

**Coulibaly v New York City Tr. Auth.**

2007 NY Slip Op 33749(U)

November 13, 2007

Supreme Court, New York County

Docket Number: 0113643/2005

Judge: Donna Marie Mills

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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

COULIBALY, ALIOU

INDEX NO. 113643/05

Plaintiff,

MOTION DATE \_\_\_\_\_

-v-

MOTION SEQ. No. 003

NEW YORK CITY TRANSIT AUTHORITY, et al.,  
Defendants.

MOTION CAL NO. \_\_\_\_\_

The following papers, numbered 1 to 4 were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... 1

Answering Affidavits- Exhibits 2+3

Replying Affidavits 4

CROSS-MOTION: YES  NO

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

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

**FILED**

NOV 21 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 11-13-2007

D. Mills  
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 21

----- X

ALIOU COULIBALY, also known as ADAMA  
DOUCOURE,

Plaintiff,

INDEX NO.  
113643/05

-against-

NEW YORK CITY TRANSIT AUTHORITY, US  
TRUST COMPANY OF NEW YORK, ANSELY  
PRIMUS, RAFAEL MERINO, CHARLES A.  
CASCIIO, JEANMARIE CASCIIO and "JOHN  
DOE," name being fictitious, true name unknown,  
person intended being the operator of a vehicle  
involved in the occurrence alleged in the complaint,

Defendants.

----- X

**DONNA MILLS, J.:**

Motion sequence numbers 003 and 004 are consolidated herein for disposition.

In motion seq. no. 003 defendants Charles A. Cascio and Jeanmarie Cascio (collectively "Cascio") move for an order granting summary judgment dismissing plaintiff's complaint and all cross-claims or, in the event summary judgment is not granted, for an order precluding plaintiff from recovering any amount for lost wages or lost earnings.

In motion seq. no. 004 defendant Rafael Merino ("Merino") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint and all counterclaims[sic].

This is an action for damages for personal injuries allegedly sustained by plaintiff, an undocumented alien, on April 21, 2005 while traveling north on Madison Avenue between 39<sup>th</sup>

[\* 3 ]

and 40<sup>th</sup> Streets in Manhattan when his bicycle became wedged between a truck owned by Merino's corporation and operated by Merino and a bus owned by the Transit Authority and operated by Ansely Primus ("Primus"). It is unclear from the deposition testimony whether Madison Avenue was four or five lanes wide at the point of the accident. Defendant Cascio's pick-up truck was stalled or double-parked in the second lane from the westerly curb.

In support of his motion for summary judgment (mot. seq. no. 003) Cascio contends that he was an innocent bystander who bears no causal connection to plaintiff's accident. According to Cascio, even if his truck were parked in violation of a parking regulation, rather than stalled, there are no evidentiary facts to establish that the violation was the proximate cause of plaintiff's accident, particularly since Merino testified at his deposition that he never saw Cascio's truck before the accident occurred (see Cascio's exhibit E, p 56) and non-party witness Jameer Ali testified at his deposition that Merino's truck was stopped in the third lane (from the easterly curb) at the time of plaintiff's accident (see Cascio's exhibit F pp 13-15). Cascio, citing Balbuena v. IDR Realty, LLC, 6 NY3d 338, 362-363 (2006), then argues that plaintiff cannot recover for lost wages because he secured his employment as a bicycle messenger by submitting false documentation.

In opposition to Cascio, plaintiff points to the following: the deposition testimony of non-party witness, David Denby, who testified that Merino's truck was moving at a slight angle to the right (see plaintiff's exhibit B pp 19, 45-46); the police accident report which noted Cascio's plate number (see plaintiff's exhibit D); the deposition testimony of the police officer that Cascio's vehicle was double parked (see plaintiff's exhibit E, pp 32-33); the deposition testimony of non-party witness Richard Esposito that Cascio's vehicle was double-parked and Merino's

\* 4 ]

truck was bearing right to avoid it (see plaintiff's exhibit F, pp 27-29); and, the deposition testimony of Primus that Merino went around Cascio's pick-up truck (see plaintiff's exhibit H pp 29-30), all of which implicate Cascio's truck. Plaintiff then contends that Balbuena, *supra*, is inapplicable herein because it is "clearly limited" to resolving the conflict between the federal Immigration Reform and Control Act of 1986 (8 USC § 1324a *et seq.* [IRCA]) and the state labor law.

