Toro v Ndiaye
2019 NY Slip Op 35032(U)
November 25, 2019
Supreme Court, Bronx County
Docket Number: Index No. 21653/2019E
Judge: John R. Higgitt

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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AISHA TORO and JULIO RODRIGUEZ, JR,

Plaintiffs,

- against -

ALIOUNE NDIAYE, ARGUS TRANS, INC. and PHILIP SERIN,

Defendants.

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DECISION AND ORDER

Index No. 21653/2019E

John R. Higgitt, J.

This is a negligence action to recover damages for personal injuries plaintiffs sustained in a motor vehicle accident that occurred on April 29, 2018. Plaintiffs seek summary judgment on the issue of defendants Ndiaye and Argus Trans, Inc's ("the Ndiaye defendants") liability for causing the subject accident and dismissal of the Ndiaye defendants' second affirmative defense. Defendant Serin cross-moves for summary judgment seeking dismissal of the complaint as against him and the cross claims against him. For the reasons that follow, plaintiffs' motion and defendant Serin's cross motion are granted.

In support of their motion for summary judgment, plaintiffs submitted the pleadings, their affidavits and the police accident report. Plaintiffs averred that they were passengers in defendant Serin's vehicle, which was at a complete stop due to traffic, when the Ndiaye defendants' vehicle struck the rear of the vehicle that plaintiffs occupied.

In support of his cross motion, defendant Serin submitted his affidavit, in which he averred that he was stopped at the intersection of Southern Boulevard and East 182 Street in Bronx County due to a red traffic signal. Although the signal turned green, defendant Serin

remained stopped due to a pedestrian in the cross walk. While his vehicle was stopped it was struck in the rear by the Ndiaye defendants' vehicle.

"A rear-end collision with a stationary vehicle creates a prima facie case of negligence requiring a judgment in favor of the stationary vehicle unless defendant proffers a non-negligent explanation for the failure to maintain a safe distance . . . A driver is expected to drive at a sufficiently safe speed and to maintain enough distance between himself [or herself] and cars ahead of him [or her] so as to avoid collisions with stopped vehicles, taking into account weather and road conditions" (*LaMasa v Bachman*, 56 AD3d 340, 340 [1st Dept 2008]). The happening of a rear-end collision is itself a prima facie case of negligence of the rearmost driver in a chain confronted with a stopped or stopping vehicle (*see Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]).

Vehicle and Traffic Law § 1129(a) states that a "driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway" (*see Darmento v Pacific Molasses Co.*, 81 NY2d 985, 988 [1993]). Based on the plain language of the statute, a violation is clear when a driver follows another too closely without adequate reason and that conduct results in a collision (*id.*).

Plaintiffs made a prima facie showing of entitlement to judgment as a matter of law on the issue of the Ndiaye defendants' liability, and defendant Serin made a prima facie showing of entitlement to judgment as a matter of law dismissing the complaint as against him and the cross claims against him.

The Ndiaye defendants argue that questions of fact exist precluding summary judgment in favor of plaintiffs or defendant Serin. The Ndiaye defendants submit the affidavit of defendant

Ndiaye, who avers that at the time of the accident he was stopped behind defendant Serin's vehicle before the light turned green. At that time, defendant Serin began to move forward and then suddenly came to an abrupt stop. Due to defendant Serin's sudden stop, defendant Ndiaye was unable to avoid a collision with the rear of defendant Serin's vehicle.

Generally, a claim that the driver of a rear-ended vehicle made a sudden stop is insufficient to constitute a non-negligent explanation for the accident (*see Bajrami v Twinkle Cab Corp.*, 147 AD3d 649 [1st Dept 2017]). Thus, the general rule regarding liability for rear-end accidents "has been applied when the front vehicle stops suddenly in slow-moving traffic; even if the sudden stop is repetitive; when the front vehicle, although in stop-and-go traffic, stopped while crossing an intersection; and when the front car stopped after having changed lanes" (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dept 1999]). Additionally, "[a] driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle" (*Nsiah-Ababio v Hunter*, 78 AD3d 672, 672 [2d Dept 2010]). The principle that a claim of a sudden stop by the rear-ended vehicle is insufficient to constitute a non-negligent explanation for a hit-in-the-rear accident has particular force when the accident occurs on a local public roadway in the City of New York (*see Animah v Agyei*, 63 Misc 3d 783 [Sup Ct, Bronx County 2019]).

Here, any sudden stop by defendant Serin does not provide the Ndiaye defendants with a non-negligent explanation for the collision. Critically, the Ndiaye defendants offer no excuse for defendant Ndiaye's failure to maintain a reasonably safe distance from defendant Serin vehicle.[1]

[1] Plaintiffs correctly argue that defendant Ndiaye's affidavit raises nothing more than feigned issues of fact because the affidavit conflicts with his unexplained inculpatory police-report admission (*see Garzon-Victoria v Okolo*, 116 AD3d 558 [1st Dept 2014]; *see also Colon v Vals Ocean Pac. Sea Food, Inc.*, 157 AD3d 462 [1st Dept 2018]). Even considering defendant Ndiaye's affidavit, it fails to raise a triable issue of fact for the reason provided above.

The Ndiaye defendants further assert that the motion is premature because depositions have not been completed. This motion, however, is not premature because "the information as to why the Ndiaye defendant[s'] vehicle struck the rear end of [the Ndiaye defendants'] car reasonably rests within defendant driver's own knowledge" (*Rodriguez v Garcia*, 154 AD3d 581, 581 [1st Dept 2017]; *see Castaneda v DO & CO New York Catering, Inc.*, 144 AD3d 407 [1st Dept 2016]). The mere hope that a party might be able to uncover some evidence during the discovery process is insufficient to deny summary judgment (*see Castaneda*, *supra*; *Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dept 2010]; *Planned Bldg. Servs., Inc. v S.L. Green Realty Corp.*, 300 AD2d 89 [1st Dept 2002]). As discussed above, defendant Ndiaye's explanation regarding how the accident occurred does not afford the Ndiaye defendants a non-negligent explanation, and the Ndiaye defendants have not demonstrated that discovery might yield evidence relevant to the issue of whether defendant Ndiaye has a non-negligent explanation for hitting the rear of defendant Serin's vehicle.

The aspect of plaintiffs' motion seeking dismissal of the Ndiaye defendants' second affirmative defense alleging plaintiffs' comparative fault is granted. Under the circumstances, the "innocent passenger" plaintiffs are entitled to dismissal of defendants' affirmative defense of comparative fault (*see Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]). Moreover, the doctrine of assumption of risk has no applicability in this case (*see Trupia v Lake George Cent. School Dist.*, 14 NY3d 392 [2010]).

Accordingly, it is

ORDERED, that aspect of plaintiffs' motion for partial summary judgment on the issue of the Ndiaye defendants' liability is granted; and it is further

ORDERED, that the aspect of plaintiffs' motion seeking dismissal of the Ndiaye defendants' second affirmative defense is granted and that defense is dismissed; and it is further

ORDERED, that defendant Serin's cross motion for summary judgment is granted, and the complaint as against him and the cross claims against him are dismissed; and it is further

ORDERED, that the Clerk of the Court shall enter judgment in favor of defendant Serin dismissing the complaint as against him and the cross claims against him.

The parties are reminded of the January 24, 2020 compliance conference before the undersigned.

This constitutes the decision and order of the court.

Dated: November 25, 2019

John R. Higgitt, A.J.S.C.