

Gillians v Molina
2015 NY Slip Op 32484(U)
December 21, 2015
Supreme Court, Bronx County
Docket Number: 309903/2011
Judge: Betty Owen Stinson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: IAS PART 8

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ROBERT GILLIANS,

Plaintiff,

INDEX № 309903/2011

-against-

DECISION/ORDER

LEONOR E. MOLINA; MARY V. NUNEZ; NEW YORK
LIVERY LEASING, INC.; RJ LEASE MANAGEMENT
CORP. and MANUEL GERARDO,

Defendants.

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HON. BETTY OWEN STINSON:

This motion by plaintiff Robert Gillians for partial summary judgment as to liability against all defendants is granted only to the extent that plaintiff may have partial summary judgment as to liability against defendants New York Livery Leasing, Inc., RJ Lease Management Corp. ("Owners") and Manuel Gerardo, a/k/a Gerardo Manuel ("Gerardo"). Cross-motion by defendants Leonor E. Molina ("Molina") and Mary V. Nunez ("Nunez") for summary judgment dismissing the complaint against them is granted.

The following facts are not disputed. Plaintiff was a passenger in a livery cab, owned by two of the defendants and operated by defendant Gerardo, when the livery cab Gerardo was driving came into contact with a van owned by Nunez and operated by Molina. The two vehicles had been proceeding in opposing directions on a street located under elevated train tracks, when Gerardo decided to make an illegal U-turn, crossing the double yellow lines separating the two directions of traffic. As Gerardo turned into the path of the van, the van struck the livery cab.

Plaintiff commenced this suit against the defendants alleging serious injuries suffered in

the collision. After certain discovery was completed, plaintiff made this motion for partial summary judgment against all defendants, and Nunez and Molina cross-moved for summary judgment dismissing the action against them.

Summary judgment is appropriate when there is no genuine issue of fact to be resolved at trial and the record submitted warrants the court as a matter of law in directing judgment (*Andre v Pomeroy*, 35 NY2d 361 [1974]). A party opposing a motion for summary judgment must come forward with admissible proof that would demonstrate the necessity of a trial as to an issue of fact (*Friends of Animals v Associated Fur Manufacturers*, 46 NY2d 1065 [1979]).

A party moving for summary judgment has the initial burden of establishing *prima facie* that it is entitled to judgment as a matter of law by submitting sufficient admissible evidence to demonstrate that there are no triable issues of fact (*Bush v St. Clare's Hospital*, 82 NY2d 738 [1993]). Only if that burden is met does the burden shift to the non-moving party to present evidence of an issue of fact for trial (*Winegard v NYU Medical Center*, 64 NY2d 851 [1985]). If the moving party fails to meet its burden, the motion must be denied regardless of the sufficiency of the non-moving party's opposition (*id.*).

A party may not create an issue of fact by submitting self-serving and contradictory evidence tailored to avoid earlier testimony (*see Phillips v Bronx Lebanon*, 268 AD2d 318 [1st Dept 2000])[no issue of fact where plaintiff testified her brother arrived at scene after her slip and fall; witnesses coming to her aid found nothing on floor; then plaintiff offered affidavit by brother stating he witnessed fall and saw bloody, soapy trail leading to bucket nearby]).

Vehicle and Traffic Law ("VTL") §1126(a) prohibits crossing over double yellow lines on the road into an opposing lane of traffic, and doing so constitutes *prima facie* negligence as a

matter of law in the absence of an emergency not of the driver's own making (*Scott v Kass*, 48 AD3d 785 [2nd Dept 2008]). Speculation that a driver in the opposing lane of traffic could have had an opportunity to avoid a vehicle crossing over a double yellow line is insufficient to defeat a motion for summary judgment (*Snemyr v Valenti*, 47 AD3d 702 [2nd Dept 2008]). A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic (*id.*). Entries in a police accident report showing where the vehicles struck one another and their respective path of travel are admissible since the reporting officer could make these determinations at the scene of the accident and these reports are kept in the normal course of business (*id.*).

In opposition to both motions, Gerardo offered an affidavit dated June 5, 2015 stating that he had completed his U-turn before being struck by the van, and therefore the U-turn had nothing to do with the impact. Rather, the van had been traveling at a "high rate of speed" and sideswiped his livery cab. Gerardo considered the impact to be "a sudden and unexpected emergency".

Plaintiff has made a *prima facie* case for summary judgment as to liability against Gerardo and the Owners of the livery cab, which is not refuted by Gerardo's affidavit in opposition. Gerardo's affidavit contradicts both his earlier testimony that his livery cab was turned south "75 percent" at the point of impact (deposition of Manuel Gerardo, October 12, 2012 at 31-32), and the police accident report showing damage to the van only at its left front end, while the livery cab had damage all along its passenger side as it completed its turn after contact with the van.

In addition, a sudden and unexpected emergency must not be of the driver's own making if fault is to become an issue of fact (*see* VTL §1126[a]). Gerardo has offered no evidence of an emergency situation *causing him to cross the double yellow lines*. On the contrary, he testified

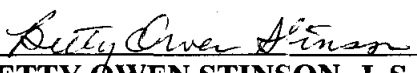
that he turned where he did because that is where he needed to discharge his passenger (deposition of Manuel Gerardo, October 12, 2012 at 29).

Defendants Molina and Nunez have made a *prima facie* case of entitlement to summary judgment dismissing the plaintiff's case against them, which Gerardo's affidavit only supports. Gerardo testified that he saw the van about half a block away coming toward him at "around 60 miles an hour" (*id.* at 32), yet he admits he inexplicably turned his livery cab into its path notwithstanding that observation. On the other hand, he testified that, when he saw the speed with which the van was approaching, he "made the U-turn faster trying to prevent being hit" (*id.* at 30), suggesting he only saw the van after he had begun his U-turn. These statements are not only internally inconsistent, but also inconsistent with Gerardo's affidavit characterizing the impact as "sudden and unexpected". He cannot claim an opportunity to estimate the speed of the van while asserting at the same time that the collision was "sudden and unexpected".

Partial summary judgement as to liability is granted, therefore, to the plaintiff as against Gerardo and the Owners of the livery cab. Molina and Nunez are granted summary judgment dismissing the complaint against them.

Movants are directed to serve a copy of this order on the Clerk of Court who shall amend the caption deleting the names of defendants Leonor E. Molina and Mary V. Nunez. This order does not address the threshold issue of whether plaintiff suffered a serious injury as a result of the subject accident.

This constitutes the decision and order of the court.
Dated: December 21, 2015
Bronx, New York


BETTY OWEN STINSON, J. S.C..