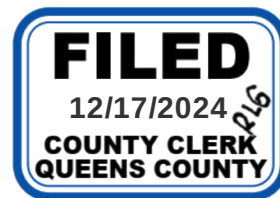


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|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>White v New York City Tr. Auth.</b>                                                                                                                                                                                         |
| 2024 NY Slip Op 35636(U)                                                                                                                                                                                                       |
| December 13, 2024                                                                                                                                                                                                              |
| Supreme Court, Queens County                                                                                                                                                                                                   |
| Docket Number: Index No. 711390/2023                                                                                                                                                                                           |
| Judge: Mojgan C. Lancman                                                                                                                                                                                                       |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

**Short Form Order**

## NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HONORABLE MOJGAN C. LANCMAN

-----X  
SUSAN ZAIRET WHITE,

IAS Part 20

Plaintiff,

Index No.: 711390/2023

-against-

Motion Seq. No.: 1

NEW YORK CITY TRANSIT AUTHORITY, GVC II INC., and  
ISAIAH MCBEAN,

Motion Date: 10.16.2024

Motion Cal. No.: 33

Defendants.  
-----X

The e-filed documents listed by NYSCEF document numbers 20-38 were read on the motion of the plaintiff, Susan Zaire White (the "Plaintiff") for summary judgment.

The Plaintiff commenced this action on June 2, 2023, to recover damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on August 16, 2022 (the "Accident"). Presently before the Court is the Plaintiff's motion for an Order (1) granting summary judgment against the defendants and (2) striking various affirmative defenses. For the following reasons, this motion is granted in part and denied in part.

**I. Factual Background and Procedural History**

The Accident occurred on August 16, 2022, at the intersection of 118th Avenue and 200th Street in Queens, New York. Two vehicles were involved in the Accident. The Plaintiff was operating her vehicle on 118th Avenue. The defendants' vehicle, owned by defendant New York City Transit Authority ("NYCTA"), leased by defendant GVC II Inc. ("GVC"), and operated by defendant Isaiah McBean ("McBean"), (collectively the "Defendants"), was traveling on 200th Street.

The Plaintiff testified at a statutory hearing on December 1, 2022. The relevant portions of her testimony are summarized herein: The Accident occurred on August 16th, 2022, at approximately 2:00 p.m. at the intersection of 118th Avenue and 200th Street in Saint Albans, NY. She was operating a 2017 Chevy Cruze owned by her husband. At the time of the Accident, the Plaintiff was on 118th street. The intersection of 118th Avenue and 200th Street is controlled by a stop sign on 200th Street. There is no stop sign on 118th Avenue. At the time of the Accident, the Plaintiff was operating her vehicle at 15-20 miles per hour. She did not see the Defendants' vehicle, an Access-A-Ride truck, before the Accident. She first became aware of the Accident when her vehicle was hit at the intersection. She claims that the Defendants' vehicle did not stop at the stop sign. The front of the Defendants' vehicle struck the rear driver side of her vehicle.

The Plaintiff also submitted an affidavit in support of this motion, in which she states as follows: That she was operating her vehicle on 118th Avenue approaching the intersection with 200th Street; that 118th Avenue at its intersection with 200th Street is not controlled by a traffic control device; that 200th Street at its intersection with 118th Avenue is controlled by stop signs in both directions; that prior to entering the intersection, she looked both ways on 200th Street and saw no other vehicles approaching the intersection; that she observed no other vehicles in the intersection when she entered it; that her vehicle was struck on the rear driver's side by the Defendants' vehicle when she was in the intersection; that she had no time to avoid the collision; and that she was wearing her seatbelt.

The Plaintiff further submits a copy of a notice to admit, in which the defendants admit that NYCTA is the owner of the bus; that GVC leased the bus from NYCTA; and that McBean operated the bus within the scope of his employment with and with the knowledge, permission, and consent of GVC.

In opposition, the Defendants submit the statement of McBean, which is unsworn and thus not considered by the Court. The Defendants also submit the affidavit of non-party Dorothy Bronson ("Bronson"). Bronson, a passenger in the Defendants' vehicle, avers that McBean "came to a full stop at the intersection". The Defendants further rely on various legal arguments contained within the affirmation of their attorney.

## II. Discussion

### A. Summary Judgment Standards

The familiar standards applicable to summary judgment motions are set forth below.

"Summary judgment is designed to expedite all civil cases by eliminating from the Trial Calendar claims which can properly be resolved as a matter of law" (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]).

The "function of summary judgment is issue finding, not issue determination" (*see Assaf v Ropog Cab Corp.*, 153 AD2d 520, 544 [1st Dept 1989]). The role of the Court in deciding a summary judgment motion is to make determinations as to the existence of *bona fide* issues of fact and not to delve into or resolve issues of credibility (*see Vega v Restani Constr. Corp.*, 18 NY3d 499 [2012]). The facts must be viewed in the light most favorable to the non-moving party (*see Sosa v 46th Street Development LLC*, 101 AD3d 490 [1st Dept 2012]). If there is any doubt as to the existence of a triable issue of fact, the motion must be denied (*see Rotuba Extruders v Ceppos*, 46 NY2d 223 [1978]).

To be entitled to the "drastic" remedy of summary judgment, the movant "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). The failure to make a *prima facie* showing of entitlement to summary judgment requires the denial of the motion, regardless of the sufficiency of the opposing papers (*see id.*; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]).

If the moving party meets its burden, the burden shifts to the party opposing the motion to establish, by admissible evidence, the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for the failure to do so (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). If no genuine issue of material fact exists, the grant of summary judgment is proper (*see Kornfeld v NRX Technologies, Inc.*, 62 NY2d 686 [1984]).

## B. Summary Judgment on Liability

Vehicle and Traffic Law § 1142 (a) provides as follows:

“Except when directed to proceed by a police officer, every driver of a vehicle approaching a stop sign shall stop as required by section [1172] 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.”

The Plaintiff establishes her *prima facie* entitlement to summary judgment by demonstrating that the Defendants’ vehicle proceeded into the intersection on a street controlled by a stop sign without yielding the right of way to the Plaintiff’s vehicle (*see Masticova v Ruderman*, 164 AD3d 1435, 1435 [2d Dept 2018]; *Amalfitano v Rocco*, 100 AD3d 939, 940 [2d Dept 2012]; *Czarnecki v Corso*, 81 AD3d 774, 775 [2d Dept 2011]).

In opposition, the defendants argue that a triable issue of fact exists in that the Defendants’ vehicle came to a complete stop at the stop sign before the Accident occurred. However, “the question of whether the defendant stopped at the stop sign is not dispositive, since the evidence established that he failed to yield even if he did stop” (*Amalfitano*, 100 AD3d at 940; *see Czarnecki*, 81 AD3d at 775).

The Defendants also assert that summary judgment against NYCTA is inappropriate pursuant to the Graves Amendment. “The Graves Amendment provides that the owner of a leased or rented motor vehicle cannot be held liable for personal injuries resulting from the use of such vehicle if the owner (1) is engaged in the trade or business of renting or leasing motor vehicles, and (2) engaged in no negligence or criminal wrongdoing contributing to the accident” (*White v U-Haul Co. of Arizona*, 226 AD3d 851, 852 [2d Dept 2024]; *see* 49 USC § 30106).

Here, the Defendants merely assert in their attorney’s affirmation that the Graves Amendment bars a grant of summary judgment against NYCTA. Absent from the opposition papers is any affidavit from NYCTA that suggests that it is entitled to the protections of the Graves Amendment or any other relevant documentation, such as the rental agreement. The bare assertion of counsel is insufficient to create a triable issue of fact, as “[t]he affirmation of defendants’ attorney in opposition to plaintiff[s] summary judgment motion ... [is] of no probative value” (*Nationwide General Insurance Company v South*, 223 AD3d 411, 411-412 [1st Dept 2024]; *see*

*Commissioners of the State Ins. Fund v Sanitation Salvage Corp.*, 187 AD3d 537, 537 [1st Dept 2020]; *Lazarre v Gragston*, 164 Ad3d 574, 575 [2d Dept 2018]).

The Defendants' discovery-related argument is also without merit. In *Quintanilla v Mark* (210 AD3d at 714-715) the Second Department held as follows with respect to the interplay between a summary judgment motion and open discovery:

“While a party is entitled to a reasonable opportunity to conduct discovery in advance of a summary judgment determination, a party contending that a summary judgment motion is premature must demonstrate that discovery might lead to relevant evidence or that the facts essential to justify opposition to the motion were exclusively within the knowledge and control of the movant. The mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion. Here, the defendant's proffered need to conduct depositions did not warrant denial of the motion, since the defendant already had personal knowledge of the relevant facts, and his mere hope or speculation that evidence might be uncovered was insufficient to deny the motion” (internal quotation marks, brackets and citations omitted).

The Defendants have personal knowledge of the facts as the owner, lessee, and operator of one of the vehicles involved in the Accident. The argument that this motion should be denied due to outstanding discovery is thus baseless (*see id.*; *Elfe*, 219 AD3d at 1306).

Moreover, “[t]he mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny the motion” (*Lopez v WS Distrib., Inc.*, 34 AD3d 759, 760 [2d Dept 2006] [citations omitted]).

Thus, the Plaintiff is granted partial summary judgment on the issue of liability.

### C. Summary Judgment on Affirmative Defenses

The Plaintiff also seeks the dismissal of various affirmative defenses asserted by the Defendants. Specifically, the Plaintiff seeks the dismissal of the (1) first affirmative defense of comparative negligence/assumption of risk; (2) second affirmative defense of failure to wear a seatbelt; (3) third affirmative defense of failure to state a cause of action; (4) fifth affirmative defense of improper service; (5) sixth affirmative defense of statute of limitations; (6) eighth affirmative defense of assumption of risk; (7) ninth affirmative defense of failure to comply with CPLR 306-b; and (8) fourteenth affirmative defense of failure to properly plead per the Public Authorities Law.

The issue of the Plaintiffs' comparative negligence is properly before the Court because: “[e]ven though a plaintiff is no longer required to establish his or her freedom from comparative negligence to be entitled to summary judgment on the issue of 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” (*Hai Ying Xiao v Martinez*, 185 AD3d 1014, 1014 [2d Dept 2020]; *see also Ng v West*, 195 AD3d 1006 [2d Dept 2021]) [citations omitted]).

Furthermore, CPLR 3212 (g) “permits a motion court to limit issues of fact for trial, by specifying which facts are not in dispute or are incontrovertible, and such facts shall be deemed established for all purposes in the action. The provision recognizes that, notwithstanding the denial or partial grant, one of several facts may nonetheless appear to be conceded or otherwise definitively resolved by the moving and opposing papers” (*see Oluwatayo v Dulinayan*, 142 AD3d 113, 118 [1st Dept 2016]).

Here, the Plaintiff fails to establish her entitlement to the dismissal of the first affirmative defense to the extent that it asserts that the Plaintiff was comparatively negligent. At her statutory hearing and in her affidavit, she admitted that she did not see the Defendants’ vehicle prior to the accident. This admission fails to eliminate all triable issues of fact as to whether the Plaintiff bears any culpable conduct or fault for the happening of the Accident (*see generally Lee v Huang*, 223 AD3d 790 [2d Dept 2024]; *Kirby v Davis*, 208 AD3d 1171[2d Dept 2022]; *Flores v Rubenstein*, 175 AD3d 1490 [2d Dept 2019]). Here, among other things, every driver has a duty to keep a proper lookout to avoid colliding with other vehicles (*see Bonilla v Calabria*, 80 AD3d 720 [2d Dept 2011]). The Plaintiff’s submissions fail to establish whether she kept a proper lookout and exercised due care to avoid contact with the Defendants’ vehicle (*see Demand v Rochevet*, 43 AD3d 981, 981 [2d Dept 2007]; *Cox v Nunez*, 23 AD3d 427, 427-28 [2d Dept 2005]). Thus, the branch of the motion seeking to dismiss the affirmative defense of comparative negligence is denied.

The Plaintiff is also not entitled to the dismissal of the Defendants’ third affirmative defense of failure to state a cause of action. “No motion by the plaintiff lies under CPLR 3211 (b) to strike the defense of failure to state a cause of action, as this amounts to an endeavor by the plaintiff to test the sufficiency of his or her own claim” (*Ochoa v Townsend*, 209 AD3d 867, 868 [2d Dept 2022] [internal citations, quotation marks, and brackets omitted]).

However, the Plaintiff is entitled to the dismissal of the portion of the first affirmative defense alleging assumption of risk and the eighth affirmative defense which also alleges that the Plaintiff assumed the risks. The affirmative defense of assumption of risk is irrelevant in cases such as this one (*see Vasquez v Strickland*, 211 AD3d 414-15 [1st Dept 2022]). “Motorists traveling through public streets, as a general rule, do not assume the risk of other motorists negligently striking their vehicle” (*Webb v Scharf*, 191 AD3d 1353, 1355 [4th Dept 2021]).

The Plaintiff establishes her entitlement to the dismissal of the second affirmative defense of failure to wear a seatbelt, as the Plaintiff stated in her affidavit that she was wearing a seatbelt and the Defendants submit no evidence to the contrary (*see Prak v New York City Transit Authority*, 205 AD3d 489, 490 [1st Dept 2022]).

The Plaintiff is also entitled to the dismissal of the Defendants’ fifth affirmative defense, which alleges that the Court lacks personal jurisdiction due to improper service because the

Defendants failed to move to dismiss on this ground within sixty days after service of the answer (*see* CPLR 3211 [e]). For this reason, the Defendants' ninth affirmative defense of failure to comply with CPLR 306-b is also dismissed, as this affirmative defense also alleges a defect in service. The ninth affirmative defense is also dismissed because the affidavits of service reflect that the Defendants were served within 120 days of the commencement of the Action.

The sixth affirmative defense asserting that this action was not brought within the statute of limitations is dismissed, as this action was clearly commenced within one year and ninety days of the Accident (*see* Public Authorities Law § 1212 [2]).

The Plaintiff is also entitled to the dismissal of the fourteenth affirmative defense of failure to properly plead as required the Public Authorities Law. The allegations in the complaint plainly comply with the relevant portions of the Public Authorities Law (*see* Public Authorities Law § 1212).

### III. Conclusion

Accordingly, it is hereby:

ORDERED, that the motion is granted in part and denied in part; and it is further

ORDERED, that the Plaintiff is granted partial summary judgment on the issue of liability against the Defendants; and it is further

ORDERED, that this decision is rendered without prejudice to NYCTA moving for summary judgment based upon the Graves Amendment, if applicable; and it is further

ORDERED, that the Defendants' first affirmative defense, to the extent it alleges that the Plaintiff assumed the risks; second affirmative defense of failure to wear a seatbelt; fifth affirmative defense of improper service; sixth affirmative defense of statute of limitations; eighth affirmative defense of assumption of risk; ninth affirmative defense of failure to comply with CPLR 306-b; and fourteenth affirmative defense of failure to properly plead per the Public Authorities Law are dismissed; and it is further

ORDERED, that the branches of the motion seeking to dismiss the first affirmative defense to the extent that it alleges that the Plaintiff was comparatively negligent and the third affirmative defense of failure to state a cause of action are denied; and it is further

ORDERED, that the Plaintiff shall serve a copy of this Order with Notice of Entry upon the Defendant via NYSCEF by January 31, 2025.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York  
December 13, 2024



MOJGAN C. LANCMAN, J.S.C.

