

Abraham v Barnett
2024 NY Slip Op 35311(U)
January 22, 2024
Supreme Court, Queens County
Docket Number: Index No. 701234/2023
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK QUEENS COUNTY

PRESENT: HON. PHILLIP HOM PART 14

Justice

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CYNTHIA ABRAHAM,

Plaintiff,

- v -

TANYA A JOHNSON BARNETT, BARRY P BARNETT,

Defendants.

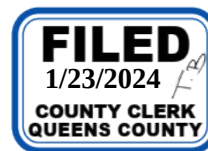
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INDEX NO. 701234/2023

MOTION DATE 08/24/2023,
01/18/2024

MOTION SEQ. NO. 001 & 002

**DECISION + ORDER ON
MOTION**



The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 34, 35, 36, 37, 38, 39, 40, 41, 42, 43

were read on this motion to/for DISMISS.

Upon the foregoing documents, Plaintiff's motion for summary judgment on the issue of liability and Defendants' motion to dismiss, are determined as follows:

On January 19, 2023, Plaintiff Cynthia Abraham ("Plaintiff") commenced this action to recover for injuries she allegedly sustained on July 31, 2022, in a car crash that occurred westbound on I-495, Long Island Expressway (the "LIE") near Exit 52, Suffolk County, New York. The car crash involved two vehicles, i.e., a vehicle owned and operated by Plaintiff's friend, i.e., nonparty Sherrie Rosenbaum ("Rosenbaum"), and a vehicle owned by defendant Tanya A. Johnson Barnett and operated by defendant Barry P. Barnett ("Defendant-Driver") (collectively "Defendants"). At the time of the crash, Plaintiff was a passenger in Rosenbaum's vehicle.

Defendants interposed an answer asserting several affirmative defenses, including, among others, failure to state a cause of action, punitive damages sought are unconstitutionally excessive and disproportionate to Defendants' alleged conduct, and the emergency doctrine.

Now, Plaintiff moves (Seq. No. 1) for an order granting her summary judgment on the issue of liability. Defendants oppose.

Defendants also move (Seq. No. 2) to dismiss Plaintiff's claims of recklessness and punitive damages under CPLR 3211 (a) (7). Plaintiff does not oppose Defendants' motion.

As a preliminary note, this Court will first determine Defendants' unopposed motion to dismiss (Seq. No. 2).

Defendants' motion (Seq. No. 2) to dismiss—CPLR 3211 (a) (7)

When considering “a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must afford the pleadings a liberal construction, accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts alleged fit within any cognizable legal theory (*Law Offs. of Harry J. Binder and Charles E. Binder, P.C. v Fraga*, 207 AD3d 455, 456 [2d Dept 2022]). “The test to be applied is whether the complaint ‘gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved *and* whether the requisite elements of any cause of action known to our law can be discerned from its averments’” (*JP Morgan Chase v J.H. Elec. of N.Y., Inc.*, 69 AD3d 802, 803 [2d Dept 2010], quoting *Moore v Johnson*, 147 AD2d 621, 621 [2d Dept 1989] [emphasis added]).

Whether the plaintiff will ultimately be able to prove his or her claims, or whether the complaint will later survive a summary judgment motion, is irrelevant in considering a CPLR 3211 motion to dismiss (*see Endless Ocean, LLC v Twomey, Lathan, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 589 [2d Dept 2014]). Additionally, “[a] court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint” (*Gawrych v Astoria Fed. Sav. & Loan*, 148 AD3d 681, 682-83 [2d Dept 2017], quoting *Well v Yeshiva Rambam*, 300 AD2d 580, 580 [2d Dept 2002]).

Plaintiff's Claim for Recklessness

“To establish recklessness, a plaintiff must demonstrate that the vehicle operator ‘has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and has done so with conscious indifference to the outcome’” (*Veralli v O'Connor*, 190 AD3d 783, 784 [2d Dept 2021], quoting *Deleon v New York City Sanitation Dept.*, 25 NY3d 1102, 1105 [2015]; *see Cox v New York State Thruway Auth.*, 202 AD3d 1043, 1044 [2d Dept 2022]).

Here, Plaintiff fails to allege any facts constituting reckless conduct on the part of Defendants (*id.*). Therefore, Plaintiff's claim for recklessness is dismissed under CPLR 3211 (a) (7).

Plaintiff's Claim for Punitive Damages

“[T]he standard for imposing punitive damages is a strict one and punitive damages will be awarded only in exceptional cases [...]” (*Marinaccio v Town of Clarence*, 20 NY3d 506, 511 [2013], quoting *Dupree v Giugliano*, 20 NY3d 921, 924 [2012]). “(P)unitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tortfeasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives” (*Moskowitz v Masliansky*, 198 AD3d 637, 640 [2d Dept 2021], quoting *Gravitt v Newman*, 114 AD2d 1000, 1002 [2d Dept 1985]; *see Thomas v Farrago*, 154 AD3d 896, 898 [2d Dept 2017]; *see generally Marinaccio*, 20 NY3d 506; *Dupree*, 20 NY3d 921).

Here, Plaintiff's allegations amount to nothing more than claims of ordinary negligence. Thus, Plaintiff's "implied" claim for punitive damages is dismissed.

Plaintiff does not oppose this motion and does not remedy the defects in her complaint. Thus, Defendants' motion is granted and Plaintiff's claims for recklessness behavior, and punitive damages are dismissed.

Plaintiff's motion (Seq. No. 1) for partial summary judgment

In a summary judgment motion, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima facie entitlement to judgment as a matter of law (see *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (see *Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

"The use of a statement recorded in a police accident report involves two levels of hearsay, each of which must fit within a hearsay exception to render the statement contained within the report admissible" (*Yassin v Blackman*, 188 AD3d 62, 65 [2d Dept 2020]). At the first level, the police accident report must be admissible (see *Yassin*, 188 AD3d at 65). "A properly certified police accident report is admissible where 'the report is made based upon the officer's personal observations and while carrying out police duties'" (*Yassin*, 188 AD3d at 65, quoting *Memenza v Cole*, 131 AD3d 1020, 1021 [2d Dept 2015]; see CPLR 4518 [a]). At the second level, assuming that the police accident report was properly certified, "the statement recorded within the police accident report by the police officer must satisfy a hearsay exception" (*Yassin*, 188 AD3d at 66).

A plaintiff is not required to show an absence of comparative fault to be entitled to summary judgment on the issue of liability (see *Rodriguez v City of New York*, 31 NY3d 312, 323 [2018]; *Marks v Rieckhoff*, 172 AD3d 847, 848 [2d Dept 2019]).

The right of an innocent passenger to summary judgment on the issue of liability is not restricted by potential issues of comparative negligence as between the two drivers (see *Delgado v Lachman*, 219 AD3d 580, 580 [2d Dept 2023]; *Ochoa v Townsend*, 209 AD3d 867, 868 [2d Dept 2022]; *Balladares v City of New York*, 177 AD3d 942, 944 [2d Dept 2019]; *Romain v City of New York*, 177 AD3d 590, 591 [2d Dept 2019]; *Phillip v D&D Carting Co., Inc.*, 136 AD3d 18, 24-25 [2d Dept 2015]; *Choi v Schwabenbauer*, 124 AD3d 574, 575 [2d Dept 2015]; *Pinilla v New York City Tr. Auth.*, 122 AD3d 703, 705 [2d Dept 2014]; *Anzel v Pistorino*, 105 AD3d 784, 786 [2d Dept 2013]).

Nevertheless, "if the plaintiff fails to demonstrate, prima facie, that the operator of the offending vehicle was at fault, or if triable issues of fact are raised by the defendants in opposition, ... summary judgment on the issue of liability must be denied, even if the moving plaintiff was an innocent passenger" (*Delgado*, 219 AD3d at 581, quoting *Phillip*, 136 AD3d at 24; see *Guido v Dagnese*, 214 AD3d 715, 717 [2d Dept 2023]).

