Green v Fofana
2021 NY Slip Op 30934(U)
March 26, 2021
Supreme Court, New York County
Docket Number: 154300/2019
Judge: Lisa S. Headley

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY **PART** IAS MOTION 22

Justice

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YOLANDA GREEN,

Plaintiff,

- v -

ABOUBAKAR FOFANA, SIDI TRANSPORT INC.,ANTONIO MARTINEZ, UHAUL CO. OF ARIZONA, ACHILLES INTERNATIONAL, INC.

Defendant.

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INDEX NO. 154300/2019

MOTION DATE 12/15/2020

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 31, 32, 33, 34, 35, 36, 37, 38, 39, 52, 53, 57, 76, 77, 78, 79, 80, 81

were read on this motion to/for JUDGMENT - SUMMARY.

This action arises from a motor vehicle accident that occurred on October 29, 2018 at East 125th Street near the intersection of 5th Avenue, when a U-Haul vehicle operated by defendant, Antonio R. Martinez, (Martinez), and leased by defendant, Achilles International Inc. (Achilles), rear-ended the cab in which plaintiff was a passenger. Plaintiff, Yolanda Green, filed this action for personal injuries allegedly sustained as a result of the accident with defendants.

Plaintiff now moves, pursuant to *CPLR §3212*, for an order: (1) granting her summary judgment on the issue of liability against defendants Martinez and Achilles, only; and (2) granting her summary judgment on the lack of her culpable conduct on the issue of liability, and dismissing defendants' first affirmative defense.

For the reasons stated herein, plaintiff's motion is granted in part with respect to defendant, Martinez, and denied with respect to defendant Achilles. Further, plaintiff's motion is granted with respect to summary judgment on the lack of her culpable conduct, and the defendants' first affirmative defense is dismissed.

Plaintiff commenced this action for damages against the owners and operators of both vehicles involved in the subject accident, as well as against co-defendant, U-Haul Co. of Arizona (U-Haul), the lessor of the truck that rear-ended the vehicle in which plaintiff was a passenger. The action against co-defendant, U-Haul was discontinued without prejudice pursuant to the

Stipulation of Partial Discontinuance signed by counsel for the parties and dated December 4, 2019. (See, NYSCEF Doc No. 35).

Further, the action was dismissed against co-defendants, Aboubakar Fofana (Fofana) and Sidi Transport Inc., the operator and owner of the cab, in which plaintiff was a passenger, pursuant to an Order issued by Justice Adam Silvera and dated March 11, 2020. The court dismissed the claims against co-defendants, Fofana and Sidi Transport, Inc., *inter alia*, based on "the affidavit of defendant Fofana who testified that he was struck in the rear by a U-Haul truck while in the process of making a left turn . . . . demonstrated [his] freedom from any liability for the accident at issue." (See, NYSCEF Doc No. 28). Therefore, the remaining defendants are Antonio R. Martinez and Achilles International, Inc.

In support of the instant summary judgment motion, plaintiff submits her own affidavit, in which she alleges that she was a passenger in a vehicle on October 19, 2018, when it was suddenly struck from the rear by a vehicle, that she later learned was operated by defendant Martinez and owned by defendant Achilles.

Plaintiff also submits the affidavit of the cab driver, Fofana, where he alleges that plaintiff was a passenger in the back seat of his vehicle, and sustained injuries when his vehicle was "suddenly" struck from the rear by the vehicle operated by defendant Martinez. Fofana states that, "[a]s I approached the intersection of 5th Avenue & East 125th Street in Manhattan NY, I had a green light to make a left turn. I was in the process [of] turning. Suddenly, my vehicle's back right-side bumper got struck by another vehicle (U-Haul truck)." Fofana further states in his affidavit that "[t]he accident was caused by vehicle # 2 suddenly hitting my vehicle from behind. There was nothing I could have done to avoid this accident."

In addition, plaintiff further submits the police report of the accident, which contains defendant Martinez's admission that he struck the rear of the vehicle in which plaintiff was a passenger. Martinez's statement in the police report reads: " Driver of Vehicle 2 states that while he was attempting to make left hand turn vehicle 1 stopped suddenly causing him to collide into [it]." Here, plaintiff contends that the above testimony proffered warrants partial summary judgment against defendants on the issue of liability, and in favor of plaintiff, and the dismissal of defendants' first affirmative defense alleging plaintiff's culpable conduct.

"'[T]he 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 demonstrate the

absence of any material issues of fact.'" *Ayotte v. Gervasio*, 81 N.Y.2d 1062, 1062 (1993); *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Winegrad v. New York Univ. Med. Ctr.*, *supra* at 853; *see also, Lesocovich v. 180 Madison Ave. Corp.*, 81 N.Y.2d 982 (1993).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact. *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980); *CitiFinancial Co. [DE] v. McKinney*, 27 A.D.3d 224, 226 (1st Dep't 2006). The court is required to examine the evidence in a light most favorable to the party opposing the motion. *Martin v. Briggs*, 235 A.D.2d 192, 196 (1st Dep't 1997). Summary judgment should not be granted if there are genuine material issues of disputed fact. *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 (1957); *Tronlone v. Lac d'Amiante Du Quebec*, 297 A.D. 2d 528, 528-529 (1st Dep't 2002), *aff'd* 99 N.Y.2d 647 (2003).

It is well-settled that the operator of a motor vehicle has fundamental obligations "to make reasonable use of his and her senses [and, concomitantly, be aware of traffic conditions], drive at a safe rate of speed under the existing conditions, and maintain a safe distance from other vehicles." *Miller v. DeSouza*, 165 A.D.3d 550, 550 (1st Dep't 2018) [internal citations omitted]; *see also, Matos v. Sanchez*, 147 A.D.3d 585, 586 (1st Dep't 2017) ["a driver is expected to maintain enough distance between himself and cars ahead of him so as to avoid collisions with stopped vehicles, taking into account weather and road conditions"]; *Williams v. Kadri*, 112 A.D.3d 442, 443 (1st Dep't 2013]; *Renteria v. Simakov*, 109 A.D.3d 749, 750 (1st Dep't 2013).

Accordingly, the Appellate Division, First Department has long held that "a rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the rear vehicle's driver, and imposes a duty upon the driver of the rear vehicle to come forward with an adequate nonnegligent explanation for the accident." *Quiros v. Hawkins*, 180 A.D.3d 500, 501 (1st Dep't 2020). "Similarly, a violation of *Vehicle and Traffic Law (VTL) § 1129(a),* which obligates drivers to maintain safe distances between their cars and cars in front of them, and be aware of traffic conditions, including vehicle stoppages, is *prima facie* evidence of negligence." *Maisonet v. Roman*, 139 A.D.3d 121, 123 (1st Dep't 2016]; *see also, Rodriguez v. Budget Rent–A–Car Sys., Inc.,* 44 A.D.3d 216, 223 (1st Dept 2007).

Further, the court held that a "plaintiff made a *prima facie* showing of negligence on the part of defendants by submitting a police report of the incident containing . . . an admission against interest." *See also Cruz v Skeritt*, 140 A.D.3d 554, 554 (1st Dep't 2016). Here, with respect to defendant Martinez's negligence, plaintiff has met her *prima facie* burden by submitting her own affidavit, as well as the affidavit of cab driver, Fofana, in which both state that their vehicle was suddenly rear ended by the vehicle operated by Martinez. Plaintiff also submits the police report of the incident containing Martinez's admission that he rear-ended the vehicle in front of him in which plaintiff was a passenger.

In opposition to the motion, defendants fail to raise a triable issue of fact as to whether they have a non-negligent explanation for the accident. Defendants contend that Martinez's affidavit is sufficient to raise a triable issue of fact. In his affidavit, Martinez states that he "saw that the taxi was also going to make a left-hand turn," when "[a]ll of a sudden the front vehicle came to a complete stop" (*See, Martinez affidavit* ¶¶ 11-12). He also states that "[w]hen the front vehicle suddenly stopped, the taxi also came to a complete stop, and "[s]ince I had expected the front vehicle and taxi to keep moving and complete their left turns I was concerned I would not have time to stop," and that, "[i]n response, I turned the wheel to the right and tried to enter the right travel lane" (*id*., ¶¶ 15-17). He states that "[a] car coming from behind me in the right travel lane prevented me from completely entering the right-hand lane and the left corner of the U-Haul van's front bumper made contact with the right corner of the taxi's rear bumper." (*id*., ¶ 18).

Defendants further argue that, "a rear-end collision does not always warrant summary judgment," and "drivers are entitled to a reasonable expectation that traffic in front of them will continue to flow if there is nothing in its way." Defendants argue that plaintiff's motion as to Martinez must be denied on the ground that "a material question of fact exists as to whether he had a reasonable expectation that traffic would continue to move at the time the accident occurred and acted reasonably in response thereto." This court disagrees.

New York courts have found that this rule does not apply, where, as here, the sudden stop takes place on a municipal street, rather than on a highway:

> "The expectation of a driver operating a motor vehicle on a highway with normal conditions — that traffic will continue unimpeded — is not shared by one operating a motor vehicle on a local public municipal roadway, particularly within the City of New York. The operator of a motor vehicle traveling on a local public roadway within the City of New York must anticipate a variety of events, including a sudden stop by a vehicle in front of the operator's vehicle. Put simply, sudden stops on

> local public roadways within the City of New York are imminently foreseeable, and the operator of a vehicle travelling on such a roadway should therefore expect that the flow of traffic will be interrupted. Synthesizing the First Department case law reflecting the general rule that a sudden stop, standing alone, does not constitute a non-negligent explanation for an accident with that Court's decision in *Baez-Pena*, ***the undersigned concludes that an assertion that the driver of a rear-ended vehicle made a sudden stop on a local public roadway within the City of New York, standing alone, is insufficient to raise a triable issue of fact as to whether the driver of the rear-ending vehicle has a non-negligent explanation***"

See, *Animah v. Agyei*, 63 Misc. 3d 783, 790 (Sup Court, Bronx County 2019). (Emphasis added).

Because an assertion that the driver of a rear-ended vehicle made a sudden stop on a local public roadway within the City of New York, standing alone, is insufficient to raise a triable issue of fact as to whether the defendant driver has a non-negligent explanation, plaintiff is entitled to summary judgment on the issue of Martinez's liability. Moreover, as an "innocent passenger" in a rear-ended vehicle, plaintiff is entitled to summary judgment on the issue of her comparative fault, and the dismissal of defendants' first affirmative defense asserting plaintiff's culpable conduct. *See, Oluwatayo v. Dulinayan*, 142 A.D.3d 113, 120 (1st Dep't 2016); *see e.g., Mello v. Narco Cab Corp.*, 105 A.D.3d 634, 634 (1st Dep't 2013) ["plaintiff established that, as a back-seat passenger in a taxi cab that rear-ended a second vehicle, she was free of negligence as a matter of law"].

In regard to plaintiff's motion for summary judgment on the issue of liability against co-defendant, Achilles, the motion is denied. In the amended complaint, plaintiff alleges that: (1) Achilles managed and controlled the U-Haul rental van involved in the accident (2) Achilles provided consent to Martinez to operate the U-Haul rental van, which was within the scope of his employment with Achilles and (3) Achilles was negligent in its ownership, operation and management of the U-Haul van. In her motion for summary judgment, plaintiff asserts numerous times that Achilles owned the U-Haul rental van, and that Achilles was subject to vicarious liability pursuant to New York *Vehicle and Traffic Law § 388* as the "lessor" of a vehicle that Martinez operated with its consent or knowledge. However, plaintiff has failed to present any basis by which Achilles can be held vicariously liable for the accident.

In opposition to the motion, defendants submit the affidavit of Joseph Traum, Achilles' director of the wheelchair/handcycle program. (See, NYSCEF Doc No. 79). Traum states that Achilles is a non-profit company that provides running programs, community and support to disabled individuals. Traum states that on October 19, 2018, the date of the accident, Achilles

rented a U-Haul van for defendant Martinez to transport hand cycles owned by Achilles. Traum asserts that, on October 19, 2018, Martinez was not an employee of Achilles, but rather was an independent contractor who had agreed to drive the U-Haul rental van. Traum further asserts that Achilles did not own the van but rented it for one day from U-Haul through its corporate account. Traum states that at the time of the accident, Achilles did not operate the van, and was not present in the van. Traum asserts that at the time of the accident, Achilles was not operating or controlling the van, nor directing or supervising Martinez as he drove the van. Defendants contend that, in light of the above, there are no grounds for a finding that Achilles is liable for the subject car accident as the employer of Martinez, or the owner of the U-Haul rental van. This court agrees.

Achilles has made a *prima facie* showing that Martinez was an independent contractor, rather than its employee. It is well-established that it is the "'general rule is that a party who retains an independent contractor . . . is not [vicariously] liable for the independent contractor's negligent acts.'" *Vullo v. Hillman Hous. Corp.*, 173 A.D.3d 600 (1st Dep't 2019) [citation omitted]; *see e.g, Sebrow v. Joe & Mike, Taxi, Inc.*, 157 A.D.3d 590, 591 (1st Dep't 2018) ["(defendant) made a *prima facie* showing that (driver) was not its employee, but rather was an independent contractor, and that it therefore could not be held liable for (driver's) acts"].

Plaintiff has failed to allege any facts or present any evidence that would overcome Achilles' *prima facie* showing. Furthermore, *VTL § 388* is inapplicable in this instance. *VTL § 388 (1)* states:

> "Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner."

VTL § 388 (3) provides that an owner for the purposes of the statute is defined by *VTL § 128*, which states that an "owner" is:

> "A person, other than a lien holder, having the property in or title to a vehicle or vessel. The term includes a person entitled to the use and possession of a vehicle or vessel subject to a security interest in another person and also includes any lessee or bailee of a motor vehicle or vessel having the exclusive use thereof, under a lease or otherwise, for a period greater than thirty days."

Accordingly, under *VTL § 388*, an owner of a motor vehicle is vicariously liable for a motor vehicle accident caused by a driver's negligence when the vehicle is operated with the owner's

consent. *Country-Wide Ins. Co. v. National R.R. Passenger Corp.*, 6 N.Y.3d 172 (2006). However, a lessee of a vehicle is not considered an "owner" for purposes of *VTL § 388,* unless he or she has exclusive use of the vehicle for a period greater than 30 days. *See*, *A Dan Jiang v. Jin-Liang Liu*, 97 A.D.3d 707, 708 (2d Dep't 2012); *Garcia v. City of New York*, 2020 WL 3495693, * 1 (Sup Ct, Bronx County 2020). Here, Achilles has established, *prima facie*, that it did not own the U-Haul rental van. While plaintiff claims in her motion that defendant Achilles was the lessor of the U-Haul rental van, such assertion is factually incorrect, as U-Haul was the lessor of the van and Achilles was the lessee. Accordingly, pursuant to *VTL §§ 128 and 388*, defendant Achilles would have had to rent or lease the subject U-Haul van for a period of time greater than thirty days in order to be vicariously liable for Martinez's negligent acts. Here, Achilles has established that it only rented the van for one day. Accordingly, plaintiff has failed to set forth any evidence that defendant Achilles was vicariously liable for the subject motor vehicle accident. Therefore, summary judgment on the issue of defendant Achilles' liability must be denied.

Lastly, defendants argue that the summary judgment motion is premature, as necessary written discovery is not complete, and depositions have not been taken. Specifically, defendants argue that discovery is needed, including depositions, to ascertain further evidence regarding why the lead vehicle came to an abrupt complete stop when Martinez observed no reason for the driver's actions, as well as what observations plaintiff made, if any, about the lead vehicle, including whether it stopped and why it stopped.

The court rejects this argument, as defendants fail to demonstrate the need for discovery since defendants have personal knowledge of the facts, "yet failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact." S*ee*, *Fernandez v. Ortiz,* 183 A.D.3d 443, 444 (1st Dep't 2020). Here, defendant Martinez has personal knowledge of the facts relevant to defendants' liability and submitted an affidavit. However, the contents of that affidavit are insufficient to raise a triable issue of fact as to defendant Martinez's liability. In addition, Martinez did not dispute that his vehicle rear-ended plaintiff's vehicle. Moreover, defendants fail to argue a non-negligent cause for the rear-end collision, and their speculation that discovery might reveal why the lead vehicle came to an abrupt stop is insufficient to deny the motion. *Mirza v. Tribeca Auto. Inc.*, 189 A.D.3d 448, 448 (1st Dep't 2020); *Tavarez v. Castillo Herrasme,* 140 A.D.3d 453, 454 (1st Dep't 2016).

For the reasons stated herein, the plaintiff's motion for summary judgment on the issue of liability against the co-defendant, Martinez, is granted, and as to co-defendant, Achilles, is denied, and plaintiff's motion to dismiss the defendants' affirmative defense alleging comparative negligence is granted.

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment on the issues of the liability of co-defendant, Antonio R. Martinez is GRANTED; and it is further

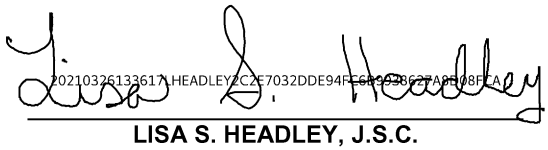
ORDERED that plaintiff's motion to dismiss the defendants' first affirmative defense due to the lack of plaintiff's culpable conduct is GRANTED and thus, defendants' first affirmative defense is dismissed; and it is further

ORDERED that plaintiff's motion for summary judgment on the issue of the liability of defendant Achilles International, Inc. is DENIED; and it is further

ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 60 days of entry, the movant-plaintiff shall serve a copy of this decision/order upon the remaining defendants with notice of entry.

This constitutes the Decision and Order of the Court.



3/26/2021
DATE

LISA S. HEADLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE