

Ortega v Neris

2015 NY Slip Op 30987(U)

May 4, 2015

Supreme Court, Bronx County

Docket Number: 303825/2012

Judge: Lucindo Suarez

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

-----X

FRANCISCO ORTEGA and ECHELON CAB CORP.,

Plaintiffs,

DECISION AND ORDER

Index No. 303825/2012

- against -

FRANKLIN NERIS and J&M PLUMBING CORP.,

Defendants.

-----X

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated of February 23, 2015 of plaintiff Francisco Ortega and the affirmation, affidavit, and exhibits submitted in support thereof; defendants' affirmation in opposition dated March 9, 2015 and the exhibits submitted therewith; the affirmation in support dated March 27, 2015 of plaintiff Echelon Cab Corp.; the reply affirmation dated April 21, 2015 of plaintiff Francisco Ortega; and due deliberation; the court finds:

In this action arising out of a November 2, 2011 motor vehicle accident in New York County, plaintiff Francisco Ortega moves pursuant to CPLR 3212 for summary judgment on the issue of defendants' liability for causing this rear end collision. Ortega's earlier motion for summary judgment on liability was denied with leave to renew upon the completion of all discovery. Submitted on the instant motion are the pleadings, a copy of plaintiff's prior motion, plaintiff's affidavit, and the deposition transcript for defendant driver Franklin Neris ("Neris").

Plaintiff averred that he was stopped in the parking lane on Broadway near West 118th Street when his vehicle was struck in the rear. Neris testified that there were three lanes for moving traffic and a parking lane on both sides of a center median on Broadway. He was traveling in the southbound left lane for twenty or thirty seconds at twenty miles per hour prior to the accident. He was less than

ten feet away from the intersection when he saw a black jeep stop across the left and center southbound lanes and perpendicular to Neris' lane of traffic at West 118th Street. The jeep was stopped for three seconds. Five seconds passed from the time Neris first saw the jeep to the time he moved his vehicle from the left lane to the right lane. There was no vehicle to his immediate right. Neris also looked in his sideview mirror before changing lanes, and he saw no traffic behind him. As he moved to the right lane, Neris "lost control" of his van and struck the rear left side of plaintiff's vehicle which was parked next to the curb. Neris had applied his brakes upon seeing the jeep, and his foot was on the brake pedal for ten seconds before the impact.

Generally, a driver traveling behind another vehicle has a duty to maintain a safe distance behind the front vehicle, whether it is moving or stopped, to avoid a rear end collision in the event the front vehicle slows down or stops, even suddenly, *see* New York Vehicle and Traffic Law §1129(a), and taking into account the weather and road conditions. *See Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 (1st Dep't 2006). A rear-end collision with a stopped or stopping vehicle constitutes a prima facie case of negligence on the part of the operator of the rear vehicle and imposes upon the driver of the rear vehicle to provide a non-negligent explanation for the accident. *See Cabrera v. Rodriguez*, 72 A.D.3d 553, 900 N.Y.S.2d 29 (1st Dep't 2010); *Woodley v. Ramirez*, 25 A.D.3d 451, 810 N.Y.S.2d 125 (1st Dep't 2006). Plaintiff has demonstrated his entitlement to partial summary judgment.

Defendants oppose the motion and argue that Neris was not at fault based upon the emergency doctrine. "The emergency doctrine recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation, or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency." *Rivera v. New York City Transit Authority*, 77 N.Y.2d 322,

327, 569 N.E.2d 432, 434, 567 N.Y.S.2d 629, 631 (1991). The doctrine does not apply to routine rear end accidents, *see Johnson v. Phillips*, 261 A.D.2d 269, 690 N.Y.S.2d 545 (1st Dep't 1999), or where the party caused or contributed to the emergency. *See Couillard v. Shaw Envtl. & Infrastructure Eng'g of N.Y., P.C.*, 125 A.D.3d 509, 4 N.Y.S.3d 176 (1st Dep't 2015). The existence of an emergency and the reasonableness of a party's response ordinarily present questions of fact, but in appropriate circumstances, the issues may be determined as a matter of law. *Alamo v. McDaniel*, 44 A.D.3d 149, 152, 841 N.Y.S.2d 477, 480 (1st Dep't 2007).

Here, defendants failed to raise a triable issue of fact based upon the emergency doctrine. *See Renteria v. Simakov*, 109 A.D.3d 749, 972 N.Y.S.2d 15 (1st Dep't 2013). Neris saw the jeep five seconds before he reacted and within that time, he looked in his sideview mirror and applied the brakes. *See Dayong Liu v. Peng Cheng*, 82 A.D.3d 405, 918 N.Y.S.2d 38 (1st Dep't 2011). It is also unclear how Neris lost control of his vehicle which was traveling at fifteen miles per hour at the time of the impact. He did not experience any mechanical problems before the accident, the vehicle did not come into contact with the jeep, and the vehicle did not come into contact with a defect in the roadway. *See Mikorski v. City of New York*, 3 A.D.3d 459, 770 N.Y.S.2d 860 (1st Dep't 2004).

Defendants argument with regard to plaintiff's contributory negligence also fails. The fact that plaintiff was parked next to a fire hydrant merely furnished the condition for the happening of the accident. *See Sheehan v. New York*, 40 N.Y.2d 496, 354 N.E.2d 832, 387 N.Y.S.2d 92 (1976). In any event, 34 RCNY § 4-08(e)(2) provides that no vehicle may stop, stand or park within fifteen feet of a fire hydrant between sunrise and sunset unless the driver remains in the driver's seat to move the vehicle when necessary. Neris admitted that plaintiff was seated in the driver's seat at the moment of impact.

Accordingly, it is

ORDERED, that the motion of plaintiff Francisco Ortega for partial summary judgment on the issue of defendants' liability for causing the collision is granted; and it is further

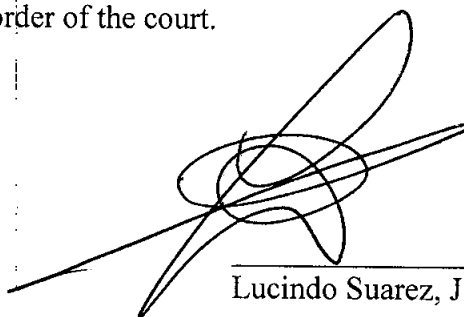
ORDERED, that the clerk of the court shall enter judgment in favor of plaintiff Francisco Ortega on the issue of defendants' liability for causing the collision; and it is further

ORDERED, that plaintiff shall have the burden at the time of trial to establish that he suffered a "serious injury" within the meaning of the Insurance Law.

ORDERED, that

This constitutes the decision and order of the court.

Dated: May 4, 2015

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right, positioned above a horizontal line.

Lucindo Suarez, J.S.C.