

Davidson v Merkert
2024 NY Slip Op 35265(U)
May 2, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 626774/2023
Judge: Thomas F. Whelan
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SHORT FORM ORDER

INDEX NO. 626774/2023

SUPREME COURT - STATE OF NEW YORK
DCM-J - SUFFOLK COUNTY**PRESENT:****Hon. Thomas F. Whelan, J.S.C.**

ERIC DAVIDSON,

Plaintiff,

-against-

GRACE LYNN MERKERT and CHRISTOPHER
MERKERT,

Defendants.

ORIG. RETURN DATE: December 29, 2023**FINAL RETURN:** February 8, 2024**MOT. SEQ. #:** 001 MG**PLTF'S ATTORNEY:**WALKER & MACKENZIE, P.C.
1650 SYCAMORE AVENUE, SUITE 19
BOHEMIA, NY 11716**DEFTS' ATTORNEY:**GOLDBERG, MILLER & RUBIN, P.C.
1501 BROADWAY, SUITE 715
NEW YORK, NY 10036

Upon the following papers read on this motion for partial summary judgment etc.: Notice of Motion/ Order to Show Cause and supporting papers by plaintiff, filed December 11, 2023; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers by defendants, filed February 1, 2024; Replying Affidavits and supporting papers by plaintiff, filed February 7, 2024; Other _____; it is

ORDERED that the motion by plaintiff Eric Davidson for partial summary judgment in his favor on the issue of defendants' liability and to dismiss certain affirmative defenses is granted; and it is further

ORDERED that a preliminary conference shall be held on May 16, 2024.

This is an action to recover damages for injuries allegedly sustained by plaintiff Eric Davidson as a result of a motor vehicle accident, which occurred on August 3, 2023, on the Sunrise Highway North Service Road, approximately two hundred feet east of the entrance ramp of the Southern State Parkway, in Suffolk County, New York. The accident allegedly occurred when the vehicle owned by defendant Christopher Merkert and operated by defendant Grace Lynn Merkert (the "Merkert vehicle") struck the rear of plaintiff's vehicle.

Plaintiff now moves for summary judgment in his favor on the issue of liability and to dismiss defendants' affirmative defenses alleging failure or misuse of a seatbelt, contributory negligence and assumption of risk, arguing that defendant driver cannot provide a non-negligent explanation for the accident, and is the sole proximate cause of the accident. In support of the motion, plaintiff submits, among other things, copies of the pleadings, and his own affidavit. In opposition, defendants submit the

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affirmation of defendant driver, and argue that there are issues of fact as to whether defendants have offered a non-negligent explanation for the accident, and that the motion is premature.

To establish prima facie entitlement to judgment as a matter of law, a movant must come forward with evidentiary proof, in admissible form, demonstrating the absence of any material issues of fact (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898 [2018]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). The failure to make such showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle (*see Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 556 [2d Dept 2018]; *Russell v J.L. Femia Landscape Servs., Inc.*, 161 AD3d 1119, 77 NYS3d 121 [2d Dept 2018]; *Comas-Bourne v City of New York*, 146 AD3d 855, 45 NYS3d 182 [2d Dept 2017]). “[A] rear-end collision establishes a prima facie case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Bruce v Takahata*, 219 AD3d 448, 449, 193 NYS3d 287 [2d Dept 2023], quoting *Scheker v Brown*, 85 AD3d 1007, 1007, 925 NYS2d 528 [2d Dept 2011]; *see Balgobin v McKenzie*, 213 AD3d 893, 182 NYS3d 669 [2d Dept 2023]). While a sudden stop of the lead vehicle may constitute a non-negligent explanation for a rear-end collision (*see Harding v Royal Waste Services, Inc.*, 208 AD3d 762, 174 NYS3d 414 [2d Dept 2022]; *Clements v Giatas*, 178 AD3d 894, 112 NYS3d 539 [2d Dept 2019]), “vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows” (*Munoz v Agenus, Inc.*, 207 AD3d 643, 645, 173 NYS3d 18 [2d Dept 2022] [internal quotation marks omitted]; *see Quintanilla v. Mark*, 210 AD3d 713, 177 NYS3d 687 [2d Dept 2022]; *Xin Fang Xia v Saft*, 177 AD3d 823, 113 NYS3d 249). “Further, evidence that the plaintiff’s vehicle came to a sudden stop, standing alone, is insufficient to rebut the presumption of negligence of the operator of the rear vehicle” (*Quinones v Grace Industries, LLC*, 219 AD3d 765, 766, 194 NYS3d 314 [2d Dept 2023], quoting *Pollet v Charyn*, 200 AD3d 728, 730-731, 159 NYS3d 92 [2d Dept 2021] [internal citations omitted]).

Vehicle and Traffic Law § 388 (1) provides that the owner of a motor vehicle is liable for damages resulting from the negligence of one who uses or operates that vehicle with the permission, express or implied, of such owner (*see Matter of Allstate Ins. Co. v Jae Kan Shim*, 185 AD3d 919, 128 NYS3d 49 [2d Dept 2020]; *Kelly v Starr*, 181 AD3d 799, 120 NYS3d 373 [2d Dept 2020]). By their answer defendants admit that Christopher Merkert owned the vehicle allegedly involved in the subject accident, and that Grace Lynn Merkert operated the vehicle at the time of the accident with Christopher’s knowledge, permission, and consent.

Although a plaintiff is not required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312, 76 NYS3d 898; *Sanders v Sangemino*, 185 AD3d 617, 124 NYS3d 820 [2d Dept 2020]),

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the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where the plaintiff moves for summary judgment dismissing a defendant's affirmative defense alleging comparative negligence (*see Sapienza v Harrison*, 191 AD3d 1028, 142 NYS3d 584 [2d Dept 2021]; *Wray v Galella*, 172 AD3d 1446, 101 NYS3d 401 [2d Dept 2019]; *Poon v Nisanov*, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]).

Plaintiff's affidavit is sufficient to establish his prima facie entitlement to summary judgment on the issue of liability (*see Bruce v Takahata*, 219 AD3d 448, 193 NYS3d 287; *Balgobin v McKenzie*, 213 AD3d 893, 182 NYS3d 669; *Lopez v Dobbins*, 164 AD3d 776, 79 NYS3d 556). Plaintiff states in his affidavit that he was traveling on the North Service Road of Sunrise Highway, approximately two hundred feet east of the entrance ramp to the Southern State Parkway, when he came to a gradual and complete stop due to traffic conditions. Plaintiff further avers that he was stopped for approximately five seconds when, suddenly and without warning, the Merkert vehicle struck the rear of his vehicle. Plaintiff states that he did nothing to contribute to the happening of the accident, and that he was wearing his seatbelt prior to and at the time of the accident.

The burden now shifts to defendants to raise a triable issue of fact as to whether there was a non-negligent explanation for the accident (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923). Defendant driver's affirmation submitted in opposition is inadmissible. Recently amended CPLR 2106 requires that an unsworn affirmation submitted in lieu of an affidavit must contain specific language (*see* CPLR 2106). Here, defendant driver's affirmation states only that she "affirm[s] the following to be true under penalties of perjury." The absence of language substantially similar to the required language renders defendant driver's affirmation inadmissible (*see* CPLR 2106; *R.F. v L.K.*, 82 Misc 3d 1221(A), 2024 NY Slip Op 50358[U] [Sup Ct, Westchester County 2024]; *cf. Hereford Insurance Company v Physio Care Physical Therapy, PC*, __ NYS3d __, 2024 NY Slip Op 24083 [Sup Ct, NY County 2024]), and, therefore, it was not considered by the court. However, even if it were to be considered, defendant driver failed to raise an issue of fact therein with respect to her negligence (*see Yawagyentsang v Safeway Construction Enterprises, LLC*, 225 AD3d 827, __ NYS3d __ [2d Dept 2024]; *Napier v Gleberman*, 212 AD3d 829, 183 NYS3d 140 [2d Dept 2023]; *Munoz v Agenus, Inc.*, 207 AD3d 643, 173 NYS3d 18 [2d Dept 2022]). The affidavit states that defendant driver was traveling westbound in the right hand lane of the Sunrise Highway North Service Road when plaintiff exited a gas station to her right, and entered the right lane directly in front of her vehicle. The affidavit further states "subsequent to this maneuver, plaintiff abruptly and unexpectedly came to a complete stop." Without more, a sudden stop is not a non-negligent explanation for a rear-end collision (*see Quinones v Grace Industries, LLC*, 219 AD3d 765, 766, 194 NYS3d 314; *Pollet v Charyn*, 200 AD3d 728, 730-731, 159 NYS3d 92). Accordingly, the affidavit fails to offer a non-negligent explanation for the accident and would, in any event, be insufficient to defeat summary judgment as to defendants' negligence.

Further, contrary to defendants' contention, the motion is not premature. Defendants failed to demonstrate that discovery may lead to relevant evidence or that facts essential to opposing the motion are within the exclusive knowledge and control of plaintiff (*see* CPLR 3212 [f]; *Figueroa v MTLR, Corp.*, 157 AD3d 861, 69 NYS3d 359 [2d Dept 2018]). Defendants' "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is

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an insufficient basis for denying the motion” (*Mauro v City of New York*, 204 AD3d 777, 779, 164 NYS3d 465 [2d Dept 2022], quoting *Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760, 825 NYS2d 516 [2d Dept 2006]; see *Figueroa v MTLR, Corp.*, 157 AD3d 861, 69 NYS3d 359). As defendant driver has personal knowledge of the relevant facts underlying the accident, the purported need to conduct discovery does not warrant denial of the motion (see *Quintanilla v Mark*, 210 AD3d 713, 117 NYS3d 687; *Mahmud v Ouyang*, 208 AD3d 861, 174 NYS3d 721 [2d Dept 2022]; *Liddell v Morrison*, 204 AD3d 987, 165 NYS3d 342 [2d Dept 2022]).

Plaintiff also seeks dismissal of defendants’ affirmative defenses sounding in, inter alia, failure to use a seat belt, assumption of risk, and contributory negligence. When seeking dismissal of an affirmative defense, the plaintiff bears the burden of demonstrating that such defense is without merit as a matter of law (see *Edwards v Walsh*, 169 AD3d 865, 94 NYS3d 629 [2d Dept 2019]; *Gonzalez v Wingate at Beacon*, 137 AD3d 747, 26 NYS3d 562 [2d Dept 2016]; *Bank of N.Y. v Penalver*, 125 AD3d 796, 797, 1 NYS3d 825 [2d Dept 2015]). “In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference . . . [and] if there is any doubt as to the availability of a defense, it should not be dismissed” (*Fireman’s Fund Ins. Co. v Farrell*, 57 AD3d 721, 723, 869 NYS2d 597 [2d Dept 2008]; see *Greco v Christoffersen*, 70 AD3d 769, 896 NYS2d 363 [2d Dept 2010]).

Plaintiff’s affidavit established his entitlement to dismissal of defendants’ affirmative defenses sounding in culpable conduct and contributory negligence (see Vehicle and Traffic Law § 1129 [a]; *Quintanilla v Mark*, 210 AD3d 713, 177 NYS3d 687 [2d Dept 2022]; *Newfield v Midwood Ambulance & Oxygen Serv., Inc.*, 204 AD3d 813, 164 NYS3d 497 [2d Dept 2022]; *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, 150 AD3d 754, 53 NYS3d 684 [2d Dept 2017]), including those based upon assumption of risk (see *Mata v Road Masters Leasing Corp.*, 128 AD3d 780, 10 NYS3d 124 [2d Dept 2015]). Moreover, plaintiff established, prima facie, that he was wearing his seatbelt at the time of the accident (see *Desola v Mads, Inc.*, 213 AD2d 445, 623 NYS2d 889 [2d Dept 1995]). Accordingly, dismissal of defendants’ affirmative defenses alleging failure or misuse of a seatbelt, contributory negligence and assumption of risk is warranted. For the same reasons stated above, defendants failed to raise an issue of fact.

Accordingly, plaintiff’s motion for summary judgment on the issue of defendants’ liability and to dismiss certain affirmative defenses is granted.

Dated:

5/2/24


HON. THOMAS F. WHELAN, J.S.C.