

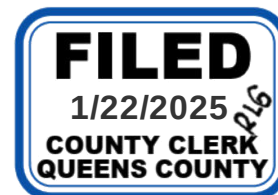
Britto v Arkin
2025 NY Slip Op 35573(U)
January 17, 2025
Supreme Court, Queens County
Docket Number: Index No. 724995/2023
Judge: Marguerite A. Grays
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE MARGUERITE A. GRAYS**
Justice

IAS PART 4

-----x
JEREMY A. BRITTO,Index
No.: 724995/2023

Plaintiff(s),

Motion
Date: May 7, 2024

-against-

Motion
Cal. No.:HOWARD N. ARKIN, SANDRA K. VAN IHSEM
and JACK D. BAIAMONTE,

Defendant(s).

Motion
Seq. No.: 1

-----x

The following numbered papers numbered EF 11-19, and EF 25-45 read on this motion by defendants Sandra K. Van Ihsem (Van Ihsem) and Jack D. Baiamonte (Baiamonte) for summary judgment pursuant to CPLR §3212 dismissing plaintiff's Complaint and all crossclaims against them; and on this cross-motion by plaintiff for partial summary judgment on the issue of defendants' liability and to strike Van Ihsem and Baiamonte's First Affirmative Defense of carelessness, contributory negligence, or assumption of risk, Second Affirmative Defense for seatbelt misuse, and Eighth Affirmative Defense of emergency doctrine, and to strike defendant Howard A. Arkin's (Arkin) Second Affirmative Defense for seatbelt misuse, Third Affirmative Defense of carelessness, negligence or assumption of risk, and culpable conduct, and Sixth Affirmative Defense of the emergency doctrine.

PAPERS
NUMBERED

Notice of Motion – Exhibits, Affirmation and Affidavit Annexed.....	EF11-EF19
Affirmation in Opposition-Exhibits.....	EF25-EF27; EF28-EF30
Reply Affidavit.....	EF37
Notice of Cross-Motion – Exhibits, Affirmation and Affidavit	EF31-EF34
Affirmations in Opposition.....	EF35-EF36; EF40-EF45

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined as follows:

In this negligence action, plaintiff seeks damages for personal injuries allegedly sustained on June 25, 2023, when the vehicle owned by Baiamonte and operated by Van Ihsem and the vehicle owned and operated by Arkin, came into contact with the vehicle owned and operated by plaintiff. The chain collision accident, which involved six motor vehicles, occurred on Union Turnpike at its intersection with Springfield Boulevard, Queens County, New York.

Defendant's Baiamonte and Van Ihsem now move for summary judgment dismissing plaintiff's complaint and all cross-claims against them and plaintiff cross-moves for summary judgment on the issue of liability and for dismissal of defendants' affirmative defenses of the emergency doctrine, comparative negligence, culpable conduct, seatbelt misuse, and assumption of risk.

Initially, the Court will address the branch of plaintiff's cross-motion for partial summary judgment on the issue of liability against all defendants. "A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendants breached a duty owed to the plaintiff and that the defendants' negligence was a proximate cause of the alleged injuries" (*Montalvo v Cedeno*, 170 AD3d 1166, 1167 [2019]). Although a plaintiff does not have to demonstrate the absence of his or her own comparative negligence to be entitled to partial summary judgment as to a defendant's liability (*see Rodriguez v City of New York*, 31 NY3d 312, 324-325 [2018]), the issue of a plaintiff's comparative negligence may be decided in the context of a summary judgment motion where, as here, the plaintiff has moved for summary judgment dismissing defendants' affirmative defense of comparative negligence (*see Poon v Nisanov*, 162 AD3d 804, 808 [2018]). Once the movant establishes his or her entitlement to judgment as a matter of law, the burden shifts to the opposing party to submit sufficient evidence to raise a triable issue of fact as to the moving party's comparative fault (*see Bien-Aime v Clare*, 124 AD3d 814 [2015]).

In support of plaintiff's cross-motion, plaintiff submits an affidavit in which he states that he was slowing down for traffic when his vehicle was rear ended by the vehicle owned by Baiamonte and operated by Van Ihsem and Arkin's vehicle. Plaintiff further states in his affidavit that he was wearing a seatbelt and there was nothing distracting him from the road at the time of the accident. Thus, plaintiff's affidavit established, prima facie, that defendants were negligent in striking the rear of plaintiff's vehicle and that defendants' negligence was a proximate cause of the accident (*see Yearwood v New York City Tr. Auth.*, 227 AD3d 843, 845 [2024]; *Flood v Fillas*, 190 AD3d 828, 829 [2021]).

In opposition, Arkin raised a triable issue of fact by offering a non-negligent explanation for the collision. The certified police report, which was submitted as part of Van Ihsem's motion, raises issues of fact as to whether Arkin was confronted with an

emergency situation prior to the accident because Arkin admitted that he struck Van Ihsem's vehicle when "his right front tire blew out causing him to lose control" (*see Ortiz v Zurita*, 195 AD3d 734, 735 [2021]; *Hendrickson v Philbor Motors, Inc.*, 101 AD3d 812, 814 [2012]). Furthermore, contrary to plaintiff's contention, the certified police report is admissible as a business record since Arkin's statement qualified as an admission (*Yassin v Blackman*, 188 AD3d 62, 66 [2020]; *see Memenza v Cole*, 131 AD3d 1020 [2015]).

In opposition to plaintiff's prima facie showing, Van Ihsem and Biamante also provided a nonnegligent explanation for the collision with plaintiff's vehicle. In her affidavit, Van Ihsem stated that her vehicle was struck in the rear by Arkin's vehicle causing her vehicle to propel forward and hit two other cars, including plaintiff's vehicle (*see Sougstad v Capuano*, 215 AD3d 776 [2023]).

However, on their own summary judgment motion, Van Ihsem and Biamante failed to establish their prima facie entitlement to judgment as a matter of law dismissing plaintiff's complaint against them. While Van Ihsem stated in her affidavit that Arkin's vehicle rear-ended her vehicle causing her vehicle to collide with plaintiff's vehicle, she also stated that she was coming to a stop and was positioned about half a car length away from plaintiff's vehicle before the collision. Pursuant to Vehicle and Traffic Law §1129 [a], "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Thus, Van Ihsem's affidavit raised an issue of fact as to whether she contributed to the happening of the accident by following plaintiff's vehicle too closely (*see Vuksanaj v Abbott*, 159 AD3d 1031, 1034 [2018]; *Bovt v Subaru Auto Leasing, Ltd*, 50 AD3d 612, 613 [2008]). Therefore, the motion by Van Ihsem and Biamante's motion for summary judgment dismissing the complaint against them is denied.

The branch of plaintiff's cross-motion to strike defendants' affirmative defenses of carelessness, contributory negligence or culpable conduct, assumption of risk, and lack of seatbelt use is granted. Through his affidavit, plaintiff established that he was wearing a seatbelt and that he did not contribute to the accident in any way. Defendants failed to offer any evidence to the contrary.

In addition, the assumption of risk doctrine does not apply to the facts in this case. Generally, the assumption of risk doctrine's application is "limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities, or athletic and recreational pursuits that take place at designated venues," which is not the case here (*Custodi v Town of Amherst*, 20 NY3d 83, 89 [2012]).

However, based on the above discussion, plaintiff failed to meet his burden of establishing that the affirmative defense based on the emergency doctrine of defendants is without merit as a matter of law (*see Yearwood v New York City Tr. Auth.*, 227 AD3d 843 [2024] [internal quotation marks omitted]). Therefore, that branch of plaintiff's cross-motion to strike the affirmative defense based on the emergency doctrine is denied.

Accordingly, defendant's Van Ihsem and Baiamonte's motion is denied in its entirety. The branch of plaintiff's cross motion for partial summary judgment is granted solely to the extent of dismissing defendant's Van Ihsem and Baiamonte's First, Second and Fifth Affirmative Defenses and Arkin's Second and Third Affirmative Defenses.

Dated: *January 17, 2025*


MARGUERITE A. GRAYS
J.S.C.

