Lavin v Latone
2021 NY Slip Op 33766(U)
March 31, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 602144-2020
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, J.S.C.

INDEX NO.: 602144-2020

KEVIN A. LAVIN,

Plaintiff,

-against-

HEATHER C. LATONE, JOHN P. CONTINI, LINDSAY M. JURGENS and MARIA JURGENS,

Defendants.

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MOTION DATE: 10/14/20
SUBMITTED: 10/14/20
MOTION SEQ. Nos.: 1 & 2
MOTION DEC.: 1- MG
2- MG

Upon the following papers read on these motions seeking summary judgment: (1) Notice of Motion and supporting papers by Jurgens Defendants dated August 19, 2020 (documents 11-18); (2) Notice of Cross-Motion and supporting papers by Plaintiff dated September 25, 2020 (documents 20-23); (3) Affirmation/Affidavit in Opposition and supporting papers by Latone and Contini dated October 8, 2020 (document 24); and (4) Affidavit/Affirmation in Reply and supporting papers by Plaintiff dated October 12, 2020 and by Jurgens Defendants dated October 13, 2020 (documents 25-26); it is

ORDERED that the motion by defendants Lindsay M. Jurgens and Maria Jurgens seeking summary judgment dismissing all claims and cross-claims against them, pursuant to CPLR 3212, is granted; it is further

ORDERED that the cross motion by plaintiff seeking partial summary judgment against defendants Heather C. Latone and John P. Contini on the issue of liability, pursuant to CPLR 3212, is similarly granted.

Plaintiff commenced this action with the filing of a summons and complaint on February 4, 2020 seeking to recover money damages for personal injuries allegedly sustained as a result of a motor vehicle accident that occurred on May 12, 2017. Issue has been joined as to all defendants. Defendants Lindsay M. Jurgens and Maria Jurgens ("the Jurgens Defendants") now move seeking summary judgment dismissing all claims and cross-claims against them. Plaintiff seeks summary judgment against Heather C. Latone and John P. Contini (" the Latone Defendants") on the issue of liability. Plaintiff does not oppose the Jurgens Defendants' motion.

The Jurgens Defendants, by affidavit of Lindsay M. Jurgens, allege that the accident at issue occurred when the vehicle owned by Maria Jurgens and operated by Lindsay M. Jurgens ("Jurgens Vehicle"), was hit in the rear by a vehicle owned by John P. Contini and operated by Heather C. Latone ("Latone Vehicle"). The Jurgens vehicle was in motion at the time of impact and the force of the collision pushed the Jurgens vehicle into the rear of plaintiff's vehicle which was stopped at a red light. Plaintiff seems to agree with this version of events, although he does not allege personal knowledge of what transpired just prior to impact. He avers in his affidavit that while he was completely stopped at a red traffic light, his vehicle was hit in the rear by the Jurgens vehicle and that he "...later learned that the vehicle that struck me directly in the rear was propelled forward after it was struck in the rear by the vehicle owned by the Defendant, John P. Contini and operated by Defendant Heather C. Latone." The certified police report indicates that defendant Latone was unlicensed and was issued two tickets at the scene related to this offense.

Plaintiff does not oppose the Jurgens motion, but cross-moves for partial summary judgment as against the Latone Defendants on the issue of liability, asserting that he was completely stopped at a red light at the time of the occurrence and bears no liability for the accident. The Latone Defendants oppose both motions by attorney affirmation only, stating that there can be more than one proximate cause of an accident.

A party moving for summary judgment "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Mere conclusions or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***O'Brien v Port Auth. of N.Y. & N.J.***, 29 NY3d 27, 52 NYS3d 68 [2017]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937

NYS2d 157 [2011]). A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff, and that the defendant's negligence was a proximate cause of the alleged injuries (*see* ***Rodriguez v City of New York***, 31 NY3d 312, 319, 76 NYS3d 898 [2018]; ***Poon v Nisanov***, 162 AD3d 804, 79 NYS3d 227 [2d Dept 2018]; ***Wray v. Galella***, 172 AD3d 1446, 101 NYS3d 401 [2d Dept. 2019]; ***Hai Ying Xiao v. Martinez***, 185 AD3d 1014, 126 NYS3d 369 [2d Dept. 2020]).

To be entitled to partial summary judgment, plaintiff no longer bears the burden of proving the absence of his or her own comparative fault (***Rodriguez,*** *supra;* ***Outar v. Sumner***, 164 AD3d 1356, 81 NYS3d 751 [2d Dept. 2018]; ***Lopez v. Dobbins***, 164 AD3d 776, 79 N.Y.S.3d 566 [2d Dept. 2018]; ***Balladares v. City of New York***, 177 AD3d 942, 944, 114 NYS3d 448, 451 [2d Dept. 2019]). Culpable conduct on the part of plaintiff would not preclude recovery, it would only proportionally reduce the amount of damages that could be recovered (CPLR1411; ***Rodriguez***, *supra*). Therefore, an assertion that plaintiff is comparatively negligent has no impact on Plaintiff's *prima facie* claim of negligence and cannot act as a bar to summary judgment (***Rodriguez***, *supra*; ***Poon,*** *supra;* ***Wray,*** *supra;* ***Maliakel v. Morio***, 185 AD3d 1018, 129 NYS3d 99 [2d Dept. 2020]). However, here no such allegation of negligence on the part of plaintiff has been made in opposition to plaintiff's motion.

Vehicle and Traffic Law §1129(a) provides that, "The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway." Every driver has a common law duty to see that which should be seen through the proper use of his or her senses and to exercise reasonable care to avoid colliding with another vehicle (***Cicalese v Burier***, 123 AD3d 1078, 1 NYS3d 210 [2d Dept 2014]; ***Bennett v Granata***, 118 AD3d 652, 987 NYS2d 424 [2d Dept 2014]; ***Colpan v Allied Cent. Ambulette, Inc.***, 97 AD3d 776, 948 NYS2d 124 [2d Dept 2012]; ***Pollack v Margolin***, 84 AD3d 1341, 924 NYS2d 282 [2d Dept 2011]). It is the duty of the operator of a motor vehicle to not follow other vehicles more closely than is reasonable and prudent and to maintain awareness of surroundings to avoid colliding with another vehicle. (***Vavoulis v Adler***, 43 AD3d 1154, 842 NYS2d 526 [2d Dept 2007]; ***Maxwell v Lobenberg***, 227 AD2d 598, 643 NYS2d 186 [2d Dept.1996]; ***Nsiah-Ababio v Hunter***, 78 AD3d 672, 913 NYS2d 659 [2d Dept. 2010]; ***Cicalese v Burier***, 123 AD3d 1078, 1 NYS3d 210 [2d Dept 2014].) "A driver of a vehicle approaching another vehicle from the rear is required to maintain a reasonably safe distance and rate of speed under the prevailing conditions to avoid colliding with the other vehicle." (***Ortiz v Hub Truck Rental Corp.***, 82 AD3d 725, 726, 918 NYS2d 156, 157 [2d Dept. 2011] (*quoting* ***Nsiah–Ababio v Hunter,*** 78 AD3d 672, 672, 913 NYS2d 659); *see also* ***Strickland v. Tirino***, 99 AD3d 888, 952 NYS2d 599 [2d Dept. 2012]).

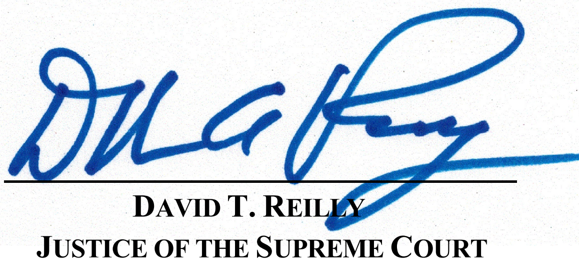
A rear end collision with a stopped or stopping vehicle gives rise to a claim of *prima facie* negligence on the part of the rear vehicle, shifting the burden to the rear vehicle driver to establish a non-negligent cause for the collision (***Hauswith v Transcare New York, Inc***, 97 AD3d 792, 949 NYS2d 154, [2d Dept 2012]; ***Leal v Wolff***, 224 AD2d 392, 638 NYS2d 110 [2d Dept. 1996]). Evidence that a vehicle was struck in the rear and propelled into the car in front of it may be a

sufficient non-negligent explanation (***Hauswith,*** *supra*; ***Strickland****, supra*). A vehicle being stopped at the time it is impacted in the rear gives rise to a *prima facie* inference of negligence on the part of the rear vehicle; in a chain collision, the party driving the middle vehicle can establish *prima facie* entitlement to judgment as a matter of law if it can demonstrate that it was properly stopped behind the lead vehicle and was propelled into the lead vehicle by an impact to the rear by a third vehicle (***Morales v Amar,*** 145 AD3d 1000, 44 NYS3d 184 [2d Dept. 2016]; ***Niosi v Jones***, 133 AD3d 578, 19 NYS3d 550 [2d Dept 2015]; ***Strickland v Tirino***, 99 AD3d 888, 952 NYS2d 599 [2d Dept. 2012]). The fact that a leading vehicle was in motion is insufficient to raise a triable issue of fact as to whether or not there is a non-negligent reason for a rear-end collision (***Strickland,*** *supra*; ***Niosi,*** supra).

Plaintiff's submissions have established a *prima facie* case of entitlement to judgment as a matter of law on the issue of Latone's negligence, for which defendant Contini is vicariously liable as the owner of the vehicle (VTL§388). The Jurgens Defendants' submissions have also established a *prima facie* case of entitlement to judgment as a matter of law, as to their own lack of negligence and Latone's negligence in causing the accident. As such, it was the burden of the Latone Defendants to produce admissible evidence establishing material issues of fact that would require a trial (***Alvarez v Prospect Hosp.,*** 68 NY2d 320, 501 NE2d 572 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 404 NE2d 718 [1980]). The Latone Defendants have offered no affidavit of any party with knowledge of the facts or any other evidence that would establish a non-negligent cause for the accident. Accordingly, summary judgment on the issue of liability is granted to plaintiff as against the Latone Defendants and summary judgment is granted to the Jurgens Defendants dismissing all claims and cross claims against them.

This constitutes the decision and Order of the Court.

Dated: **March 31, 2021**
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_______ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION