SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS Part 25

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David Fils, Aime Choute and Marckinson St. Louis, Index # 507705/2017
Calendar #s 8-9, 40

PLAINTIFFS, Motion Sequence #s 7-9

-against-

DECISION/ORDER

Fire Department of the City of New York, The City of New York, Patricia Campbell, L.E.D. Transport Inc., Seth W. Birch, and Jean Bertin Luc,

DEFENDANTS.

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Recitation, as required by CPLR §§ 2219 and 3212 of Papers consider on Review of Motion:

Papers	**NYSCEF Document #s:**
Plaintiffs' Mot. Seq 7 (summary judgment against Defendants L.E.D. Transport and Seth Birch)	99-106
Defendant Jean Bertin Luc's Mot. Seq. 8 for summary judgment	107-108
Def. Luc's Affirmation in support of Plaintiffs' Mot. Seq. 7	109
Defendants FDNY, City of New York and Patricia Campbell's ("FDNY") Mot. Seq. 9 for summary judgment	110-123
Defendants LED Transport/Seth Birch's Opposition to Mot. Seq. 7-9	129-131
Defendant Jean Bertin Luc's Opposition to FDNY Defendants Mot. Seq. 9	132
Defendant Jean Bertin Luc's Reply to Defendants L.E.D. Transport and Seth Birch's Opposition (Mot. Seq. 8)	133
FDNY Defendants Reply to Defendantss L.E.D. Transport and Seth Birch's Opposition (Mot. Seq. 9)	134

Upon the foregoing cited papers and oral argument on April 5, 2023, pursuant to CPLR §§ 3212(e) and 3211(b), Plaintiffs' Motion for Summary Judgment against Defendants L.E.D. Transport Inc. and Seth W. Birch ("LED/Birch" Defendants) and to strike the LED/Birch Defendants' affirmative defenses of comparative negligence and assumption of risk (Mot. Seq. 7) is GRANTED. Upon further review of the submissions, the Court also grants Plaintiffs' motion to strike the LED/Birch Defendants' affirmative defenses of comparative negligence and assumption of risk (Mot. Seq. 7).[1]

[1]During the court appearance on motion sequences 7, 8 and 9 on April 5, 2023, this Court indicated that it would be denying Plaintiff's motion to strike the LED/Birch Defendants' affirmative defenses of comparative negligence and assumption of risk (Mot. Seq. 7). However, upon further review of the filings on these motions, the Court has decided differently. However, the Court will consider reargument of this portion of this Decision and Order on Mot. Seq. 7 if the LED/Birch Defendants chooses to pursue that option.

The Decision and Order on Defendant Jean Bertin Luc's ("Luc") summary judgment motion, pursuant to CPLR § 3212, dismissing the complaint and any all crossclaims against him (Mot. Seq. 8) is likewise GRANTED.

The Decision and Order on Defendants Fire Department of the City of New York, The City of New York and Patricia Campbell's (the "FDNY" Defendants) summary judgment motion, pursuant to CPLR § 3212, dismissing the complaint and any all crossclaims against them (Mot. Seq. 9) is likewise GRANTED.

Plaintiffs were passengers in Defendant Luc's vehicle. It was apparently stopped when the LED/Birch Defendants' vehicle rear-ended Defendant Luc's vehicle, causing it to hit the FDNY Defendants' vehicle, resulting in Plaintiffs' alleged injuries. As a general rule, a rear-end collision with a stationary vehicle creates a *prima facie* case in favor of the operator of the stationary vehicle unless the operator of the moving vehicle comes forward with an adequate, non-negligent explanation for the accident. *See Mundo v. City of Yonkers*, 249 A.D.2d 522 (2nd Dep't 1998); *see also Whaley v. Carvana N.Y. City*, 2023 N.Y. App. Div. LEXIS at 2 (2nd Dep't, Sept. 27, 2023) (struck in the rear, plaintiff's parked vehicle established *prima facie* negligence which could only be rebutted by a non-negligent explanation); *Rebecchi v. Whitmore*, 172 A.D.2d 600 (2nd Dep't 1991) (plaintiff's affidavit that she was stopped was sufficient to establish as a matter of law that defendants were solely at fault); *cf. Moylett v. Zioulis*, 239 A.D.2d 396 (2nd Dep't 1997) (well-settled that when a vehicle is stopped for a red-light and is struck in the rear, a *prima facie* case of negligence is established and can only be rebutted by the moving vehicle with evidentiary facts sufficient to raise a triable issue). Moreover, the failure to maintain a safe distance between two vehicles, in the absence of an adequate non-negligent explanation, is negligence as a matter of law. *See Aromando v. New York*, 202 A.D.2d 617 (2nd Dep't 1994); *see also Taing v. Drewery*, 100 A.D.3d 740 (2nd Dep't 2012) (if a driver approaching from the rear fails to maintain a reasonable speed, control and care to avoid colliding with a vehicle that suddenly stops, the latter's sudden stop is not a valid defense as to fault).

As the passenger-plaintiffs have made-out the required *prima facie* entitlement to judgment as a matter of law by offering sufficient evidence to eliminate any material issues of fact, the burden of proof switched to the LED/Birch Defendants to present admissible evidence tending to rebut that, which it did not do with respect to these Plaintiffs. Thus, the instant matter is distinguishable from, e.g., the Appellate Division's finding in *Teger v. Ford Credit Titling Trust*, 11 A.D.3d 676, 676-677 (2nd Dep't 2004) (while plaintiff, who was the only survivor from a vehicle involved in a motor-vehicle accident, demonstrated his *prima facie* entitlement to summary judgment by showing that he was not driver, whose negligence caused the accident, the defendants raised triable issues of facts as to his comparative negligence and credibility, thus precluding summary judgment). In the instant case, the LED/Birch Defendants have not presented any evidence refuting the passenger-Plaintiffs' entitlement to summary judgment on liability.

The LED/Birch Defendants speculate that a combination of rainy/foggy weather combined with their belief that the FDNY Defendants' ambulance failed to slow as it proceeded through the red-light at the intersection, point to what they determined to be ambiguous testimony (*see* NYSCEF Doc. 129 at 7). It avers that this speculation is sufficient to raise issues of fact to be determined by the jury. The Court disagrees and finds the LED/Birch Defendants failed to present

sufficient admissible evidence of non-negligent explanations for their vehicle's collision into the back of Defendant Luc's vehicle. More specifically, there is no evidence of an unavoidable skid on wet pavement. *See, e.g., Plaide v. D&D Carting Co., Inc.,* 136 A.D.3d 18 (2nd Dep't 2015) or that the FDNY Defendants' ambulance exceeded the reckless disregard emergency-vehicle standard of New York's Vehicle and Traffic Law ("VTL") that allows such vehicle to proceed through a red-light but only after slowing down for purposes of safe operation. *See* VTL § 1104(b)(2); *see also* VTL §§ 1104(e) and 1144(b). Accordingly, summary judgment on the issue of liability is warranted against the LED/Birch Defendants, which, by extension is likewise granted in favor of Defendant Luc (Mot. Seq. 8).

Summary judgment is also granted in favor of the FDNY Defendants (Mot. Seq. 9) given that the LED/Birch Defendants were the sole proximate cause of the accident. Furthermore, the FDNY Defendants were entitled to the reckless disregard standard under VTL § 1104 as there is no contradicting evidence the ambulance was responding to a call, had its emergency lights and/or sirens operating, still slowed to approximately 25 mph as it approached the intersection, and only proceeded through the red light after observing all vehicles stopped at that intersection.

As for the portion of Plaintiffs' motion to strike the LED/Birch Defendants' affirmative defenses of comparative negligence and assumption of risk, CPLR § 3211(b) provides that a party may move for judgment dismissing one or more defenses on the ground that the defense is not stated nor has merit. A plaintiff is no longer required to show freedom from comparative fault to establish her or his *prima facie* entitlement to judgment as a matter of law on the issue of liability. *See, e.g.*, *Whaley v. Carvana N.Y. City*, 2023 N.Y. App. Div. LEXIS at 2 (summary judgment on liability established via plaintiff's affidavit that her parked vehicle was struck in the rear). As Plaintiffs established their *prima facie* entitlement to judgment as a matter of law on the issue of liability, the burden shifts to Defendant to show by competent evidence the existence of a triable factual issue of the defense's merit. *See, e.g., Town of Hempstead v. Lizza Industries, Inc.*, 293 A.D.2d 739 (2nd Dep't 2002).

Here, it would be counterintuitive to find comparative negligence and the assumption of risk by passengers in a rear-ended vehicle that was stopped because an ambulance was entering the intersection during an emergency call. The LED/Birch Defendants have not presented competent evidence for these affirmative defenses. Accordingly, Plaintiffs met their evidentiary burden to warrant the striking of those two affirmative defenses in the absence of sufficient evidence by the LED/Birch Defendants to establish a *prima facie* basis for their admission at the damages phase of this trial. The Court's decision precluding these defenses does not run counter to *Rodriguez v. City of New York*, 31 N.Y.3d 312, 324 (2018) (When a defendant's liability is established as a matter of law before trial, the jury must still determine whether the plaintiff was negligent and whether such negligence was a substantial factor in causing plaintiff's injuries. If so, the comparative fault of each party is then apportioned by the jury) nor *Rodriguez*'s progeny, *e.g., Whaley v. Carvana N.Y.City; Xin Fang Xia v. Saft*, 177 A.D.3d 823, 825 (2nd Dep't 2019), as these cases are inapplicable to the circumstances in this case where summary judgment for Defendant Luc and where Plaintiffs were passengers in its.

Assumption of risk and comparative negligence are different types of culpable conduct. Assumption of risk involves a voluntary encounter with a known risk of harm and the focus is

upon what was known and comparative negligence involves the failure to use reasonable care under the circumstances. *Beadleston v. American Tissue Corp.*, 41 A.D.3d 1074, 1076 (3rd Dep't 2007). While a person could disregard a known risk by voluntarily being in a dangerous area and then also act unreasonably while there, the person's presence, by itself would not be negligence. *Id.* Conversely, while there are circumstances wherein each defense may be applicable. *See e.g. Ciserano v. Sforza*, 130 A.D.2d 618 (2nd Dep't 1987) where front-seat passenger in friend's car struck by another car was found to be 25% responsible for injuries suffered by second-car's driver because passenger knew that his friend was driving impaired and thus charged with assuming the risk. Given the distinguishable facts to the instant matter, Plaintiffs' motion to strike the LED/Birch Defendants' assumption of risk and comparative negligence affirmative defenses is granted.

This constitutes the Decision and Order of the Court.

Date: September 5, 2023
Brooklyn, New York

Hon. Patria Frias-Colón, J.S.C.