

Harika v Feldman

2018 NY Slip Op 32246(U)

September 12, 2018

Supreme Court, New York Court

Docket Number: 159637/2016

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT:	<u>HON. ADAM SILVERA</u>	PART	IAS MOTION 22
	<i>Justice</i>		
	-----X	INDEX NO.	<u>159637/2016</u>
NADIA HARIKA,			08/01/2018,
Plaintiff,		MOTION DATE	<u>08/01/2018,</u>
- v -			<u>08/01/2018</u>
PHILIP FELDMAN, JIA WU, ALASKA TAX INC., MONIRUL ISLAM		MOTION SEQ. NO.	<u>002 003 004</u>
Defendant.			

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 89
were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 77, 79, 84, 85, 87, 88, 90, 92, 94
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 78, 81, 82, 83, 86, 91, 93, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106
were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, it is ordered that defendants Alaska Taxi, Inc. and Monirul Islam’s motion for summary judgment to dismiss on the issue of liability (mot. seq. no. 002), plaintiff’s motion for summary judgment on the issue of liability as against all defendants (mot. seq. no. 003), and defendant Jia H. Wu’s threshold motion for summary judgment as well as defendant Philip Feldman’s threshold cross-motion for summary judgment (mot. seq. no. 004) are all decided below.

Defendant Wu’s motion for summary judgment, and defendant Feldman’s cross-motion for summary judgment, both seeking to dismiss plaintiff’s complaint, are denied. Defendant Wu

argues that plaintiff failed to show that she sustained a serious injury pursuant to Insurance Law §5102(d) in that, based upon the examinations of defendants' doctors, plaintiff's ranges of motion are within normal ranges, she doesn't suffer from a substantial curtailment of daily activities for 90 out of the 180 days following the accident, plaintiff has no permanent loss, and that disc bulges alone do not constitute a serious injury. Defendant Feldman cross-moves for summary judgment and joins in defendant Wu's motion, seeking the same relief.

The standards of summary judgment are well settled. To grant summary judgment, it must be clear that no material or triable issues of fact are presented. *See Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 (1957). "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case". *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]". *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." *Garcia v J.C. Duggan, Inc.*, 180 AD2d 579, 580 (1st Dep't 1992), citing *Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 (1st Dep't 1990). As such, summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence. *See Ugarriza v Schmieder*, 46 NY2d 471, 475-476 (1979).

In opposition, plaintiff proffers, *inter alia*, her physician's affidavit and medical reports which shows limitations in plaintiff's ranges of motion. As to defendant Wu's argument that

plaintiff failed to explain her gap in treatment, the Court notes that plaintiff proffers her own affidavit in which she specifically states that she treated with her doctor “approximately three times per week through April 2018, when [her] no-fault benefits were cut off.” Miller Aff. In Opp., Exh. E, Harika Affidavit, ¶8. Moreover, Dr. Goldenberg’s report specifically outlines the medical plan set up for plaintiff following her initial examination which includes physical therapy 4 times a week for four weeks, as well as a home exercise program. Thus, defendant Wu’s gap in treatment argument fails. Here, as there are conflicting doctors’ affidavits and medical reports, there exists an issue of fact precluding summary judgment for defendants Wu and Feldman such that the motion and cross-motion are denied.

Turning to defendants Alaska Taxi, Inc. and Monirul Islam’s motion for summary judgment seeking to dismiss, they argue that their vehicle was stopped when it was hit in the rear by defendant Feldman’s vehicle in this three car accident, such that they are not liable for any injuries plaintiff may have sustained in the accident. Here, it is uncontested that plaintiff was a passenger in a taxi operated by defendant Islam and owned by defendant Alaska Taxi. On the date and time of the accident, defendants Alaska Taxi and Islam’s stopped vehicle was rear ended by defendant Feldman’s vehicle which was rear ended by defendant Wu’s vehicle. Thus, defendants Alaska Taxi and Islam have made out a prima facie case of negligence, and the burden shifts to plaintiff and co-defendants to raise a triable issue of fact. *See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). “[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] shift[s] the burden to [the non-moving party] to come forward with an adequate nonnegligent explanation for the accident”. *Cruz v Lise*, 123 AD3d 514 (1st Dep’t 2014)(internal quotations omitted).

Here, plaintiff and co-defendants argue that an issue of fact exists as to defendants Alaska Taxi and Islam's liability as their vehicle allegedly stopped short, thus causing the accident. It is well settled that the argument that the "vehicle stopped abruptly in front of him before he rear-ended [the vehicle immediately in front] is insufficient to raise an issue of fact as to whether [the front vehicle] was negligently operating his vehicle prior to the collision." *Chame v Kronen*, 150 AD3d 622, 622 (1st Dep't 2017). The Appellate Division, First Department has consistently held that, in opposition to summary judgment, "[i]t is not a sufficient defense to claim that [a] vehicle stopped short." *Mitchell v Gonzalez*, 269 AD2d 250, 251 (1st Dep't 2000). As such, plaintiff and co-defendants' have failed to raise a genuine issue of triable fact sufficient to defeat the motion for summary judgment. Thus, defendants Alaska Taxi and Islam's motion is granted and this action is dismissed as against them only.

Lastly, plaintiff's motion for summary judgment, pursuant to CPLR 3212, is granted on the issue of liability against defendants Feldman and Wu. Plaintiff's motion, which contends that she was a passenger in a taxi operated by defendant Islam and owned by defendant Alaska Taxi, when such stopped vehicle was struck in the rear by a vehicle operated by defendant Feldman, has made out a prima facie case of negligence and the burden shifts to defendants Feldman and Wu to raise a triable issue of fact. *See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). A plaintiff who establishes that she was an innocent passenger is entitled to summary judgment on the issue of liability. *See Mello v Narco Cab Corp.*, 105 AD3d 634, 635 (1st Dep't 2013).

Here, defendants Alaska Taxi, Islam, and Wu oppose plaintiff's motion, arguing that summary judgment must be denied as plaintiff has failed to establish that she sustained a serious injury. The Court notes that the issue of serious injury is one for the jury to determine, and does

not preclude summary judgment as to liability. Thus, defendants Alaska Taxi, Islam, and Wu failed to raise a triable issue of fact to preclude summary judgment on the issue of liability.

Defendant Feldman also opposes plaintiff's motion for summary judgment arguing that an issue of fact exists as to whether plaintiff was contributorily negligent in causing her own injuries, such as by failing to wear a seatbelt. However, the Court of Appeals explicitly held that "[t]o be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault." *Rodriguez v City of New York*, 31 NY3d 312, 324-325 (2018). The Court of Appeals specifically stated that "comparative negligence is *not* a defense to the cause of action of negligence, because it is not a defense to any element (duty, breach, causation) of plaintiff's prima facie cause of action for negligence, and as CPLR 1411 plainly states, is not a bar to plaintiff's recovery, but rather a diminishment of the amount of damages." *Id.* As such, defendant Feldman has also failed to raise a genuine issue of fact, and plaintiff's motion for summary judgment is granted as to defendants Feldman and Wu on the issue of liability.

Accordingly, it is

ORDERED that defendants Alaska Taxi Inc. and Monirul Islam's motion for summary judgment (mot. seq. no. 002) to dismiss this action as against them is granted and this action is dismissed as to defendants Alaska Taxi Inc. and Monirul Islam only; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Alaska Taxi Inc. and Monirul Islam dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs, and amend the caption to remove defendants Alaska Taxi Inc. and Monirul Islam only; and it is further

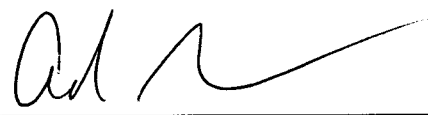
ORDERED that the said claims and cross-claims against defendants Philip L. Feldman and Jia H. Wu are severed and the balance of the action shall continue; and it is further

ORDRED that defendant Jia H. Wu's threshold motion for summary judgment is denied (mot. seq. no. 004), and defendant Philip L. Feldman's threshold cross-motion for summary judgment is denied; and it is further

ORDERED that plaintiff's motion for summary judgment (mot. seq. no. 003) is granted on the issue of liability as against defendants Philip L. Feldman and Jia H. Wu; and it is further

ORDERED that within 30 days of entry, defendants Alaska Taxi, Inc. and Monirul Islam shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.



9/12/2018
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE