

Gavins v Jones

2023 NY Slip Op 33011(U)

August 29, 2023

Supreme Court, Kings County

Docket Number: Index No. 521835/2021

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 29th day of August 2023

HONORABLE FRANCOIS A. RIVERA

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EBONY GAVINS,

Plaintiff,

- against -

GREGORY JONES, JOHN DOE, a-driver not yet identified, KHATUNA BERIASHVILI, NYC FLEET MANAGEMENT LTD., UBER TECHNOLOGIES, INC., and OMELIA OCHAEL WATSON,

Defendants.
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DECISION & ORDER

Index No.: 521835/2021

By notice of motion filed on November 10, 2022, under motion sequence one, defendants Khatuna Beriashvili (hereinafter Beriashvili) and NYC Fleet Management Ltd. (hereinafter NYC Fleet) seeks an order pursuant to CPLR 3212 granting summary judgment in their favor on the issue of liability, dismissing the complaint of plaintiff Ebony Gavins (hereinafter Gavins or plaintiff), and all cross claim asserted against them. This motion was opposed by co-defendant Gregory Jones (hereinafter Jones).

The New York State Court Electronic Filing (NYSCEF) system document numbers 22 through and including 32, 53 and 69 were considered on this motion.

By notice of cross-motion filed on February 15, 2023, under motion sequence two, plaintiff Gavins seeks an order pursuant to CPLR 3212: (1) granting summary judgment in the plaintiff's favor on the issue of liability as against defendant Jones; (2) granting summary judgment finding that the plaintiff was an innocent passenger; (3) striking defendant Jones' first, second, seventh, and eighth affirmative defenses; (4) striking defendant Uber Technologies, Inc.'s (hereinafter Uber), first, second, third, fourth, and sixth affirmative defenses; and (5) striking defendant Omelia Ochael Watson's (hereinafter Watson), first affirmative defense. This motion was opposed by Jones.

NYSCEF document numbers 34 through and including 36, 53, and 54 were considered on this motion.

By notice of cross-motion filed on February 16, 2023, under motion sequence number three, defendant Uber seeks an order pursuant to CPLR 3212 granting summary judgment in Uber's favor on the issue of liability, dismissing the complaint, and all cross claim asserted against it. This motion was opposed by Beriashvili and NYC Fleet.

NYSCEF document numbers 37 through and including 55 were considered on this motion.

By notice of cross-motion filed on July 5, 2023, under motion sequence four, defendant Watson seeks an order pursuant to CPLR 3212 granting summary judgment in Watson's favor on the issue of liability and dismissing the complaint and all cross claims asserted against Watson. This motion was opposed by Beriashvili and NYC Fleet.

NYSCEF document numbers 56-70 were considered on this motion.

BACKGROUND

On August 25, 2021, the plaintiff commenced the instant action for damages for personal injuries by filing a summons and verified complaint with the Kings County Clerk's Office (KCCO).

On January 19, 2022, defendant Jones joined issue by interposing and filing an answer with cross claims with the KCCO. As relevant to the instant motion, Jones first affirmative defense alleges the plaintiff's culpable conduct. The second affirmative defense claims lack of jurisdiction due to improper service. The seventh affirmative defense asserts a failure to state a cause of action. The eighth affirmative defense asserts the plaintiff's assumption of the risk.

On February 8, 2022, defendants Beriashvili and NYC Fleet joined issue by interposing and filing a joint verified answer with the KCCO.

On November 15, 2021, defendant Uber joined issue by interposing and filing a verified answer with the KCCO.

On August 11, 2022, defendant Watson joined issue by interposing and filing a verified answer with the KCCO.

The plaintiff's verified complaint alleges the following salient facts. On September 15, 2020, the plaintiff was a passenger in a 2016 Toyota motor vehicle bearing a New York State license plate that was being operated by defendant Beriashvili and traveling on Halsey Street at or near Patchen Avenue in Kings County, in the State of New York. Beriashvili was driving the vehicle with the permission of its owner, defendants Uber and NYC Fleet.

At the same, date, time and location, defendant Watson was operating a motor vehicle 2017 Hyundai bearing a New York State license plate, and defendant Jones was operating a 2009 Nissan bearing a New York State license plate. The three vehicles collided with each other due to the operators' negligent operation of their respective vehicles (hereinafter the subject accident). The subject accident caused the plaintiff to sustain serious physical injuries.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible

form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

A motion for summary judgment shall be supported by an affidavit, a copy of the pleadings and other available proof, such as depositions and written admissions (*Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018], citing CPLR 3212 [b]). The moving party's submissions must show that there is no defense to the cause of action or that the cause of action or defense has no merit (*Gobin v Delgado*, 142 AD3d 1134 [2d Dept 2016]).

Defendants Beriashvili and NYC Fleet jointly seek summary judgment in their favor on the issue of liability and dismissal of the complaint and all cross claim asserted against them. The plaintiff seeks, among other things, summary judgment in the plaintiff's favor on the issue of liability as asserted against Jones, and a striking of the first, second, seventh and eight affirmative defense asserted in Jones' answer. Defendant Uber seeks an order granting summary judgment in Uber's favor on the issue of liability and dismissal of the complaint and all cross claim asserted against it. Defendant Watson seeks order granting summary judgment in Watson's favor on the issue of liability and dismissing the complaint and all cross claim asserted against Watson.

It is well settled that the Supreme Court has the authority to search the record and grant summary judgment to a nonmoving party with respect to an issue that was the subject of a motion before the court (CPLR 3212[b]; *Schwartz v Town of Ramapo*, 197 AD3d 753, 756 [2d Dept 2021]). All the movants submitted a copy of the certified police report to admit the statements of each of the drivers involved in the subject accident. Defendants Beriashvili and NYC Fleet, the plaintiff and Watson also submitted the affidavit of Beriashvili in their respective motions for summary judgment.

Beriashvili's affidavit established the following facts. On September 15, 2020, he was operating a 2016 Toyota bearing a New York License plate, owned by NYC Fleet, with one passenger, Gavin, seated in the backseat. On that date, at around 2:00 pm, he was travelling eastbound on Halsey Street in Brooklyn, New York. Halsey Street, in this area, is a two-way street with one lane for moving traffic in each direction. Beriashvili was stopped at a traffic light on Halsey Street near Patchen Avenue. There was another vehicle stopped behind him. While he was still stopped, another vehicle driven by Jones was travelling in the opposite direction (westbound) on Halsey Avenue. Jones' vehicle merged out of its lane and struck his vehicle head on. The force of the impact propelled Beriashvili's vehicle backward into the motor vehicle behind him.

The defendant drivers' admissions contained in the certified police report demonstrated the following facts. Beriashvili's vehicle was stopped at a traffic light facing eastbound on Halsey Street. Watson's vehicle was stopped behind it, also facing eastbound. While these vehicles were stopped, Jones's vehicle, driving westbound on

Halsey Street, merged out of its westbound lane and collided head on with Beriashvili's vehicle. Jones fled the scene after the collision.

A defendant moving for summary judgment in a negligence action has the burden of establishing, prima facie, that he or she was not at fault in the happening of the subject accident (*Aponte v Vani*, 155 AD3d 929, 930 [2d Dept 2017]; see *Ferguson v City of New York*, 209 AD3d 981 [2d Dept 2022]). A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic (*Francois v Baez-Mises*, 216 AD3d 1138 [2d Dept 2023]).

Here, Beriashvili established prima facie entitlement to judgment as a matter of law by demonstrating that defendant Jones violated Vehicle and Traffic Law § 1126 (a) by crossing over a double yellow line into an opposing lane of traffic, thereby causing a head on collision (*Barbaruolo v Difede*, 73 AD3d 957, 957 [2d Dept 2010], citing *Scott v Kass*, 48 AD3d 785, 785 [2d Dept 2008]). Inasmuch Beriashvili was not liable for causing the subject collision, so too, neither Uber nor NYC Fleet are liable. Their liability is tethered to that of Beriashvili through statute, pursuant to Vehicle and Traffic Law § 388, or pursuant to principles of vicariously liability.

Defendant Watson also seeks summary judgment in Watson's favor on the issue of liability and dismissal of the complaint and all cross claim asserted against Watson. The evidentiary submission of Beriashvili establishes that Watson was struck while stopped behind Beriashvili's vehicle and while waiting for a red light. Watson was therefore free of liability in the happening of the subject accident.

The plaintiff also claims, among other things, that Jones' violated Vehicle and Traffic Law § 1126 (a). A search of the record establishes not only that Jones' negligent operation of his vehicle was the sole proximate cause of the subject accident but also that the plaintiff was an innocent passenger and free of comparative fault. The plaintiff also seeks an order striking Jones' affirmative defense alleging plaintiff's culpable conduct, lack of jurisdiction due to improper service, failure to state a cause of action and plaintiff's assumption of the risk.

The defense of culpable conduct is properly struck because the Court has determined that Jones' negligent operation of his motor vehicle was the sole proximate cause of the subject accident. Jones waived the affirmative defense of lack of personal jurisdiction based on improper service by failing to move on it within 60 days after having previously raised it in his answer (*see* CPLR 3211[e]; *Tannenbaum Helpern Syracuse & Hirschtritt LLP v Deheng L. Offs.*, 127 AD3d 564, 565 [1st Dept 2015], citing *Aretakis v Tarantino*, 300 AD2d 160 [1st Dept 2002]).

