Rabbi v Diagne
2025 NY Slip Op 35284(U)
March 19, 2025
Supreme Court, Queens County
Docket Number: Index No. 708336/2020
Judge: Maurice E. Muir
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE MAURICE E. MUIR
Justice

IAS Part - 42

MOHAMMED HOSSAIN F. RABBI,

Plaintiff,

-against-

CHEIKH DIAGNE AND H & R RIDE, INC.,

Defendants.

Index No.: 708336/2020

Motion Date: 11/14/24

Motion Cal. No. 27

Motion Seq. No. 1

The following electronically filed ("EF") documents read on this motion by Mohammed Hossain F. Rabbi ("Mr. Rabbi" or "plaintiff") for an order: 1) pursuant to CPLR § 3212 granting summary judgment to the plaintiff against the defendants as to the issue of liability; 2) finding that the plaintiff is free from comparative fault; 3) pursuant to CPLR § 3211(b) dismissing defendants' Second, Fourth, Fifth, Sixth, Seventh, and Eighth, Affirmative Defenses; 4) granting such other, further and different relief as this court may deem just, proper, and equitable.

	Papers Numbered
Notice of Motion-Affirmation-Memorandum of Law-Exhibits.....	EF 27 - 37
Affirmation in Opposition-Exhibits	EF 38 - 41
Reply Affirmation-Exhibits	EF 42

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

This is an action to recover damages for personal injuries the Mohammed Hossain F. Rabbi ("Mr. Rabbi" or "plaintiff") allegedly sustained in a motor vehicle accident. As a result, on June 23, 2020, the plaintiff commenced this action; and on December 7, 2020, issue was joined. Now, the plaintiff seeks the above-described relief. In support of the instant motion, the plaintiff he testified avers that on August 21, 2017, the vehicle operated by Cheiki Diagne ("Mr. Diagne") and owned by H & R Ride, Inc. ("H & R") (collectively, the "defendants") struck his vehicle in the rear while he was driving at 540 1st Avenue, County, City and State of New York.

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 the 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, 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, it is well settled law that "[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]; *Arslan v. Costello*, 164 AD3d 1408 [2d Dept 2018]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]; *Jimenez-Pantaleon v. Aucancela*, 221 AD3d 676 [2d Dept 2023]; *Martin v. Copado Esquivel*, 226 AD3d 668 [2d Dept 2024]).

Here, Mr. Rabbi established his *prima facie* entitlement to judgment as a matter of law on the issue of liability by submitting his uncontroverted testimony, wherein he avers that while he was stopped at a red light, Mr. Diagne struck his vehicle in the rear; and compelled it approximately four (4) feet. Moreover, Mr. Diagne failed to provide the court with a non-negligent explanation for striking the plaintiff's vehicle in the rear; and he failed to raise a triable issue of fact: In fact, Mr. Diagne failed to submit an affidavit refuting the plaintiff's contentions; and his attorney's affirmation lacks probative value because, it is not based on personal knowledge or supported by documentary evidence. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]; *Amato v.*

Fast Repair, Inc., 15 AD3d 429 [2d Dept 2005]). Moreover, it is well settled law that the owner of a motor vehicle is liable for the negligence of one, who operates the vehicle with the owner's express or implied consent. (*see Al-Mamar v. Terrones,* 146 AD3d 737 [2d Dept 2017]; *Sargeant v. Village Binderty*, 296 AD2d 395 [2d Dept 2002]; *Matter of Allstate Indem. Co. v. Nelson*, 285 AD2d 454 [2d Dept 2021]; *Headley v. Tessler*, 267 AD2d 428 [2d Dept 1999]). As such, the court finds that H & R, as the owner of the motor vehicle, is also liable for Mr. Diagne's negligence.

Lastly, that branch of the plaintiff's motion to strike the defendants' affirmative defense based upon comparative fault, the seatbelt law, collateral estoppel, mitigation of damages and the general obligations laws is granted in part and denied in part. "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 Dept 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]). Additionally, 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' second, fourth, and fifth affirmative defenses (i.e., culpable conduct, seatbelt law, collateral estoppel) lack merit.

Accordingly, it is hereby

ORDERED that branch of plaintiff's motion for summary judgment in his favor and against the defendants, on the issue of liability, pursuant to CPLR § 3212, is granted; and it is

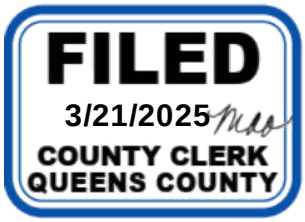
further,

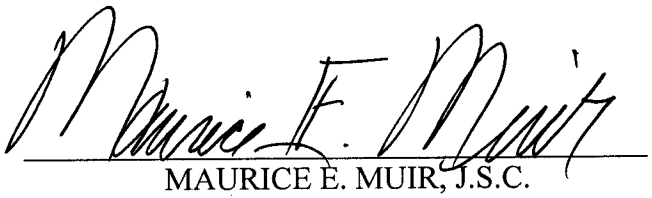
ORDERED that branch of plaintiff's motion to strike the defendants' affirmative defense, pursuant to CPLR § 3211(b), is granted to the extent that the defendants' second, fourth, and fifth affirmative defense are dismissed, in its entirety, with prejudice; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendants on or before April 10, 2025.

The foregoing constitutes the decision and order of the court.

Dated: March 19, 2025
Long Island City, New York





MAURICE E. MUIR, J.S.C.