The driver of a motor vehicle that approaches another vehicle from the rear, must maintain a reasonably safe rate of speed, a reasonably safe distance, and control over his vehicle, and use reasonable care to avoid colliding with a lead vehicle (*see* Vehicle and Traffic Law § 1129 [a]; *Sooklall v Morisseav-Lafague*, 185 AD3d 1079, 1081 [2d Dept 2020]; *Catanzaro v Edery*, 172 AD3d 995, 996 [2d Dept 2019]; *Comas-Bourne v City of New York*, 146 AD3d 855, 856 [2d Dept 2017]; *Billis v Tunjian*, 120 AD3d 1168, 1169 [2d Dept 2014]).

It is well-settled law that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of liability as to the rearmost vehicle, requiring that driver to rebut this inference of negligence by providing a nonnegligent explanation for the collision (*id.*; *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Cheow v Cheng Lin Jin*, 121 AD3d 1058, 1059 [2d Dept 2014]).

“Stops by a lead vehicle which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows” (*Perez v Persad*, 183 AD3d 771, 771 [2d Dept 2020]; *see Thompson v New York City Tr. Auth.*, 208 AD3d 815, 817 [2d Dept 2022]). “Moreover, an assertion that the lead vehicle came to a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the operator of the rear vehicle” (*id.*).

Under the common law emergency doctrine, “when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context [citation omitted], provided the actor has not created the emergency” (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] [internal quotation marks omitted]). “Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact [citation omitted], those issues ‘may in appropriate circumstances be determined as a matter of law’” (*Vitale v Levine*, 44 AD3d 935, 936 [2d Dept 2007], quoting *Bello v Transit Auth. of N.Y. City*, 12 AD3d 58, 60 [2d Dept 2004]).

“[T]he emergency doctrine does not apply to typical accidents involving rear-end collisions because trailing drivers are required to leave a reasonable distance between their vehicles and vehicles ahead” (*Ordonez v Lee*, 177 AD3d 756, 757 [2d Dept 2019], quoting *Lowhar-Lewis v Metropolitan Transp. Auth.*, 97 AD3d 728, 729 [2d Dept 2012]). “A trailing driver's conduct in failing to leave reasonable distance creates the possibility that a sudden stop will be necessary” (*Lowhar-Lewis*, 97 AD3d at 729).

In support, Plaintiff submits, among other things, her affidavit (EF Doc 18), Rosenbaum's affidavit (EF Doc 17), and a police accident report (EF Doc 14). Plaintiff labeled the police accident report as “certified”; however, in opposition, Defendants argue that same is uncertified and inadmissible. In reply, Plaintiff claims that she now includes a certified police accident report (EF Doc 32), which does not constitute new evidence provided for the first time in reply. Significantly, the police accident report is still uncertified, and is inadmissible. As such, the Court does not determine whether a certified police accident report offered in reply papers constitutes

new evidence, where an uncertified police accident report was submitted in the original moving papers.

Here, Rosenbaum avers that, at the time of the crash, Plaintiff was a front-seat passenger in Rosenbaum's vehicle, who was wearing her seatbelt, and they were traveling westbound on the LIE. She states that she and Plaintiff were the only occupants in her vehicle. Rosenbaum attests that, on the date of the crash, the weather was clear and sunny, and the roads were dry. Rosenbaum avers that, prior to the crash, vehicles in front of her vehicle started to slow down due to traffic. She attests that she applied her brakes, as the traffic slowed and the vehicles in front of her began to brake. Rosenbaum further attests that, immediately before the collision, she brought her vehicle to a complete stop, because the traffic in front of her came to a stop. She avers that she stopped her vehicle approximately 6 feet behind the car in front of her. Rosenbaum states that she was completely stopped for approximately 5-10 seconds, when Defendants' vehicle suddenly rear-ended her vehicle. She claims that she did not see Defendants' vehicle before the crash, and that Plaintiff did nothing to distract her prior to the accident. Rosenbaum attests that, following the crash, Defendant-Driver told her that he could not stop in time, which caused him to rear-end her.

Plaintiff's affidavit provides very similar statements contained in Rosenbaum's affidavit. Additionally, Plaintiff claims that, following the crash, Defendant-Driver admitted fault for causing the crash, and apologized to Plaintiff and Rosenbaum.

