

Lowery v Khalifa

2022 NY Slip Op 30694(U)

March 4, 2022

Supreme Court, New York County

Docket Number: Index No. 162167/2018

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA S. HEADLEY PART 22M

Justice

-----X

NOREEN LOWERY,

Plaintiff,

- v -

NASIR KHALIFA, PICCOLO CAB CORP., KRISTIN ANTIGNANI

Defendant.

-----X

INDEX NO. 162167/2018

MOTION DATE 08/31/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 41, 42, 43, 46, 47, 48, 49, 50

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

This is a personal injury case arising out of a motor vehicle accident. Defendant Kristin Antignani ("movant-defendant") moves for summary judgment, pursuant to CPLR §3212, to dismiss the complaint and the co-defendants' cross claims. Plaintiff Noreen Lowery cross-moves (1) for summary judgment as to liability against defendants, Nasir MD Khalifa and Piccolo Cab Corp.; and (2) upon summary judgment being granted, Plaintiff moves to sever this action from the previously joined action, Antignani v. Khalifa and Piccolo Cab Corp filed in Supreme Court of the State of New York, New York County bearing Index No. 156821/2019; and (3) Plaintiff seeks a trial preference based upon her age, pursuant to CPLR §§3403(a)(4) and 3403(b). Defendants Khalifa and Piccolo Cab Corp filed opposition papers. Plaintiff filed a reply affirmation.

Plaintiff contends in her complaint that the subject accident occurred on August 1, 2018 near the Battery Park underpass on the FDR Drive in New York, New York. Plaintiff, who was born in 1943, and is now 78 years old, was a passenger in a taxi driven by defendant Khalifa and owned by defendant Piccolo Cab. Plaintiff contends that the taxi hit the rear end of another vehicle (a Jeep) that was occupied by defendant Antignani.

I. Defendant Antignani's Motion to Dismiss

In support of the movant-defendant's motion, defendant Antignani submits, inter alia, a certified copy of the police accident report, her own deposition testimony, plaintiff's deposition testimony, and defendant Nasir MD Khalifa's deposition testimony. The movant-defendant Antignani testified that she had been travelling southbound on the FDR at an estimated 45-50 miles per hour. (NYSCEF Doc. No. 33 [Antignani Deposition Transcript]). Movant-defendant Antignani testified that she experienced no mechanical difficulties with the car and the gas tank was full. Antignani further testified that her vehicle stalled, and came to a stop about three seconds after she

felt it “hiccup.” Antignani testified that the place where her vehicle stopped was well-lit, flat and straight, and close enough to the end of the underpass for her to see the light outside. Further, Antignani testified that she saw that the dashboard lights were not illuminated, turned off the car and activated the hazard lights. Antignani testified that within two minutes of stopping, her sister, who was in her vehicle, called AAA and 911, and about a minute later, Antignani exited the car with a beacon light that she first placed behind the vehicle by the passenger side, and then on the roof on the rear passenger side. Antignani testified that she turned around and saw the approaching headlights in the left lane, grabbed her child’s car seat while her friend jumped on top of the child to protect him, and moments later, the taxi hit her vehicle. In addition, Antignani testified that the impact pushed her car to the left into a wall.

Co-defendant Khalifa opposed the motion, and testified at the deposition that he did not see any vehicle in front of him as he entered the underpass in the left lane. (*NYSCEF Doc. No. 49 [Khalifa Deposition Transcript]*). Co-defendant Khalifa asserts that it was a cloudy and raining day, and that there was a little coating of water on the road inside the underpass, which he entered with his headlights and wipers on. He testified that he was able to see ahead of him with the existing lighting in the underpass, and before he entered, he looked in the rearview mirror and saw a car much taller than his behind him. About five seconds later, when co-defendant Khalifa was driving 30 miles per hour, he felt an impact from behind that made him speed up. Then, he further testified that after he stepped on the brake he felt the car skid and felt very dizzy, and then fell unconscious before his taxi hit Antignani’s vehicle.

In brief, plaintiff Lowery testified that she had no memory of the accident. (*NYSCEF Doc. No. 34 [Lowery Deposition Transcript]*).

The police accident report states that “[n]o witnesses observed the accident.” However, it recites the account that Antignani gave at the scene, which closely tracks her deposition testimony. (*NYSCEF Doc. No. 33*). The police report also states that Khalifa told the police that he was struck from behind by an unknown vehicle. The report further states that “based on pictures provided and scene assessment, that there were no other cars involved in the crash and no other cars could have gotten through either vehicle to leave the scene.” (spelling errors corrected).

The movant-defendant Antignani’s motion to dismiss is granted. The Court has held that the conduct of a driver of a stalling vehicle, who bring the vehicle to a complete stop in a lane with the hazard lights was not the proximate cause of a resulting rear end collision, but merely furnished the condition or occasion for it. *See, Kante v. Tong Fei Chen*, 176 A.D.3d 928, 929-930 (2d Dep’t 2019) (internal citations omitted). Here, Antignani’s uncontradicted testimony was that she turned on her hazards and placed a flashing red beacon light on her car.

Defendant Khalifa argues that there is a question of fact as to whether Antignani did in fact employ the hazards and the beacon light. His only support for this claim is that he never saw her car. Rather, he concedes that his headlights were on and that the existing lighting in the underpass allowed him to see what was ahead of him. Moreover, he claims that he did not witness the impact because he was unconscious. Defendant Khalifa’s speculation regarding Antignani’s failure to use the lights does not raise an issue of credibility in view of Antignani’s unambiguous testimony,

which is corroborated by the police report. *Compare Romero v. Valdez*, 198 A.D.3d 496 (1st Dep't 2021) Under the circumstances, the court finds that the movant-defendant Antignani did not engage in any culpable conduct, and that the opposition papers fail to raise sufficient triable issues of fact. *See, Wu v. Torres*, 199 A.D.3d 550, 550 (1st Dep't 2021).

II. Plaintiff's Cross-Motion for Summary Judgment

Plaintiff's cross-motion for summary judgment as to liability against defendants, Nasir MD Khalifa and Piccolo Cab Corp. is denied. "[A] rear-end collision with a stopped vehicle creates a *prima facie* case of negligence on the part of the operator of the moving vehicle unless the operator presents evidence sufficient to rebut the inference of negligence." *Rodriguez v. Sharma*, 178 A.D.3d 508, 508 (1st Dep't 2019); *see, Baez-Pena v. MM Truck & Body Repair, Inc.*, 151 A.D.3d 473, 476 (2017). Here, although plaintiff is an innocent passenger, the defendant has proffered a non-negligent explanation for the accident, specifically testifying that another vehicle hit his taxi in the rear and caused him to lose consciousness and collide with Antignani's car. Although Antignani's testimony and statements in the police report dispute the existence of another vehicle, this gives rise to a question of fact. *Jeffrey v. DeJesus*, 116 A.D.3d 574, 575 (1st Dep't 2014). There is also conflicting evidence as to whether the taxi suffered rear-end damage consistent with the alleged impact, and the photographs submitted on this issue are not sufficiently clear to make a determination. (*See, NYSCEF Doc. No. 37*).

III. Plaintiff's Motion for Trial Preference

That portion of plaintiff's motion seeking a trial preference is granted. There is no dispute that plaintiff is over 70 years old. (*See, NYSCEF Doc. No. 42 [Lowery affidavit]*). Thus, the plaintiff is entitled to a preference based upon her age pursuant to *CPLR §3403(a)(4)*; *see also, Skolnick v. Max Connor, LLC*, 89 A.D.3d 443, 444 (1st Dep't 2011).

IV. Plaintiff's Motion for severance of the actions

Plaintiff moves to sever this action from the previously joined action, *Antignani v. Khalifa and Piccolo Cab Corp* filed in Supreme Court of the State of New York, New York County bearing Index No. 156821/2019. This court shall defer a determination on the request for a severance of this action from the Antignani action until the parties have provided an update as to the status of that case. Pursuant to a so-ordered stipulation in the Antignani action dated October 15, 2021, Antignani was to be deposed as to damages on or before December 5, 2021, and defendant Piccolo Cab on or before December 12, 2021. Furthermore, Antignani's IME was to have been completed with 60 days of the completion of her deposition, *i.e.*, approximately February 5, 2022. If, in fact, all of that that discovery has been completed as scheduled, then a joint trial would be more expeditious. Both actions now share a single, common question as to the liability of Khalifa (and derivatively Piccolo).

Accordingly, it is hereby

ORDERED that defendant Antignani's motion for summary judgment on the issue of liability and to dismiss the complaint and the co-defendants' cross claims is GRANTED; and it is further

ORDERED that the complaint and cross claim as against defendant Kristin Antignani are DISMISSED with costs and disbursements to defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further hereby

ORDERED that the Clerk is directed to enter judgment accordingly, and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability against defendants Nasir MD Khalifa and Piccolo Cab Corp. is DENIED, and it is further

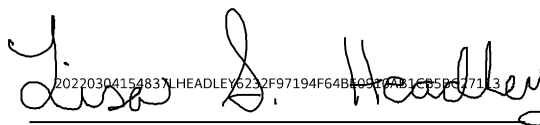
ORDERED that plaintiff's motion for a trial preference is GRANTED, and it is further

ORDERED that the parties are directed to contact the Part 22 clerk for a virtual conference to apprise the court of the status of discovery in the Antignani action so that the Part 22 court may determine whether this action should be severed from the Antignani action; and it is further

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

This is the Decision and Order of the Court.

3/4/2022
DATE


LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE