

Bell v Bonaio Taxi Inc.

2024 NY Slip Op 33803(U)

October 16, 2024

Supreme Court, New York County

Docket Number: Index No. 156488/2020

Judge: James G. Clynes

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES G. CLYNES PART 22M

Justice

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HELEANA BELL,

Plaintiff,

- v -

BONAO TAXI INC., JOHN DOE

Defendant.

-----X

INDEX NO. 156488/2020

MOTION DATE 08/26/2024

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, the motion by Plaintiff for partial summary judgment on the issue of liability against Defendants, BONAO TAXI INC. and "JOHN DOE," pursuant to CPLR 3212, (2) dismissing all affirmative defenses alleging Plaintiff's comparative fault and that there should be no apportionment of liability at the time of trial, (3) dismissing the ninth affirmative defense of asserting Defendants' vehicle was stolen at the time of the subject collision, and precluding Defendants from offering testimony at trial as to liability.

Plaintiff seeks recovery for injuries allegedly sustained as a result of an April 16, 2019 motor vehicle accident between a bus, within which Plaintiff was a passenger, and a vehicle owned by Defendant Bonao and operated by an unknown individual.

Plaintiff contends that she is free from liability as she was an innocent passenger at the time of the collision. Plaintiff further contends that Defendant's affirmative defense alleging Plaintiff's comparative fault should be dismissed.

In support of her motion, Plaintiff relies on, in pertinent part, an uncertified police report and her examination before trial testimony. The uncertified police report submitted by Plaintiff is inadmissible (*Coleman v Maclas*, 61 AD3d 569 [1st Dept 2009]). Although the report is signed at the bottom by the reporting police officer, it is not certified as a business record, and Plaintiff does

not submit an affidavit or other sworn evidence from someone with personal knowledge establishing the police report's authenticity or accuracy (*Fay v Vargas*, 67 AD3d 568 [1st Dept 2009]).

Plaintiff testified that she was a passenger on the M10 bus, about to get off at the next stop, she was standing on the right side of the bus holding onto her cart, about to get off at the next stop, heard a bang, felt the bus shake, and fell onto a bar inside the bus. Plaintiff further testified that she does not know if the bus was moving at the time of the accident.

In opposition, Defendant contends that Plaintiff has failed to establish that Defendant was the sole proximate cause of the accident. Defendant further contends that if the motion is granted, Defendant is entitled to a full trial on the issue of damages and even where a defendant is precluded from offering evidence at the time of trial on the issue of liability, e.g., how the accident happened, rates of speed, force of impact, vehicular damage, etc., he is entitled to defend on the issue damages. The Court notes that Defendant relies only on an attorney affirmation. Pursuant to a Court Order dated December 15, 2023, Defendant is precluded from testifying at trial and from submitting an affidavit in support of or in opposition to a dispositive motion. New York courts have consistently held an attorney's affirmation to be inadequate to oppose a summary judgment motion (*see GTF Marketing Inc. v Colonial Aluminum Sales, Inc.*, 66 NY2d 965, 968 [1985]). Without more, such as an affidavit or testimony from a person with first-hand knowledge, Defendant's opposition fails to raise an issue of fact sufficient to preclude a determination of summary judgment on the issue of liability in favor of Plaintiff and against Defendant.

In reply, Plaintiff contends that based on the evidence submitted, the burden has now shifted to the Defendants to come forward with a non-negligent explanation for causing the collision and they have failed to do so.

Plaintiff's motion for summary judgment on liability is granted only to the extent that Plaintiff as an innocent passenger is free from liability for the accident. There is no dispute that Plaintiff is free from liability as an innocent passenger and is therefore entitled to partial summary judgment on the issue of liability (*see Garcia v Tri-County Ambulette Service, Inc.*, 282 A.D.2d

206 [1st Dept. 2001]). However, Plaintiff's submission does not establish prima facie negligence by Defendant. Issues of fact remain as to the liability of Defendant.

The portion of Plaintiff's motion seeking to strike Defendant's affirmative defenses alleging comparative fault is denied. However, although 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 alleging comparative negligence" (*Frankel v Jaroslawicz*, 225 AD3d 742, 743 [2d Dept 2024] citing *Carlos Rodriguez, Appellant, v City of NY, Respondent.*, 31 NY3d 312 [2018]). A determination of comparative negligence is almost invariably a question of fact and is for the jury to determine in all but the clearest of cases (*Johnson v NY City Tr. Auth.*, 88 AD3d 321, 324 [1st Dept 2011]). Plaintiff's testimony does not establish as a matter of law that the bus was stopped when Plaintiff was standing without holding onto the pole. Since comparative negligence and culpable conduct are relevant to the mitigation of Plaintiff's damages, under the circumstances of this case, Plaintiff failed to establish entitlement to judgment warranting dismissal of Defendant's affirmative defense as to Plaintiff's culpable conduct (*Rodriguez* at 321).

The branch of Plaintiff's motion seeking to dismiss Defendant's Ninth Affirmative Defense of asserting Defendant's vehicle was stolen at the time of the subject collision is denied. Once ownership of a vehicle is established permission or consent to use the vehicle, either express or implied, is rebuttably presumed until evidence negating consent is proffered (*Murdza v Zimmerman*, 99 NY2d 375, 380 [2003]; see also *Matter of NY Cent. Mut. Fire Ins. Co. v Dukes*, 14 AD3d 704, 705 [2d Dept 2005]). Whether the issue of consent can be decided as a matter of law or requires submission to a jury depends on the nature of the evidence rebutting the consent (*Country Wide Ins. Co. v Natl. R. R. Passenger Corp.*, 6 NY3d 172, 179 [2006]). Here, Plaintiff failed to establish ownership of Defendant's vehicle and therefore the Court cannot presume permission or consent to use the vehicle. Accordingly, it is

ORDERED that Plaintiff's motion for summary judgment on liability is granted to the extent that Plaintiff as an innocent passenger is free from liability for the accident; and it is further

ORDERED that the branch of Plaintiff's motion to dismiss all affirmative defenses alleging Plaintiff's comparative fault and that there should be no apportionment of liability at the time of trial is denied; and it is further

ORDERED that the branch of Plaintiff's motion seeking to dismiss Defendant's Ninth Affirmative Defense of asserting Defendant's vehicle was stolen at the time of the subject collision is denied; and it is further

ORDERED that within 30 days of entry, Plaintiff shall serve a copy of this Decision and Order upon Defendant with Notice of Entry.

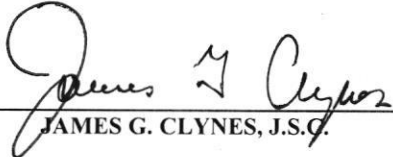
This constitutes the Decision and Order of the Court.

10/16/2024
DATE

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED SETTLE ORDER GRANTED IN PART OTHER

CHECK IF APPROPRIATE: INCLUDES TRANSFER/REASSIGN SUBMIT ORDER FIDUCIARY APPOINTMENT REFERENCE



JAMES G. CLYNES, J.S.C.