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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

DEMETRIUS BRIGGS,

Plaintiffs,

Index No. 308493/2012

-against-

DECISION AND ORDER

ROCKALL CONTRSUCTION INC.,
REIDMAN ASSOCIATES INC.,
MALACHI J. MAGUIRE,

Defendants.

Hon. Sharon A. M. Aarons:

Plaintiffs move for summary judgment pursuant to CPLR 3212 in their favor as to liability only against defendants. Defendants file written opposition. The motion is granted.

On May 29, 2013, while slowly moving forward waiting to make a left turn from Franklin Avenue onto Madison Street, in the county of Kings, State of New York, the vehicle driven by plaintiff Demetrius Briggs (Briggs) was struck from behind by a vehicle owned by defendants Rockall Construction Inc. (Rockall) and Reidman Associates Inc., (Reidman), and operated by defendant Malachi J. Maguire (Maguire).

In support of the motion, plaintiff submits the pleadings; the unsigned, certified deposition transcript of plaintiff Briggs; the unsigned, certified deposition transcript of defendant Maguire, [1] and an uncertified copy of the police accident report. [2] Plaintiff testified that Franklin Avenue is a one-way street with two lanes of moving traffic, a bicycle lane and parking lanes on either side. Prior to the accident, plaintiff noticed defendants' vehicle, a trailer on the side of Madison Street.

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[1] The Court will consider plaintiff and defendant's deposition transcripts because a deposition transcript which was not signed, but which is certified by the reporter, may be considered where it is not challenged as inaccurate. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]). Here, defendant only argued that the parties deposition transcripts were unsigned, but not that they were inaccurate.

[2] Uncertified accident reports, even those which contain statements attributable to parties, are generally inadmissible hearsay and totally lacking in probative value. (*See Rivera v. GT Acquisition 1 Corp.*, 72 A.D.3d 525, 526, 899 N.Y.S.2d 46 [1st Dept. 2010]; *Coleman v. Maclas*, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009].)

As he reached the light, plaintiff stopped in the left lane and waited for the light to change so he could make a left turn. No other car was in front of his at the light. Plaintiff's car was stopped at a second line that was behind the crosswalk line. Defendants' truck was parked one-half car length behind that second line. The truck was parked partially in the left parking lane and partially in the left lane for moving traffic. When the light changed to green, plaintiff took his foot off of the gas pedal and, as his car was moving forward, the truck driver pulled out of his parking spot and hit plaintiff's vehicle. Plaintiff immediately hit the brakes, but defendants' vehicle continued to push his car into the intersection. Plaintiff's tires started to smoke, and that is when defendants' truck driver, Maguire, got out of his vehicle and came around, and his words were, "Oh, Shit! I didn't know I hit you. The truck is powerful."

Defendant Maguire testified that he pulled up to Franklin Avenue to drop off the machine/container that was loaded on his ten-wheeler flatbed type truck. He stated that the container sits in the back of the truck and is able to be rolled off the back of it for garbage and moving machinery. Defendant Maguire's truck was in a parking lane, but not completely parked, and part of his truck was also in the driving lane. Maguire was getting ready to raise the truck's hydraulic boom to release the container, and it was at that time he felt a small impact. Maguire stated that, when the container is raised, the protocol is that the truck moves forward and the container slides off. Defendant did not have anyone to assist him with unloading the container or directing traffic in any fashion, and although his truck contained flares, he did not use it to direct traffic. His truck moved forward less than five feet before he felt an impact.

Pursuant to Vehicle and Traffic Law § 1128 (a), "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." A violation of this section of the Vehicle and Traffic Law establishes prima facie liability on the part of the driver of the offending

vehicle, and imposes a burden on him or her to proffer a non-negligent explanation for the accident. *Flores v. City of New* York, 66. A.D.3d 599, 888 N.Y.S.2d 27 (1st Dept. 2009); *Williams v. New York City Transit Auth.*, 37 A.D.3d 827, 828, 832 N.Y.S.2d 54, 55 (2d Dept. 2007). Vehicle and Traffic Law § 1162 further provides that "[n]o person shall move a vehicle which is stopped, standing or parked unless and until such movement can be made with reasonable safety." A violation of this section, too, establishes prima facie liability on the part of the offending driver (*Adobea v Junel*, 114 AD3d 818 [2d Dept 2014]). Therefore, in order to survive summary judgment on the issue of liability, the driver of the offending vehicle must raise a triable issue of fact, such as an issue of fact concerning the plaintiff's comparative negligence. *See e.g. Zummo v. Holmes*, 57 A.D.3d 366, 869 N.Y.S.2d 447 (1st Dept. 2008).

Here, plaintiff's burden was met by his testimony that he was hit from behind by defendants' vehicle and Maguire's own testimony that the truck was occupying both a parking lane and a traffic lane when he moved it forward without making sure that it was safe to do so. In opposition, defendants fail to present any additional evidence that would raise a triable issue of act as to liability. Defendant's argument that plaintiff was moving at the time of the accident is irrelevant as, by Maguire's own admission, the truck was occupying two lanes of traffic at the time of the accident. Maguire testified that it was the protocol to move his truck forward when raising and releasing the container. It is apparent from this testimony that Maguire failed to keep the truck within a single lane without reasonably ascertaining that it was safe to do so. In short, there is no countervailing evidence to refute the fact that the accident was caused by the sole negligence of defendant Maguire. (*Corrigan v Porter Cab Corp.*, 101 A.D.3d 471, 472, 955 N.Y.S.2d 336 [1st Dept. 2012]; *see also Gutierrez v Trillium USA, LLC*, 111 A.D.3d 669, 670-671, 974 N.Y.S.2d 563 [2d Dept. 2013]; *Renteria v Simakov*, 109 A.D.3d 749, 972 N.Y.S.2d 15 [1st Dept. 2013]). In addition, defendant's first affirmative defense that any damages sustained by the plaintiffs were caused by plaintiffs'

culpable conduct, including contributory negligence or assumption of the risk, and not by the culpable conduct or negligence of the defendants, is stricken. Defendants have not explained the manner in which either plaintiff acted negligently. (*See Stevens v. Zukowski*, 55 A.D.3d 1400, 1401, 865 N.Y.S.2d 435, 436 [4th Dept. 2008]; *Jedrysik v. Panorama Tours, Ltd.*, 34 A.D.3d 1338, 1340, 824 N.Y.S.2d 848, 849 [4th Dept. 2006]; *Rodriguez v. Emanuele*, 36 Misc. 3d 1211(A), 954 N.Y.S.2d 761 [Sup. Ct., Bronx County 2012]).

The parties have not litigated the issue of whether the plaintiffs sustained serious injuries pursuant to Insurance Law § 5102 (d). The issue of "serious injury" remains to be determined during the damages trial. (*Zecca v. Riccardelli*, 293 A.D.2d 31, 742 N.Y.S.2d 76 [1st Dept. 2002]; *Reid v. Brown*, 308 A.D.2d 331, 764 N.Y.S.2d 260 [1st Dept. 2003]).

Accordingly, plaintiff's motion for summary judgment as to liability only against the defendants is granted. It is hereby

ORDERED that the motion of plaintiff Demetrius Briggs is granted with regard to liability against defendants Rockall Construction Inc., Reidman Associates Inc., and defendant Malachi J. Maguire; and it is further

ORDERED that defendants' first affirmative defense for reduction of damages based upon comparative negligence or assumption of the risk is stricken; and it is further

ORDERED that a trial of the issues of damages and "serious injury" shall be had before the court; and it is further

ORDERED that plaintiffs' counsel shall serve a copy of this order with notice of entry upon counsel for defendants.

Dated: March 9, 2016

SHARON A. M. AARONS, J.S.C.