| **Goydas v Krug** |
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| 2021 NY Slip Op 33137(U) |
| November 8, 2021 |
| Supreme Court, Queens County |
| Docket Number: Index No. 715757/2019 |
| Judge: Maurice E. Muir |
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY



Present: HONORABLE MAURICE E. MUIR
Justice

IAS Part - 42

BARBARA GOYDAS,

Plaintiff,

-against-

ROSEANN KRUG,

Defendant.

Index No.: 715757/2019

Motion Date: 10/28/21

Motion Cal. No. 15

Motion Seq. No. 1

The following electronically filed ("EF") documents read on this motion by Barbara Goydas ("Ms. Goydas" or "plaintiff") for an order: a) pursuant to CPLR § 3212, granting summary judgment to the plaintiff as to liability against Roseann Krug ("Ms. Krug" or "defendant"); and b) dismissing the first affirmative defenses as to liability as well as the second affirmative defense of seat belts.

| | Papers Numbered |
|---|---|
| Notice of Motion-Affirmation in Support-Exhibits..... | EF 13 - 20 |
| Affirmation in Opposition-Exhibits..... | EF 24 - 26 |
| Reply Affirmation-Exhibits..... | EF 28 |

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This is an action to recover damages for personal injuries allegedly sustained by Ms. Goydas due to a motor vehicle collision. As a result, she sustained severe and permanent personal injuries. On September 13, 2019, the plaintiff commenced the instant action against the defendant; and on October 8, 2019, issue was joined, wherein the defendant interposed an answer with five (5) affirmative defenses. In particular, the defendant's first affirmative defense states that "[a]ny damages sustained by the Plaintiff(s) were caused by the culpable conduct of the Plaintiff(s), including contributory negligence or assumption of risk, and not by the culpable

conduct or negligence of this(these) answering Defendant(s)." Moreover, the defendant's second affirmative defense states that ". . . Plaintiff(s) failed to use or misused seat belts, and thereby contributed to the alleged injuries." Additionally, on October 31, 2019, the court issued a preliminary conference order ("PCO"), which directed the parties to conduct Examinations Before Trial ("EBT") on or before February 5, 2020; and Independent Medical Examinations ("IME") forty-five (45) days thereafter. On August 26, 2021, the plaintiff filed the instant motion seeking the above-described relief. In support of the instant motion, the plaintiff argues that she was involved in a motor vehicle crash that occurred on August 2, 2018, while she was exiting the Clearview Expressway at the Union Turnpike, County of Queens, City and State of New York. Moreover, the plaintiff avers that she was hit in the rear by the defendant while she was stopped at the stop sign. In opposition, counsel for the defendant provides a copy of the police report, which states the following:

> AT TPO driver of V1 states she was headed Northbound onto Union Turnpike off the Clearview Expressway when she stopped at the yield sign due to oncoming traffic when V2 rear ended her vehicle. Driver of V2 states she was headed off the Clearview Expressway onto Union Turnpike slowing down, monitoring oncoming traffic while trying to merge and didn't realize V1 made a complete stop causing her to rear end V1.

According to the Court of Appeals, a plaintiff is no longer required to show freedom from comparative fault in order to establish his or her prima facie entitlement to judgment as a matter of law on the issue of a defendant's liability (*see Rodriguez v. City of New York*, 31 NY3d 312 [2018]; *Sooklall v. Morisseav-LaFague*, 185 AD3d 1079 [2d Dept 2020]; *Merino v. Tessel,* 166 AD3d 760 [2d Dept 2018]). "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" (*Catanzaro v. Edery*, 172 AD3d 995 [2d Dept 2019], quoting *Witonsky v. New York Tr. Auth.*, 145 AD3d 938 [2d Dept 2016]; *see* Vehicle and Traffic Law § 1129(a)). Furthermore, "[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the rearmost vehicle, thereby requiring that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision" (*Edgerton v. City of New York*, 160 AD3d 809 [2d Dept 2018]; *Buchanan v. Keller*, 169 AD3d 989 [2d Dept 2019]).

Here, the plaintiff established her prima facie entitlement to judgment as a matter of law on the issue of liability by submitting, *inter alia*, her own affidavit, which demonstrated that she

was exiting from the Clearview Expressway when the defendant suddenly and without warning struck her vehicle in the rear. (*see Xiao v. Martinez*, 185 AD3d 1014 [2d Dept 2020]). In opposition, the defendant failed to provide a non-negligent explanation for the subject accident sufficient to raise a triable question of fact. (*see Pomerantsev v. Kodinsky*, 156 AD3d 656 [2d Dept 2017]; *Strickland v. Tirino*, 99 AD3d 999 [2d Dept 2012)]). In fact, Ms. Krug did not submit an affidavit converting the plaintiff's allegations. Moreover, her attorney's affirmation is not based on personal knowledge or supported by documentary evidence. As such, it has no probative value. (*Nerayoff v. Khorshad*, 168 AD3d 866 [2d Dept 2019]; *Warrington v. Ryder Truck Rental, Inc.*, 35 AD3d 455 [2d Dept 2006]; *Flagstar Bank, FSB v. Titus*, 120 AD3d 469 [2d Dept 2014]).

Lastly, the plaintiff seeks to strike the defendant's affirmative defenses. Pursuant to CPLR § 3211(b), it provides, in relevant part, that "[a] party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." When moving to dismiss, the plaintiff bears the burden of demonstrating that the affirmative defenses 'are without merit as a matter of law because they either do not apply under the factual circumstances of [the] case, or fail to state a defense'" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 748 [2d Dept 2010]). On a motion pursuant to CPLR § 3211(b), the court should apply the same standard it applies to a motion to dismiss pursuant to CPLR § 3211(a)(7), and the factual assertions of the defense will be accepted as true. "Moreover, if there is any doubt as to the availability of a defense, it should not be dismissed" (*Shah v. Mitra*, 171 AD3d 971 [2d Dept 2019], quoting *Wells Fargo Bank, N.A. v. Rios*, 160 AD3d 912, 913 [2d Dept 2018]). Here, the court finds that the defendant's first affirmative defenses -- based upon contributory negligence, assumption of risk and culpable conduct of the plaintiff -- lacks merit. However, the plaintiff has not established sufficient grounds to strike the defendant's second affirmative defense, which is based upon the seatbelt law. (*see, Johnson v. Thompson*, 149 AD3d 1520 [2d Dept 2017]).

Accordingly, it is hereby

ORDERED that branch of plaintiff's motion for summary judgment on the issue of liability, pursuant to CPLR § 3212, is granted; and it is further,

ORDERED that branch of plaintiff's motion to strike the defendant's first affirmative defense, pursuant to CPLR § 3211(b), is granted only; and it is further,

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon the defendant on or before November 30, 2021.

The foregoing constitutes the Decision and Order of the court.

Dated: November 5, 2021
Long Island City, NY

FILED
11/8/2021
COUNTY CLERK
QUEENS COUNTY

Maurice E. Muir

MAURICE E. MUIR, J.S.C.