Jitta v Santiago
2024 NY Slip Op 35063(U)
December 16, 2024
Supreme Court, Queens County
Docket Number: Index No. 713909/16
Judge: Timothy J. Dufficy
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Short Form Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Present: HON. TIMOTHY J. DUFFICY **IAS PART 35**
Justice

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KENDALL JITTA,

Plaintiff,

- against -

EDGAR SANTIAGO and CITY WASTE SERVICES OF NEW YORK, INC.,

Defendants.

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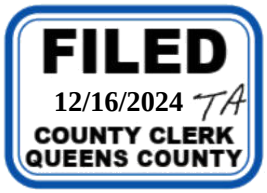
Index No.: 713909/16
Motion Date: 9/24/24
Mot. Seq.: 7



The following papers were read on this motion by plaintiff for an order *inter alia*, granting plaintiff summary judgment on the issue of liability against defendants Edgar Santiago (Santiago) and City Waste Services of New York, Inc. (City Waste) (collectively defendants) and striking the defendants fifth, sixth, eighth, eleventh and twelfth affirmative defenses.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits	EF 100-117
Affirmation in Opposition-Affidavits-Exhibits.....	EF 121-122
Replying Affidavit.....	EF 127

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

As an initial matter, while the instant motion was made more than one hundred and twenty (120) days after the Note of Issue, under the unique circumstances of this case, which include a lengthy stay due to the liquidation of an insurance company and the fact that Santiago did not appear for a deposition, until September 23, 2023, despite multiple court orders, plaintiff has established "good cause" for the untimely motion (*see Brill v City of New York*, 2 NY3d 648 [2004].)

This action arises from a motor vehicle accident, that occurred on August 9, 2016, on Liberty Avenue, at or near the intersection of 175th Street, in Queens County. On that

date, there was a collision between a truck operated by Santiago and owned by City Waste and a vehicle operated by plaintiff Kendal Jitta (Jitta). An individual named Jamie Smith (Smith) was a passenger in the Jitta vehicle.

Plaintiff Jitta moves for summary judgment on the issue of liability against the defendants and to dismiss the aforementioned affirmative defenses. In support of the motion, the plaintiff submits, *inter alia*, the pleadings, her deposition transcript, the deposition transcript of Santiago, the deposition transcript of Smith, and a properly authenticated video of the accident.

The video of the accident shows plaintiff Jitta's vehicle and the Santiago vehicle both traveling on Liberty Avenue. The Jitta vehicle is in the right lane and the Santiago vehicle is in the left lane, traveling behind the Santiago vehicle. The video then shows the Santiago vehicle make a right turn from the left lane and come in contact with the plaintiff/Jitta vehicle.

A movant for summary judgment must make *prima facie* showing of entitlement to summary judgment as a matter of law through the submission of sufficient evidence to demonstrate the absence of any material issues of fact, and he or she must do so by tender of evidentiary proof in admissible form (*see Alvarez v Prospect Hosp*., 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1985]). Once the movant has made the *prima facie* showing, the burden shifts to the opposing party to come forward with sufficient proof in admissible form to establish the existence of triable issue of fact (*Alvarez v Prospect Hosp*., *supra*, 68 NY2d 320, 324).

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 (*see Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Rodriguez v City of New York*, 31 NY3d 312 [2018]. "To be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault" (*Rodriguez v City of New York*, *supra*, 31 NY3d 324-325).

Although a plaintiff need not demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's

liability (*see Rodriguez v City of New York,* 31 NY3d 312, 324-325), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff has moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence (*see e.g. Poon v Nisanov, supra,* 162 AD3d 804 [2d Dept 2018]; *Jiang-Hong Chen v Heart Tr., Inc*., 143 AD3d 945, 945 [2d Dept 2016]). When moving to dismiss an affirmative defense, the plaintiff 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]).

"[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).

Here, plaintiff Jitta has established a *prima facie* entitlement to summary judgment by showing that the defendant/driver violated numerous Vehicle and Traffic Law (VTL) provisions, including VTL §§ 1128(a), 1160(a), and 1163(a). In opposition, the defendants fail offer a non-negligent explanation for the accident and thus have failed to raise an issue of fact. Accordingly, plaintiff's motion for summary judgment on the issue of liability against the defendants is granted.

Plaintiff also moves for dismissal of the defendants affirmative defenses.

Plaintiff has established her freedom from comparative negligence by the submission of her deposition testimony that she was traveling straight in the right lane, at about 20 to 25 miles per hour, when she was struck by the defendants' truck, and that the defendant/driver violated the Vehicle and Traffic Law making a right turn from the left lane and this was the sole proximate cause of the accident (*see Peluso v Martinez*, 136 AD3d 769 [2d Dept 2016]; *Rivera v Corbett*, 69 AD3d 916 [2d Dept 2010].)

As such, plaintiff's motion to dismiss the defendants' fifth, and sixth affirmative defenses, as well as any other affirmative defenses pertaining to plaintiff's comparative negligence, is granted. Defendants' eighth affirmative defense (assumption of risk) is inapplicable and thus is without merit and is dismissed. Defendants' eleventh affirmative defense (emergency situation) is also inapplicable and without merit and is dismissed.

Finally, the defendants' twelfth affirmative defense (failure to use seatbelt), is dismissed as the plaintiff has submitted proof, unchallenged by the defendants, that she was wearing her seatbelt.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability against the defendant is **granted**; and it is further

ORDERED that the branch of plaintiff 's motion to dismiss the defendants' fifth, sixth, eighth, eleventh and twelfth affirmative defenses, as well as any other affirmative defenses pertaining to plaintiff's comparative negligence **is granted** , and it is further

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

Dated: December 16, 2024

TIMOTHY J. DUFFICY, J.S.C.

FILED
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COUNTY CLERK
QUEENS COUNTY

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