Lima v Florimon
2016 NY Slip Op 31102(U)
May 11, 2016
Supreme Court, Bronx County
Docket Number: 21156/2014
Judge: Howard H. Sherman
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 FILED May 18 2016 Bronx County Clerk

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

Decision and Order

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Cesar Lima

Plaintiff

Index No. 21156/2014

-against-

Ramon Florimon , Lenny G. Encarnacion

Defendants

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Lenny Encarnacion and Yulissa Chong

Plaintiffs

Index No. 21737/2015

-against -

Ramon Florimon

Defendant

Howard H. Sherman
J.S.C.

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Facts and Procedural Background

Plaintiff Cesar Lima (Lima) seeks recovery for injuries alleged to have been sustained on July 7, 2012 in a three -vehicle collision that occurred at the intersection of East Tremont and La Fontaine Avenues, Bronx, New York. At the time of the accident, Lima and Yulissa Chung (Chung) were passengers in a motor vehicle that was being operated by Lenny Encarnacion (Encarnacion) , which, while stopped at a red light, was impacted in the rear by a vehicle owned and operated by Ramon Florimon, and by the force of the impact, propelled into a motor vehicle directly in front of it.

By order of this court (Douglas, J.) the above actions arising out of the accident are to be jointly tried.

To date, no Note of Issue has been filed.

Motion

In the first-entitled action , defendant Encarnacion now moves for summary judgment dismissing the complaint and the cross-claim asserted against her on the grounds that there is no issue of fact that her conduct caused or contributed to the rear-end collision with her vehicle and the subsequent impact with the lead vehicle. The motion is supported by copies of the pleadings , and the transcripts of the deposition testimony of the moving defendant and of Cesar De Los Santos Lima b/s/h/a Cesar Lima , as well as an uncertified copy of the police accident report. [1]

Discussion and Conclusions

It is by now well settled that the proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law , tendering sufficient evidence to demonstrate the absence of a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557, 404 N.E.2d 718 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , as

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[1] The copy of the police report is not admissible (see, Coleman v. Maclas, 61 A.D.3d 569, 877 N.Y.S.2d 297 [1st Dept. 2009].

the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (*Braun v. Carey*, 280 App.Div. 1019) or where the issue is 'arguable' (*Barrett v. Jacobs*, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (*Esteve v. Avad*, 271 App. Div. 725, 727). " Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404, 144 N.E.2d 387 [1957].

Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691, 670 N.Y.S.2d 543 [2d Dept 1998], quoting *Larkin Trucking Co. V. Lisbon Tire Mart*, 185 AD2d 614, 615,585 N.Y.S.2d 894, [4th Dept. 1992]; see also, Torres v. Merrill Lynch Purch., 95 A.D.3d 741, 945 N.Y.S.2d 78 [1st Dept. 2012]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324, 501 N.E.2d 572 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735, 883 N.E.2d 350 [2008] , *rearg.den.* 10 N.Y.3d 885).

Once such a showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial of the action. (Romano v. St. Vincent's Medical Center of Richmond, 178 AD2d 467 , 577 N.Y.S.2d 311 [2d Dept. 1991];Meridian Mgt.

Corp. v. Cristi Cleaning Serv. Corp., 70 A.D.3d 508, 894 N.Y.S.2d 422 [1st Dept. 2010]).

While summary judgment is "is rarely granted in negligence cases since the very question of whether a defendant's conduct amounts to negligence is inherently a question for the trier of fact in all but the most egregious instances (*Wilson v. Sponable*, 81 AD2d 1, 5; Siegel, Practice Commentaries, McKinney's Cons Laws of NY Book 7B, CPLR C3212:8,p. 430) " Johnannsdottir v. Kohn, 90 AD2d 842, 456 N.Y.S.2d 86 [2d Dept. 1982] , such a motion will be granted "where the facts clearly point to the negligence of one party without any fault or culpable conduct by the other party." (Morowitz v. Naughton , 150 AD2d 536 [2d Dept. 1989]; see also, Gramble v. Precision Health, Inc., 267 AD2d 66,67 , 699 N.Y.S.2d 393 [1st Dept. 1999]; Spence v. Lake Service Station, Inc., 13 AD 3d 276, 788 N.Y.S.2d 337 [1st Dept. 2004]).

In the case of a rear-end collision, summary judgment on liability would properly lie " unless the driver of the following vehicle presents a nonnegligent explanation for the accident, or a nonnegligent reason for his failure to maintain a safe distance between his car and the lead car [and] [a] claim that the lead vehicle 'stopped suddenly' is generally insufficient to rebut the presumption of non-negligence on the part of the lead vehicle [emphasis added]." (Woodley v. Ramirez, supra at 452 , citing as authority, Malone v. Morillo, 6 A.D.3d 324, 775 N.Y.S.2d 312 [1st Dept. 2004]; Mullen v. Rigor, 8 A.D.3d 104, 778 N.Y.S.2d 168 [1st Dept. 2004]; Agramonte v. City of New York, 288 A.D.2d 75, 732

N.Y.S.2d 414; see also, Cabrera v. Rodriguez, 72 A.D.3d 553, 900 N.Y.S.2d 29 [1st Dept. 2010]; Chowdhury v. Matos, 118 A.D.3d 488, 987 N.Y.S.2d 132 [1st Dept. 2014]).

Upon review of the moving papers and consideration of the applicable law, it is the finding of this court that defendant has demonstrated as a matter of law that she bears no liability for the rear-end collision to her vehicle and the attendant impact with the lead vehicle.

No opposition is interposed.

Accordingly, it is

ORDERED that the motion be and hereby is granted on default and pursuant to CPLR 3212, and it is further

ORDERED that summary judgment be entered in favor of defendant ENCARNACION in the first-entitled action dismissing as asserted against her the complaint and the cross-claim.

This shall constitute the decision and order of this court.

Dated: May 11, 2016

Howard H. Sherman