

Hill v Correa

2017 NY Slip Op 31718(U)

March 9, 2017

Supreme Court, Bronx County

Docket Number: 22532/2014

Judge: Kenneth L. Thompson, Jr.

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This opinion is uncorrected and not selected for official publication.

JUL 20 2017

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20 X

MILLER LEE HILL,

Plaintiff,

-against-

NICHOLAS CORREA, A & C TIRES, INC., JAMES
D. McNAIR and MARIA N. CLAUDIO-CRUZ,

Defendants.

Index No: 22532/2014

DECISION AND ORDER

Present:
HON. KENNETH L. THOMPSON, JR.

_____ X

The following papers numbered 1 to 6 read on this **motion to renew**

No	On Calendar of May 18, 2017	PAPERS NUMBER
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed-----	_____	<u>1, 5</u>
Answering Affidavit and Exhibits-----	_____	<u>3, 6</u>
Replying Affidavit and Exhibits-----	_____	<u>4</u>
Affidavit-----	_____	_____
Pleadings -- Exhibit-----	_____	_____
Memorandum of Law-----	_____	<u>2</u>
Stipulation -- Referee's Report --Minutes-----	_____	_____
Filed papers-----	_____	_____

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Defendant, Nicholas Correa, (Correa), and A&C Tires, Inc., move pursuant to CPLR 2221 to renew, vacate, modify or clarify an order of this court dated August 24, 2016. Plaintiff cross-moves for sanctions and attorney fees for an allegedly frivolous and baseless motion.

The underlying order in this action held as follows:

That plaintiff's vehicle stopped suddenly due to the vehicle stopping short in front of plaintiff's vehicle does not provide a non-negligent explanation for Correa's failure to avoid colliding with the rear of plaintiff's vehicle. Furthermore, Correra testified that he looked away from the direction his vehicle was traveling just before the impact with plaintiff's vehicle.

The aforementioned holding is in sharp contrast to the holding in a related

action, index #300940/2014, arising from the same three car collision which held as follows:

Given that a vehicle with a flat tire pulled in front of the Miller vehicle causing Miller to decelerate, there is an issue of fact as to whether Correa has a non-negligent explanation for hitting the Miller vehicle in the rear. *Singh v. Sanders*, 286 A.D.2d 256, 257 [1st Dept 2001]).

If a vehicle with a flat tire had indeed pulled in front of the Miller Lee Hill vehicle, an issue of fact is created as to whether Correa had a non-negligent explanation for the cause of the accident. *Singh v. Sanders*, 286 A.D.2d 256, 257 [1st Dept 2001]).

On this motion to renew, Correa submits an unsigned transcript of a telephone interview of a passenger in the lead vehicle operated by co-defendant, James D. McNair, (McNair), in which, Anton Morrison, indicates that McNair vehicle did have a flat tire. It is not admissible evidence however it is not the only evidence of the flat tire on the McNair vehicle. The police report has an admission of McNair that states as follows, "Driver of Vehicle one stated that he was on the center lane of south bound Major Deegan when his tire blew out. He tried to move over to the right lane when vehicle two struck him from behind." Moreover, this Court takes judicial notice of its own above cited holding in the related action, index 300940/2014, that the Correra vehicle had a flat tire and changed lanes into a three-car collision.

Accordingly, the branch of the motion of Nicholas Correa, (Correa), and A&C Tires, Inc., that seeks renewal of the motion that resulted in the decision of

this Court dated August 24, 2016, is granted, and upon renewal the motion is decided as follows: Plaintiff's motion is granted to the extent that the 13th affirmative defense is hereby dismissed. Plaintiff's motion is otherwise denied.

Plaintiff's cross-motion for sanctions and attorney's fees is denied as meritless.

The foregoing constitutes the decision and order of the Court.

Dated: 7/19/2017



KENNETH L. THOMPSON JR. J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

PW LEGAL

-----X

MILLER LEE HILL,

Index No.: 22532/14E

Plaintiff,

-against-

NICHOLAS CORREA, A&C TIRES, INC., JAMES D.
McNAIR and MARIA N. CLAUDIO-CRUZ,

Defendants.

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO RENEW, CLARIFY,
VACATE AND/OR MODIFY ORDER**

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Our File No.: UTMY-3724-A



PRELIMINARY STATEMENT

Defendants, NICHOLAS CORREA and A&C TIRES, INC., respectfully submit this memorandum of law in support of the within motion which seeks an order, (a) pursuant to C.P.L.R. §2221(a), leave to renew argument on the decision and order dated August 24, 2016 by the Hon. Kenneth L. Thompson stemming from a motion for partial summary judgment filed by plaintiff, MILLER LEE HILL, on liability against, and for dismissal of the 1st, 5th, 7th and 13th affirmative defenses asserted by defendants, NICHOLAS CORREA and A&C TIRES, INC., and for denial of that motion based on new evidence; or, in the alternative; (b) pursuant to C.P.L.R. §2221(a), leave for clarification of the decision and order dated August 24, 2016 by the Hon. Kenneth L. Thompson stemming from a motion for partial summary judgment filed by plaintiff, MILLER LEE HILL, on liability against, and for dismissal of the 1st, 5th, 7th and 13th affirmative defenses asserted by defendants, NICHOLAS CORREA and A&C TIRES, INC., in accordance and consistent with the decision and order of the Hon. Kenneth L. Thompson dated August 11, 2016 stemming from a motion for summary judgment on liability filed by JOSE A. REYES, as plaintiff, and a cross-motion for summary judgment filed by defendant, LEE HILL MILLER, under Index No. 300940/2014; or, in the alternative; (c) pursuant to C.P.L.R. §2221(a), leave to vacate and/or modify the decision and order dated August 24, 2016 by the Hon. Kenneth L. Thompson stemming from a motion for partial summary judgment filed by plaintiff, MILLER LEE HILL, on liability against, and for dismissal of the 1st, 5th, 7th and 13th affirmative defenses asserted by defendants, NICHOLAS CORREA and A&C TIRES, INC., in accordance and consistent with the Court's earlier decision and order dated August 11, 2016 stemming from a motion for summary judgment on liability filed by JOSE A. REYES, as plaintiff, and a cross-motion for summary judgment filed by defendant, LEE HILL MILLER, under Index No.

300940/2014 as well as under Index No. 22531/2014; and, (d) for such other further relief as this Court deems just and proper.

This matter arises out of a multi-car collision on November 13, 2013 resulting in separate personal injury suits commenced by MILLER LEE HILL and JOSE A. REYES.

LEGAL ARGUMENT

Point I

LEAVE TO RENEW ARGUMENTS AND FOR DENIAL OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS WARRANTED

A motion to renew can be premised upon new facts not presented on the prior application that would change the prior decision and must contain a reasonable justification for the failure to present such facts on the prior motion. C.P.L.R. § 2221(e)(2), (3).

In this case, the initial new facts arise out of the Court's findings of fact in the subsequent order, entered on plaintiff, MILLER LEE HILL's (hereinafter "HILL"), motion for summary judgment. The decision was decided and entered by the Clerk after the REYES', as plaintiff, motion and cross-motion decision and order. The findings between the decisions are completely in opposite as to defendant, NICHOLAS CORREA's (hereinafter "CORREA"), liability as well as HILL's liability.

In addition, despite documented difficulty attempting to obtain cooperation from defendant, JAMES D. MCNAIR (hereinafter "MCNAIR"), who concededly started the chain reaction, a passenger from his vehicle has recently been located. He contradicts HILL's testimony and, in fact, implicates him further in the occurrence.

Anton Morrison, a passenger in the MCNAIR vehicle, states that the chain collision did not begin with CORREA nor did CORREA serve as the factor that initially brought about the

collision. Rather, he states that HILL made contact with the MCNAIR vehicle before CORREA struck the HILL vehicle.

In this respect, this new information actually explains HILL's inability to testify as to a logical recitation of how the incident occurred, his involvement in bringing about the accident, and his own observations.

Of note, Morrison is a non-party who is not under the control of CORREA or A&C. Moreover, efforts to obtain his cooperation have been difficult and almost impossible. As such, reasonable justification exists for the failure to present his anticipated testimony in the earlier motions.

Point II

CLARIFICATION OF THE HILL DECISION FOR CONSISTENCY WITH THE REYES DECISION IS NECESSARY AS THE DECISIONS ARE IN OPPOSITE

Procedurally and logistically, the decisions are not consistent. Due to the fact that these cases are subject to a joint trial, clarification of the HILL order is necessary for the purposes of trial and ultimate adjudication of the lawsuits.

Due to the fact that this Honorable Court authored both decisions, the clarification must be made before the case is set out for trial to prevent undue delay and prejudice to CORREA or A&C TIRES, INC. (hereinafter "A&C").

For these reasons, clarification of the HILL order is a necessary prerequisite to both actions proceeding to trial as it will articulate which issues will be presented to the judge and jury who will ultimately decide the cases.

Point III

THE HILL ORDER MUST BE MODIFIED, IF NOT TOTALLY VACATED, TO BE CONSISTENT WITH THE EARLIER REYES DECISION

There is no doubt that the decision in the REYES action was decided and entered, as well as served with Notice of Entry, before the decision in the HILL action. Moreover, the decision in the REYES case involving HILL as a defendant, dealt with issues germane to both matters, and dealt with a review of evidence and submissions which were more comprehensive by virtue of all parties' participation in the REYES action.

HILL did not file a Notice of Appeal on the decision as it pertains to the finding of his liability. Moreover, REYES, as plaintiff, did not file a Notice of Appeal as it pertains to the Court's earlier finding that a question of fact exists as to a non-negligent explanation pertaining to CORREA's liability.

Because the REYES decision predates the HILL decision in every way, the decision in HILL must be modified, if not totally vacated, to be consistent with the Court's original decision.

In support of this position, defendants also insist that vacating the order in HILL is consistent with the doctrine of *res judicata*. In this respect, the issue of CORREA, A&C and HILL's liability was decided by the Court pursuant to the initial decision in the REYES matter. There is no difference in the factual scenario and evidence—but for the possibility that the Court was privy to more evidence and argument when it reached its decision in REYES—the REYES decision must take precedence.

In order to preclude re-litigation of the issues relative to both matters through the later decision in this matter, it must be shown that critical issues were decided in an early action by a Court of competent jurisdiction, where the parties were part of the prior action, and were given an opportunity to fully litigate the issue. *Israel v. Wood Dolson Co.*, 1 N.Y.2d 116 (1956).

Specifically, “[w]here a full opportunity has been afforded to the prior action and he has failed to prove his freedom from liability or to establish liability or culpability on the part of another, there is no reasoning for permitting him to retry these issues.” *Id.* at 119.

To be sure, not only is HILL a party to the REYES action and, by virtue of the decision of that action, a party subject to comparative liability, he did not seek dismissal of the cross-claims asserted by the other parties, including CORREA and A&C.

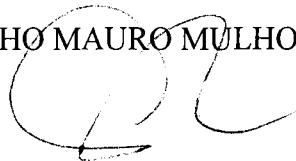
It cannot be argued that, with a more comprehensive argument and evidence framework in REYES, the decision in HILL should not be vacated and the original decision on the liability determinations adhered to in the earlier REYES decision.

For these reasons, defendants, CORREA and A&C, seek an order vacating the HILL decision based on the findings in the earlier decision which adjudicated the liability issues amongst the parties for the purposes of trial.

WHEREFORE, defendants, NICHOLAS CORREA and A&C TIRES, INC., respectfully request the Court grant the within motion, along with such other and further relief as the Court deems just and proper.

Dated: New York, New York
March 9, 2017

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To: (See Affidavit attached)