

Ramsay v Arriaga
2023 NY Slip Op 35303(U)
August 17, 2023
Supreme Court, Bronx County
Docket Number: Index No. 805501/2022E
Judge: Patsy Gouldborne
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 13**

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CHARMAINE E. RAMSAY,

Index No. 805501/2022E

Plaintiff,

-against-

Hon. PATSY GOULDBORNE

Justice Supreme Court

MICHAEL J. ARRIAGA and EDGECOMBE

PLUMBING AND HEATING INC., a/k/a

EDGECOMBE PLUMBING AND HEATING INC.,

Defendants.

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The following were read on this motion (NYSCEF Seq #1) noticed on **April 20, 2023**.

Notice of Motion - Exhibits and Affidavits Annexed	NYSCEF Doc. No(s). 12-19
Answering Affidavit and Exhibits	NYSCEF Doc. No(s). 21-23
Reply Affidavit and Exhibits	NYSCEF Doc. No(s). 24-28

Upon the foregoing papers, Plaintiff moves, pursuant to CPLR 3212, for an order 1) granting partial summary judgment in favor of plaintiff and against the defendants on the issue of liability and 2) finding that the Plaintiff is free from comparative negligence; and 3) setting this matter down for an assessment of damages. This parties appeared before this Court on July 25, 2023. The Defendant's counsel was given the opportunity to submit a sur-reply, of which it was declined.

This action is to recover damages for personal injuries allegedly sustained by Plaintiff from a motor vehicle accident that occurred on July 20, 2020, at the corner of Amsterdam Avenue and West 108th Street, in the County of New York, State of New York.

In support of the motion, Plaintiff proffers her affidavit, her attorneys' affirmation, the Summons and Verified Complaint, the Verified Answer, the Verified Bill of Particulars, and the Certified Police Accident Report.

Plaintiff's affidavit states that she was driving northbound on Amsterdam Avenue towards West 108th Street where [she] intended to make a right turn and bring the vehicle to a garage on 108th Street. Plaintiff states that, [she] was driving on Amsterdam between 107th Street and 108th Street in the right-most lane for moving traffic when [she] saw the traffic light at West 108th Street turn red. Plaintiff states that [she] slowly brought the vehicle to a stop at the light behind another vehicle with [her] right turn signal activated. Plaintiff states [she] was stopped for approximately 45 seconds to 1 minute when the light turned green for traffic on Amsterdam and [she] remained stopped for another 5-10 seconds as did the car in front of Plaintiff. Plaintiff

states that as [she] was stopped, suddenly and unexpectedly, [she] felt a large crash in the rear of [her] vehicle pushing [her] vehicle forward. Plaintiff states the police came to the scene and a report was made.

The Certified Police Report states in relevant part that the defendant “[vehicle 2] was traveling at the above location was distracted from another vehicle when all of the sudden rear-ended vehicle 1” [plaintiff].

In opposition, the Defendants proffer their Attorney’s Affirmation. The Defendants Counsel asserts that Plaintiff has failed to comply with uniform civil rule 202.8-G, wherein the court may direct that there shall be annexed to the notice of motion a separate, short and concise statement in number paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried. Counsel states the motion is defective for Plaintiff’s failure to comply with uniform civil rule 202.3- wherein “ Every brief, memorandum, affirmation, and affidavit which was prepared by use of a computer shall include on a page attached to the end of the applicable document, a certification by the counsel who has filed the document setting forth the number of words in the document and certifying that the document complies with the word count limit. The counsel certifying compliance may rely on the word count of the word processing system used to prepare the document.” This was submitted in Plaintiff’s reply, of which the Defendant had an opportunity to submit a sur-reply as indicated above.

Defendant’s counsel further argues that the motion is premature. Counsel states the preliminary conference Order of April 2022 directed the plaintiff to appear for a deposition on or before September 14, 2022. Counsel states the deposition did not take place and has not been held to date. Counsel states that the affirmation of Plaintiff’s counsel is not evidence as it is not based upon personal knowledge. Counsel states that the police report does not indicate that the officer was a witness to the accident. Counsel further states that the movant fails to address whether the plaintiff’s vehicle had operating taillights.

Defendants Counsel argues that a trial in this case would include a jury’s ultimate determination as to whether the Plaintiff was negligent in any manner and whether that negligence, if any, was a substantial factor in causing plaintiff’s injuries in this case.

Discussion

Summary judgment is the procedural equivalent of a trial. (*Mendoza v Highpoint Associates, IX, LLC*, 83AD3d I [1st Dept 2011]). It is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*See Rotuba Extruders Inc., v Ceppos*, 46 NY2d223 [1978]). The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law,

submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries (*Fernandez v Ortiz*, 183 AD3d 443 [1st Dept 2020]).

A motorist is under a "duty to see that which under the circumstances he [or she] should have seen by the proper use of his [or her] senses (VTL § 1141). Each driver in the exercise of ordinary prudence ought to have observed and used such care to avoid the collision as an ordinarily prudent person would have used under the circumstances (*see Shea v. Judson*, 283 NY 393 [1940]; *Rennie v. Barbarosa Transp.*, 151 A.D.2d 379, 380 [1st Dept 1989]; *Costalas v. City of New York*, 143 A.D.2d 573 [1st Dept 1988]; *see also*, 1 NY PJI 2:79 [2d ed]). It is uncontroverted that the Plaintiff was stopped at the time of the accident, wherein she was rear-ended by the Defendant's vehicle. Rear-end collisions with stopped or stopping vehicles create a *prima facie* case of negligence against the rear vehicle driver unless an adequate non-negligent explanation for the accident is given (*Kalair v Fajerman*, 202 AD3d 625, 626 [1st Dept 2022]).

The Defendants when "opposing a motion for summary judgment must produce evidentiary proof in admissible form...". (*Zuckerman v City of New York*, 49 NY2d 557 [1st Dept 1980]). In the instant matter, the Defendants' attorney affirmation is insufficient to rebut the Plaintiff's filings. Counsel for the Defendants has no personal knowledge of the manner, which the accident occurred. Such an affirmation by counsel is without evidentiary value and thus unavailing. It is well settled law, that the affirmation of an attorney who possesses no first-hand knowledge of the event lacks probative value. (*Lewis v Safety Disposal System of Pennsylvania, Inc.* 12 A.D.3d 324 [1st Dept. 2004]). The Defendants have failed to provide an adequate non-negligent explanation for the accident (*Kalair v Fajerman*, 202 AD3d 625 [1st Dept 2022]), and have failed to raise a triable issue of fact as to same.

Defendants Counsel argues that this motion is premature, as discovery is not complete. "A grant of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." (*See Young v City of New York*, 2014 NY Slip Op 30229 (U) [Sup. Ct. NY County 2014]; *Lee v Ana Development Corp.*, 83 A.D.3d 545 [1st Dept 2011]).

Plaintiff's submissions establish *prima facie* entitlement to summary judgment on the issue of liability against the Defendants and dismissal of any affirmative defense as to comparative fault. In opposition, the Defendants have failed to provide a non-negligent explanation for the accident and have failed to raise an issue of fact as to their liability.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

Accordingly, it is hereby

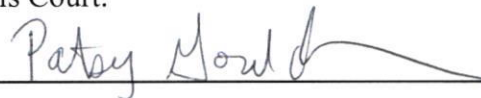
ORDERED that Plaintiff's motion (Mot. Seq. 1) seeking an order directing that partial summary judgment be entered in favor of the Plaintiff and against the Defendants on the issue of liability, dismissal of any affirmative defense as to comparative fault is **GRANTED**; and it is further

ORDERED that the Clerk shall mark motion sequence 1 decided in all court records.

This constitutes the Decision and Order of this Court.

Dated: August 17, 2023

Hon.



PATSY GOULDBORNE, J.S.C.