Cross v Welcome
2016 NY Slip Op 30433(U)
March 16, 2016
Supreme Court, New York County
Docket Number: 158732/2013
Judge: Michael D. Stallman
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN *Justice* PART 21

ERIC CROSS AND KAREN CROSS,

Plaintiffs,

- v -

NEVILLE L. WELCOME, NEW YORK CITY TRANSIT AUTHORITY and THE CITY OF NEW YORK,

Defendants.

INDEX NO. 158732/2013

MOTION DATE 11/23/15

MOTION SEQ. NO. 004

The following papers, numbered 49-63, were read on this motion for summary judgment

Notice of Motion —Affirmation — Exhibits A-J —Affidavit of Service	No(s). 49-61
Affirmation in Opposition	No(s). 62
Reply Affirmation	No(s). 63

Upon the foregoing papers, it is ordered that plaintiffs' motion for summary judgment is granted, and summary judgment is granted as to liability only on the first cause of action in plaintiff's favor against defendants Neville L. Welcome and New York City Transit Authority.

It is undisputed that, on October 14, 2012, a bus, operated by defendant Neville Welcome and owned by defendant New York City Transit Authority (NYCTA), rear-ended a vehicle operated by plaintiff Eric Cross, on Seventh Avenue at its intersection with West 34th Street. Eric Cross's wife, plaintiff Karen Cross, was a passenger in the vehicle, and she asserts a derivative cause of action.

According to Cross, his vehicle was stopped at a red light at the

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

intersection, just prior to the crosswalk, and three seconds later "there was just an explosion of—a violent explosion and the car licked [sic] forward about 10 or 12 feet." (Bond Affirm. Ex F [Cross EBT], at 14-15.)

At his deposition, Welcome testified,

> "We were approaching the intersection. We both had the green light and as we going [*sic*] through the intersection, the traffic agent stationed at 34th Street and Seventh Avenue came out and abruptly stopped the vehicle in front of me because there was an ambulance coming down on 34th Street, coming west to east on 34th Street."

(Bond Affirm., Ex G [Welcome EBT], at 25.)

Welcome testified that he was traveling about 10 miles per hour, and that he stepped on his brakes immediately about four or five seconds before he hit Cross's vehicle. (*Id*. at 27-28.) According to Welcome, in the two seconds prior to the accident, his foot was "Covering the brake. Covering the brake means it's over the brake, but it's not on the brake." (*Id*. at 39.) Welcome stated, "There was just a slight touch on the vehicle, so to my knowledge, there was no damage to the vehicle." (*Id*. at 53.)

Plaintiffs now move for summary judgment in their favor as to liability against defendants.

> "It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate nonnegligent explanation for the accident."

(Continued...)

(*Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]; *Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *see also Dattilo v Best Transp. Inc.*, 79 AD3d 432, 433 [1st Dept 2010] [A rear-end collision with a vehicle that is slowing down establishes a prima facie case of negligence on the part of the driver of the rear vehicle].) As a corollary, a presumption also arises that no negligence on the part of the driver of the lead vehicle contributed to the collision. (*Soto-Maroquin v Mellet*, 63 AD3d 449, 450 [1st Dept 2009].)

Plaintiffs have met their prima facie burden for summary judgment in their favor as to liability against Welcome and NYCTA. Based on Eric Cross's deposition testimony, Welcome's bus rear-ended Cross's vehicle, creating a presumption of Welcome's negligence. NYCTA and Welcome admitted in their answer that Welcome operated the bus while in the course of his employment with the permission and consent of its owner. (Bond Affirm., Ex B [Verified Answer] ¶ 3.) Therefore, plaintiffs have met their prima face burden of demonstrating the NYCTA's liability as the owner of the bus under Vehicle and Traffic Law § 388 (1).

In opposition, the NYCTA and Welcome argue that Welcome's testimony offers a non-negligent explanation for the rear impact, i.e., the unexpected appearance of the traffic agent stopping Cross's vehicle despite the green light. They argue that Welcome's testimony that the bus was travelling at a low rate of speed of the bus, and that Welcome was covering the brake, shows that he was operating the bus in a reasonable manner, and the operation of the bus would therefore not have lead to the rear impact but for the unexpected actions of the traffic agent.

NYCTA and Welcome fail to raise a triable, material issue of fact warranting denial of plaintiff's motion for summary judgment. As the NYCTA and Welcome indicate, Welcome's and Cross's accounts of the rear-end collision are in dispute. Cross testified that he was stopped at a red light; Welcome testified that the traffic light was green, and that a

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traffic agent had directed Cross to stop. However, under Cross's version or under Welcome's version of the rear-end collision, Welcome fails to offer a non-negligent explanation of the accident to rebut the presumption of his negligence.

The gist of Welcome's testimony is that Cross's vehicle suddenly stopped at the green light, at the direction of a traffic agent at the intersection.

In the Appellate Division, First Department, the vast majority of cases hold that a sudden stop, standing alone, is insufficient to rebut the presumption of negligence. (*Diako v Yunga*, 126 AD3d 567 [1st Dept 2015]; *Cruz v Lise*, 123 AD3d 514 [1st Dept 2014]; *Chowdhury v Matos*, 118 AD3d 488 [1st Dept 2014]; *Santana v Tic-Tak Limo Corp.*, 106 AD3d 572 [1st Dept 2013] ["Defendant driver's testimony that plaintiff 'stopped short' and that he could not see her brake lights 'is insufficient to rebut the presumption of negligence'"]; *Androvic v Metropolitan Transp. Auth.*, 95 AD3d 610, 610 [1st Dept 2012] ["That the bus came to a sudden stop was insufficient to raise a triable issue of fact"]; *but see Berger v New York City Hous. Auth.*, 82 AD3d 531 [1st Dept 2011].)

The NYCTA and Welcome argue that the alleged lack of physical damage to Cross's vehicle is sufficient to rebut the presumption of negligence. The Court disagrees. The Appellate Division, First Department rejected a similar argument in *Diako v Yunga*, where the driver claimed that the plaintiff made a sudden stop, causing Yunga to "tap" the rear of plaintiff's vehicle. (*Diako*, 126 AD3d at 567.)

Dated: 3/16/16
New York, New York

_____, J.S.C.

1. Check one:..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. Check if appropriate:..... MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. Check if appropriate:..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

MICHAEL D. STALLMAN
J.S.C.