

Clayton v Berrios

2015 NY Slip Op 31663(U)

January 5, 2015

Supreme Court, Bronx County

Docket Number: 306282/11

Judge: Sharon A.M. Aarons

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX** Part 24

EVRIK CLAYTON,

Plaintiff,

-against-

Index No. 306282/11

DECISION and ORDER

DENNIS R. BERRIOS, ANTOINETTE N. LOFARO,
and ROCCO LOFARO,

Defendants.

Hon. Sharon A. M. Aarons:

Defendant Dennis R. Berrios (Berrios) moves for summary judgment pursuant to CPLR 3212 dismissing all claims and cross-claims against him. Plaintiff cross-moves for summary judgment awarding plaintiff judgment against defendants as to liability only. The motion is granted, and the cross-motion is granted as to the remaining defendants.

Plaintiff was allegedly injured as a result of a three-car collision which occurred on October 21, 2010 on Route 15/Merritt Parkway southbound, at or around entrance ramp 44 in Fairfield, Connecticut. Plaintiff's vehicle was struck in the rear by defendant Berrios' vehicle, after defendant Berrios' vehicle was struck in the rear by the vehicle owned and operated by defendants Antoinette N. Lofaro and Rocco Lofaro (the Lofaro defendants).

In support of the motion, defendant Berrios submits a copy of the summons and complaint; a copy of defendant Berrios' answer; and an unsigned but certified copy of defendant Berrios' deposition testimony. Defendant Berrios states in his deposition testimony that the accident occurred on Merritt Parkway in the southbound direction, heading to New York. There were two lanes of travel, but the right lane was blocked off because of construction, and thus there was only one lane

of travel at the time of the accident. Leading up to the construction area, there were signs indicating there was construction ahead, and that motorists were to reduce their speed. As he approached entrance ramp 44, traveling at or around 40 miles per hour, a vehicle (Nissan Pathfinder)¹ began entering his lane of travel, directly ahead of his vehicle. He applied his brakes, honked his horn, and flashed his lights to avoid colliding with the Nissan Pathfinder. As he was slowing down, his vehicle was rear-ended by the Lofaro defendants' vehicle. The impact caused defendant Berrios' vehicle to spin to the left and to hit the guard rail along the median. At the time of the rear-end impact, the Pathfinder was approximately 10 feet ahead of his vehicle, but had not yet fully merged into the lane of travel.

Plaintiff and the Lofaro defendants oppose the motion. In support of their opposition, the Lofaro defendants rely on the exhibits submitted in the motion and cross-motion, and in an affirmation by counsel argue that there are issues of fact as to how the accident occurred, thereby precluding summary judgment. Plaintiff opposes the motion stating that plaintiff was free from fault, and that the accident was caused by the defendants, and otherwise relies on the arguments made in plaintiff's cross-motion for summary judgment as to liability only.

In support of the cross-motion plaintiff submits, *inter alia*, a copy of the pleadings; the unsigned but certified deposition testimony of defendant Antonette N. Lofaro;² the unsigned and

¹ While defendant Berrios referred to the third vehicle involved in the collision as a "Nissan Pathfinder," the other parties identify that third vehicle as a "Toyota Highlander."

² "Where, as here, a certified but unsigned deposition has not been challenged as inaccurate, it may be considered. (*Ortiz v. Lynch*, 105 A.D.3d 584, 965 N.Y.S.2d 84 [1st Dept. 2013]; *Bennett v. Berger*, 283 A.D.2d 374, 726 N.Y.S.2d 22 [1st Dept. 2001])."

uncertified deposition testimony of defendant Berrios;³ the signed and certified deposition testimony of the plaintiff; a certified copy of the police accident report; and pictures purportedly of the vehicles involved in the accident after the accident occurred. Plaintiff argues that the testimony provides three different versions of the accident - one from plaintiff's perspective, one from defendant Antonette N. Lofaro's perspective, and the other from defendant Berrios' perspective. In each of their version of events, defendant Berrios' vehicle was caused to collide with plaintiff's vehicle, after the Berrios vehicle was struck in the rear by the vehicle driven by defendant Antonette N. Lofaro. However, while plaintiff testified that he was struck a second time by the Lofaro defendants' vehicle, defendant Antonette N. Lofaro testified that her vehicle did not collide with plaintiff's vehicle. Additionally, while plaintiff testified that he was fully in the left lane of travel, and traveled approximately 200 feet in that lane prior to being rear-ended by defendant Berrios' vehicle, defendant Berrios testified that plaintiff had not fully entered the lane of travel. Plaintiff also testified that his vehicle was struck in the back quarter panel, including the back passenger door and tire. The police report stated that plaintiff's vehicle "was entering" and "was merging into" defendant Berrios' lane of travel at the time of the collision. In addition, while defendant Antonette N. Lofaro testified that defendant Berrios had brought his vehicle to a complete stop prior to the collision, defendant Berrios testified that he was slowing down at the time of the collision. Defendant Antonette Lofaro further testified that she was unable to stop in time to avoid rear-ending defendant Berrios' vehicle. Finally, in

³No party has challenged the accuracy of any of the transcripts, nor challenged the failure to submit the certification of any of the depositions. Under these circumstances these deficiencies are deemed waived by the parties. *See Rosenblatt v. St. George Health & Racquetball Assoc., LLC*, 984 N.Y.S.2d 401, 2014 N.Y. App. Div. LEXIS 2854 (2d Dept. 2014) (failure to submit to the Supreme Court a certified copy of the plaintiff's deposition was an irregularity and, as no substantial right of a party was prejudiced, the court should have ignored the defect).

counsel's affirmation, plaintiff argues that regardless of what version of events is taken as true, plaintiff bore no responsibility for the collision, and the Lofaro defendants "appear to have the majority if not all of the liability for the accident herein."

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, which should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Consequently, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 165).

It is well established that a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the driver of the offending vehicle and imposes a burden on him or her to proffer a non-negligent explanation for the accident. (*Francisco v. Schoepfer*, 30 A.D.3d 275, 817 N.Y.S.2d 52 [1st Dept. 2006]; *Mullen v. Rigor*, 8 A.D.3d 104, 778 N.Y.S.2d 168 [1st Dept. 2004]; *Malone v. Morillo*, 6 A.D.3d 324, 775 N.Y.S.2d 312 [1st Dept. 2004]; *Singh v. Sanders*, 286 A.D.2d 256, 729 N.Y.S.2d 119 [1st Dept. 2001]; *Mitchell v. Gonzalez*, 269 A.D.2d 250, 703 N.Y.S.2d 124 [1st Dept. 2000]). A driver is expected to drive at a sufficiently safe speed and maintain enough distance between himself and cars ahead of him so as to avoid a rear-end collision, taking into account the weather and road conditions. (*Francisco*, 30 A.D.3d at 275; *Garcia v. Bakemark Ingredients (E.) Inc.*, 19 A.D.3d 224, 797 N.Y.S.2d 467 [1st 2005]; VTL § 1129[a].) The presumption in rear-end cases arises not from act of the lead vehicle in stopping

or braking, but, instead, from the duty of the driver of the vehicle behind to keep a safe distance and to not collide with traffic ahead. (*Leguen v. City of New York (Dept. of Sanitation)*, 30 Misc. 3d 1235(A), 2011 WL 873554, at *2 [Sup. Ct., Queens County 2011]). Therefore, in order to survive summary judgment on the issue of liability, the driver of the rear-ending vehicle is expected to provide a non-negligent explanation, in admissible evidentiary form, for the collision, whether or not the lead vehicle was moving at the time of the accident. (*Id.*; *Maccauley v. ELRAC, Inc.*, 6 A.D.3d 584, 775 N.Y.S.2d 78 [2d Dept. 2004]; *Johnson v. Phillips*, 261 A.D.2d 269, 271, 690 N.Y.S.2d 545 [1st Dept. 1999]). There is no requirement that all discovery be complete prior to summary judgment motions. (*Rainford v. Han*, 18 A.D.3d 638, 795 N.Y.S.2d 645 [2d Dept. 2005]).

It is not disputed that defendant *Berios* was rear-ended by the Lofaro defendants' vehicle. It is also undisputed that the collision between the *Berios* and Lofaro vehicles occurred prior to any alleged subsequent collisions between the *Berios* vehicle and plaintiff's vehicle, and the Lofaro vehicle and plaintiff's vehicle. The Lofaro defendants have not come forward with a non-negligent explanation of the accident. Defendant Antonette N. Lofaro's assertion that defendant *Berios* "stopped suddenly," on its own, is unavailing. (*Androvic v. Metro. Transp. Auth.*, 95 A.D.3d 610, 610, 944 N.Y.S.2d 113, 114 [1st Dept. 2012] ["defendants established prima facie entitlement to judgment as a matter of law by submitting evidence showing that the bus . . . had come to a complete stop before it was struck in the rear by a police vehicle . . . In opposition, plaintiff failed to provide a non-negligent explanation for the rear-end collision sufficient to establish an issue of fact regarding . . . defendants' negligence (*id.*). That the bus came to a sudden stop was insufficient to raise a triable issue of fact."]) Merely stating that defendant *Berios*' vehicle had stopped prior to the collision does not provide an explanation of the collision sufficient to survive summary judgment. Moreover,

defendant Berios' vehicle was thrust into plaintiff's vehicle after being struck by the Lofaro defendants' vehicle.

The parties have not litigated the issue of whether the plaintiff(s) sustained serious injuries pursuant to Insurance Law § 5102 (d). The issue of "serious injury" remains to be determined during the damages trial. (*Zecca v. Riccardelli*, 293 A.D.2d 31, 742 N.Y.S.2d 76 [1st Dept. 2002]; *Reid v. Brown*, 308 A.D.2d 331, 764 N.Y.S.2d 260 [1st Dept. 2003].

Accordingly, defendant Berrios motion for summary judgment is granted. Plaintiff's cross-motion for summary judgment as to liability only is granted as to the remaining defendants. It is hereby

ORDERED that all claims and cross-claims against defendant **DENNIS R. BERRIOS** are dismissed; and it is further

ORDERED that the plaintiff is granted partial summary judgment finding plaintiff free of culpable conduct, and granting judgment as to liability only against defendants ANTOINETTE N. LOFARO and ROCCO LOFARO; and it is further

ORDERED that a trial of the issues of damages shall be had before the court; and it is further

ORDERED that plaintiff's counsel shall serve a copy of this order with Notice of Entry upon counsel for all parties hereto.

This constitutes the Decision and Order of the Court.

Dated: January 5, 2015


SHARON A. M. AARONS, J.S.C.