Rubin v Zishan
2013 NY Slip Op 32627(U)
October 17, 2013
Supreme Court, New York County
Docket Number: 110219/10
Judge: Arlene P. Bluth

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** 22

Justice

Index Number : 110219/2010
RUBIN, KAREN
vs.
ZISHAN, MOHAMAD
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to 3 **, were read on this motion to/for** defendant Colon's msj dismissing case vs him

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	**No(s).** 1
Answering Affidavits — Exhibits	**No(s).** 2
Replying Affidavits	**No(s).** 3

Upon the foregoing papers, it is ordered that this motion is

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 10/17/13

_____, J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 22

----------X

Karen Rubin,

Plaintiff,

-v-

Mohamad Zishan, Pervoye Taxi, Inc., Hector Colon and Luis Valdez ,

Defendants.

----------X

Index No. 110219/10
Mot. Seq. 002

Hon. Arlene P. Bluth, JSC

Defendant Colon's motion for summary judgment to dismiss the case and any cross-claims against him is granted; only defendants Zishan and Pervoye Taxi, Inc. opposed this motion.

This case involves a three-car accident which occurred on July 27, 2008 on the FDR Drive near the exit for 96th Street. Plaintiff was a passenger in a cab (the rear vehicle) driven by defendant Zishan and owned by defendant Pervoye Taxi, Inc. (the "taxi defendants") which struck the middle vehicle, defendant Colon's truck, in the rear, and propelled his truck into a vehicle owned and operated by defendant Valdez, the front car. As the middle car, Colon denies any liability for the accident.

In order to prevail on its motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact. *Alvarez v Prospect Hospital,* 68 NY2d 320, 508 NYS2d 923 (1986). Once the movant demonstrates entitlement to judgment, the burden shifts to the opponent to rebut that prima facie showing. *Bethlehem Steel Corp. v Solow*, 51 NY2d 870, 872, 433 NYS2d 1015 (1980). In opposing such a motion, the party must lay bare its evidentiary

proof. Conclusory allegations are insufficient to defeat the motion; the opponent must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact. *Zuckerman v. City of New York,* 49 NY2d 557 at 562, 427 NYS2d 595 (1980).

In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo,* 168 AD2d 204, 562 NYS2d 89 [1st Dept 1990], *lv. denied* 77 NY2d 939, 569 NYS2d 612 [1991]). As summary judgment is a drastic remedy which deprives a party of being heard, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*Chemical Bank v West 95th Street Development Corp.,* 161 AD2d 218, 554 NYS2d 604 [1st Dept 1990]), or where the issue is even arguable or debatable (*Stone v Goodson,* 8 NY2d 8, 200 NYS2d 627 [1960]).

In support of the motion, defendant Colon submits his affidavit (exh B to moving papers), in which he states that he was stopped in traffic when he was hit in the rear by the cab, and that he was propelled into the car in front of him. Therefore, Colon, through his affidavit, made a prima facie showing of entitlement to judgment as a matter of law by demonstrating that his stopped vehicle was rear-ended by the taxi.

The only opposition to the motion is from the taxi defendants. Zishan, the driver, submits his affidavit (exh A to opposition) in which he states that at the time of the accident "the two vehicles in front of me were stopped for no reason", the traffic in front of them was moving freely (para. 2), and "the vehicle directly in front of (sic) did not have any brake lights on or any hazard lights" (para. 3). Zishan claims that as soon as he saw that the vehicle in front of him was stopped, he put his foot on the brake but was unable to avoid hitting that vehicle.

In reply, Colon's attorney notes that Zishan admits to seeing vehicles stopped in the lane

ahead of him, and that this should have served as ample warning to reduce his speed or take evasive action to avoid a collision. The Court agrees; having admitted that he saw that the vehicle in front of him was stopped, the issue of whether the brake lights or hazard lights were functioning is insufficient to rebut the inference of negligence. *See Vespe v Kazi,* 62 AD3d 408, 409, 878 NYS2d 46, 47 (1st Dept 2009) *("*while plaintiff claims that there is an issue of fact as to whether Padilla had his hazard lights on, such fact is irrelevant in light of the testimony of Kazi and plaintiff that they saw Padilla's vehicle stopped before the accident. Thus, any failure to use hazard lights was not the proximate cause of the accident *(see Barile v Lazzarini,* 222 AD2d 635, 635 NYS2d 694 [1995])". Additionally, counsel cites to plaintiff's deposition transcript (exh C to moving papers, T. at 102) where she testified that she first observed that the vehicle ahead of the taxi was not moving when the taxi was six car-lengths from Colon's truck.

It is well settled that a rear-end collision with a stopped or stopping vehicle creates a presumption that the operator of the following vehicle was negligent; in order to rebut that presumption, the following vehicle's operator must proffer a non-negligent explanation for his or her involvement in the accident (*Corrigan v Porter Cab Corp.*, 101 AD3d 471, 955 NYS2d 336 [1st Dept 2012], *Agramonte v City of New York*, 288 AD2d 75, 732 NYS2d 414 [1st Dept 2001]). As applied here, the taxi defendants did not come forward with a non-negligent explanation for their involvement in the accident sufficient to rebut the presumption of negligence. Therefore, there is nothing for a jury to determine with respect to defendant Colon's liability. Accordingly, defendant Colon's motion for summary judgment dismissing the action and any cross-claims against him is granted.

Accordingly, it is

ORDERED that defendant Colon's motion for summary judgment dismissing the action and any cross-claims against him is granted; and it is further

ORDERED that movant Colon shall serve a copy of this order on all parties and the Trial Support Clerk who is respectfully requested to remove Hector Colon, as defendant, from the caption of this case; and it is further

ORDERED that the balance of the action shall continue; the parties are reminded of the next compliance conference which has been scheduled for December 6, 2013 at 9:30 am, Room 103, DCM Part 22.

This is the Decision and Order of the Court.

Dated: October 17, 2013
New York, NY

HON. ARLENE P. BLUTH, JSC