Fermas v AMPCO Sys. Parking
2016 NY Slip Op 30294(U)
February 16, 2016
Supreme Court, Queens County
Docket Number: 22618/2012
Judge: David Elliot

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT
Justice

IAS Part 14

WISSAM FERMAS,
Plaintiff,

- against -

AMPCO SYSTEM PARKING, et al.,
Defendants.

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No. 22618 2012

Motion
Date January 21, 2016

Motion
Cal. No. 41

Motion
Seq. No. 13

The following papers numbered 1 to 15 read on this motion by defendants Ampco System Parking, ABM Industries Incorporated, Wheels LT., and Royston S. Powell (collectively moving defendants) for an order: (1) granting them summary judgment dismissing the amended complaint on the issue of liability; (2) granting them summary judgment in their favor on their cross-claims against codefendant Akm Amin Rahman; or, in the alternative, (3) for an order granting them leave to amend their answer to assert an affirmative defense for plaintiff's failure to utilize a seat belt; and on this cross motion by plaintiff for an order granting her summary judgment in her favor and against moving defendants on the issue of liability.

	Papers Numbered
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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained as a result of a motor vehicle accident which occurred on October 11, 2012, at approximately 9:30 p.m., on the South Service Road at or near General Aviation Way, JFK Airport, County of Queens, City and State of New York. Plaintiff was a rear-seated passenger in the vehicle owned by defendant Simon Liang and being operated by defendant Akm Amin Rahman, when said vehicle and the one owned by defendant ABM Industries Incorporated and being driven by defendant Royston S. Powell collided.

The moving defendants submit, *inter alia*, the deposition testimony of Powell, who testified, in relevant part: that he was traveling northbound on the South Service Road; that there was nothing obstructing his view; that the street lighting was fair and his headlights were on; that he was intending to make a left turn on to General Aviation Way, so he illuminated his left turn signal as soon as he entered the left turning lane; that he did not see Rahman's vehicle, who was traveling southbound on the South Service Road, at any time prior to impact, due to the fact that Rahman's vehicle did not have its headlights on; that he slowed down to make the turn; that he started to execute his turn when his vehicle was impacted in the front passenger side by Rahman's vehicle; and that he was unable to take evasive action since he never saw Rahman's vehicle prior to the accident.

Rahman testified, in relevant part: that he consumed three alcoholic beverages prior to the accident at the JFK Air Train bar; that plaintiff met him there and drank with him; that he and plaintiff entered the vehicle intending to pick up Liang's son from work; that plaintiff sat in the rear passenger's seat; that he proceeded driving along the South Service Road; that the area was not particularly well lit; that he could not recall whether his vehicle's headlights were on; that he noticed Powell's vehicle about a block before the accident; that he did not notice whether said vehicle had its turn signal on, but he saw it go into the left turn lane and assumed it would wait to make the left turn until after he passed that intersection; that he swerved left in an attempt to avoid Powell's vehicle but the accident occurred; and that he was later arrested and ultimately convicted of driving while intoxicated and vehicular assault (*see* VTL § 1192 [2]; Penal Law § 120.03). Moving defendants submit the Certificate of Disposition confirming same.

Plaintiff testified, in relevant part, to the following: that she met Rahman at the Air Train bar and drank about an hour prior to the accident; that she witnessed Rahman consuming a couple of beers; that she does not know how much he drank that evening but he seemed "normal"; that they left the bar to go to Liang's vehicle; that she sat in the rear passenger's seat; that she did not put her seat belt on; and that she has no recollection of the details of the accident.

Moving defendants also submit the testimony of Police Officer Lawrence Sesso, who responded to the scene and arrested him at the hospital later that evening.

Moving defendants first argue that they are entitled to summary judgment as a matter of law since Rahman was the sole proximate cause of the accident, to wit: he was driving while intoxicated and he failed to use his headlights. Moreover, they state that plaintiff also bears culpability for her injuries, having knowingly accepted a ride from Rahman given the circumstances. Though these defendants are correct in their assertion that a violation of the Vehicle and Traffic Law constitutes negligence as a matter of law, there may be more than one proximate cause of an accident (*see Desio v Cerebral Palsy Transport, Inc.*, 121 AD3d 1033 [2014; *Adobea v Junel*, 114 AD3d 818 [2014]; *Rahaman v Abodeledhman*, 64 AD3d 552 [2009]). They are not entitled to judgment as a matter of law on this ground given that the record presents an issue of fact as to whether Powell also acted negligently in having failed to observe Rahman's vehicle at any time prior to impact – irrespective of whether the latter's headlights were on – and in having failed to yield to Rahman's right of way (*see* VTL § 1141). This is particularly so in light of plaintiff – in opposition to the motion and in support of her own cross motion – having presented a video taken of the incident, which appears to depict, *inter alia*, that, contrary to his counsel's contention, Rahman's vehicle was not "invisible"; rather, the reaction of Powell's passenger, captured on the video, suggests that she was fully aware of the existence of Rahman's vehicle approaching on the opposite side of traffic upon Powell's vehicle having entered the left turning lane and prior to Powell having started to execute his turn. That, coupled with Powell's testimony in which he stated that he never saw Rahman's vehicle at any time prior to the accident, speaks to whether he acted reasonably under the circumstances and creates an issue of fact suitable for a jury to determine (*see e.g. Midstate Mut. Ins. Co. v Knebel*, 128 AD3d 1032 [2015] [noting that a driver has a duty to see that which he or she should have seen through the proper use of his or her senses]).

Moving defendants next aver that, since Powell was confronted with an emergency situation, he cannot be held liable for the accident. To that end, and similar to the circumstances described in support of the first point of their motion, they indicate that Powell was was not required to anticipate that Rahman would operate a black vehicle, without its headlights illuminated and while intoxicated.

"Under the emergency doctrine, 'when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context' " (*Miloscia v New York City Bd. of Educ.*, 70 AD3d 904 [2012], quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322

[1991]). Inasmuch as the record presents an issue as to whether the circumstances with which Powell was faced were, indeed, unexpected and left little or no time for him to take any evasive action, it cannot be determined whether the doctrine applies in this instance (*see generally Makagon v Toyota Motor Credit Corp.*, 23 AD3d 443 [2005] [stating the general rule that a question of the existence of an emergency and the reasonableness of the response is an issue for the trier of fact]; *see also Pearson v Northstar Limousine, Inc.*, 123 AD3d 991 [2014] [emergency doctrine does not apply when the emergency was partially created by a driver's own conduct]).

As to that branch of moving defendants' motion for an order granting them summary judgment on their cross-claims against Rahman, while they may have established that Rahman's plea of guilty to vehicular assault was *a* proximate cause of the accident (*see Strychalski v Dailey*, 65 AD3d 546 [2009]), as discussed, *supra*, there may be more than one proximate cause of an accident. Given the fact that there are issues of fact with respect to potential comparative negligence on moving defendants' behalf, they are not entitled to summary judgment as a matter of law on their cross-claims against Rahman.

Finally, moving defendants request that, in the event they are not awarded summary judgment in their favor, they be granted leave to amend their answer to include an affirmative defense for plaintiff's lack of use of a seat belt. Plaintiff opposes that branch of the motion, indicating, *inter alia*, that moving defendants have failed to attach the proposed amended or supplemental pleading. The amendment to CPLR 3025 (b), effectively January 1, 2012, requires a movant seeking leave to amend his or her pleading not only to submit the proposed pleading, but to highlight the difference between the original pleading and the proposed amended pleading. Since moving defendants have failed to do both, that branch of the motion must be denied (*see* CPLR 3025 [b]; *Karl's Plumbing & Heating Co., Inc. v Yevool, Inc.*, Sup Ct, Queens County, February 3, 2012, Schulman, J., index No. 11677/2009; Patrick M. Connors, Supplementary Practice Commentary (McKinney's Cons Laws of NY, Book 7B, CPLR C3025:9A, 2013 Supp Pamph at 13). It is noted that moving defendants, in reply, fail to address plaintiff's opposition to this extent. Neither in reply do they, as an attempt to cure any deficiency, submit a proposed amended answer. It should also be noted that the matter has already twice appeared in the Trial Scheduling Part and has a final trial date of May 19, 2016 and, in such a circumstance, judicial discretion to award such a request is exercised "sparingly." Additionally and to that end, there is a lack of reasonable excuse for moving defendants having failed to seek such relief at an earlier stage in this litigation (*see Alrose Oceanside, LLC v Mueller*, 81 AD3d 574 [2011]).

Turning to plaintiff's cross motion for summary judgment in her favor, as pointed out by moving defendants' counsel in opposition to same, this is plaintiff's second motion seeking summary judgment in her favor. By prior order dated April 17, 2014, this court,

citing *Strychalski v Dailey* (65 AD3d at 546), held that plaintiff had failed to establish her freedom from negligence given the fact that she accepted a ride in Rahman's vehicle knowing that he was intoxicated. Inasmuch as the instant cross motion violates the rule against successive motions for summary judgment, and inasmuch as plaintiff has not presented newly discovered evidence or other sufficient cause for filing the successive motion (*see Vinar v Litman*, 110 AD3d 867 [2013]; *Sutter v Wakefern Food Corp.*, 69AD3d 844 [2010]), same is denied (*see Kimber Mfg., Inc. v Hanzus*, 56 AD3d 615 [2008]; B *&* *N Props., LLC v Elmar Assoc., LLC*, 51 AD3d 831 [2008]; *Selletti v Liotti*, 45 AD3d 669 [2007]; *see also GMAC Mtge., LLC v Bisceglie*, 109 AD3d 874 [2013]; *Wells Fargo Bank, N.A. v Ostiguy*, 42 Misc 3d 1237 [A] [Sup Ct Columbia County 2014]). It is further noted that plaintiff has not moved to renew her prior motion, nor has she made the requisite showing pursuant to CPLR 2221 (e) to the extent plaintiff's cross motion can be treated as one for renewal.

In any event, the contention that Rahman's actions have no bearing on the happening of this accident (and, in turn, that the moving defendants are solely liable for the subject accident) is belied by, *inter alia*, *Strychalski's* holding, specifically as it relates to Rahman's plea of guilty to Penal Law § 120.03 (a person is guilty of vehicular assault when that person operates a motor vehicle while intoxicated and, as a result, operates same in a matter which causes serious physical injury to another person).

Accordingly, the motion and cross motion are denied.

Dated: February 16, 2016

J.S.C.