Benitez v Ryder Truck Rental, Inc.
2020 NY Slip Op 34471(U)
October 23, 2020
Supreme Court, Suffolk County
Docket Number: 618009/2018
Judge: Linda Kevins

SHORT FORM ORDER

INDEX No. 618009/2018
CAL. No.

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 29 - SUFFOLK COUNTY

PRESENT:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE 7/22/2020
ADJ. DATE 7/28/2020
Mot. Seq. # 002 - MG
Mot. Seq. #003 - XMD

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HANAHN BENITEZ,

Plaintiff,

- against -

RYDER TRUCK RENTAL, INC., RYDER SYSTEM, INC., DARNELL L. NICHOLAS, MICHEL SALINAS MARTINEZ, STRAIGHT-LINE TRUCKING INC.

Defendants.

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Upon the following papers e-filed and read on this motion for summary judgment: Notice of Motion and supporting papers by plaintiff, dated May 19, 2020; Answering Affidavits and supporting papers by defendants Nicholas and Straight-Line Trucking, Inc., dated July 21, 2020; Replying Affidavits and supporting papers by plaintiff, dated July 27, 2020; **Notice of Cross Motion and supporting papers** by defendant Michael Salinas Martinez, dated June 4, 2020 ; Answering Affidavits and supporting papers by Nicholas and Straight-Line Trucking, Inc., dated July 21, 2020; Replying Affidavits and supporting papers to cross-motion by Martinez, dated July 27, 2020; Other ___; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion and the cross motion of defendant Michel Salinas Martinez are hereby consolidated for purposes of this determination; and it is further

ORDERED that plaintiff's motion for an order pursuant to CPLR 3212 (e) granting partial summary judgment in her favor on the issue of liability against defendants Darnell Nicholas and Straight-Line Trucking, Inc., and for summary judgment in her favor on the issue of her own negligence is granted; and it is further

ORDERED that the motion of defendant Michel Salinas Martinez, improperly denominated as a cross motion, for an order granting him summary judgment dismissing the complaint against him and dismissing the cross claims against him is denied; and it is further

ORDERED that the Clerk of the Court is directed to amend the caption of this action by removing defendants Ryder Truck Rental, Inc. and Ryder System, Inc., from the caption, as the action was discontinued against them; and it is further

ORDERED that counsel for the parties, and if a party has no counsel, then the party, are directed to appear before the Court in IAS Part 29, located at the Alan D. Oshrin Courthouse, One Court Street, Riverhead, New York 11901, **on December 8, 2020 at 9:30 a.m.**, for a Conference, or if the Court is still operating remotely due to the COVID-19 health crisis, such appearance shall be held remotely. Counsel and any parties who are not represented by counsel shall, **with a copy to all parties, contact the court by email at Sufkevins@nycourts.gov at least one week prior to the date of the scheduled conference** to obtain the date, time and manner of such conference; and it is further

ORDERED that if this Order has not already been entered, plaintiff is directed to promptly serve a certified copy of this Order, pursuant to CPLR §§8019(c) and 2105, upon the Suffolk County Clerk who is directed to hereby enter such order; and it is further

ORDERED that upon Entry of this Order, plaintiff is directed to promptly serve a copy of this Order with Notice of Entry upon all parties and to promptly file the affidavits of service with the Clerk of the Court.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff as a result of a motor vehicle accident that occurred on September 10, 2019 on the Long Island Expressway near exit 56 in the Town of Islip. The accident allegedly happened when a vehicle that plaintiff was riding in as a passenger, owned and operated by defendant Michael Salinas Martinez (hereinafter Martinez) was struck in the rear by a vehicle driven by defendant Darnell Nicholas (hereinafter Nicholas) during the course of his employment with defendant Straight-Line Trucking Inc. (hereinafter Straight-Line). Initially, the Court notes that the action was discontinued against Ryder Truck Rental, Inc. and Ryder System, Inc. by stipulation of discontinuance dated August 28, 2019.

