

Bailey v Feligene

2021 NY Slip Op 30313(U)

February 3, 2021

Supreme Court, Kings County

Docket Number: 522576/2018

Judge: Lillian Wan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF KINGS: PART 17

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 SOPHIA BAILEY,

Plaintiff,

- against -

Index No.: 522576/2018

Motion Date: 2/3/21

Motion Seq.: 04

DECISION AND ORDER

JACQUES R. FELIGENE, UBER TECHNOLOGIES,
 INC., LEANNA STAGER, POWERLINE AUTO
 REPAIR INC., d/b/a POWERLINE COLLISION,
 INC. and "JOHN DOE", Said Name Being Fictitious
 or Unknown,

Defendants.

-----X
 The following e-filed documents, listed by NYSCEF document number, (Motion 04) 71-81, 85-90, 95, 98, 99 and 101, were read on this motion by defendant, Leanna Stager, for summary judgment.

Defendant, Leanna Stager (hereinafter Stager), brings this motion seeking summary judgment and dismissal of the complaint and all cross-claims of co-defendants Uber Technologies (hereinafter Uber) and Jacques R. Feligene (hereinafter Feligene). This action involves a rear-end motor vehicle accident which occurred on October 12, 2017, at the intersection of Sunrise Highway and Brookville Boulevard, in which Stager's vehicle was struck from behind by an Uber vehicle driven by Feligene. The Feligene vehicle was rear-ended by a truck which left the scene of the accident before the police arrived. The plaintiff, Sophia Bailey, was a passenger in Feligene's vehicle. For the reasons set forth below, the motion of defendant Stager is granted.

The defendant truck company was named in the complaint caption as "John Doe or Jane Doe, Names Being Fictitious or Unknown and XYZ Corp., Said Name Being Fictitious or Unknown." Subsequently, that defendant, Powerline Auto Repair Inc. d/b/a Powerline Collision, Inc. (hereinafter Powerline), was identified and served, and appeared in the action. This motion was filed on February 27, 2020, prior to Powerline's filing of an Answer on October 5, 2020. There are cross-claims against Stager asserted by all defendants. Defendant Powerline has not opposed the motion.

Pursuant to the order of Supreme Court, Kings County Justice Lizette Colon dated December 4, 2019, defendant Feligene was directed to appear for a deposition by January 30, 2020, or be precluded from testifying at trial or submitting an affidavit in response to a

dispositive motion. At the time of the filing of this motion defendant Feligene had not appeared for a deposition. By court order dated December 17, 2020, defendant Powerline is scheduled to appear for a deposition on or before March 12, 2021.

Stager's vehicle was the first vehicle in this three-car accident and, according to her deposition testimony, she was stopped at a red light for approximately three minutes when the front of defendant Feligene's vehicle struck the rear passenger side corner of her car. Although there were three vehicles in front, her vehicle did not come into contact with any other vehicles at the time of impact. In support of the motion, Stager submits the pleadings, the deposition transcripts of Stager and plaintiff Sophia Bailey, the order of December 4, 2019, and an uncertified police accident report.

The plaintiff and defendant Feligene oppose the motion. Defendant Uber has not submitted opposition to the motion. The plaintiff submits the pleadings, including the order of March 6, 2020 permitting amendment of the summons and complaint to add Powerline as a defendant, the amended summons and complaint, the police report and email correspondence. The plaintiff argues that the motion is premature, relying primarily on the argument that Powerline had not appeared as a defendant in the action when the summary judgment was filed, and that Powerline's deposition testimony is necessary to determine whether there are triable issues of fact. In opposition, Feligene submits the police report. Feligene argues that there are triable issues of fact as to Feligene's liability because vehicle #3, defendant Powerline, struck Feligene's vehicle, pushing it into Stager's vehicle.

It is well-settled that a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the operator of the rear vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision. *Perez v Persad*, 183 AD3d 771 (2d Dept 2020); *see also Edgerton v City of New York*, 160 AD3d 809 (2d Dept 2018); *Billis v Tunjian*, 120 AD3d 1168 (2d Dept 2014). 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. *Perez* at 771; *Tutrani v County of Suffolk*, 10 NY3d 906 (2008); *Witonsky v New York City Transit Authority*, 145 AD3d 938 (2d Dept 2016); *Nsiah-Ababio v Hunter*, 78 AD3d 672 (2d Dept 2010); *see* Vehicle and Traffic Law § 1129(a).

The defendant, Stager, has established her *prima facie* entitlement to summary judgment as a matter of law. *See Lopez v Dobbins*, 164 AD3d 776 (2d Dept 2018); *Nikolic v City-Wide Sewer & Drain Serv. Corp.*, 150 AD3d 754 (2d Dept 2017); *see also Rodriguez v City of New York*, 31 NY3d 312 (2018). In opposition, the plaintiff and defendants, Uber and

Feligene, have failed to raise a triable issue of fact.

Although the police report is uncertified and is therefore inadmissible, *see Yassin v Blackman*, 188 AD3d 62 (2d Dept 2020), Stager's testimony makes clear that she was stopped at a red light for approximately three minutes when her vehicle was struck from behind by Feligene's vehicle. Although Feligene never appeared for a deposition, the deposition testimony of the plaintiff, a passenger in Feligene's vehicle, supports Stager's contentions. The plaintiff testified that prior to the accident Feligene was conversing on his cell phone via a Bluetooth device in his ear, and utilizing four different GPS devices. When the plaintiff informed Feligene that he had missed the exit, he made a sudden, sharp left turn in an attempt to make a U-turn, and the vehicle was struck in the rear by a truck. Feligene's vehicle then collided into the rear of Stager's vehicle. The plaintiff testified that Feligene's vehicle was moving when it struck Stager's vehicle. The plaintiff's testimony contradicts the assertions contained in Feligene's attorney affirmation that Feligene's vehicle was "pushed" into Stager's vehicle by the third vehicle. In light of plaintiff and Stager's deposition testimony, Feligene has failed to provide a non-negligent explanation for the accident.

Contrary to the assertion of the plaintiff and co-defendant Feligene, Stager's motion is not premature as they have failed to demonstrate how further discovery might reveal or lead to relevant evidence that raise a triable issue of fact. *See* CPLR § 3212(f); *Zhou v 828 Hamilton, Inc.*, 173 AD3d 943 (2d Dept 2019). The fact remains that the admissible evidence in the form of deposition testimony of Stager and the plaintiff establishes that Stager's vehicle was stopped when she was rear-ended by Feligene's moving vehicle. In light of this testimony, the motion is not premature, and the defendants have failed to provide a non-negligent explanation for the accident. *See Perez*, 183 AD3d 771. Moreover, the affirmation of Feligene's attorney alone, that Feligene's vehicle was "pushed" into Stager's car, is insufficient to raise a triable issue of fact. *See Browne v Castillo*, 288 AD2d 415 (2d Dept 2001). In addition, Feligene has not demonstrated that facts essential to oppose the motion were exclusively within the plaintiff's control. *See Zhou*, 173 AD3d 943. Lastly, defendant Uber has not opposed Stager's motion. As such, defendant Stager's motion to dismiss the complaint and all cross-claims of defendants Uber Technologies, Inc. and Feligene is granted.

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that defendant Stager's motion is granted in its entirety.

This constitutes the decision and order of the Court.

Dated: February 3, 2021

A handwritten signature in black ink that reads "Lillian Wan". The signature is written in a cursive style and is positioned above a horizontal line.

HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.