Susana v Kelly
2021 NY Slip Op 33062(U)
December 21, 2021
Supreme Court, Bronx County
Docket Number: Index No. 33156/2018E
Judge: Veronica G. Hummel
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31

ELENA SUSANA,

Plaintiff,

-against-

AUDREY K. KELLY,

Defendant.

Index No. 33156/2018E

HON. VERONICA G. HUMMEL, A.J.S.C.

Mot. Seq. No. 1

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to plaintiff ELENA SUSANA's ("Plaintiff") motion (Seq. No. 1) seeking (a) an order, pursuant to CPLR 3212, granting her summary judgment as to liability against defendant AUDREY K. KELLY ("Defendant") and dismissing Defendant's affirmative defense of comparative negligence or, in the alternative, (b) an order, pursuant to CPLR 3212, granting Plaintiff summary judgment as to liability against Defendant and finding Defendant negligent as a matter of law.

This is a personal-injury action arising out of a two-car accident that occurred on February 10, 2018, in Westchester County, New York. During the accident, Plaintiff's vehicle was struck in the rear by Defendant's vehicle.

In support of the motion, Plaintiff submits an attorney affirmation, a Statement of Material Facts, a copy of the pleadings, a certified copy of the police accident report (the "Police Report"), and copies of the transcripts of the depositions of Plaintiff and Defendant. Although the Police Report is certified, Plaintiff's statement to responding officers reflected in the Police Report does not fall within any hearsay exception, such as an admission against interest, and thus cannot be considered by the Court in deciding the motion. *See Yassin v. Blackman*, 188 A.D.3d 62, 65-67 (2d Dep't 2020).

In opposition to the motion, Defendant submits only an attorney affirmation. In the affirmation, Defendant's counsel argues principally that Plaintiff's motion was untimely when filed on April 6, 2021, and that Plaintiff has failed to show "good cause" for the belated filing. The Note of Issue was filed in this matter on July 16, 2020. Under the Part Rules of IAS Part 31, any motion for summary judgment must be filed within 60 days of the filing of the Note of Issue. Here, however, Defendant concedes that, under the COVID-19–related Executive Orders in place at the

time, Plaintiff's time to file her summary judgment motion was tolled until November 4, 2020 (*see* NYSCEF Doc. 21, EO 202.72), and that, after the expiration of said toll, the deadline for the filing of the motion was January 4, 2021. Plaintiff's counsel explains that the delay in filing the motion was due to the negative effects that the COVID-19 pandemic had on their office and practice. In light of the COVID-19 pandemic and the issues that it has caused for law practices such as Plaintiff's, as well as the public policy of this State favoring resolution of matters on the merits, the Court finds that Plaintiff has shown good cause for her delay in filing the motion and grants her, *nunc pro tunc*, leave to file the motion.

In her affirmation, Defendant's counsel also argues that the Police Report should be disregarded as inadmissible hearsay and that Plaintiff improperly relies on self-serving statements "in which she declares herself free of any negligence." While it is unclear as to which statements Defendant is referring, since Defendant provides no citation to any of Plaintiff's supporting papers, the argument is nonetheless misplaced. Defendant did not include in her opposition papers a Statement of Material facts corresponding to Plaintiff's Statement of Material Facts, as required by Uniform Trial Court Rule 202.8-g(b). 22 NYCRR 202.8-g (eff. Feb. 1, 2021). Consequently, under Rule 202.8-g(c), each fact stated in Plaintiff's Statement of Material facts is deemed admitted.

The relevant, admitted—and thus undisputed—facts are as follows: The accident occurred on February 10, 2018, at approximately 9:46 a.m., on Ardsely Road, at or near its intersection with Edgemont Road, in Greenburg, New York. At the time of the accident, traffic on Ardsely Road was heavy and vehicles were "stuck in a line." Plaintiff stopped her vehicle at or near the intersection because there were "oncoming cars on the intersection, on the other street coming." Defendant's vehicle was approximately seven or eight feet behind Plaintiff's vehicle when it stopped suddenly. Defendant did not have time to react to Plaintiff's brake lights. Defendant, however, swerved her vehicle, striking the right rear of Plaintiff's vehicle with the front left of Defendant's vehicle.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon such a showing, the burden then shifts to the nonmovant to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006). A plaintiff in a negligence action moving for summary

judgment on the issue of liability must, therefore, establish, *prima facie*, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries. *Fernandez v. Ortiz*, 183 A.D.3d 443 (1st Dept 2020). A plaintiff is not required to demonstrate his or her freedom from comparative fault in order to establish a *prima facie* entitlement to summary judgment on the issue of liability. *Rodriguez v. City of N.Y.*, 31 N.Y.3d 312, 324-25 (2018).

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 driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident." *Urena v. GVC Ltd.*, 160 A.D.3d 467, 467 (1st Dep't 2018) (quoting *Matos v. Sanchez*, 147 A.D.3d 585, 586 (1st Dep't 2017)); *Santos v. Booth*, 126 A.D.3d 506, 506 (1st Dep't 2015); *Woodley v. Ramirez*, 25 A.D.3d 451, 452 (1st Dep't 2006). Under New York Vehicle and Traffic Law ("VTL") § 1129(a), "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 vehicle and traffic upon the condition of the highway." In other words, a driver must maintain a safe distance between his vehicle and the one in front of her. A violation of VTL § 1129(a) is *prima facie* evidence of negligence, and "[t]his rule has been applied when the front vehicle stops suddenly in slow-moving traffic." *Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216, 223-24 (1st Dep't 2007) (quoting *Johnson v. Phillips*, 261 A.D.2d 269, 271 (1st Dep't 1999)); *Mascitti v. Greene*, 250 A.D.2d 821, 822 (2d Dep't 1998). In a rear-end collision, there is a presumption of non-negligence of the driver of the lead vehicle. *See Soto-Maroquin v. Mellet*, 63 A.D.3d 449, 450 (1st Dep't 2009).

Based on the submissions, Plaintiff has established *prima facie* entitlement to judgment as a matter of law by submitting undisputed evidence that she was stopped at an intersection while yielding to other vehicles in said intersection when she was struck in the rear by the vehicle driven by Defendant.

Defendant, in turn, has failed to come forward with an adequate non-negligent explanation for the accident. First Department caselaw is clear that a claim by the rear driver that the lead vehicle made a sudden stop, standing alone, is insufficient to rebut the presumption of negligence on the part of the rear driver. *Ly Giap v. Hathi Son Pham*, 159 A.D.3d 484, 485 (1st Dep't 2018); *Bajrami v. Twinkle Cab Corp.*, 147 A.D.3d 649 (1st Dep't 2017); *Santos*, 126 A.D.3d at 506; *Soto-Maroquin*, 63 A.D.3d at 450; *Woodley*, 25 A.D.3d at 452; *see also Earl v. Hill*, 2021 N.Y. Slip

Op. 06948 (1st Dep't Dec. 14, 2021). Thus, Defendant's argument that she swerved to avoid Plaintiff's vehicle upon its sudden stop is insufficient to rebut the presumption that Defendant's actions were the negligent cause of the accident.

For the same reasons, Defendant's Second Affirmative Defense alleging comparative negligence must be dismissed.[1]

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the movant was not addressed by the Court, it is hereby denied.

ORDERED that plaintiff ELENA SUSANA's motion is **GRANTED in part** to the extent that she is granted partial summary judgment as to liability against defendant AUDREY K. KELLY and defendant KELLY's Second Affirmative Defense alleging comparative negligence is dismissed; and it is further

ORDERED that the Clerk shall mark the motion (Seq. No. 1) disposed in all court records.

This constitutes the decision and order of the Court.

Dated: December 21, 2021 **Hon.** *s/Hon. Veronica G. Hummel/signed 12/21/2021*
VERONICA G. HUMMEL, A.J.S.C.

1.	CHECK ONE.....	☐ CASE DISPOSED IN ITS ENTIRETY		☒ CASE STILL ACTIVE	
2.	MOTION IS.....	☐ GRANTED	☐ DENIED	☒ GRANTED IN PART	☐ OTHER
3.	CHECK IF APPROPRIATE.....	☐ SETTLE ORDER	☐ SUBMIT ORDER	☐ SCHEDULE APPEARANCE	
		☐ FIDUCIARY APPOINTMENT		☐ REFEREE APPOINTMENT	

[1] To the extent that Defendant's First Affirmative Defense alleges that Plaintiff failed to use a seatbelt, and that such failure contributed to Plaintiff's alleged injuries suffered in the accident, such affirmative defense cannot be dismissed. Plaintiff, who bears the initial burden on the motion, has not submitted any evidence addressing whether she was wearing a seatbelt at the time of the accident and has not made any argument whatsoever why the affirmative defense is meritless.