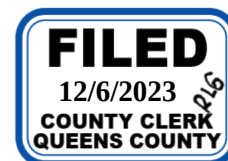


Silvera v Metropolitan Transp. Auth.
2023 NY Slip Op 35123(U)
December 1, 2023
Supreme Court, Queens County
Docket Number: Index No. 723969/2022
Judge: Mojgan C. Lancman
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN

IAS Part 20

-----X
KESHA SILVERA,

Index No.: 723969/2022

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 9.27.2023

METROPOLITAN TRANSPORTATION AUTHORITY,
NEW YORK CITY TRANSIT AUTHORITY and
MICHAEL KIMBLE,

Motion Cal. No.: 45

Defendants.
-----X

The e-filed papers bearing NYSCEF Doc. Nos. 13-26 were read on the motion made by the plaintiff, Kesha Silvera (the "Plaintiff"), for, *inter alia*, partial summary judgment.

The Plaintiff commenced this cause seeking to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on September 24, 2021 (the "Accident"). Presently before the Court is the Plaintiff's motion for an Order: (1) granting partial summary judgment in her favor against the defendants, Metropolitan Transportation Authority (the "MTA"), New York City Transit Authority ("NYCTA") and Michael Kimble ("Kimble") (collectively, the "Defendants"), on the issue of legal liability; (2) striking the affirmative defense of culpable conduct; and (3) striking the affirmative defense of the emergency doctrine.

For the following reasons, the motion is granted in part, denied in part and, upon searching the record, the MTA is granted summary judgment dismissing the complaint insofar as asserted against it.

I. Factual Background

The Accident occurred on Archer Avenue between Parsons Boulevard and 160th Street in Queens, New York. Two vehicles were involved in the Accident. The Plaintiff was the operator of one vehicle, which was parked. The other vehicle was a bus operated by Kimble and owned by NYCTA. Kimble was in the course of his employment with NYCTA at the time of the Accident.

In support of this motion, the Plaintiff submits the transcript of her statutory hearing, which she signed before a notary public. The Plaintiff testified, in relevant part, that: (1) she was sitting in the driver's seat of her vehicle when the Accident occurred; (2) that her vehicle was parked; (3) that she heard the "reverse sound signal" of the bus; (4) that she then looked up and started honking immediately; (5) that the bus backed up and struck the front of her vehicle; and (6) that she could not avoid the Accident because there was a motor vehicle behind her.

The Defendants do not submit affidavits in opposition. Instead, an affirmation from their counsel is filed.

II. Discussion

A. Summary Judgment on the Issue of Liability

The familiar principles applicable to summary judgment motions are set forth below.

“Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law” (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The “function of summary judgment is issue finding, not issue determination” (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the “drastic” remedy of summary judgment, the movant “must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case” (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686 [1984]).

Vehicle and Traffic Law § 1211 [a] states that: “[t]he driver of a vehicle shall not back the same unless such movement can be made with safety and without interfering with other traffic.”

The Plaintiff establishes *prima facie* entitlement to summary judgment against NYCTA and Kimble because the uncontroverted evidence demonstrates that the bus operated by Kimble moved in reverse and struck her parked vehicle (*see Logan v Apex Express, Inc.*, 165 AD3d 910 [2d Dept 2018]; *Bukharetsky v Court St. Off. Supplies, Inc.*, 82 AD3d 812 [2d Dept 2011]; *Sanabria v Paduch*, 61 AD3d 839 [2d Dept 2009]; *Pragay v Lavado*, 45 AD3d 828 [2d Dept 2007]; *Elefantis v P.O.P. Displays, Inc.*, 44 AD3d 608 [2d Dept 2007]; *Ortiz v Calavera*, 26 AD3d 319 [2d Dept 2006]).

There are no triable issues of fact because neither Kimble nor NYCTA submit an affidavit in opposition. The attorney affirmation submitted in opposition fails to raise any triable issues of fact because it has “no probative value in opposition to a summary judgment motion” (*Commissioners of the State Ins. Fund v Sanitation Salvage Corp.*, 187 AD3d 537, 537 [1st Dept 2020]).

The Defendants’ legal argument that the motion should be denied as premature because of outstanding discovery is without merit. In *Quintanilla v Mark*, 210 AD3d 713, 714-715 [2d Dept 2022], it was held as follows with respect to the interplay between a summary judgment motion and open discovery:

While a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, a party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Here, the defendant's proffered need to conduct depositions did not warrant denial of the motion, since the defendant already had personal knowledge of the relevant facts, and his mere hope or speculation that evidence might be uncovered was insufficient to deny the motion [internal quotation marks, brackets and citations omitted]).

Here, both NYCTA and Kimble have personal knowledge of the relevant facts because Kimble was the operator of the bus involved in the Accident. Thus, the argument that outstanding discovery warrants denial of this motion is baseless (*see id.*; *Elfe v Roman*, 219 AD3d 1304 [2d Dept 2023]). The Defendants’ remaining opposition arguments are also baseless. The Plaintiff is therefore granted summary judgment on the issue of liability against NYCTA and Kimble.

As explained below, the branch of the motion for summary judgment against the MTA is denied, and upon searching the record, summary judgment dismissing the complaint insofar as asserted against it is granted.

“[I]t is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court” (*Schwartz v Town of Ramapo*, 197 AD3d 753, 756 [2d Dept 2021]). Here, the parties had a full and fair opportunity to address the facts as they relate to the happening of the Accident and the issue of legal liability. They availed themselves of this opportunity factually by submitting exhibits and legally by briefing the issue of liability.

The MTA is entitled to summary judgment because “... the functions of the MTA with respect to public transportation are limited to financing and planning, and do not include the

operation, maintenance, and control of any facility” (*Delacruz v Metropolitan Transp. Authority*, 45 AD3d 482, 483 [1st Dept 2007] [internal quotation marks and citations omitted]).

Second, the MTA is not liable for the torts of its subsidiaries such as NYCTA (*see Brunson v City of New York*, 150 AD3d 1189 [2d Dept 2017]; *Fridman v New York City Tr. Auth.*, 131 AD3d 1202 [2d Dept 2015]; *Mayayev v Metropolitan Transp. Auth. Bus*, 74 AD3d 910 [2d Dept 2010]; *Rampersaud v Metropolitan Transp. Auth. of the State of N.Y.*, 73 AD3d 888 [2d Dept 2010]; *Emerick v Metropolitan Transp. Auth.*, 272 AD2d 150 [2d Dept 2000]). Here, the Defendants’ answer admits that NYCTA owned the bus at issue and that Kimble operated same within the scope of his employment with NYCTA.

B. Culpable Conduct

The next issue presented for consideration is whether the affirmative defense of culpable conduct should be dismissed. This issue is properly before the Court because: “[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability, the issue of a plaintiff’s comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant’s affirmative defense of comparative negligence” (*Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1014 [2d Dept 2020]; *see also Ng v West*, 195 AD3d 1006 [2d Dept 2021]) [citations omitted]). The answer asserts the Plaintiff’s culpable conduct as the first affirmative defense.

Furthermore, CPLR § 3212 [g] “... permits a motion court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action. The provision recognizes that, notwithstanding the denial or partial grant, one of several facts may nonetheless appear to be conceded or otherwise definitively resolved by the moving and opposing papers” (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 118 [1st Dept 2016] [internal quotation marks and citations omitted]).

The Plaintiff is an innocent driver (*see id.*). The evidence in admissible form, her sworn statutory hearing testimony, reveals that the bus operated by Kimble moved in reverse and struck the Plaintiff’s parked vehicle. There is no evidence that the Plaintiff contributed in any manner to the Accident. Consequently, the “Plaintiff has established h[er] lack of culpable conduct as an undisputed innocent driver, which entitles h[er] to summary judgment on lack of fault pursuant to CPLR 3212 [g]” (*Oluwatayo v Dulinayan*, 142 AD3d 113, 120; *see Ramirez v Elias-Tejada*, 168 AD3d 401 [1st Dept 2019]). The affirmative defense of culpable conduct is therefore dismissed (*see Oluwatayo v Dulinayan*, 142 AD3d 113).

C. The Emergency Doctrine

“[T]he common-law emergency doctrine ... recognizes that 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 alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context provided that the actor has not

created the emergency” (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] [internal quotation marks and citations omitted]). The emergency doctrine is not a valid defense because, among other things, Kimble created an emergency by moving the bus in reverse. The subject defense is therefore dismissed.

Lastly, the Court notes that although the Plaintiff is granted summary judgment on the issue of liability against NYCTA and Kimble, they are entitled to discovery on the issue of damages (*see Barr v Raffè*, 96 AD2d 800 [1st Dept 1983]), and the Plaintiff is not relieved of the burden of establishing that she suffered a serious injury within the meaning of Insurance Law § 5102 [d] (*see Zecca v Riccardelli*, 293 AD2d 31 [2d Dept 2002]).

III. Conclusion

For the reasons stated above, it is hereby:

ORDERED, that the Plaintiff’s motion is granted in part and denied in part; and it is further,

ORDERED, that the Plaintiff is granted partial summary judgment against NYCTA and Kimble on the issue of liability; and it is further,

ORDERED, that the affirmative defenses of culpable conduct and the emergency doctrine are dismissed; and it is further,

ORDERED, that the Plaintiff’s motion is denied as to the MTA; and it is further,

ORDERED, that upon searching the record, the MTA is granted summary judgment; and it is further,

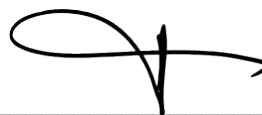
ORDERED, the Plaintiff’s complaint insofar as asserted against the MTA is dismissed; and it is further,

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendants via NYSCEF by January 31, 2024.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York

December 1, 2023



MOJGAN C. LANCMAN, J.S.C.

