

Thompson v De La Cruz-Tineo
2023 NY Slip Op 35252(U)
October 10, 2023
Supreme Court, Bronx County
Docket Number: Index No. 809589/2022E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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DWAYNE THOMPSON,

Index No. 809589/2022E

Plaintiffs,

-against-

Hon. BIANKA PEREZ

Justice Supreme Court

KEENLY MANUEL DE LA CRUZ-TINEO AND
ICEBERG MECHANICAL CORP.,
Defendants.

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The following were read on this motion (Mot. Seq. 1) submitted on **May 31, 2023**.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	Nyscef No(s). 11-15
Answering Affidavit and Exhibits	Nyscef No(s). 19-22
Reply Affidavit and Exhibits	Nyscef No(s). 24

Upon the foregoing papers, plaintiff Dwayne Thompson (hereinafter “Thompson”) moves, pursuant to CPLR 3212, for an Order granting Plaintiff summary judgment on the issue of liability and setting the matter down for an immediate trial on damages only and b) striking Defendants’ Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth Affirmative Defense. Defendants oppose.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent “to lay bare his or her proof and demonstrate the existence of triable issues of fact” (*Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-646 [2d Dept 2006]).

The plaintiff established prima facie, his entitlement to summary judgment by submitting his affidavit which demonstrated that the sole proximate cause of the accident was the negligence of the defendants in backing into his vehicle without warning and unsafely. The evidence plaintiff submitted also sufficiently established his prima facie burden that defendant violated Vehicle and

Traffic Law § 1211(a), which states that “[t]he driver of a vehicle shall not [move same while in reverse gear] unless such movement can be made with safety and without interfering with other traffic,” and that such violation constitutes negligence as a matter of law (*see Plaut v Allright Parking Mgt., Inc.*, 18 AD3d 396 [1st Dept 2005]).

In opposition, defendants failed to raise a triable issue of fact and admit they struck Plaintiff’s vehicle. Accordingly, plaintiff’s motion for summary judgment on the issue of liability is granted. As to dismissal of Defendants affirmative defenses, they are decided below:

Second, Fourteenth, Sixteenth, Seventeenth, and Eighteenth Affirmative Defense- Culpable Conduct of Plaintiff - Out of Defendant’s control - Intervening Cause, Misuse

Plaintiff’s submission also establishes prima facie entitlement to dismissal of Defendants’ first affirmative defenses alleging Plaintiffs culpable conduct and contributory negligence as Plaintiff’s affidavits establishes that Plaintiff was not responsible for the accident (*see generally Kwipu v Sontag*, 203 AD3d 607 [1st Dept 2022]). Moreover, Defendants admit striking Plaintiff’s vehicle. Secondly, as there are no allegations of product liability against Defendants and Plaintiff has established Defendants are the sole proximate cause of the accident, the affirmative defense of “misuse of the aforesaid product” is unavailing and accordingly dismissed.

Third and Thirteenth Affirmative Defense- Failure to State a Cause of Action & Frivolous Lawsuit

For the Court to decide if plaintiffs failed to state a cause of action, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*see Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997] [on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). Here, the pleadings clearly state a cause of action recognizable by law as plaintiff alleges personal injuries as a result of the collision between the defendants’ vehicle and his vehicle. Thus, the affirmative defense for failure to state a claim and frivolous lawsuit is also dismissed.

Fourth Affirmative Defense- Lack of Jurisdiction

The Court also grants the branch of Plaintiff's motion seeking to dismiss Defendants' affirmative defense of lack of jurisdiction given that defendants waived the defense by failing to move to dismiss the Complaint on that ground within 60 days after serving their answer (see CPLR 3211[e]).

Sixth Affirmative Defense- Mitigation of Damages

A party seeking to avail itself of the affirmative defense of failure to mitigate damages must establish that the injured party failed to make diligent efforts to mitigate its damages, and the extent to which such efforts would have diminished those damages. "Parties generally have a duty to mitigate damages the satisfaction of which generally presents and issue of fact." (*Bernstein v. Freudman*, 180 A.D.2d 420, 421 [1st Dept. 1992]). Consideration of whether plaintiff failed to mitigate damages, "should be strictly limited to the jury's determination of the plaintiff's damages and should not be considered by the triers of fact in resolving the issue of liability." (*Spier v. Barker*, 35 N.Y.2d 444, 450 [Ct App 1974]). Accordingly, the Court declines to dismiss the affirmative defense of failure to mitigate damages.

Eighth Affirmative Defense- Seatbelt

Plaintiff has failed to establish prima facie entitlement to dismissal of this affirmative defense as he did not state in his sworn affidavit that he was occupying his vehicle while wearing a seatbelt. Therefore, dismissal of this affirmative defense is not warranted at this time.

Seventh, Ninth and Tenth Affirmative Defense- Apportionment/Equitable Share

Pursuant to CPLR 1402, the equitable share of damages attributable to released tortfeasors under General Obligations Law § 15-108 is "determined in accordance with the relative culpability of each person liable for contribution" (see *Williams v. Niske*, 81 N.Y.2d 437, 440, n. 1, 599 N.Y.S.2d 519, 615 N.E.2d 1003 [1993]). This apportionment, if any, must be made at trial (see *Brunetti v. Musallam*, 59 A.D.3d 220, 222, [1st Dept.2009]).

Eleventh and Twelfth Affirmative Defenses- Assumption of Risk

The Court also dismisses the "irrelevant defense of assumption of risk" (*Vasquez v Strickland*, 211 A.D.3d 414, 415 [1st Dept 2022]). Motorists traveling through public streets, as a

general rule, do not assume the risk of other motorists negligently striking their vehicle (see *Webb v. Sharf*, 191 A.D.3d 1353 [4th Dept. 2021]); also, generally *Trupia ex rel. Trupia v. Lake George Cent. Sch. Dist.*, 14 N.Y.3d 392 [2010]).

Fifteenth Affirmative Defense-Improper County

Defendants did not submit a demand to change venue pursuant to CPLR 511(a) & (b), with their answer, deeming any change of venue defense waived. Therefore, defendants' fifteenth affirmative defense is dismissed.

Nineteenth Affirmative Defense- In Personam Jurisdiction

If the defendant asserts improper service of process as an affirmative defense in its answer, it must move to dismiss on that ground within 60 days after service of the answer. Here, Defendants failed to move within the requisite time; accordingly, this affirmative defense should be dismissed, see CPLR 3211[e]; *Wiebusch v. Bethany Memorial Reform Church*, 9 A.D.3d 315 ([1st Dept. 2004]).

Twentieth- Statute of Limitations

Plaintiff filed the Summons and Complaint June 28, 2022, within three years from the date the action arose, July 24, 2019. Accordingly, this affirmative defense is dismissed.

Accordingly, it is hereby

ORDERED, that plaintiff's motion for summary judgment on the issue of liability is granted, it is further

ORDERED, that Second, Third, Fourth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth Affirmative Defenses are dismissed, and it is further

ORDERED, that all other branches of the plaintiff's motion are denied.

This constitutes the decision and order of the Court.

Dated: October 10, 2023

Hon. 

BIANKA PEREZ, J.S.C.