Forgione v New York City Tr. Auth.
2018 NY Slip Op 32121(U)
July 12, 2018
Supreme Court, Queens County
Docket Number: 706632/2016
Judge: Joseph Risi
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INDEX NO. 706632/2016
RECEIVED NYSCEF: 07/19/2018

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JOSEPH RISI IA Part 3
Acting Supreme Court Justice

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PETER F. FORGIONE and CHRISTINA M. FORGIONE,

Plaintiffs,

-against-

NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, RAMON A. MARMOL and WENTING SUN,

Defendants.

---X

Index Number 706632/2016

Motion Seq. #5, 6, and 7

DECISION/ORDER

FILED
JUL 2018
COUNTY CLERK
QUEENS COUNTY

The following papers numbered EF74 to EF99, 1-12 read on this motion by Wenting Sun and a separate motion by the New York City Transit Authority (NYCTA), to dismiss the complaint on the ground that Peter F. Forgione (the injured plaintiff), did not sustain a "serious" injury, within the meaning of Insurance Law §5102; and a motion by Wenting Sun for partial summary judgment in her favor on the issue of liability pursuant to CPLR §3212.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits	EF74-85, 1-4
Answering Affidavits - Exhibits	EF86-97, 7-8
Reply Affidavits	EF98-99, 9-12

Upon the foregoing papers, it is ordered that the motions are consolidated for determination as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained in a multi-car motor vehicle accident. The undisputed record indicates that a vehicle operated by NYCTA driver Ramon A. Marmol struck the rear of a Subaru owned by Christina Forgione and operated by Peter F. Forgione (herein "plaintiff" or "the injured plaintiff"), propelling the Forgione vehicle into the rear

of a Jeep operated by Sun. Based upon the rear-end collision, Sun moves for summary judgment in her favor on the issue of liability. The motion by Sun is opposed by the NYCTA and by the injured plaintiff.

Peter F. Forgione alleges that, as a result of the subject accident, he injured his neck and lower back. NYCTA and Sun separately move to dismiss the complaint on the ground that the injuries sustained by Forgione were not "serious." The NYCTA/Sun motions are opposed by plaintiffs.

Serious Injury

The motions for summary dismissal of the complaint on the ground that the injured plaintiff did not sustain a serious injury, are denied. The defendants Sun and NYCTA failed on their separate motions for summary judgment to establish their prima facie entitlement to judgment as a matter of law dismissing the complaint on the ground that the plaintiff did not sustain a serious injury within the meaning of Insurance Law § 5102 (d) as a result of the subject accident (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]; *Gaddy v Eyler*, 79 NY2d 955 [1992]). Moving defendant NYCTA relies upon the orthopedic report of Dr. Stuart Herson, and the neurological report of Dr. Marianna Golden, both dated August 23, 2017, both indicating that plaintiff has full range of motion of his cervical and lumbar spine and that the alleged injuries thereto have resolved. These findings are adopted by Wenting Sun in her motion to dismiss the complaint on the ground that the injured plaintiff did not sustain a serious injury. The defendants' medical experts, however, never addressed the claim, clearly set forth in the plaintiff's verified bill of particulars, that he sustained a medically determined injury or impairment of a nonpermanent nature which prevented him from performing substantially all of the material acts which constituted his usual and customary daily activities for not less than 90 days during the 180 days immediately following the accident. The defendants' respective physicians each first examined the plaintiff more than six months after the accident. Although both of the physicians stated that the plaintiff was not disabled when they examined him, neither of them addressed the possibility that he had a medically determined injury or impairment immediately following the accident that affected his activities during the 180 days immediately following the accident (*see Jocelyn v Singh Airport Serv.*, 35 AD3d 668, 669 [2d Dept 2006]; *Talabi v Diallo*, 32 AD3d 1014 [2006]; *Volpetti v Yoon Kap*, 28 AD3d 750, 751 [2006]; *Sayers v Hot*, 23 AD3d 453, 454 [2005]). Since the defendants failed to establish their respective prima facie burdens, it is unnecessary to consider whether the plaintiffs' papers in opposition are sufficient to raise a triable issue of fact (*see Talabi v Diallo, supra; Volpetti v Yoon Kap, supra; Sayers v Hot, supra; Coscia v 938 Trading Corp.*, 283 AD2d 538 [2001]).

Liability

The motion by Sun for summary judgment in her favor on the issue of liability, is denied. It is well settled that "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law * * * [and] [f]ailure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 [1986]; *Elzer v Nassau County*, 111 AD2d 212, 213 [2d Dept 1985]).

It is well-settled that where a rear-end collision occurs, a presumption of prima facie liability arises and the burden shifts to the driver of the rear vehicle to provide a non-negligent explanation (*Somers v Condlin*, 39 A.D.3d 289, 289 [1st Dept 2007]). Such a "sufficient" explanation has been found where defendant's vehicle (the rearmost vehicle) suffered a mechanical failure or skidded on wet pavement (*Reid v Courtesy Bus Co.*, 234 AD2d 531 [2d Dept 1996]), where the rearmost vehicle tried unsuccessfully to brake and turn the steering wheel to avoid the rear-end hit on an icy and snowy roadway (*Simpson v Eastman*, 300 AD2d 647 [2d Dept 2002]), or where the stopping vehicle was itself rear-ended and propelled into the stopped vehicle (*Katz v Masada II Car & Limo Service, Inc.*, 43 AD3d 876 [2d Dept 2007]). In some circumstances, the sudden stop of a lead vehicle can constitute a sufficient explanation for the rear-end collision, such as when it fails to make a proper signal (*Klopchin v Masri*, 45 AD3d 737 [2d Dept 2007]). However, usually sudden stops that are coupled with other negligent acts or violations of the Vehicle and Traffic Law on the part of the stopped vehicle are sufficient to rebut the presumption of negligence (*Id.*); *see also Abbott v Picture Cars East, Inc.*, 78 AD3d 869 [2d Dept 2010] (defendant's vehicle made an improper lane change then stopped suddenly in front of plaintiff's vehicle). A bare explanation that the frontmost vehicle suddenly stopped, is insufficient to rebut the presumption (*see Ramirez v Konstanzer*, 61 AD3d 837 [2d Dept 2009]); *Jumandeo v Franks*, 56 AD3d 614 [2d Dept 2008]). Indeed, it is well settled that "[a] driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself and the cars ahead of him to avoid collisions with stopped vehicle, taking into account weather and road conditions" (*Malone v Morillo*, 6 AD3d 324 [1st Dept 2004], *quoting Mitchell v Gonzalez*, 269 AD2d 250 [1st Dept 2000]). Here, plaintiff's affidavit raises an issue of fact with the assertion that Sun's vehicle suddenly and without warning, jumped into the right turning lane from the left lane, and in front of the injured plaintiff's vehicle. Specifically, Forgione states, "as I approached the entrance to the supermarket parking lot located to my right, I noticed [Sun's vehicle] in front of me in the left lane. I observed [Sun's vehicle] turn right in front of me from the left lane toward the parking lot and I applied my brakes. I then felt a heavy impact to the rear of my car by a Transit bus which caused my car to be pushed into the passenger side of [Sun's vehicle] . . ."

Vehicle and Traffic Law §1128 states in relevant part:

> Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:
> (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*. (Emphasis added).

Similarly, Vehicle and Traffic Law §1163 states, in relevant part:

> (a) No person shall...turn a vehicle from a direct course or move right or left upon a roadway unless and *until such movement can be made with reasonable safety* (Emphasis added).

Based upon the Affidavit of the injured plaintiff, Sun violated the foregoing statutes in that she changed lanes without first ascertaining that said movement could be made safely.

Notably, the operator of the bus testified that Forgione's vehicle sped up and crossed from the left lane into the right lane in the path of the bus . . . the Forgione vehicle then decreased its speed when it got into the right lane and contact occurred quickly (between the bus and Forgione's vehicle)." Simply put, the operator of the bus testified that the Subaru operated by Forgione cut in front of the bus thereby causing the subject collision[s].

There appears, therefore, to be at least three different versions of the multi-car collision, with each party recalling different material facts which are in conflict with each other. The drastic remedy of summary judgment should be granted only if there are no triable issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist" (*Pearson v Dix McBride, LLC,* 63 AD3d 895, 895 [2d Dept 2009]; *Kolivas v Kirchoff*, 14 A.D.3d 493 [2d Dept 2005]; *see Dykeman v Heht*, 52 AD3d 767, 768 [2d Dept 2008]). Additionally, in determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmovant (*see Brown v Outback Steakhouse*, 39 AD3d 450, 451 [2d Dept 2007]). Here, viewing the evidence in the light most favorable to the plaintiffs, Sun failed to establish, prima facie, her entitlement to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Under the circumstances, triable issues of fact exist as to which party or parties were at fault in the subject accident and, therefore, the motion by Sun for summary judgment in her favor on the issue of liability, is denied.

Conclusion

The motion by NYCTA to dismiss the complaint on the ground that plaintiff did not sustain a serious injury, is denied.

The motion by Sun to dismiss the complaint on the ground that plaintiff did not sustain a serious injury, is denied.

The motion by Sun for partial summary judgment in her favor on the issue of liability, is denied.

This constitutes the decision and order of the Court.

Date: July 12, 2018

7/12/18

HON. JOSEPH RISI, A.J.S.C.

FILED
JUL 19 2018
COUNTY CLERK
QUEENS COUNTY