

Fisher v Conte

2025 NY Slip Op 30721(U)

February 27, 2025

Supreme Court, Kings County

Docket Number: Index No. 517387/2023

Judge: Richard J. Montelione

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At IAS Part 99 of the Supreme Court of the State of New York, Kings County, on the 27th day of February 2025

PRESENT: HON. RICHARD J. MONTELIONE, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

DECISION AND ORDER

-----X
YELENA FISHER,

Index No.: 517387/2023
Mot. Seq. 001

Plaintiff,
-against-

INNESSA CONTE, VLADIMIR KOVALENKO, KARAMAT
MIAN and ASJAD ALI,

Defendants.

-----X

The following papers were read on this motion pursuant to CPLR 2219(a):

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FILED

Papers	Numbered
Defendants Innessa Conte and Vladimir Kovalenko's Notice of Motion Affirmations/Affidavits/Exhibits.....	28-33
Plaintiff's Answering Affirmations/Affidavits/Exhibits.....	38-42
Defendants Innessa Conte and Vladimir Kovalenko's Reply Affirmations/Affidavits/Exhibits.....	43

MONTELIONE, RICHARD J., J.S.C.

Yelena Fisher (plaintiff) commenced this action to recover damages for personal injuries by filing a summons and verified complaint on June 14, 2023. Defendants Innessa Conte (Conte) and Vladimir Kovalenko (Kovalenko) joined issue by interposing a verified answer with cross-claims on August 8, 2023. On August 29, 2023, issue was joined by defendants Karamat Mian (Mian) and Asjad Ali (Ali) interposing a verified answer. Now, defendants Conte and Kovalenko move this court pursuant to CPLR 3212 for an order granting summary judgment in their favor dismissing plaintiff's complaint and any and all cross claims asserted against them on the issue of liability (Mot. Seq. No. 1).

Plaintiff's claim arises out of a four-vehicle rear-end accident. On March 28, 2022, at or near the intersection of Ocean Parkway and Avenue C in Brooklyn, New York, plaintiff was operating her vehicle, the second vehicle in the chain collision, bearing license plate number

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KEF6069. Plaintiff alleges that her vehicle was stopped when it was struck in the rear by the third vehicle in the chain operated by defendant Kovalenko and owned by defendant Conte bearing license plate number HVV6112. Defendant Ali is the alleged operator of the fourth vehicle in the chain which is owned by defendant Mian bearing license plate number T646091C.

As an initial matter, defendants Kovalenko and Conte argue that they are entitled to summary judgment on liability based on res judicata and collateral estoppel. Res judicata and collateral estoppel are affirmative defenses that must be asserted either in a pre-answer motion to dismiss or answer. *See* CPLR 3018[b]; CPLR 3211 [a][5]. However, it is also permissible for a defendant to amend their answer pursuant to CPLR 3025[a] to include an affirmative defense as a matter of course, or by leave of court if the time to amend the answer has expired. *See* David D. Seigel & Patrick M. Connors, *New York Practice* § 223 [6th ed, Dec. 2022 update]. Here, defendants Kovalenko and Conte appeared by verified answer but failed to assert the affirmative defenses of res judicata and collateral estoppel. The time for defendants to amend their answer as a matter of course is well passed, and they have made no application to the court seeking leave to file an amended answer. Accordingly, the defendants have waived the defenses of res judicata and collateral estoppel.

Notwithstanding the foregoing, defendants maintain that they are entitled to summary judgment as a matter of law because, as the middle vehicle in this chain collision, they are not the proximate cause of the accident.

It is well-established that, “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 nonnegligent explanation for the collision.” (*Graham v New York City Transit Authority*, 219 AD3d 1316, 1316 [2d Dept 2023], quoting *Arslan v Costello*, 164 AD3d 1408, 1409 [2018]). However, “[i]n a chain collision accident, the operator of the middle vehicle may establish prima facie entitlement to judgment as a matter of law by demonstrating that the middle vehicle was properly stopped behind the lead vehicle when it was struck from behind by the rear vehicle and propelled into the lead vehicle” (*Chuk Hwa Shin v Correale*, 142 AD3d 518 [2d Dept 2016] [internal citations omitted]).