Plaintiff's affidavit and Rosenbaum's affidavit establish that Plaintiff was an innocent seat-belted passenger in Rosenbaum's stopped vehicle, which was suddenly rear-ended by Defendants' vehicle. Given the circumstances, the emergency doctrine is inapplicable (*see Bing Kang Chen v S & F Travel, Inc.*, 219 AD3d 1477, 1478 [2d Dept 2023]; *Ordonez*, 177 AD3d at 757; *Comas-Bourne* 146 AD3d at 856; *Lowhar-Lewis*, 97 AD3d at 729-30). As such, the Court finds that Plaintiff establishes her entitlement to partial summary judgment on the issue of liability against Defendants. Therefore, it is incumbent upon Defendants to raise a triable issue of fact.

In opposition, Defendants submit an attorney affirmation (EF Doc 25), and Defendant-Driver's affidavit (EF Doc 28).

Defendants argue that Plaintiff's motion is premature, as discovery is still outstanding, including, the examination before trial of Plaintiff. The Court finds that Defendants' premature argument unavailing, as they fail to offer any evidence that discovery may lead to relevant evidence or that facts essential to opposing the motion were exclusively in Plaintiff's knowledge and control (*see Maliakel v Morio*, 185 AD3d 1018, 1019 [2d Dept 2020]; *Ordonez*, 177 AD3d at 757; *Romain*, 177 AD3d at 592; CPLR 3212 [f]).

Defendants also argue that Plaintiff's motion must be denied, because Defendant-Driver's affidavit raises a triable issue of fact. Defendant-Driver avers that, prior to the accident, his vehicle, and the car in front of him, i.e., Rosenbaum's vehicle, were traveling 15 to 30 miles per hour. Defendant-Driver states that, prior to the crash, he was looking straight ahead, when Rosenbaum's vehicle suddenly changed from accelerating to a complete stop. He avers that he applied his brakes, but he was unable to stop in time, and he rear-ended Rosenbaum's vehicle. Defendant-Driver attests that, after the accident, Rosenbaum told him that she pumped her brakes

to warn him that she was going to stop short. Defendant-Driver states that “it appeared that the vehicle ahead of [him] was accelerating just prior to the accident, as her ‘pumping her brakes’ involved her removing foot from the brakes, causing her brake lights to go off and her vehicle to accelerate.”

The Court finds that Defendant-Driver’s explanation amounts to nothing more than Rosenbaum’s vehicle came to a sudden stop which, alone, fails to raise a triable issue of fact as to Defendants’ liability (*see Thompson v New York City Tr. Auth.*, 208 AD3d 815, 817 [2d Dept 2022]; *Perez v Persad*, 183 AD3d 771, 772 [2d Dept 2020]; *Ordonez v Lee*, 177 AD3d 756, 757 [2d Dept 2019]; *Buchanan v Keller*, 169 AD3d 989, 992 [2d Dept 2019]; *Catanzaro v Ederly*, 172 AD3d 995, 997 [2d Dept 2019]; *Comas-Bourne v City of New York*, 146 AD3d 855, 855-56 [2d Dept 2017]; *Billis v Tunjian*, 120 AD3d 1168, 1169 [2d Dept 2014]; *Cajas-Romero v Ward*, 106 AD3d 850, 851-52 [2d Dept 2013]; *Lowhar-Lewis v Metropolitan Transp. Auth.*, 97 AD3d 728, 729 [2d Dept 2012]). Thus, Defendants fail to raise a triable issue of fact.

In accordance with the foregoing, it is **ORDERED** that Defendants’ motion (Seq. No. 2) to dismiss Plaintiff’s claims for recklessness and punitive damages is granted without opposition; and it is further

ORDERED that Plaintiff’s claims for recklessness and punitive damages are hereby dismissed; and it is further

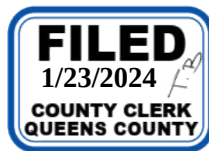
ORDERED that Plaintiff’s ordinary negligence claims remain; and it is further

ORDERED that Plaintiff’s motion (Seq. No. 1) for partial summary judgment on the issue of liability is granted; and it is further

ORDERED that Plaintiff shall serve, via NYSCEF, a copy of this Order with Notice of Entry upon Defendants, within twenty (20) days of the date of entry.

This constitutes the Decision and Order of this Court.

Dated: January 22, 2024




PHILLIP HOM, J.S.C.