Merino has also moved for summary judgment (mot. seq. no. 004). Merino's attorney, relying on plaintiff's testimony at his statutory hearing (General Municipal Law 50-h) and deposition and Merino's deposition testimony, makes the following observations to support his conclusion that Merino cannot be charged with liability for the accident: plaintiff admitted he was operating his bicycle outside the lane of travel and in between two travel lanes (see Merino's exhibit F, pp 42-43); plaintiff testified that the bus forced him into Merino's truck (see Merino's exhibit E, pp 27-29); and, Merino testified that at the time of the accident his truck was facing north and straight (see Merino's exhibit G, p 33).

In opposition to Merino, plaintiff contends that plaintiff's comparative negligence, if any, presents a question of fact. Plaintiff then cites the testimony of the police officer who filed the accident report, who testified at his deposition that Merino said he was trying to avoid a double-parked vehicle (see mot. seq. no. 004, plaintiff's exhibit D, p 20), the deposition testimony of Richard Esposito that Merino was merging to the right (*id.*, plaintiff's exhibit E, pp 25, 27-28), the deposition testimony of Primus that Merino was moving toward the bus (*id.*, plaintiff's exhibit F, pp 17-18), the deposition testimony of David Denby that Merino was moving at a slight angle to the right (*id.*, plaintiff's exhibit G, p 19), and the deposition testimony of Merino

[\* 5 ]  
that he failed to observe plaintiff in his rear and side-view mirrors (*id.*, plaintiff's exhibit I, pp 51-52), all of which implicate Merino.

The court finds that defendants' motions for summary judgment should be denied. "In general, questions of negligence regarding a road accident are best resolved at a jury trial rather than on a motion for summary judgment [citations omitted]" (Lindgren v. New York City Housing Authority, 269 AD2d 299, 302 [1<sup>st</sup> Dept 2000]). Given that summary judgment is a drastic remedy properly denied if there is any doubt as to the existence of a triable issue (see Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957], rearg den 3 NY2d 941 [1957]), the court finds that the general rule applies herein and that the parties' and witnesses' deposition testimony should be assessed by the trier of fact..

Cascio has alternatively sought an order precluding plaintiff from recovering lost wages. "[A]n undocumented alien may be precluded from recovering damages for lost wages if he or she obtained employment by submitting false documentation to the employer" (Coque v. Wildflower Estates Developers, Inc. 31 AD2d 484, 487 [2d Dept 2006] citing Balbuena v. IDR Realty LLC, *supra*, 6 NY3d at 362-363). At his deposition plaintiff testified that he used the name and social security number of a friend to obtain the employment he was engaged in at the time of his accident (see Cascio's exhibit G, pp 9-11).

Accordingly, it is hereby

ORDERED that Cascio's motion for summary judgment dismissing the complaint and all cross-claims (mot. seq. no. 003) is denied and it is further

ORDERED that Cascio's alternative application for an order precluding plaintiff from recovering damages for lost wages is granted and plaintiff is so precluded and it is further

[\* 6]  
ORDERED that Merino's motion for summary judgment dismissing the complaint and all other claims against him (mot. seq. no. 004) is denied.

This constitutes the decision and order of the court.

DATED: 11-13, 2007

  
\_\_\_\_\_  
J.S.C.

**DONNA M. MILLS, J.S.C.**

**FILED**  
NOV 21 2007  
NEW YORK  
COUNTY CLERK'S OFFICE