In the instant case, it is undisputed that the defendant Kovalenko was operating the third vehicle in this chain collision behind plaintiff’s vehicle and in front of defendant Ali’s vehicle.¹ (*See* Defendants’ Statement of Material Facts, NYSCEF Doc. No. 29; *see also* Plaintiff’s Counter Statement of Material Facts, NYSCEF Doc. No. 42). In support of the motion, defendants submit the affidavit of defendant Kovalenko wherein he attests, under penalty of

¹ The first vehicle involved in this chain collision belongs to Alessandro Fasano, a defendant in the related matter under Index No. 535580/2022, but a non-party to this action.

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perjury, that his vehicle was stopped for approximately 2-3 minutes before he was struck in the rear by defendant Ali, which caused his vehicle to be pushed forward into the rear of plaintiff's vehicle. (NYSCEF Doc. No 32). Defendants have met their prima facie burden of establishing that defendant Kovalenko was stopped behind plaintiff's vehicle when it was struck from behind by defendant Ali and propelled forward into the plaintiff's vehicle. The burden now shifts to plaintiff to raise a triable issue of fact.

Plaintiff does not dispute defendants' version of events. (See NYSCEF Doc No. 42). Rather, plaintiff directs the court's attention to her EUO testimony and argues that it raises a material issue of fact as to whether defendant Kovalenko impacted the rear of her vehicle before being struck by defendant Ali's vehicle thus precluding summary judgment. The following is reflected in the transcript of plaintiff's EUO testimony (Plaintiff's Exhibit 1, EUO Transcript, NYSCEF Doc. No. 39 at 19-20, lines 8-25; 1-16):

Q: Briefly tell me how the accident happened.

A: I was hit from the rear by someone.

Q: Did your vehicle strike another vehicle?

A: Very slightly. It was a very light contact.

Q: Did your vehicle strike the vehicle in front of you?

A: Yes.

Q: Did this occur after your vehicle was struck in the rear?

A: Yes.

Q: How many vehicles were involved in the accident?

A: Four.

Q: Apart from the vehicle that struck you in the rear and the vehicle that you struck lightly, where was the – how was the fourth vehicle involved in the accident?

A: The fourth vehicle hit the vehicle that was behind me that hit me. The fourth vehicle was the reason for that accident.

Q: Okay. So let me summarize: When the fourth vehicle struck the vehicle behind you, the vehicle behind you struck you in the rear, and then you struck a vehicle that was in front of you. Is that correct?

A: Yes.

Contrary to plaintiff's contention, this testimony corroborates defendants' position that the fourth vehicle operated by defendant Ali struck the third vehicle operated by Kovalenko

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causing it to be propelled forward into the rear of plaintiff's vehicle. Moreover, when asked whether the vehicle behind her impacted the rear of her vehicle twice, plaintiff responded "I don't know. I felt like two times." (NYSCEF Doc. No. 39 at 21, lines 2-5). Plaintiff further testified that that she felt the impacts one after the other. (*Id* at line 10). Therefore, plaintiff's EUO testimony fails to raise a triable issue of fact.

Based on the foregoing, it is

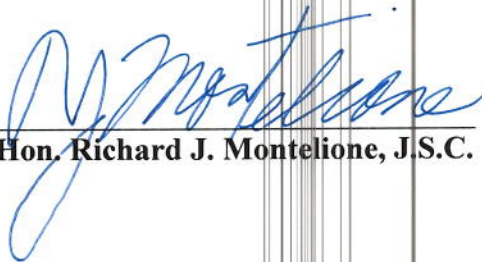
ORDERED that defendants VLADIMIR KOVALENKO and INNESSA CONTE'S motion for summary judgment on the issue of liability is GRANTED; and it is further

ORDERED that plaintiff's complaint and any and all cross-claims are dismissed as asserted against defendants VLADIMIR KOVALENKO and INNESSA CONTE; and it is further

ORDERED that all other request for relief herein are denied.

This constitutes the decision and order of the court.

ENTER


Hon. Richard J. Montelione, J.S.C.

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