Jones' seventh affirmative defense asserts that the plaintiff's complaint fails to state a cause of action. Since the issuance of *Butler v Catinella* (58 AD3d 145 [2d Dept 2008]), the Appellate Division Second Department has made clear that no motion lies to strike the defense of failure to state cause of action. Such a motion amounts to an "endeavor by the plaintiff to test the sufficiency of his or her own claim" (*Mazzei v Kyriacou*, 98 AD3d 1088 [2d Dept 2012], quoting *Butler*, 58 AD3d at 150). *Butler* overruled prior Second Department case law which held that failure to state a cause of action was not a proper affirmative defense. "Overruling those earlier cases, the Second

Department now joins the First and Third Departments in holding that the worst that can be said about the defendant's including failure to state a cause of action as a defense in the answer, is that it's harmless—mere surplusage—because a motion to dismiss on that ground lies at any time” (*Emigrant Mortg. Co., Inc. v Markland*, 37 Misc 3d 1230 [A] [Sup Ct, Kings County 2012]; *see also* CPLR 3211[e]—whether or not the defendant has included it as a defense; *Butler*, 58 AD3d at 145; CPLR 3211(b); Siegel, 7B McKinney's Practice Commentaries, C3211:38). Moreover, in light of the instant decision and order of this Court, the plaintiff obviously states a cause of action.

Jones' eight affirmative defense asserts that the plaintiff assumed the risk of the subject accident. The doctrine of primary assumption of the risk, which encompasses activities such as athletic competition, does not apply to this case (*Webb v Scharf*, 191 A.D.3d 1353 [4th Dept 2021], citing *Custodi v Town of Amherst*, 20 NY3d 83, 87 [2012]). Nor does implied assumption of the risk apply. Motorists traveling through public streets, generally, do not assume the risk of other motorists negligently striking their vehicle (*see generally Perez v Navarro*, 148 AD2d 509, 509-510 [2d Dept 1989]). Nor does an innocent passenger riding in such a motor vehicle. Consequently, the plaintiff has demonstrated prima facie entitlement to an order striking the first, second, seventh, and eighth affirmative defense asserted in the answer of defendant Jones.

In opposition to the respective motions of movants Beriashvili, NYC Fleet, the plaintiff, and Watson, defendant Jones argued that discovery had not been completed and that their respective motions were premature. Jones, however, did not submit his own affidavit setting forth how the subject accident occurred.

To establish that a summary judgment motion is premature, the nonmoving party must offer an evidentiary basis to suggest that discovery may lead to relevant evidence, or that facts essential to opposing the motion were exclusively within the knowledge and control of the moving party (*Velazquez-Guadalupe v Ideal Builders and Constr. Services, Inc.*, 216 AD3d 63, 76 [2d Dept 2023], citing *Mogul v Baptiste*, 161 AD3d 847, 848[2d Dept 2018]). 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 (*Lazarre v Gragston*, 164 AD3d 574, 575 [2d Dept 2018]). Here, defendant Jones failed to offer such an evidentiary submission or otherwise raise a triable issue of fact. Consequently, the respective motions of Beriashvili and NYC Fleet, the plaintiff and Watson for summary judgment in their favor on the issue liability is granted. Furthermore, the the first, second, seventh, and eighth affirmative defense asserted in the answer of defendant Gregory Jones is granted,

CONCLUSION

The motion of defendants Khatuna Beriashvili and NYC Fleet Management Ltd. for summary judgment in their favor on the issue of liability and for the dismissal of plaintiff Ebony Gavins' complaint and all cross claim asserted against them is granted.

The branch of the cross motion of plaintiff Ebony Gavins for summary judgment in the plaintiff's favor on the issue of liability as against defendant Gregory Jones is granted.

The branch of the cross motion of plaintiff Ebony Gavins for an order striking the first, second, seventh, and eighth affirmative defense asserted in the answer of defendant Gregory Jones is granted.

The branch of the cross motion of plaintiff Ebony Gavins for an order striking the first, second, third, fourth, and sixth affirmative defenses asserted in the answer of defendant Uber Technologies, Inc. is rendered academic.

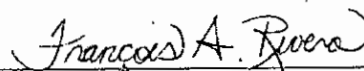
The branch of the cross motion of plaintiff Ebony Gavins for an order striking the first affirmative defense asserted in the answer of defendant Omelia Ochael Watson is rendered academic.

The cross motion by defendant Uber Technologies, Inc. for summary judgment in its favor on the issue of liability and the dismissal of plaintiff Ebony Gavins' complaint and all cross claim asserted against it is granted.

The cross motion by defendant Omelia Ochael Watson for summary judgment in Watson's favor on the issue of liability and dismissal of plaintiff Ebony Gavins' complaint and all cross claim asserted against her is granted.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

HON. FRANCOIS A. RIVERA
J.S.C.