Plaintiff now moves for partial summary judgment on the issue of liability against defendants Nicholas and Straight-Line, arguing that Nicholas negligently operated his motor vehicle during the course of his employment with Straight-Line, and that Straight-Line is vicariously liable for the actions of Nicholas under the doctrine of respondent superior. In support of the motion, plaintiff has submitted copies of the pleadings, a verified bill of particulars, an uncertified police accident report and the transcript of her deposition testimony.

At her deposition, plaintiff testified that on the date of the accident she was a passenger in a vehicle driven by Martinez, and they were traveling eastbound on the Long Island Express to go to Riverhead. She testified that she was sitting in the rear of the vehicle on the passenger

side, that she was wearing a seatbelt, and that the accident happened at approximately 3:00 a.m. Plaintiff testified that the roads were dry, the weather was clear, and that it was dark outside, and that several street lights were illuminated. She testified that Martinez was driving the vehicle in a proper manner, though he was driving it a bit fast. Plaintiff was asked about the traffic conditions at the time of the accident, and she testified that she did not recall. She testified that her vehicle was in the right lane of travel at the time of the accident, and that prior to the accident she did not hear the sound of tires screeching nor did she hear the sound of a horn, but she felt a heavy impact to the rear of the vehicle. She testified that her body was pushed forward into the back side of the front-passenger seat, and she used her hands to protect herself, but her face sustained lacerations, among other things, and she was taken by ambulance to Northwell Hospital in Brentwood.

It is well settled that a party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Friends of Animals v Associated Fur Mfrs.***, 46 NY2d 1065, 1067, 416 NYS2d 790 [1979]). The failure of the moving party to make a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant establishes such burden, the burden shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]. The court's function is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility; therefore, in determining the motion for summary judgment, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see* ***Roth v Barreto***, 289 AD2d 557, 735 NYS2d 197 [2001]; ***O'Neill v Fishkill***, 134 AD2d 487, 521 NYS2d 272 [1987]).

The Vehicle and Traffic Law establishes standards of care for motorists, and an unexcused violation of such standards of care constitutes negligence per se (*see* ***Barbieri v Vokoun***, 72 AD3d 853, 900 NYS2d 315 [2d Dept 2010]; ***Coogan v Torrisi***, 47 AD3d 669, 849 NYS2d 621 [2d Dept 2008]; ***Dalal v City of New York***, 262 AD2d 596, 692 NYS2d 468 [2d Dept 1999]). Vehicle and Traffic Law Section 1129 (a) provides: "The 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."

When the driver of a vehicle approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (***Catanzaro v Edery***, 172 AD3d 995, 101 NYS3d 170 [2d Dept 2019]; ***Tumminello v City of New York***, 148 AD3d 1084, 49 NYS3d 739 [2d Dept 2017]; ***Brothers v Bartling***, 130 AD3d 554, 13 NYS3d 202 [2d Dept 2015]; ***Gutierrez v Trillium USA, LLC***, 111 AD3d 669, 974 NYS2d 563 [2d Dept 2013]). A rear-end collision with a *stopped or stopping* (emphasis added) vehicle creates a prima facie case of negligence with respect to the operator of the rear vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a nonnegligent explanation for the collision

(***Tutrani v County of Suffolk***, 10 NY3d 906, 861 NYS2d 610 [2008]; ***Edgerton v City of New York***, 160 AD3d 809, 74 NYS3d 617 [2d Dept 2018]; ***Nowak v Benites***, 152 AD3d 613, 60 NYS3d 48 [2d Dept 2017]; ***Le Grand v Silberstein***, 123 AD3d 773, 999 NYS2d 96 [2d Dept 2014]).

In addition to the transcript of her deposition testimony, plaintiff submits an uncertified police accident report. The police accident report does not indicate whether the officer at the scene of the accident witnessed it, and it, therefore constitutes hearsay and is inadmissible (*see* ***Jiang-Hong Chen v Heart Tr., Inc.***, 143 AD3d 945, 39 NYS3d 504 [2d Dept 2016]; ***Allstate Ins. Co. v Ramlall***, 132 AD3d 617, 17 NYS3d 308 [2d Dept 2015]; ***Lacagnino v Gonzalez***, 306 AD2d 250, 760 NYS2d 533 [2d Dept 2003]). While the report contains an admission by defendant Nicholas and would normally be admissible as an exception to the hearsay rule, the police report itself is not certified, and thus, is not in admissible form. Therefore, the admission is also inadmissible and was not considered in the determination of the motion (see CPLR 4518 [a]; ***Yassin v Blackman***, ___ AD3d ____, 2020 NY Slip Op 05090 [2 Dept 2020]). In ***Yassin***, the Court reviewed a line of cases that deemed, as admissible, information contained in uncertified police accident reports which fell within certain hearsay exceptions and concluded that they "were wrong," and that they will no longer be followed. The Court held that: "[A] party's admission contained within a police accident report may not be bootstrapped into evidence if a proper foundation for the admissibility of the report itself has not been laid" (***Yassin v Blackman***, ___AD3d___, 2020 NY Slip Op 05090). The Court specifically constrained its ruling to cases "in which a party affirmatively proffers a police accident report in support of a motion for summary judgment" (*id.*).

Plaintiff also submits a document, dated April 2019, entitled "Suffolk County Conviction Search" which contains information regarding defendant Nicholas. It states that Nicholas was charged with "followed too closely" on the date of the accident, and that he was convicted on October 17, 2018. The document lacks authentication and is, thus, inadmissible.

Here, plaintiff established prima facie her entitlement to summary judgment on the issue of the liability of defendants Nicholas and Straight-Line, through the transcript of her deposition testimony. It is undisputed that plaintiff was a passenger in a vehicle that was rear ended by defendant Nicholas, and she did not engage in any culpable conduct which contributed to the happening of the accident (***Lopez v Suggs***, 186 AD3d 589, 126 NYS2d 676 [2d Dept 2020]; ***Romain v City of NY***, 177 AD3d 590, 112 NYS3d 162 [2d Dept 2019]). Having established her prima facie case of entitlement to summary judgment in her favor, the burden shifts to defendants to proffer evidence in admissible form raising a triable issue of fact (CPLR 3212 [b]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

Defendants Nicholas and Straight-Line Trucking, Inc. oppose the motion on the grounds that it is premature as they have not conducted discovery. However, defendants fail to demonstrate that additional discovery may lead to relevant evidence or that facts essential to oppose the motion are exclusively within the knowledge and control of plaintiff (*see* CPLR 3212 [f]; ***Skura v Wojtlowski***, 165 AD3d 1196, 87 NYS3d 100 [2d Dept 2018]; ***Richards v Burch***,

132 AD3d 752, 18 NYS3d 87 [2d Dept 2015]; ***Suero-Sosa v Cardona***, 112 AD3d 706, 977 NYS2d 61 [2d Dept 2013]). The "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process" is an insufficient basis for denying the motion (***Gasis v City of New York***, 35 AD3d 533, 534-535, 828 NYS2d 407, 409 [2d Dept 2006]; *see also* ***Dyer Trust 2012-1 v Global World Realty, Inc.***, 140 AD3d 827, 33 NYS3d 14 [2d Dept 2016]; ***Savage v Quinn***, 91 AD3d 748, 937 NYS2d 265 [2d Dept 2012]).

To defeat a motion for summary judgment, a party opposing such motion must lay bare his proof, in evidentiary form. Rather than submitting an affidavit by defendant Nicholas, counsel merely submits his own affirmation. It is well settled that an affirmation of an attorney who lacks personal knowledge of the facts has no probative value (*see* ***Cullin v Spiess***, 122 AD3d 792, 997 NYS2d 460 [2d Dept 2014]). It is undisputed that plaintiff was an innocent passenger in a vehicle which was rear ended by defendants' vehicle, and there is nothing in the record to suggest that plaintiff contributed to the happening of the accident. "The right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers (***Romain v City of New York***, 177 AD3d 590, 591, 112 NYS3d 162).

As defendants have failed to submit proof sufficient to raise a triable issue regarding a nonnegligent explanation for the rear-end collision, and they have failed to raise a triable issue of fact regarding any negligence on the part of plaintiff, an innocent passenger, plaintiff's motion for partial summary judgment in her favor is granted.

Defendant Martinez moves (seq. 003) for an order granting him summary judgment dismissing the complaint and cross claims against him. In support of the motion, Martinez submits copies of the pleadings, a certified police accident report, the transcript of plaintiff's deposition testimony, and his own affidavit. In his affidavit, Martinez states that on the date of the accident, he was driving his vehicle eastbound on the Long Island Expressway when it was "suddenly struck in the rear" by a vehicle driven by defendant Nicholas. He states that at the time of the accident he was driving in the right lane of travel, and he did not make any lane changes 30 seconds prior to the accident.

The certified police accident report indicates that the accident happened when a vehicle driven by Martinez was rear ended by a vehicle driven by defendant Nicholas. According to the accident report, Nicholas told the officer at the scene that "he dropped something and took his eyes off the roadway for a moment." "[W]hen he looked back the car was there, and he hit it." The officer issued a ticket to Nicholas charging him with violating VTL § 1129(a), following too closely, and the diagram of the vehicles indicates that damage was sustained to the rear of the Martinez vehicle and to the front end of the vehicle driven by Nicholas. Martinez established that Nicholas was negligent and was a cause of the accident by his submissions, including: the police accident report which contains an admission by Nicholas (*see* ***Ashby v Estate of Encarnacion***, 178 AD3d 763, 111 NYS3d 894 [2d Dept 2019]), a diagram of damage sustained to the vehicles, the issuance of a ticket by the officer at the scene charging Nicholas with

violating VTL § 1129 (a) and the transcript of plaintiff's deposition testimony. However, Martinez has not established prima facie that Nicholas was the sole proximate cause of the accident.

As there can be more than one proximate cause of an accident (***Carias v Grove***, ___AD3d___, 2020 NY Slip Op 05029 [2020]; ***Richardson v Cablevision Sys. Corp***., 173 AD3d 1083, 104 AD3d 655 [2d Dept 2019]), a defendant moving for summary judgment is required to make a prima facie showing that he or she is free from fault (***Flores v Westchester County Bee Line***, 186 AD3d 676, 126 NYS3d 922 [2d Dept 2020]; ***Boulos v Lerner-Harrington***, 124 AD3d 709, 2 NYS3d 526 [2d Dept 2015]). Here, the affidavit of Martinez is devoid of any information regarding the traffic conditions at the time of the accident, his rate of speed, whether he was bringing his vehicle to a stop or was stopped for some reason, whether or not he observed defendant's vehicle before the accident occurred, and the like. Consequently, Martinez did not establish, prima facie, that he was not at fault in the happening of the accident in order to meet his burden (*see* ***Green v Masterson***, 172 AD3d 826, 98 NYS3d 443 [2d Dept 2019]; ***Miron v Pappas***, 161 AD3d 1063, 77 NYS3d 163 [2d Dept 2018]; ***Boulos v Lerner-Harrington***, 124 AD3d 709, 2 NYS3d 526). "[N]ot every rear-end collision is the exclusive fault of the rearmost driver" (***Martinez v Allen***, 163 AD3d 951, 951-952, 82 NYS3d 130 [2d Dept 2018], quoting ***Tutrani v County of Suffolk***, 64 AD3d 53, 59, 878 NYS2d 412 [2009]*see also* ***Conroy v NY City Tr. Auth.***, 167 AD3d 977, 91 NYS3d 183 [2d Dept 2018]).

As Martinez failed to eliminate issues of fact regarding whether he exercised reasonable care under the circumstances and whether he was free from comparative fault, his motion for summary judgment dismissing the complaint against him and dismissing the cross claims by defendants is denied. In light of defendant's failure to meet his prima facie burden, the sufficiency of co-defendants' opposition papers need not be determined (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316).

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

LINDA KEVINS, JSC

Dated: 10/23/2020

____ FINAL DISPOSITION _X__ NON-FINAL DISPOSITION