SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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JOSE D. MORA,

Plaintiff,

- v -

AUGUSTUS VERNAC BRANKER, MTA BUS COMPANY, METROPOLITAN TRANSPORTATION AUTHORITY

Defendant.

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INDEX NO. 150816/2018

MOTION DATE 09/09/2022

MOTION SEQ. NO. 001

ORDER - AMENDED (MOTION RELATED)

The following e-filed documents, listed by NYSCEF document number (Motion 001) 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 68

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

Plaintiff's motion (MS001) for summary judgment on liability is granted and defendant's affirmative defenses are severed and dismissed.

Background

On November 21, 2016, plaintiff Jose Mora was driving eastbound on 57th Street in Manhattan between Fifth and Sixth Avenue when the back right of his car made contact with the front left of defendant bus. The bus was operated by defendant Branker.

It is not contested that the subject block of 57th Street had three lanes of traffic going east; the rightmost lane was a bus lane. Branker was operating his bus in the bus lane but there was a vehicle stopped in the bus lane, requiring the bus to change lanes to the middle lane in order to go around that vehicle. Plaintiff's car was in that middle lane. The bus driver admitted that did not see the plaintiff's vehicle until contact was made and the plaintiff did not notice the bus until he was hit. Clearly, plaintiff was hit in the rear; nobody claims that he backed up into the bus.

When there is a hit in the rear, there is a presumption of negligence against the rear driver and the rear driver has the burden to give a non-negligent explanation.

Defendants attempt to assert non-negligent explanations for how the accident occurred. For example, they point to the accident report, where the bus driver, Branker, claimed that the plaintiff "forced [his] way" around the bus, and that the side of plaintiff's car struck the front of defendant Branker's bus (NYSCEF Doc. No. 55 at 2-3). Branker also contends that he and plaintiff entered the middle lane at the same time, resulting in plaintiff cutting off defendant and causing the accident. Those attempts fall flat, however, and the bus driver did not give a sworn non-negligent explanation because he testified under oath that he never even saw the plaintiff's car until the collision. Either you see someone do something wrong or you don't; here, the bus driver admits under oath that he did not see plaintiff do anything wrong – he did not see plaintiff at all.

In addition, the Vehicle and Traffic Law requires a driver changing lanes, as the bus was doing here, to wait until it is safe to do so. Unfortunately, the bus was forced to merge into the middle lane because some unknown but selfish driver stopped his car in the bus lane. The bus driver just did not see the plaintiff and merged into his car, violating this statute.

Liability

"The 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 eliminate any material issues of fact from the case" (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853, 476 N.E.2d 642, 487 N.Y.S.2d 316 [1985]). After which, the burden shifts to the party opposing the motion to 'demonstrate by admissible evidence the existence of a factual

issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]' (*Zuckerman v City of New York*, 49 NY2d 557, 560, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]).

Violation of the Vehicle and Traffic Law constitutes negligence per se (*see Flores v City of New York*, 66 AD3d 599, 888 NYS2d 27 [1st Dept 2009]). Pursuant to Vehicle and Traffic Law § 1128 (a) "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Moreover, "[a] rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the operator of the rear vehicle" (*Samouhi v Retamales*, 180 AD3d 1099, 120 N.S3d 69 [2d Dept 2020]).

The Court grants plaintiff's motion for summary judgment as it pertains to VTL § 1128(a). An issue of material fact must be more than conjecture, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient" (*Zuckerman*, 49 NY2d at 562). The bus driver's assertion that he and plaintiff merged simultaneously or that plaintiff forced his way in front of the bus is mere speculation, as defendant Branker clearly testified that he never saw the plaintiff's car up until the moment of the collision (NYSCEF Doc. No. 53 at 44). The bus driver admitted that he did not see plaintiff's car nor did he know where plaintiff's car "came from" (*id*.). That defendants now offer alternative versions of how the accident might have happened does not present a material issue of fact, especially when testimony exists that directly contradicts it, and photos of the vehicles clearly indicate plaintiff was hit from behind.

On the other hand, plaintiff's testimony has remained consistent and comports with the pictures of the accident. Plaintiff testified he drove in the middle lane, closest to the bus lane, on 57th Street for the entire time he was on 57th Street. The rear of his vehicle was pushed to the left

by the force of the collision, not because he was changing lanes at the time (NYSCEF Doc. No. 52 at 34-5).

A few divergent facts do not compel the Court to deny the motion. For example, defendants argue that plaintiff's vehicle was not stopping at the time of the collision, but plaintiff testified his foot was neither on the brake nor on the gas (*id*. at 34). Ascertaining whether plaintiff's car was stopping or not during rush hour traffic has nothing to do with the fact that plaintiff's vehicle was indisputably hit from the back. It was the bus driver's obligation to keep a safe distance behind plaintiff's vehicle and to ensure that it was safe to change lanes.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for summary judgment on liability is granted and defendant's affirmative defenses are severed and dismissed.

09/23/2022
DATE

ARLENE P. BLUTH, J.S.C.

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