

Gerchak v Locurto
2024 NY Slip Op 35464(U)
August 29, 2024
Supreme Court, Westchester County
Docket Number: Index No. 67779/2022
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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RICHARD GERCHAK,

Plaintiff,

Index No. 67779/2022

– against –

LAURA A. LOCURTO, as Executor of the Estate of Ralph E.
Gerchak, deceased,

Motion Seq. 001

Defendant.

DECISION & ORDER

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In an action to recover damages for personal injuries as a result of a motor vehicle accident, plaintiff Richard Gerchak moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability and also moves pursuant to CPLR 3211 (b) to dismiss the defendant's first, second, third, fourth, fifth, sixth, seventh, eighth, tenth, and twelfth affirmative defenses.

Papers Considered

NYSCEF DOC NO. 15-34

1. Notice of Motion/Statement of Material Facts/Affirmation in support by Michael E. Greenspan Esq./Memorandum of Law/ Exhibits 1-6
2. Affirmation in opposition of Richard A. Lilling, Esq./Response to Statement of Material Facts
3. Affirmation in Reply by Michael E. Greenspan Esq.

FACTUAL AND RELEVANT PROCEDURAL BACKGROUND

Plaintiff Richard Gerchak commenced this action on or about November 2, 2022 by filing a summons and complaint. Plaintiff is seeking to recover for personal injuries he sustained as a result of a motor vehicle accident that occurred around 7:00 p.m. on January 27, 2022 at the intersection of South Highland Avenue and Keystone Road in Tarpon Springs, Florida. Plaintiff was a passenger in the vehicle owned and operated by his brother, Ralph E. Gerchak, who died as a result of the accident. This action is brought against the decedent's estate, which is represented by the decedent's daughter, Laura A. Locurto. The complaint alleges that the decedent driver

[1]

negligently failed to stop at a stop sign governing northbound traffic at the intersection. When the decedent's vehicle proceeded into the intersection, it collided into an eastbound vehicle operated by a non-party Sidney Nicole Deliberti. Plaintiff claims that he sustained serious injuries as a result of the collision. The complaint alleges that the collision was solely due to the decedent's negligence and that plaintiff sustained serious injuries as a result.

Defendant joined issue with the service and filing of her answer and affirmative defenses on January 9, 2023.

Plaintiff now moves for partial summary judgment on the issue of liability pursuant to CPLR 3212 and moves pursuant to CPLR 3211(b) to dismiss ten out of twelve affirmative defenses. Plaintiff argues that the decedent is the sole proximate cause of the subject accident and that plaintiff, as an innocent passenger in the vehicle, could have done nothing to prevent or avoid the collision. Plaintiff only recalls buckling his seatbelt and does not recall any details of the accident.

In support of plaintiff's motion on the issue of liability, plaintiff submits his testimony and the testimony of Deliberti. Although a nonparty in this action, Deliberti is a plaintiff in an action in Florida against the defendant. Pursuant to a stipulation dated February 28, 2024, the parties agreed that the deposition transcript of Deliberti dated October 25, 2023, taken in the Florida action, could be utilized for all purposes by all parties in the instant action. It was also stipulated that plaintiff would utilize the deposition transcript of Deliberti in lieu of obtaining the deposition of Laura Locurto, based on the representation of defense counsel that Laura Locurto would not testify at trial.

Deliberti testified that on the evening of the accident she was driving on East Tarpon Avenue approaching the intersection of South Highland Avenue on her right.¹ The traffic on South Highland Avenue was controlled by a stop sign. She "saw a black vehicle approaching a stop sign to my right. I kept driving assuming the vehicle was going to make a complete stop. As I was getting closer to the stop sign, I noticed the car was coming out. He didn't stop or attempt to stop at the stop sign. I slammed on my brakes, and I struck the vehicle on the driver's side." She testified that she "slammed on my brakes when I saw the vehicle start to pull out." Deliberti testified that her head hit the steering wheel upon impact. Deliberti testified that there were two

¹ The map indicates that Keystone Boulevard turns into East Tarpon Avenue.

lanes on East Tarpon Avenue but that she could not recall what lane she was in. She could not recall the traffic conditions at the time, or how fast she or the decedent's vehicle had been traveling.

Plaintiff testified that it was clear and dry on the night of the accident. He stated that only vehicles on South Highland had a stop sign before they entered the intersection of Keystone Boulevard. He testified that the decedent had intended to make a left turn at the intersection. Plaintiff testified that he had buckled his seatbelt but that he does not recall anything else until waking up in the ambulance.

In light of the above, plaintiff argues that summary judgment on liability is warranted, as the decedent failed to yield at a stop sign to a motor vehicle lawfully travelling through the intersection, the right of way, which creates a prima facie case of liability against defendant.

Plaintiff further argues that all affirmative defenses except for the defenses related to damages (nine and eleven), should be dismissed. The first four affirmative defenses address culpable conduct. Plaintiff argues that, as an innocent passenger in the car, he cannot be held comparatively negligent. The third, sixth and seventh affirmative defenses address liability of a third party. According to plaintiff, defendant did not and cannot join Deliberti, who is a resident of Florida. In addition, any claims of third-party liability are allegedly without merit. The fifth affirmative defense alleges failure to state a claim and the tenth affirmative defense states that the venue of Westchester, even if technically proper, is not the correct forum pursuant to the doctrine of forum non conveniens. According to plaintiff, these defenses are without merit, as the answer even admits that venue in Westchester is proper.

Plaintiff also argues that the eighth affirmative defense should be dismissed, as he testified that he buckled his seat belt upon getting into the vehicle. Finally, plaintiff claims that the twelfth affirmative defense, alleging that defendant was confronted with an emergency situation, is inapplicable under the circumstances and must be dismissed.

In opposition, defendant argues that liability must be denied, as there are questions of fact as to the credibility of Deliberti. Defendant, only offering an attorney affirmation, alleges that the credibility of Deliberti's testimony is an issue of fact for the jury to determine. According to defendant, Deliberti is an interested witness as she is a plaintiff in her own action in Florida. Defendant surmises that Deliberti has a vested interest in establishing the liability of the decedent to support her own claims. Further, she has not been deposed in this action. According to defendant, the testimony is also lacking, as Deliberti does not recall certain things about the

accident, including how fast she was traveling at the time of the accident. Defendant proffers that the motion is premature, as defendant may still seek to depose Deliberti.

Regarding the affirmative defenses, defendant argues that it would be premature to dismiss the third, sixth, and seventh affirmative defenses, relating to the Deliberti's role in the accident. Defendant claims that she would be prejudiced if the jury was not permitted to determine whether the accident was caused by someone other than the decedent. Defendant also argues that the fourth affirmative defense, as it relates to the plaintiff's failure to mitigate damages, should not be dismissed. According to defendant, if plaintiff failed to mitigate his damages by, for example, failing to seek appropriate medical care, this conduct should be considered by the jury. Defendant does not address the remainder of the affirmative defenses.

DISCUSSION

Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007). The movant's burden is "heavy," and "on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 (2013) (internal quotation marks and citation omitted). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact." *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008) (internal quotation marks and citation omitted). "A motion for summary judgment should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility." *Ruiz v Griffin*, 71 AD3d 1112, 1115 (2d Dept 2010) (internal quotation marks and citation omitted).

"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." *Ahmed v Fernando*, 22 AD3d 832, 832 (2d Dept 2022) (internal citations omitted). Further, "[t]o be entitled to partial summary judgment a plaintiff does not bear the . . . burden of establishing . . . the absence of his or her own comparative fault." *Id.*

This accident took place in Florida. The Court of Appeals has held that “[i]f the rule of tort law at issue regulates primary conduct, the law of the place of the tort’s commission will typically govern.” *Eccles v Shamrock Capital Advisors, LLC*, 2024 NY Slip Op 02841, *7 (2024) (internal quotation marks omitted). However, “the first step in any case presenting a potential choice of law issue is to determine whether there is an actual conflict between the laws of the jurisdictions involved.” *Allstate Ins. Co. v Stolarz*, 381 NY2d 219, 223 (1993). Here, neither party asserts a potential conflict between New York and Florida law. Further, a review of the relevant Florida statute “reveals that there is no conflict here.” *Id.*

Florida law provides:

“(a) Except when directed to proceed by a police officer or traffic control signal, every driver of a vehicle approaching a stop intersection indicated by a stop sign shall stop at a clearly marked stop line, but if none, before entering the crosswalk on the near side of the intersection or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering the intersection. After having stopped, the driver shall yield the right-of-way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when the driver is moving across or within the intersection.”

Florida Statute § 316.123(2)(a).

As noted by plaintiff, the comparable New York statutes include the following:

Vehicle and Traffic Law § 1140:

“(a) The driver of a vehicle approaching an intersection shall yield the right of way to a vehicle which has entered the intersection from a different highway.”

Vehicle and Traffic Law § 1142 (a):

“Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section eleven hundred seventy-two and after having stopped shall yield the right of way to any vehicle which has entered the intersection from another highway or which is approaching so closely on said highway as to constitute an immediate hazard during the time when such driver is moving across or within the intersection.”

Vehicle and Traffic Law § 1172 (a):

“(a) Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop at a clearly marked stop line, but if none, then shall stop before entering the crosswalk on the near side of the intersection, or in the event there is no crosswalk, at the point nearest the intersecting roadway where the driver has a

view of the approaching traffic on the intersecting roadway before entering the intersection and the right to proceed shall be subject to the provisions of section eleven hundred forty-two.”

It is well settled that a driver who fails to yield the right-of-way after stopping at a stop sign is in violation of Vehicle and Traffic Law § 1142 (a) and is negligent as a matter of law. *Rabenstein v Suffolk County Dept. of Pub. Works*, 131 AD3d 1145, 1145 (2d Dept 2015). Moreover, “[t]he question of whether the driver stopped at the stop sign is not dispositive where the evidence establishes that the driver failed to yield after initially stopping.” *Jones v Haifeng Zuo*, 220 AD3d 933, 934 (2d Dept 2023) (internal quotation marks omitted). A driver who has the right-of-way is entitled to anticipate that other drivers will obey traffic laws that require them to yield. *Cheese v Ferguson*, 208 AD3d 1302, 1303 (2d Dept 2022).

There can be more than one proximate cause of an accident. *Hartsuff v Michaels*, 139 AD3d 1005, 1006 (2d Dept 2016). A driver traveling with the right-of-way may nevertheless be found to have contributed to the happening of the accident if he or she did not use reasonable care to avoid the accident. *Rabenstein v Suffolk County Dept. of Pub. Works*, 131 AD3d at 1146; *see also Jones v Haifeng Zuo*, 220 AD3d at 934 (internal quotation marks omitted) (“a driver who has the right-of-way has a duty to exercise reasonable care to avoid a collision . . . [and] to see what there is to be seen through the proper use of his or her senses”). Nonetheless, a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision. *Cheese v Ferguson*, 208 AD3d at 1303.

It is undisputed that the decedent had a stop sign and Deliberti did not. Defendant does not dispute that the decedent failed to stop and/or yield at the stop sign. Thus, Deliberti had the right-of-way and was therefore entitled to anticipate that the decedent would obey traffic laws requiring him to yield. Therefore, based on the evidence presented, including the certified transcripts, plaintiff has established his prima facie entitlement to judgment on the issue of liability by demonstrating that the decedent’s vehicle failed to yield the right-of-way to Deliberti’s vehicle after stopping at a stop sign in violation of Florida and the comparable Vehicle and Traffic Law § 1142 (a), while plaintiff was a passenger, and that plaintiff did nothing to contribute to the accident.

In opposition, defendant fails to raise a triable issue of fact. Defendant argues that summary judgment must be denied as plaintiff’s evidence relies on a deposition testimony from a nonparty, who defendant has not been able to depose in this action. Defendant’s assertions are without merit and belied by the record. In the Florida action, Deliberti is the plaintiff and the

instant defendant is the defendant. The testimony provided relates to the same accident which is the subject of the instant action. As a result, defendant's attorneys had the opportunity to cross examine Deliberti. Moreover, the record indicates the plaintiff and defendant's attorneys stipulated that Deliberti's deposition taken in Florida could be "utilized for all purposes by all parties" in the instant action. The parties further stipulated that plaintiff would use Deliberti's testimony in lieu of obtaining the deposition of Laura Locurto.

In sum, plaintiff has submitted his own testimony and testimony from one of the two drivers in the accident that decedent failed to stop at a stop sign. Defendant does not dispute this, nor has she failed to provide any facts to counter this assertion. Defendant broadly alleges that the liability of the decedent may not be established without considering the liability of Deliberti. Here, however, defendant's opposition, brought only by attorney affirmation, alleging that liability must be denied because the Deliberti did not recall certain things about the accident such as the speed she was traveling, is unavailing, and does not raise a triable issue of fact so as to defeat the motion. *See e.g. Becker v Elm Air Conditioning Corp.*, 143 AD2d 965, 966 (2d Dept 1988) ("The affirmation by the plaintiffs' attorney, who had no personal knowledge of the facts, and which was not accompanied by any other affidavits or evidentiary proof, was insufficient)."

Moreover, even if defendant submitted evidence that raised an issue as to the potential fault of Deliberti, this would not defeat plaintiff's motion. It is well settled that "[t]he right of the plaintiffs, as innocent passengers, to summary judgment is not 'restricted by potential issues of comparative negligence' which may exist as between the defendant driver and the driver of the host vehicle." *Bailadores v City of New York*, 177 AD3d 942, 944 (2d Dept 2019).

Finally, contrary to defendant's contentions, plaintiff's motion is not premature. *See e.g. Sapienza v Harrison*, 191 AD3d 1028, 1031 (2d Dept 2021) (internal quotation citations omitted) ("Here, the defendant's professed need to conduct discovery did not warrant denial of the motion since she already had personal knowledge of the relevant facts and the mere hope or speculation that evidence may be uncovered during the discovery process is insufficient to deny the motion").

Accordingly, plaintiff is granted partial summary judgment on liability.

Dismissal of Affirmative Defenses

As set forth in CPLR 3211 (b), "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." "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, the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff moved for summary judgment dismissing a defendant's affirmative defense of comparative negligence." *Poon v Nisanov*, 162 AD3d 804, 808 (2d Dept 2018) (internal citation omitted). "When moving to dismiss an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is 'without merit as a matter of law.'" *Bank of N.Y. v Penalver*, 125 AD3d 796, 797 (2d Dept 2015).

Plaintiff moved to dismiss all twelve affirmative defenses except for the ninth and eleventh. At the outset, in response to plaintiff's motion, defendant only opposed the third, fourth, sixth and seventh affirmative defenses. Accordingly, the first, second, fifth, eighth, tenth and twelfth "affirmative defenses must be dismissed on the ground that the defendants did not oppose the dismissal of those affirmative defenses. In any event, those affirmative defenses were either waived (*see* CPLR 3211 [e]) or are without merit." *Starkman v City of Long Beach*, 106 AD3d 1076, 1078 (2d Dept 2013).

Defendant's third and sixth affirmative defenses allege negligence of third parties. Plaintiff, as the passenger in the decedent's car, has established that he "did not engage in any culpable conduct that contributed to the happening of the accident, as [he] was a merely passenger . . ." *Phillip v D & D Carting Co., Inc.*, 136 AD3d 18, 23 (2d Dept 2015). Deliberti testified that she did not see decedent's vehicle until he was in the intersection and that she could not brake to avoid the collision. The caselaw is clear that a driver with the right-of-way who has only seconds to react to a vehicle which has failed to yield is not comparatively negligent for failing to avoid the collision. *Cheese v Ferguson*, 208 AD3d at 1302.

Defendant's contention, brought only by attorney affirmation, that the accident could have been caused by someone other than the decedent, is speculative, and does not raise a triable issue of fact so as to defeat the motion. *See e.g. Sirico v Beukelaer*, 14 AD3d 549, 549 (2d Dept 2005) (internal citation omitted) ("The affirmation of the plaintiff's attorney lacked probative weight and could not raise a triable issue of fact. Mere speculation that the defendant may have failed to take some unspecified measures to avoid the accident, or in some other way contributed to the occurrence of the accident, was insufficient to defeat the motion for summary judgment"). Accordingly, the third and sixth affirmative defenses are dismissed.

The seventh affirmative defense, alleging that plaintiff failed to join a necessary party, is also dismissed. Deliberti is a Florida resident and is not a party to this action.

The fourth affirmative defense alleges that plaintiff failed to mitigate damages. Defendant has argued that this defense should remain to the extent it relates to taking appropriate care of injuries after an accident. Plaintiff has not moved to dismiss the remaining affirmative defenses related to damages and requests for the issue of damages and serious injury to be determined at trial. Courts have held that a defense should not be stricken where there are “triable issues of fact.” *Jacob Marion, LLC v Jones*, 168 AD3d 1043, 1045 (2d Dept 2019). Accordingly, at this time, the fourth affirmative defense is not dismissed.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto have been considered by this court notwithstanding the specific absence of reference thereto.

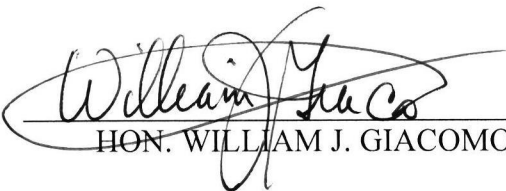
CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff’s motion is granted to the extent that partial summary judgment is granted on the issue of liability and the first, second, third, fifth, sixth, seventh, eighth, tenth and twelfth affirmative defenses are dismissed.

The parties are directed to appear for a virtual settlement conference on October 7, 2024 at 11:00 a.m. subject to confirmation by the virtual conference link emailed by this Court.

Dated: White Plains, New York
August 29, 2024


HON. WILLIAM J. GIACOMO, J.S.C.