

DiGerolamo v Carrera
2024 NY Slip Op 35665(U)
October 28, 2024
Supreme Court, Suffolk County
Docket Number: Index No. 621036/2023
Judge: James F. Quinn
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INDEX No. 621036/2023SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 41 - SUFFOLK COUNTY**PRESENT:**Hon. JAMES F. QUINN
Acting Justice of the Supreme CourtMOT. DATE 05/14/2024ADJ. DATE 09/10/2024

Mot. Seq. #001-MG

-----X
NANCY A. DIGEROLAMO,

Plaintiff,

- against -

JEAN M. CARRERA,

Defendant.
-----X**DECISION AND ORDER**DAVIS & FERBER, LLP
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Upon the E-File document list numbered 13-22, 25-29 and 31-33 read on motion by Plaintiff Nancy A. DiGerolamo for an order pursuant to CPLR §3212, granting Plaintiff summary judgment on liability and dismissing Defendants' Fourth, Fifth and Tenth Affirmative Defenses; it is hereby

ORDERED, that the application by Plaintiff Nancy A. DiGerolamo for an order pursuant to CPLR §3212, granting Plaintiff summary judgment on liability and dismissing the Fourth, Fifth and Tenth Affirmative Defenses is **granted**.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff when she was involved in a car accident with a vehicle driven by Defendant Jean M. Carrera. The accident allegedly occurred on July 18, 2021 at approximately 11:42AM at the Dunkin Donuts Drive through located at 381 Route 25A, Mt. Sinai, Town of Brookhaven, County of Suffolk, State of New York. The action was commenced by the filing of a summons and complaint on August 22, 2023. Issue was joined by the filing of an answer on October 31, 2023 by the Defendant. Plaintiff moves this court for summary judgment on the issue of liability and dismissal of the Fourth (culpable conduct), Fifth (failure to wear a seatbelt) and Tenth (emergency doctrine) affirmative defenses.

The Plaintiff submitted, *inter alia*, the pleadings, an affidavit of Plaintiff Nancy A. DiGerolamo and a certified copy of the police accident report. In opposition Defendant submits, *inter alia*, an affidavit of the Defendant Jean M. Carrera. Defendant asks the court to deny the motion in its entirety and argues that the motion is premature as discovery has not been completed. It is undisputed that the vehicle Plaintiff was in was hit in the rear by the Defendant. Defendant asserts the emergency doctrine as an affirmative defense.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*Alvarez v. Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to so summary judgment (*Winegrad v. New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v. New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR §3212(b); *Alvarez v. Prospect Hosp.*, *supra*; *Zuckerman v. City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). However, conclusory allegations unsupported by competent evidence are insufficient to defeat a summary judgment motion (*Alvarez*, *supra*, 68 NY2d at 324-325, 508 NYS2d 923). Courts have the authority to search the record on a motion for summary judgment and make determination in accordance with the admissible evidence presented (see *Marciano v. Ran Oil Co. East, LLC*, 63 AD3d 1118, 882 NYS2d 452 [2d Dept 2009]; *Amore Partners, Inc. v. Mephisto, Inc.*, 222 AD2d 473, 635 NYS2d 57 [2d Dept 1995]).

It is well settled that 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, Vehicle and Traffic Law § 1129(a); *Martin v County of Westchester*, 194 AD3d 1036, 144 NYS3d 394 [2d Dept 2021]; *Capuozzo v Miller*, 188 AD3d 1137, 136 NYS3d 416 [2d Dept 2020]). Moreover, a rear-end collision with a stopped or stopping vehicle 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 (see, *Pollet v Charyn*, 200 AD3d 728, 159 NYS3d 92 [2d Dept 2021]; *Dolores v Grandpa's Bus Co., Inc.*, 189 AD3d 1539, 135 NYS3d 295 [2d Dept 2020]).

Plaintiff states in her affidavit that she was stopped in line at the Dunkin Donuts drive through, she was wearing her seatbelt, her tail and brake lights were operable and she experienced no mechanical difficulties. Plaintiff states that she felt a heavy impact to the rear of the car that pushed the vehicle forward. Plaintiff has made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that the vehicle she was driving was struck in the rear by Defendant's vehicle (see, *Martin v County of Westchester*, *supra*; *Arslan v Costello*, 164 AD3d 1408, 84 NYS3d 229 [2d Dept 2018]). The burden then shifts to the Defendant to come forward with a non-negligent explanation for the accident (see *Pollet v Charyn*, *supra*; *Lisetskiy v Weiss*, 123 AD3d 775, 999 NYS2d 83 [2d Dept 2014]).

