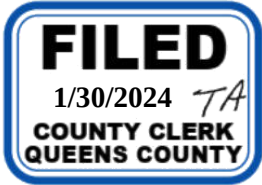


Miller v Sanchez
2024 NY Slip Op 35217(U)
January 25, 2024
Supreme Court, Queens County
Docket Number: Index No. 700418/2020
Judge: Maurice E. Muir
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR

JANET MILLER and ROBIN S. AMDERSON,

IAS Part - 42

Plaintiffs,

Index No. 700418/20

Motion Date: 5/18/23

-against-

Motion Cal. No. 30

CESAR SANCHEZ, CARLA ACOSTA
"JOHN DOE I", and JOHN DOE II",

Motion Seq. No. 1

Defendants.

The following electronically filed ("EF") documents read on this motion by Carla Acosta ("Ms. Acosta" or Movant") for an order pursuant to CPLR § 3212 granting summary judgment to the defendant, Carla Acosta, dismissing plaintiff's complaint and all cross-claims against her and for such other and further relief as this Court deems just and proper. Moreover, Janet Miller ("Ms. Miller") and Robin S. Amderson ("Ms. Amderson") (collectively, the "plaintiffs") cross move for an order: pursuant to CPLR § 3212 granting plaintiff summary judgment against all defendants on the issue of liability, as well as striking the defendants' affirmative defense alleging comparative fault; and granting such other and further relief as this Court deems just and proper.

	Papers <u>Numbered</u>
Notice of Motion-Affirmation in Support-Exhibits.....	EF 18 - 25
Affirmation in Opposition-Exhibits-Service.....	EF 49 - 50
Notice of Cross Motion-Affirmation in Support-Exhibits.....	EF 73 - 80
Affirmation in Opposition to Notice of Cross Motion-Exhibits.....	EF 81 - 85
Affirmation in Reply.....	EF 87
Affirmation in Reply to Cross Motion.....	EF 88

Upon the foregoing papers it is ordered that the motion and cross-motion are combined herein for disposition, and determined as follows:

This is an action to recover damages for personal injuries Janet Miller (“Ms. Miller”) and Robin S. Amderson (“Ms. Amderson”) (collectively, the “plaintiffs”) allegedly sustained in a motor vehicle collision, which occurred on March 20, 2018 on 63rd Street at or near its intersection with Roosevelt Avenue, Queens, New York (“subject accident”). As a result, on January 9, 2020, they commenced the instant action against the defendants. In the case at bar, the plaintiff the instant action against Carla Acosta (“Ms. Acosta”), because she gave non-party Christopher Scott Chisolm (“Mr. Chisolm”), permission to operate her motor vehicle. Under New York law, the owner of a motor vehicle is liable for the negligence of one, who operates the vehicle with the owner’s express or implied consent. (*see Al-Mamar v. Terrones*, 146 AD3d 737 [2d Dept 2017]; *Sargeant v. Village Binderty*, 296 AD2d 395 [2d Dept 2002]; *Matter of Allstate Indem. Co. v. Nelson*, 285 AD2d 454 [2d Dept 2021]; *Headley v. Tessler*, 267 AD2d 428 [2d Dept 1999]). Thereafter, on March 18, 2020, issue was joined, wherein co-defendant Cesar Sanchez (“Mr. Sanchez”) interposed an answer with seven affirmative defenses (e.g., contributory negligence, assumption of risk, culpable conduct, etc.). Now, the parties move for the above-described relief.

In support of the instant motion, Ms. Acosta avers that on March 20, 2018, the plaintiffs were passengers in her motor vehicle, which was operated by Mr. Chisolm, who was rear-ended by a vehicle owned/and operated by Mr. Sanchez. As a result, Ms. Acosta argue that neither she nor Mr. Chislom were the proximate cause of the subject accident. It is well settled law that “[a] defendant moving for summary judgment in a negligence action has the burden of establishing, *prima facie*, that he or she was not at fault in the happening of the subject accident” (*Boulos v. Lerner-Harrington*, 124 AD3d 709 [2d Dept 2015]; *see Aponte v. Vani*, 155 AD3d 929 [2d Dept 2017]; *Baulete v. L & N Car Serv., Inc.*, 134 AD3d 753 [2d Dept 2015]; *Miron v. Pappas*, 161 AD3d 1063 [2d Dept 2018]; *see also Chan Pok Kim v. Jurado*, 203 AD3d 694 [2d Dept 2022]). ““There can be more than one proximate cause of an accident”” (*Lopez v. Reyes-Flores*, 52 AD3d 785 [2d Dept 2008] quoting *Cox v. Nunez*, 23 AD3d 427 [2d Dept 2005]; and “[g]enerally, it is for the trier of fact to determine the issue of proximate cause” (*Kalland v. Hungry Habor Assoc., LLC*, 84 AD3d 889 [2d Dept 2011])). Furthermore, it is well settled law that “[a] rear-end collision with a stopped or stopping vehicle creates a *prima facie* case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision”

(*Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]; *Arslan v. Costello*, 164 AD3d 1408 [2d Dept 2018]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]; *Jimenez-Pantaleon v. Aucancela*, 221 AD3d 676 [2d Dept 2023]).

