

Harbajan v Yanez

2017 NY Slip Op 31187(U)

March 27, 2017

Supreme Court, Queens County

Docket Number: 2700/2015

Judge: Leslie J. Purificacion

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Part 39

-----X

Index Number 2700/2015

CURTIS HARBAJAN,

Plaintiff,

DECISION/ORDER

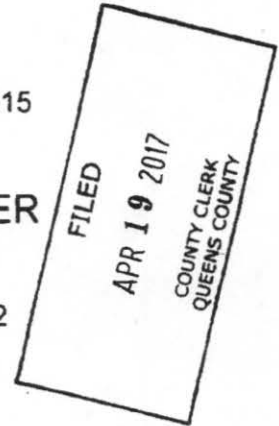
--against--

Motion Sequence No. 2

EDWIN J. YANEZ and JOSE L. YANEZ,

Defendants,

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The following papers numbered 1 to 9 read on plaintiff's motion seeking partial summary judgment on the issue of liability and setting the matter down for a trial on the issues of damages only.

| | <u>Papers Numbered</u> |
|--|----------------------------|
| Notice of Motion, Affirmation, Exhibits and Service..... | 1-4 |
| Answering Aff., Exhibits and Service..... | 5-7 |
| Reply..... | 8-9 |

Upon the foregoing papers, the motion is determined as follows:

In this personal injury action, plaintiff Curtis Harbajan seeks to recover damages for injuries allegedly sustained as a result of a motor vehicle accident that occurred on September 18, 2013 in the parking lot of a Dunkin Donuts located at 84-03 Corona Avenue in Queens County, New York. At the time of the accident, the plaintiff was a pedestrian exiting the Dunkin Donuts store and entering into the parking lot when he was struck by a vehicle owned by defendant Edwin J. Yanez and operated by defendant Jose L. Yanez. Plaintiff filed his summons and verified complaint on March 5, 2015. Issue was joined by service of defendants' verified answer dated April 10,

2015. Plaintiff now moves for partial summary judgment on the issue of liability and to set the matter down for a trial on damages.

In support of his motion, plaintiff submits an affirmation from counsel John Papadopoulos, Esq; a copy of the pleadings; a copy of plaintiff's verified bill of particulars; an uncertified copy of the police accident report; and copies of the transcripts of the examination before trial of plaintiff and defendant driver Jose L. Yanez.

Plaintiff testified that he was involved in a pedestrian knock down accident on September 18, 2013 in a parking lot adjacent to a Dunkin Donuts in Elmhurst, New York. Plaintiff stated that he was traveling to high school on an MTA bus and stopped to get some breakfast from Dunkin Donuts. Plaintiff claimed that when he entered into the parking lot he noticed the defendant's car positioned between Dunkin Donuts and some gas pumps. Plaintiff stated that he entered into the store and remained for approximately 8 minutes. Plaintiff exited the store by walking down a ramp. Plaintiff claimed that he saw the defendant's car when he exited the Dunkin Donuts and that the vehicle was stopped and had moved to the end of the parking lot. It appeared to the plaintiff that the vehicle was about to leave the parking lot. Plaintiff claimed that he took five steps off the ramp and did not see the vehicle move. Plaintiff then stated that he stopped because he felt his phone was about to fall out of his pocket. Plaintiff looked down to secure the phone in his pocket and when he picked his head up, the car backed up and hit him in his knees. Plaintiff claimed that he did not see the vehicle back up but that one to two seconds passed between when he looked down and the impact.

Plaintiff also submitted the transcript of defendant driver Jose L. Yanez's examination before trial testimony. Mr. Yanez stated that he was on his way to work on the morning of September 18, 2013 when he stopped at Dunkin Donuts to purchase a cup of coffee. Yanez stated that he made a left into the parking and then positioned himself to back up into a parking spot that was in front of the Dunkin Donuts store. He stated that he pulled up past the designated parking spot and turned left so that his vehicle was facing away from the Dunkin Donuts. Yanez claimed that he proceeded to back up into parking spot while breaking. He claimed that he looked back over his right shoulder, in his rearview mirror, left mirror and right mirror. Yanez claimed that while he was backing up he felt a thump and immediately stopped his vehicle. Yanez stated that the plaintiff started knocking on his window and told him that he had just hit him. Yanez stated that he did not see the plaintiff prior to the plaintiff knocking on his window.

Plaintiff argues that based on the depositions submitted that the defendant is solely responsible for striking the plaintiff with his vehicle. Plaintiff avers that the defendant driver was negligent as a matter of law for violating Vehicle and Traffic Law § 1146, which states that a driver must exercise due care to avoid colliding with pedestrians and Vehicle and Traffic Law §1211(a) which states that, "the driver of a vehicle shall not back the same unless such movement can be made with safety". In addition, plaintiff avers that defendant was negligent for failing to see the plaintiff prior to the impact.

In opposition, defendants state that plaintiff has failed to submit evidence in admissible form in his motion for summary judgment. Specifically, defendants contend that the deposition transcripts of the parties are inadmissible because they are unsworn

and unsigned. In addition the defendants claim that the police accident report is not certified and thereby also inadmissible. Finally, defendants argue that the plaintiff was negligent because in his deposition he stated that he did not observe the vehicle that struck him. Defendant claim that the plaintiff's failure to see the vehicle involved in the accident prior to the contact raises a question of whether he were using reasonable care while walking in the parking lot.

In reply, plaintiff argues that pursuant to CPLR §3116(a), a deposition transcript is required to be submitted to the witness for examination and signature. If the witness fails to sign and return the deposition within 60 days, it may be considered as accurate. Plaintiff submits, as Exhibit "A", a copy of a correspondence from plaintiff's counsel to the defendant's attorney. The correspondence appears to be the cover letter explaining that the plaintiff has enclosed the transcript with the correspondence and awaits defendant's execution. Plaintiff also argues that defendants do not allege any prejudice or inaccuracy with respect to the deposition transcripts.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the movant succeeds, the burden shift to the party opposing the motion, who must then show the existence of material issues of fact by producing evidentiary proof in admissible form, in support of his position (see Zuckerman v. City of New York, 49 N.Y.2d 557).

At the outset, the court finds that the plaintiff has submitted sufficient evidence that he has complied with CPLR §3116(a) and will consider the parties' deposition transcripts. The court further finds that the testimony of the parties demonstrated that defendant-driver was negligent as a matter of law in that he violated VTL §1146(a) and

VTL §1211(a) by failing to exercise due care and failing to take adequate precautions to avoiding hitting the plaintiff as he was backing up into a parking spot. Defendant admitted in his deposition that he did not see the plaintiff and his view was unobstructed. However, there can be more than one proximate cause of an accident (see Cator v Filipe, 47 a.D.3d 664; Kurus v. Albano, 38 A.D. 849). Here, the plaintiff has failed to establish, as a matter of law, that he is free from comparative negligence. Plaintiff testified that he was aware of the defendants' vehicle stopped at the edge of the parking lot when he exited Dunkin Donuts. He further testified that he took five steps into the parking lot and stopped to look down to secure his phone before he was struck by the defendant Yanez backing up. Therefore, there is a question of fact as to whether plaintiff exercised due care while walking through the parking lot.

Accordingly, the plaintiff's motion for partial summary judgment on the issue liability is denied.

This is the decision and order of the court.

Date: March 27, 2017



Hon. Leslie J. Purificacion, J.S.C.