In opposition, Defendant failed to raise a triable issue of fact (see *Martin v County of Westchester*, *supra*; *Auguste v Jeter*, 167 AD3d 560, 88 NYS3d 509 [2d Dept 2018]). Defendant contends that the application is premature as discovery is not complete. Moreover, Defendant failed to offer a non-negligent explanation for the rear-end collision (see *E.B. v Gonzalez*, 208 AD3d 618, 174 NYS3d 387 [2d Dept 2022]; *Acevedo v Akhtar*, 204 AD3d 596, 165 NYS3d 314 [1st Dept 2022]). as Defendants' contention that the application is premature as discovery is not complete is unfounded. Defendant fails to adequately demonstrate how discovery might lead to relevant evidence or that facts essential to justify opposition to the motion is exclusively within the knowledge or control of defendant (see CPLR 3212 (f); *Williams v Spencer-Hall*, 113 AD3d 759, 979 NYS2d 157 [2d Dept 2014]; *Cajas-Romero v Ward*, 106 AD3d 850, 965 NYS2d 559 [2d Dept 2013]; *Romero v Greve*, 100 AD3d 617, 953 NYS2d 296 [2d Dept 2012]). Indeed, "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" (*Cajas-Romero v Ward*, *supra*, 106 AD3d at 852; see also *Niyazov v Hunter EMS, Inc.*, 154 AD3d 954, 63 NYS3d 457 [2d Dept. 2017]). Defendant provides no evidentiary basis for the claim

that further discovery may reveal facts known only to Plaintiff that are sufficient to defeat Plaintiff's motion for summary judgment. Defendant acknowledges in her affidavit that she was stopped behind the plaintiff and hit the rear of Plaintiff's vehicle.

Accordingly, Plaintiff's motion for partial summary judgment as to liability is granted.

As to that branch of the motion to dismiss Defendants' Fourth, Fifth and Tenth affirmative defenses the Plaintiff bears the burden of demonstrating that such defenses are 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, 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 seeks dismissal of Defendants' affirmative defenses of culpable conduct including contributory negligence and assumption of the risk, failure to wear a seatbelt and emergency doctrine.

Plaintiff demonstrated she was stopped when her vehicle was struck from behind and therefore established, prima facie, that she was not at fault in the happening of the accident, warranting dismissal of Defendants' affirmative defense of culpable conduct (*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), 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, she was wearing her seatbelt at the time of the accident (*see Desola v Mads, Inc.*, 213 AD2d 445, 623 NYS2d 889 [2d Dept 1995]). Likewise, Plaintiff has established that there was no emergency. Without having perceived or reacted to any emergency, Defendant may not rely on the emergency doctrine to excuse Defendant's conduct (*see DeDiaz v Kausner*, 198 AD3d 475, 156 NYS3d 16 [1st Dept 2021]).

Defendant argues that the accident occurred as the result of an emergency situation thereby absolving Defendant of negligence pursuant to the emergency doctrine. Defendant in her affidavit states "Prior to the accident I was stopped behind plaintiff's vehicle within the drive through. While waiting I received a phone call from my brother that my 88 year old mother had taken a fall at home and was being rushed to the Emergency Room" (NYSCEF Doc. #27, ¶3). Defendant states "Upon hearing the information I became frantic and knew that I had to rush to the hospital to see if my mother was alright. I attempted to maneuver out of the drive through and lightly came into contact with the passenger side rear portion of plaintiff's vehicle" (NYSCEF Doc. #27, ¶4).

"[T]he emergency doctrine holds that those faced with a sudden and unexpected circumstance, not of their own making, that leaves them with little or no time for reflection or reasonably causes them to be so disturbed that they are compelled to make a quick decision without weighing alternative courses of conduct, may not be negligent if their actions are reasonable and prudent in the context of the emergency" (*Bello v. Transit Auth. of N.Y. City*, 12 AD3d 58, 60, 783 NYS2d 648; *see Miloscia v. New York City Bd. of Educ.*, 70 AD3d 904, 905, 896 NYS2d 109; *Vitale v. Levine*, 44 AD3d 935, 936, 844 NYS2d 105) (*Evans v Bosl*, 75 AD3d 491, 905 NYS2d 254 [2d Dept 2010]). Defendant states in her affidavit "After the accident, plaintiff and I pulled over and got out of my vehicle and went over to speak with her and exchange information" (NYSCEF Doc. # 27, ¶5). Defendant states that she was stopped behind the Plaintiff and after receiving a concerning phone call she hit the rear of plaintiff's vehicle while

trying to maneuver out of the line. The emergency doctrine and the litany of caselaw speaking to it encompasses scenarios where individuals are driving and encounter various circumstances, not when they are stopped and not driving. Defendant asks this court to find that receiving a concerning or urgent phone call permits one to drive negligently but not be held negligent. Individuals receive like phone calls while they are not behind the wheel of a vehicle and in response get into the car to drive. The court cannot extend the emergency doctrine to excuse negligent driving in response to a concerning or urgent phone call one may receive. Here, Defendant failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324, 508 NYS2d 923).

Accordingly, dismissal of Defendants' Fourth, Fifth and Tenth affirmative defenses is warranted.

Accordingly, it is hereby

ORDERED, Plaintiff Nancy A. DiGerolamo's application for summary judgment is **granted as to liability only**; and it is further

ORDERED, Defendants' Fourth, Fifth and Tenth Affirmative Defenses are dismissed.

The parties are directed to appear before the Court **IN PERSON** on **October 29, 2024 at 9:30am** for a Compliance Conference, as scheduled.

The foregoing constitutes the **Decision and Order** of this Court.

Dated: October 28, 2024
Riverhead, New York


HON. JAMES F. QUINN, A.J.S.C.

____ FINAL DISPOSITION XX NON-FINAL DISPOSITION