Here, the court finds that Ms. Acosta established her *prima facie* entitlement to judgment as a matter of law by demonstrating that Mr. Chislom was not at fault in the happening of the subject accident (see *Daniel v. Ian-Michael*, 188 AD3d at 1156; *Mihalatos v. Barnett*, 175 AD3d at 493; *McPhaul-Guerrier v. Leppla*, 201 AD3d 920 [2d Dept 2022]). In fact, Mr. Sanchez struck Mr. Chislom's vehicle in rear, which was corroborated by the plaintiffs. (see *Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Xiao v. Martinez*, 185 AD3d 1014 [2d Dept 2020]). In opposition, Mr. Sanchez failed to provide a non-negligent explanation for the subject accident sufficient to raise a triable question of fact. In fact, Mr. Sanchez failed to submit affidavit refuting Ms. Acosta's contentions; and his attorney's affirmation lacks probative value because, it is not based on personal knowledge or supported by documentary evidence. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]; *Amato v. Fast Repair, Inc.*, 15 AD3d 429 [2d Dept 2005]; *Roche v. Hearst Corp.*, 53 NY2d 767 [1981]).

Now, the court turns to the plaintiffs' cross-motion, who argue that they were innocent passengers in the subject accident. It is well settled law that "[t]he right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers. (*Romain v. City of New York*, 177 AD3d 590 [2d Dept 2019], citing CPLR § 3212(g); *Jung v. Glover*, 169 AD3d 782 [2d Dept 2019]; *Phillips v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]; *Anzel v. Pistorinoi*, 105 AD3d 784 [2d Dept 2013]). Here, the plaintiffs demonstrated their *prima facie* entitlement to judgment as a matter of law on the issue of liability against the defendants by establishing that Mr. Sanchez struck Mr. Chislom's motor vehicle in the rear -- in violation of Vehicle and Traffic Law §1129(a). (*Balladares v. City of New York*, 177 AD3d 942 [2d Dept 2019]; *Whitehead v. David Rosen Bakery Suppliers, Inc.*, 208 AD3d 533 [2d Dept 2022]; *M&T Bank v. Bonilla*, 215 AD3d 813 [2d Dept 2023]). Neither Ms. Acosta nor Mr. Sanchez submitted an affidavit establishing that the plaintiffs were engaged in any culpable conduct, which contributed to the subject accident. (see *Phillips v. D&D Carting Co., Inc.*, 136 AD3d 18 [2d Dept 2015]; *Lopez v. Suggs*, 186 AD3d 589 [2d Dept 2020]). As

such, the plaintiffs' have established their entitlement to judgment as a matter of law, on the issue of liability.

Lastly, that branch of the plaintiffs' motion to dismiss Mr. Sanchez's second affirmative defense based upon comparative negligence is granted. "CPLR § 3211(b) provides that '[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit.' When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense'" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]). On a motion pursuant to CPLR § 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR § 3211(a)(7), and the factual assertions of the defense will be accepted as true. (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). Notwithstanding the same, it is well settled law that failure to raise plead defenses in opposition to a motion for summary judgment renders those defenses abandoned and subject to dismissal. (*Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539 [1975]; *114 Woodbury Realty, LLC v. 10 Bethpage Rd., LLC*, 178 AD3d 757 [2d Dept 2019]; *New York Commercial Bank v. J. Realty F. Rockaway, Ltd.*, 108 AD3d 756 [2d Dept 2013]; *Starkman v. City of Long Beach*, 106 AD3d 1076 [2d Dept 2013]; *Katz v. Miller*, 120 AD3d 768 [2d Dept 2014]). Here the court finds that Mr. Sanchez's second affirmative defense (e.g., culpable conduct, contributory negligence, assumption) lacks merit. As such, the Mr. Sanchez's second affirmative defense is dismissed; and plaintiffs' motion to dismiss Ms. Acosta's comparative negligence defense is moot.

Accordingly, it is hereby

ORDERED that the Defendant Carla Acosta motion for summary judgment, pursuant to CPLR § 3212, is granted in its entirety; and it is further,

ORDERED that the complaint and all crossclaims against Defendant Carla Acosta are dismissed, in its entirety, with prejudice; and it is further,

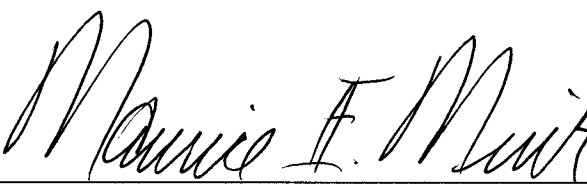
ORDERED that branch of plaintiffs' motion for summary judgment, on the issue of liability, pursuant to CPLR § 3212, is granted; and it is further,

ORDERED that branch of plaintiff's motion to strike defendant Cesar Sanchez affirmative defense, based comparative negligence, is granted and said defense is dismissed, in its entirety, with prejudice, pursuant to CPLR § 3211(b); and it is further,

ORDERED that plaintiffs shall serve a copy of this decision and order with notice of entry upon all parties, via certified mail and NYSCEF, on or before March 5, 2024.

The foregoing constitutes the Decision and Order of the court.

Dated: January 25, 2024
Long Island City, NY


MAURICE E. MUIR, J.S.C.

