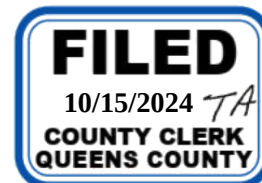


Morales v Sanchez
2024 NY Slip Op 35362(U)
October 11, 2024
Supreme Court, Queens County
Docket Number: Index No. 710655/2023
Judge: Maurice E. Muir
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Short Form Order

NEW YORK STATE SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice



ESTUARDO MORALES,

IAS Part - 42

Plaintiff,

Index No.: 710655/2023

-against-

Motion Date: 3/28/24

FRANKLYN SANCHEZ and M. LAPENNA
REFRIGERATION, INC.,

Motion Cal. No. 42

Defendants.

Motion Seq. No. 1

The following electronically filed (“EF”) documents read on this motion by Estuardo Morales (“Mr. Morales” or plaintiff”) for an order: a) granting plaintiff, Estuardo Morales, summary judgment against Defendants, Franklyn Sanchez and M. Lapenna Refrigeration, Inc., on the issue of liability; b) dismissing Defendants, Franklyn Sanchez and M. Lapenna Refrigeration, Inc., affirmative defenses alleging comparative negligence, contributory negligence, culpable conduct of Plaintiff, Estuardo Morales; and c) granting such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affirmation in Support-Exhibits.....	EF 18 - 25
Affirmations in Opposition-Exhibits.....	EF 27 - 34
Reply Affirmation-Service.....	EF 35 - 37
Affirmations in Opposition.....	EF 38

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries Mr. Morales allegedly sustained in a motor vehicle collision. On May 23, 2023, the plaintiff commenced the instant action; and on July 26, 2023, issue was joined, wherein M. Lapenna Refrigeration, Inc. (“Lapenna”) and Franklyn Sanchez (“Mr. Sanchez”) (collectively, the “defendants”) interposed an answer with

twenty-eight (28) affirmative defenses. Now, the plaintiff filed the instant motion seeking the above-described relief. In support of the instant motion, the plaintiff avers that on February 2, 2023, at approximately 12:00 a.m., I was operating a motor on the 108th Street, at or near its intersection with 34th Avenue, in the County of Queens, City and State of New York, when the motor vehicle owned by Lapenna and operated by Mr. Sanchez struck his vehicle in the rear, which was a heavy impact. In opposition, Mr. Sanchez avers that on February 2, 2023, he was employed by La Penna Refrigeration, Inc. ("LaPenna"); and he was operating a 2016 Ford SUV, which was owned by La Penna. Moreover, Mr. Sanchez avers "as [he] was traveling at a very low speed, at approximately 10 m.p.h. on 108th Street, the vehicle in front of [him] came to an abrupt and unexpected halt. [He] attempted to avoid colliding with Plaintiff's vehicle by immediately slamming on [his] brakes, however, [he] accidentally stepped on the gas pedal instead of the brakes, causing [his] vehicle to unavoidably collide with the rear of Plaintiff's vehicle."

It is well settled law that 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" (*Garrutti v. Kim Co. Refrig. Corp.*, 222 AD3d 728 [2d Dept 2023]; *Tsyganash v. Auto Mall Fleet Mgt., Inc.*, 163 AD3d 1033, 1033-1034 [2d Dept 2018]; *see Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Marazita v. City of New York*, 202 AD3d 951 [2d Dept 2022]). A plaintiff is no longer required to show freedom from comparative fault in establishing his or her *prima facie* case against a defendant on the issue of that defendant's liability (*see Rodriguez v. City of New York*, 31 NY3d at 312; *see e.g., Poon v. Nisanov*, 162 AD2d 804 [2d Dept 2018]). "[However], the issue of a plaintiff's comparative negligence may be decided in the context of a plaintiff's motion for summary judgment on the issue of liability where, as here, the plaintiff also seeks dismissal of the defendant's affirmative defense alleging comparative negligence" (*Garrutti v. Kim Co. Refrig. Corp.*, 222 AD3d 728 [2d Dept 2023]; *Ramirez v. Wangdu*, 195 AD3d 646 [2d Dept 2021]; *Kirby v. Davis*, 208 AD3d 1171, 1173 [2d Dept 2022]; *Sebagh v. Capital Fitness, Inc.*, 202 AD3d 853 [2d Dept 2022]; *Poon v. Nisanov*, 162 AD2d 804 [2d Dept 2018]). Furthermore, "[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]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]).

Here, the plaintiff established his *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting, *inter alia*, his own unrefuted affidavit, which demonstrates that he was struck in the rear of his vehicle while stopped at a red light. (*see Xiao v. Martinez*, 185 AD3d 1014 [2d Dept 2020]). In fact, Mr. Sanchez admitted that on the day in question, he attempted to avoid colliding with plaintiff's vehicle by immediately slamming on his brakes. However, he accidentally stepped on the gas pedal instead of the brakes, causing his vehicle to unavoidably collide with the rear of Plaintiff's vehicle. Furthermore, Mr. Sanchez's contention that the plaintiff abruptly and unexpectedly halted his vehicle is unavailing. It is well settled law that while a nonnegligent explanation for a rear-end collision may include evidence of a sudden stop of the lead vehicle, "vehicle stops which are foreseeable under the prevailing traffic conditions, even if sudden and frequent, must be anticipated by the driver who follows, since he or she is under a duty to maintain a safe distance between his or her car and the car ahead" (*Theo v. Vazquez*, 136 AD3d 795 [2d Dept 2016]; *Brothers v. Bartling*, 130 AD3d 554 [2d Dept 2015]; *see also Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]; *Gil v. Manhattan Beer Distribs., LLC*, 207 AD3d 525 [2d Dept 2022]). The claim that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the rearmost vehicle (*see Kastritsios v. Marcello*, 84 AD3d 1174 [2d Dept 2011]; *Perez v. Persad*, 183 AD3d 771 [2d Dept 2020]; *Genao v. Cassetta*, 214 AD3d 626 [2d Dept 2023]; *Le Grand v. Silberstein*, 123 AD3d 773, 774 [2d Dept 2014]; *see also Liu v. Lowe*, 173 AD3d 946 [2d Dept 2019]; *Donnellan v. Lamarches*, 221 AD3d 783 [2d Dept 2023]; *Gil v. Manhattan Beer Distributors, LLC*, 207 AD3d 525 [2d Dept 2022]).

Contrary to defendants' contentions, the instant motion for summary judgment is not "wildly premature." Here, the defendants failed to offer an evidentiary basis to suggest that discovery might lead to relevant evidence and that facts essential to justify opposition to the motion is exclusively within the knowledge and control of the plaintiff. (*Harrinarain v. Sisters of St. Joseph*, 173 AD3d 983 [2d Dept 2019]; *Lopez v. Suggs*, 186 AD3d 589 [2d Dept 2020]; *Theresa Striano Revocable Trust v. Hoffman*, 71 AD3d 993 [2d Dept 2010]; *Gil v. Manhattan Bar Distribs, LLC*, 207 AD2d3d 525 [2d Dept 2022]). As the Appellate Division, Second Department, has repeatedly held "[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is an

insufficient basis for denying the motion.” (*Pierre v. Demoura*, 148 AD3d 736 [2d Dept 2017]; see also *Martinez v. Kuhl*, 165 AD3d 774 [2d Dept 2018]; *Niyazov v. Hunter, EMS, Inc.*, 154 AD3d 954 [2d Dept 2017]; *Gil v. Manhattan Beer Distributors, LLC*, 207 AD3d 525 [2d Dept 2022]).

Lastly, that branch of the plaintiff’s motion to strike the defendants’ affirmative defenses alleging comparative negligence, contributory negligence, culpable conduct of Plaintiff 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 De pt 2010]; see also *Lewis v. U.S. Bank National Association*, 186 AD3d 694 [2d Dept 2020]). Additionally, 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. “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]). Lastly, it is well settled law that failure to raise plead defenses in opposition to a motion for summary judgment rendered 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 the defendants’ affirmative defenses (i.e. comparative negligence, contributory negligence, and plaintiff’s culpable conduct, etc.) lack merit.

Accordingly, it is hereby

ORDERED that branch of plaintiff’s 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 the defendants’ affirmative defenses based upon comparative negligence, contributory negligence, and plaintiff’s culpable conduct are granted, pursuant to CPLR § 3211(b); and it is further,

ORDERED that the defendants' first, second, third and twentieth affirmative defenses based upon comparative negligence, contributory negligence, and plaintiff's culpable conduct are dismissed with prejudice, pursuant to CPLR § 3211(b); and it is further,

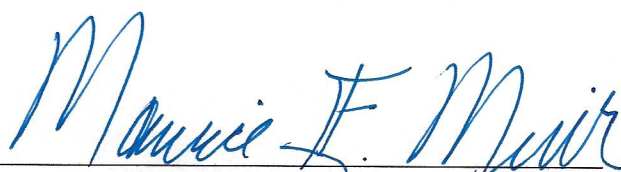
ORDERED that the parties shall confine discovery to the issue of damages only; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants, via first class mail and NYSCEF, on or before October 30, 2024.

The foregoing constitutes the decision and order of the court.

Dated: October 11, 2024

Long Island City, NY


MAURICE E. MUIR, J.S.C.

