Williams v Adan
2021 NY Slip Op 33647(U)
January 15, 2021
Supeme Court, Suffolk County
Docket Number: Index No. 0600092/2020
Judge: Linda Kevins

SHORT FORM ORDER

INDEX No. 0600092/2020

CAL. No.

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

P R E S E N T:

HON. LINDA KEVINS
Justice of the Supreme Court

MOTION DATE: 6/8/2020; 7/6/2020; 7/29/2020
ADJ. 10/20/2020

MOT. SEQ. # 001 - MotD
MOT. SEQ. # 002 - MG
MOT. SEQ. # 003 - MD

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DENISE WILLIAMS,

Plaintiff,

- against –

CHRISTINE JOY ADAN, RYAN ADAN and LUIS A. BARROS-OCHOA.

Defendants.

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Upon the following papers e-filed and read on these motions for summary judgment/dismissal: Notice of Motion and supporting papers (# 001) by plaintiff, dated May 18, 2020; (# 002) by Ryan and Christine Joy Adan, dated June 15, 2020; (# 003) by defendant Luis Barros-Ochoa, dated July 7, 2020; Answering Affidavits and supporting papers to (#001) by the Adan defendants, dated July 6, 2020; by Ochoa, dated July 6, 2020; to (# 003) by plaintiff, dated July 21, 2020; Replying Affidavits and supporting papers to (#001) by plaintiff, dated July 7, 2020; to (#002) by the Adan defendants, dated July 8, 2020; to (#003) by Ochoa, dated July 29, 2020; Other ____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that plaintiff's motion (seq. # 001) for summary judgment, the motion (seq. # 002) by defendants Christine Joy Adan and Ryan Adan for summary judgment and the motion (seq. # 003) by defendant Luis Barros-Ochoa for an order dismissing the action as against him are consolidated for the purposes of this determination; and it is further

ORDERED that plaintiff's motion (seq. # 001) for an order pursuant to CPLR 3212 (e) granting partial summary judgment in her favor on the issue of liability and dismissing affirmative defenses is granted to the extent that summary judgment is granted in favor of plaintiff against defendant Luis Barros-Ochoa on the issue of liability and his first, third, sixth, seventh and eighth affirmative defenses are dismissed and the motion for summary judgment against the Adan defendants is denied; and it is further

ORDERED that the motion (seq. # 002) by defendants Christine Joy Adan and Ryan Adan for summary judgment dismissing the complaint and cross claims against them is granted; and it is further

ORDERED that the motion (seq. # 003) by defendant Luis Barros-Ochoa for an order dismissing the complaint as against him on the grounds that the court lacks jurisdiction over his person due to improper service and that the action is barred by the statute of limitations, pursuant to CPLR § 3211(a)(5) & (a) (8) is denied; 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 **March 9, 2021 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 January 25, 2017 on Veterans Memorial Highway in the Town of Islip. The accident allegedly happened when a vehicle driven by defendant Luis Barros-Ochoa collided with the rear of a vehicle owned by defendant Ryan Adan and driven by defendant Christine Adan pushing it into the rear of plaintiff's vehicle.

Plaintiff now moves for an order dismissing various affirmative defenses contained in the answers of the defendants and for partial summary judgment on the issue of liability, arguing that defendants negligently operated their vehicles and were the sole proximate cause of the accident. In support of the motion, plaintiff submits copies of the pleadings, a certified police accident report, an affidavit by defendant Christine Adan, an affidavit by Luis Barros-Ochoa and her own affidavit.

In her affidavit, plaintiff states that she was driving her vehicle westbound, on Veterans Memorial Highway at approximately 7:49 a.m. in the left lane of travel. She states that the traffic conditions were conducive with weekday rush-hour traffic conditions, and that there was a long line of cars ahead of her that were stopped for a red-light traffic signal. Plaintiff states that she brought her vehicle to a stop, and that her vehicle was stopped between 15 to 20 seconds before she felt one impact to the rear of her vehicle. She states that the front of the Adan vehicle struck her vehicle in the rear, and that there was a third vehicle involved, directly behind the Adan vehicle.

The affidavit of defendant Christine Adan is submitted. In her affidavit, Adan states that on the date of accident, she was traveling westbound on Veterans Memorial Highway and was driving at a rate

of speed of five mph, as traffic conditions were heavy, and the vehicle in front of her was slowing down. She states that after she passed the intersection of Lincoln Road, her vehicle was struck in the rear by a vehicle driven by defendant. She states that she felt one heavy impact to the rear of her vehicle causing it to be pushed into the rear of plaintiff's vehicle, and then she felt a light impact to the front of her vehicle.

The certified police accident report comports with the statements made in the affidavits, and also contains an admission by defendant Ochoa that his vehicle rear ended the Adan vehicle which was stopping abruptly.

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, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Once such a showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (***Alvarez v Prospect Hosp***., 68 NY2d 320, 508 NYS2d 923; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595).

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 (***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]; ***Macauley v ELRAC, Inc***., 6 AD3d 584, 585, 775 NYS2d 78 [2d Dept 2003]). A rear-end collision with a stopped 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 a chain-collision accident involving rear end collisions, the driver of the rear-most vehicle "bears a presumption of responsibility" (***Gustke v Nickerson***, 159 AD3d 1573, 72 NYS3d 733 [4th Dept 2018], quoting ***Ferguson v Honda Lease Trust***, 34 AD3d 356, 357, 826 NYS2d 10 [1st Dept 2006]). Furthermore, the operator of the middle vehicle that is propelled into the lead vehicle will not bear responsibility for the accident if the vehicle was properly stopped or stopping (***Morales v Amar***, 145 AD3d 1000, 44 NYS3d 184 [2d Dept 2016]; ***Niosi v Jones***, 133 AD3d 578, 19 NYS3d 550 [2d Dept 2015]; ***Raimondo v Plunkitt***, 102 AD3d 851, 958 NYS2d 460 [2d Dept 2013]).

Here, plaintiff's submissions, including her affidavit and Ochoa's admission contained in the certified police accident report (***Liu v Lowe***, 173 AD3d 946, 102 NYS3d 713 [2d Dept 2019]; ***Scott v Kass***, 48 AD3d 785, 851 NYS2d 649 [2d Dept 2008]), are sufficient to establish her prima facie case of entitlement to summary judgment in her favor on the issue of liability against defendant Ochoa (***Tsyganash v Auto Mall Fleet Mgt., Inc***., 163 AD3d 1033, 83 NYS3d 74 [2d Dept 2018]; ***Singh v Avis Rent A Car Sys., Inc***., 119 AD3d 768, 989 NYS2d 363 [2d Dept 2014]; ***Markesinis v Jaquez***, 106 AD3d 961, 965 NYS2d 363 [2d Dept 2013]). However, the affidavit of defendant Adan, also submitted with

plaintiff's motion, does not establish liability on her part, and thus, plaintiff has failed to establish her prima facie entitlement to summary judgment against the Adan defendants. Therefore, the motion is denied with respect to the Adan defendants, and the burden only shifts to defendant Ochoa to proffer evidence in admissible form sufficient to rebut the inference of negligence by providing a nonnegligent explanation for the collision.

In opposition, defendant Ochoa submits an affidavit wherein he states that on the date of the accident he was traveling westbound on Veterans Highway in the left lane of travel and traffic was "flowing." He states that "shortly before the accident I saw the ADAN vehicle suddenly and unexpectedly stop short directly in front of me." He states further that he depressed the brake pedal, but he was unable to stop his vehicle to avoid colliding with the Adan vehicle. Ochoa states that the collision between plaintiff's vehicle and the Adan vehicle "may have occurred first" before his vehicle became involved.

The affidavit is insufficient to raise a triable issue of fact on liability, as an explanation of a sudden stop by the lead vehicle, standing alone, is insufficient to rebut the inference of negligence and does not provide a nonnegligent explanation for the collision (***Perez v Persad,*** 183 AD3d 771, 123 NYS3d 683 [2d Dept 2020]). Drivers must anticipate sudden stops which are foreseeable under prevailing traffic conditions **(*Xin Fang Xia v Saft***, 177 AD3d 823, 113 NYS3d 249 [2d Dept 2019]; ***Le Grand v Silberstein***, 123 AD3d 773, 999 NYS2d 96) and must maintain a reasonably safe rate of speed and distance from other vehicles. Ochoa's affidavit fails to contain any information regarding his vehicle's rate of speed, the distance between his vehicle and the Adan vehicle, and it does not provide an adequate description of the traffic conditions on the morning of the accident. Absent such evidence, Ochoa's argument that the Adan vehicle came to a sudden stop is insufficient to rebut the inference of negligence (*see* ***Capuozzo v Miller***, ___AD3d___, 2020 NY Slip Op 07026 [2d Dept 2020]). Whether the Adan vehicle collided with plaintiff's vehicle prior to being struck by Ochoa's vehicle has no bearing on Ochoa's negligence (*see* ***Abdou v Malone***, 166 AD3d 931, 88 NYS3d 491 [2d Dept 2018]).

Defendant Ochoa also opposes the motion on the grounds that it is premature as he has not conducted discovery. However, defendant fails 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]).

Here, the missing information is from defendant himself, as addressed above. Therefore, the relevant information is not exclusively within the knowledge and control of the plaintiff. Having failed to submit competent evidence sufficient to raise a triable issue of fact as to whether defendant has a nonnegligent explanation for the accident, plaintiff's motion for partial summary judgment on the issue of liability against defendant Ochoa is granted.

Plaintiff also moves for an order dismissing the first, fourth and fifth affirmative defenses contained in Adans' answer. The first affirmative defense is comparative negligence. The affidavits establish that plaintiff's vehicle was stopped in traffic when her vehicle was rear ended and plaintiff has demonstrated that she was not at fault in the happening of the accident (***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]). In opposition, Adan fails to submit any proof that there is merit to the affirmative defense of comparative negligence, and, therefore, the first affirmative defense alleging comparative negligence is dismissed.

The fourth affirmative defense of General Obligations Law § 15-108 regarding settlements between tortfeasors is inapplicable to the instant matter, and the fifth affirmative defense of the emergency doctrine has no merit. The emergency doctrine is generally inapplicable to rear-end collisions, as rear-following drivers are required to leave a reasonable distance between their vehicles and vehicles ahead (*see* Vehicle and Traffic Law § 1129 [a]; ***Ordonez v Lee***, 177 AD3d 756, 110 NYS3d 339 [2d Dept 2019]; ***Lowhar-Lewis v Metro. Transp. Auth.***, 97 AD3d 728, 948 NYS2d 667 [2d Dept 2012]). Furthermore, the Adans do not oppose plaintiff's arguments striking such defenses. Accordingly, the fourth and fifth affirmative defenses are also dismissed.

Plaintiff also moves for an order dismissing the first, third, sixth, seventh and eight affirmative defenses contained in defendant Ochoa's answer. The third affirmative defense alleges comparative negligence and the sixth affirmative defense alleges the emergency doctrine. The affidavits of the parties establish that such defenses have no basis, and the merits of these defenses were discussed above regarding the Adan's identical two defenses. As Ochoa fails to demonstrate otherwise, the third and sixth affirmative defenses are dismissed as they lack merit.

With respect to the first affirmative defense of lack of personal jurisdiction and the eighth affirmative defense that the action is barred by the statute of limitations, these defenses are also the subject of Ochoa's motion to dismiss (seq. # 003). Regarding personal jurisdiction, Ochoa argues that the court lacks jurisdiction over his person due to improper service. However, Ochoa waived such argument, as he was required to move to dismiss within 60 days of service of his answer, which contained such affirmative defense.

CPLR 3211 (e) provides that "an objection that the summons and complaint . . . was not properly served is waived if, having raised such an objection in a pleading, the objecting party does not move for judgment on that ground within sixty days after serving the pleading, unless the court extends the time upon the ground of undue hardship."

Here, Ochoa's answer was filed on January 31, 2020 and this motion was filed on July 7, 2020, which is well over 60 days. Counsel's conclusory excuse that COVID-19 happened does not provide facts constituting an undue hardship, and no administrative orders regarding this time prescription have been supplied to the Court.

In any event, the affidavit of service alleges that Ochoa was served on February 12, 2020, pursuant to CPLR § 308 (2), by leaving the documents with a person of suitable age and discretion at 96 Maple Avenue Apt 3N, Patchogue, New York. The process server describes the person who allegedly refused to give her name, as a black female between the age of 30 and 45, with height between five feet four and

five foot eight, weighing between 131 and 160 pounds. Additionally, the process server states that he mailed the documents to Ochoa on February 13, 2020.

Here, the affidavit of the process server is facially sufficient and, therefore, constitutes a prima facie showing of proper service (***HSBC Bank USA, N.A. v Whitter***, 159 AD3d 942, 74 NYS3d 285 [2d Dept 2018]; ***Genway Corp. v Elgut***, 177 AD2d 467, 575 NYS2d 899 [2d Dept 1991]). Only a sworn denial that sets forth specific facts challenging the allegations in the affidavit of service may overcome the presumption of proper service (see ***Deutsche Bank National Trust Company v Saketos***, 158 AD3d 610, 72 NYS3d 167 [2d Dept 2018]). Ochoa's affidavit denying service is based upon hearsay. Ochoa alleges that his 15-year-old daughter found the documents in the door jam, but no affidavit by his daughter is submitted. Furthermore, Ochoa fails to state who, if anyone else, lived at his residence besides his daughter. Accordingly, the first affirmative defense asserting lack of personal jurisdiction is dismissed.

Regarding, the defense that the action is barred by the statute of limitations, the time to commence an action for personal injuries is three years from the date the cause of action accrues (CPLR § 214). The subject cause of action accrued on the date of the accident, January 25, 2017, and this action was commenced on January 2, 2020. Therefore, the action was timely commenced, and Ochoa's eighth affirmative defense is dismissed.

The seventh affirmative defense, alleging that the action is barred by New York State Worker's Compensation statute, is without merit, and is also dismissed.

Defendants Christine Adan and Ryan Adan move (# 002) for summary judgment dismissing the complaint against them on the ground that Christine Adna was not a cause of the accident and did not breach a duty of care owed to plaintiff. In support of the motion defendants submit the affidavits of all of the parties which were addressed in plaintiff's motion. In her affidavit, Christine Adan avers that she was traveling in the left lane of traffic at a rate of five mph and was stopping her vehicle based upon traffic conditions, when her vehicle was struck from behind and pushed into the rear of plaintiff's vehicle. "Evidence that a vehicle was struck in the rear and propelled into the vehicle in front of it may provide a sufficient non-negligent explanation" (***Ortiz v Haidar***, 68 AD3d 953, 954, 892 NYS2d 122 [2d Dept 2009]; *see also* ***Abdou v Malone,*** 166 AD3d 931, 88 NYS3d 491 [2d Dept 2018]; ***Niosi v Jones***, 133 AD3d 578, 19 NYS3d 550 [2d Dept 2015]; ***Strickland v Tirino,*** 99 AD3d 888, 890, 952 NYS2d 599 [2d Dept 2012]).

Here, the Adans established their prima facie entitlement to summary judgment dismissing the complaint and cross claims against them by demonstrating that their vehicle was the middle vehicle in a chain-reaction collision that was propelled into the rear of plaintiff's vehicle (*see* ***Rossnagel v Kelly***, 177 AD3d 650, 113 NYS3d 230 [2d Dept 2019]). In opposition, neither plaintiff nor Ochoa submit any evidence to raise a triable issue of fact. Accordingly, the motion by the Adan defendants for an order granting them summary judgment dismissing the complaint and cross claims against them is granted.

The motion by defendant Ochoa for an order dismissing the complaint against him on the grounds that the action is barred by the statute of limitations and the Court lacks jurisdiction over his person due to improper service is denied. As discussed above when addressing Ochoa's affirmative defenses in motion sequence # 001, Ochoa waived his objection to service of process and failed to establish that this action

was commenced in excess of the three-year time prescription. Accordingly, Ochoa's motion for an order dismissing the complaint as against him is denied.

Anything not specifically granted herein is hereby denied.

This constitutes the decision and Order of the Court.

LINDA KEVINS, JSC

Dated: 1/15/21

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION