

**Perez v Cabrera**

2017 NY Slip Op 33347(U)

October 6, 2017

Supreme Court, Bronx County

Docket Number: Index No. 21178/2013E

Judge: Mary Ann Brigantti

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SUPREME COURT STATE OF NEW YORK  
COUNTY OF BRONX TRIAL TERM - PART 15

PRESENT: Honorable Mary Ann Brigantti

-----X  
STUARDY PEREZ,

Plaintiff,

-against-

**DECISION / ORDER**

Index No. 21178/2013E

FRANCISCO A. CABRERA, et als.,

Defendants

-----X

The following papers numbered 1 to 9 read on the below motion noticed on March 24, 2017 and duly submitted on the Part IA15 Motion calendar of **July 21, 2017** :

<u>Papers Submitted</u>	<u>Numbered</u>
Santiago's Notice of Motion, Exhibits	1,2
Olmedo Cross-Motion, Exhibits	3,4
Cabrera Aff. In Opp.	5
Cabrera Aff. In Opp.	6
Santiago Reply Aff., Exhibits	7,8
Olmedo Reply Aff.	9

Upon the foregoing papers, defendants George Santiago and Tareyah Kennerly move for summary judgment, dismissing the plaintiff's complaint and all cross-claims pursuant to CPLR 3212. Defendants Ruben Olmedo and Yaniri Olmedo cross-move for summary judgment, dismissing the plaintiff's complaint, and all cross-claims, pursuant to CPLR 3212. Defendant Francisco A. Cabrera ("Cabrera") opposes the motion and cross-motion.

I. Background

This matter arises out of an alleged multi-vehicle motor vehicle accident that occurred on the Bruckner Expressway on August 25, 2012. The plaintiff Stuardy Perez ("Plaintiff") testified that at the time of the accident he was operating a motorcycle on the Bruckner Expressway, going north (Pl. EBT at 32, 33). The Bruckner Expressway at this location consisted of three lanes of travel in his direction. As he proceeded, traffic began to slow down because there was ongoing construction work or cleaning occurring in the left lane of the highway, so that cars were merging toward the middle and right lanes (*id* at 36). Plaintiff had been traveling in the left lane at about

33 miles per hour, when he and other bikers began to merge to the right (*id* at 41, 42). Plaintiff merged onto the right lane and stayed there for about three to four minutes (*id* at 45, 46). After that time, Plaintiff saw headlights in his side view mirrors coming from a motorcycle (*id* at 46, 47). He did not hear the sound of horns from any other motorist (*id* at 49). After seeing these lights, the motorcycle struck the rear of his motorcycle (*id* at 49, 50). The impact caused Plaintiff to swerve to the left, and caused him to separate from his motorcycle (*id* at 55). Eventually, Plaintiff's left shoulder came into contact with a rear bumper of a burgundy Toyota Corolla, a vehicle that was traveling in the middle lane (*id* at 54, 55). After making contact with the bumper, Plaintiff fell to the roadway (*id* at 57). Plaintiff testified that the motorcycle that struck him was a Suzuki 1000cc GXR, however he never discovered the identity of its driver (*id* at 52, 62).

Defendant George Santiago ("Santiago") testified that on the date of this accident, he was operating a red Toyota Corolla on the Bruckner Expressway when traffic conditions began to slow down due to roadway work ahead (Santiago EBT at 21). Santiago was slowing down in the middle lane when he heard screeching noises that sounded like slamming brakes and felt one impact to the rear of his car (*id* at 29).. Before he heard the screeching, Santiago observed two or three motorcycles speed past him on either side (*id* at 31). After the impact, Santiago stopped his vehicle and asked the motorcycle operator if he was okay (*id* at 34). The operator responded "no" and Santiago then pulled his vehicle over to the right and called the police (*id*). Santiago testified that the impact to his vehicle was to its back, toward the muffler, on the passenger side (*id* at 41). Santiago noted that there were other people involved in the accident behind him, in "another accident" (*id* at 37). He noted that a "van" was "hit by another motorcyclist in the back" (*id*). When he got out of his car, he saw the van "like a full car length behind [him]" in the middle lane. (*id* at 38, 39). He noted that the other accident involved a van and a motorcycle. The driver of the other motorcycle was unconscious and lying on the highway, directly behind the van (*id* at 42, 43). Santiago observed that the rear of the van was damaged (*id* at 45, 46). In addition to the vehicles involved in this accident, Santiago noted that there were about 20 other motorcycles at the scene (*id* at 49). He did not witness the accident between the other motorcycle and the van (*id* at 65, 66).

Ruben Olmedo (“Olmedo”) testified that he was operating a Chrysler minivan on the date of this accident. He did not recall what lane he was traveling in or his speed (Olmedo EBT at 19). He stated that four vehicles were involved in the accident. His accident occurred when “[his] car was impacted by a motorcycle” (*id* at 20). He stated that he first knew he was involved in an accident when an air bag near his headrest deployed (*id* at 21-22). “Seconds after that, that other one was that I noticed we were in an accident, I saw a motorcycle dragging on the highway ending up at the rear from the front of the car that was in front of me” (*id* at 21). Before he felt the impact, he did not see any impact between other vehicles on the highway. The motorcycle that he saw in front of him after the impact was not the same motorcycle that hit him in the rear. That motorcycle was 5-8 feet in front of him and traveling in the right lane (*id* at 25). There was damage to the rear of his vehicle (*id* at 28), the rear door was completely dented. The rear bumper was also damaged (*id* at 25, 26). He did not exit the vehicle at the scene - he remained in his car (*id* at 34). He did not see what hit him from behind (*id*).

Cabrera testified that he was driving a motorcycle at the time of the accident, in a group of about 10 other motorcycles (Cabrera EBT at 26), and he was driving in the front of the pack (*id* at 42). The accident occurred in the right lane of the Bruckner Expressway near the Sheridan Avenue exit (*id* at 31, 32). Cabrera stated that immediately before the accident, a van that was traveling in the middle lane suddenly moved into the right lane and cut him off (*id* at 51, 52). In response, Cabrera applied his brakes and swerved to the left (*id* at 60), but the front of his motorcycle came into contact with the rear of the van (*id* at 63, 64). As a result of this impact Cabrera came off of the motorcycle and his body struck the van (*id* at 67). Cabrera testified that his motorcycle never came into contact with another motorcycle (*id* at 46, 47, 48, 49). He was not aware of another motorcycle involved in this accident (*id* at 85, 86).

Santiago and co-defendant Tareyah Kennerly, owner of the Santiago vehicle, now move for summary judgment on the basis that their vehicle was stopped in traffic when it was struck in the rear. Olmedo and his vehicle’s owner Yaniri Olmedo cross-move for summary judgment. Olmedo argues, *inter alia* that it is undisputed that there was no contact between their vehicle and Plaintiff’s motorcycle, and there is no evidence that his vehicle caused the accident.

Cabrera opposes the motion and cross-motion. Cabrera argues that Santiago's motion is procedurally defective because he failed to include a complete set of the pleadings. With respect to the merits, Cabrera asserts that the deposition testimony reveals conflicting versions of the circumstances surrounding this accident and the location of construction work/vehicles that were allegedly blocking the roadway. Cabrera also argues that there are issues of fact as to whether two separate accidents occurred, and whether Cabrera struck the motorcycle operated by Plaintiff. While Cabrera testified that he did not contact any motorcycle, Plaintiff testified that he was struck in the rear by a motorcycle and pushed into the vehicle that was traveling in front of him. Regarding the Olmedo defendants, Cabrera contends that there are issues of fact as to whether Olmedo contributed to this accident by suddenly changing lanes and cutting off Cabrera's motorcycle. Further, Cabrera alleges that Olmedo's motion is defective because the deposition transcripts they rely upon are not in admissible form.

## II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46<sup>th</sup> Street Development LLC.*, 101 A.D.3d 490 [1<sup>st</sup> Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can

reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

### III. Applicable Law and Analysis

#### (A) *Santiago Defendants*

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident." (*Cabrera v Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010] citing *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept. 2001]; see also *Dattilo v Best Transp. Inc* 79 A.D.3d 432 [1st Dept. 2010]).

In this case, Santiago established entitlement to summary judgment as a matter of law, as is not disputed that his vehicle was struck from behind by Plaintiff's vehicle (*see Cabrera v Rodriguez*, supra.; *see also Morales v. Garzon*, 120 A.D.3d 1126 [1<sup>st</sup> Dept. 2014]) The burden therefore shifted to Plaintiff or co-defendants to raise a triable issue of fact. Plaintiff and co-defendant Olmedo do not oppose Santiago's motion.

Cabrera opposes the motion and first argues that the motion is procedurally defective because Santiago failed to provide a copy of co-defendant Olmedo's answer. However, Olmedo's answer is available electronically and it was supplied in support of the Olmedo cross-motion. Accordingly, the motion may be considered on its merits, as the record is sufficiently complete (*see Studio A. Showroom, LLC v. Yoon*, 99 A.D.3d 632 [1<sup>st</sup> Dept. 2012]).

Cabrera argues that summary judgment must be denied because there are conflicting versions as to the facts and circumstances surrounding this accident. However, under any "version" of this accident, and regardless of which direction traffic was merging, Santiago is not liable because it is undisputed that his vehicle was struck in the rear by Plaintiff's motorcycle. Cabrera points to no testimony or evidence indicating that Santiago caused or contributed to Plaintiff's accident. Santiago is therefore entitled to summary judgment.

(B) *Olmedo Defendants*

Olmedo also established his entitlement to summary judgment by pointing to the parties' deposition testimony, which reveals that his vehicle did not impact Plaintiff's motorcycle, and his collision with the Cabrera motorcycle had nothing to do with Plaintiff's accident.

Cabrera argues that Olmedo's cross-motion is defective because the deposition transcripts are inadmissible, as they are uncertified and unsigned, and there is no evidence that they were ever forwarded to the deponents for signature. However, the Olmedo and Santiago transcripts are admissible because they were submitted by the party deponents themselves, and thus they were adopted as accurate (*see Franco v. Rolling Frito-Lay Sales, Ltd.*, 103 A.D.3d 543, 543 [1<sup>st</sup> Dept. 2013]). Furthermore, the transcripts of Cabrera and Plaintiff are admissible because they were both certified by the court reporter, and neither party disputes their accuracy (*id.*).

Cabrera further argues that the cross-motion must be denied because there are issues of fact as to whether Olmedo contributed to this accident by making a sudden lane change and cutting off Cabrera's motorcycle, causing Cabrera to apply his brakes and swerve to the left. Cabrera further asserts that there are factual issues as to whether two separate accidents occurred and whether his motorcycle came into contact with Plaintiff's motorcycle. Cabrera also points out the parties' differing description of the road conditions surrounding this accident location. After close review of the deposition testimony, this Court finds that Cabrera's contentions are insufficient to defeat Olmedo's cross-motion. First, there is no admissible evidence demonstrating that it was Cabrera's motorcycle that collided with Plaintiff's motorcycle. Plaintiff testified that he was struck from the rear by "another motorcycle," and this impact propelled him into the rear of the Santiago vehicle. Plaintiff did state that he viewed the offending motorcycle after the accident and noted that it was a Suzuki 1000cc GXR. This is the same model motorcycle that Cabrera was allegedly riding. However, aside from the model type, Plaintiff could give no further description of the motorcycle and he never learned the identity of its driver. Moreover, it is not disputed that at the time of this accident, Cabrera was riding along with a group of about ten other motorcycles. Cabrera himself testified that his motorcycle did not come into contact with another motorcycle. Rather, after he was cut off, he lost control and struck the rear of the Olmedo vehicle. Olmedo confirmed that his van was struck in the rear by a

motorcycle and after the accident he observed the damage to his rear bumper and trunk. Furthermore, Santiago testified that after the accident, he observed a mini van in the middle lane approximately one car length behind his vehicle. He said that there was damage to the rear of the van, and a motorcycle located behind it (Santiago EBT at 43).

Even if there were an impact between Plaintiff and Cabrera's motorcycle, Cabrera has failed to raise an issue of fact with respect to Olmedo's liability here. While the act of cutting off Cabrera's motorcycle may be relevant with respect to the subsequent collision between Olmeda's vehicle and Cabrera's motorcycle, there is no evidence on the record causally linking this impact to Plaintiff's accident. Cabrera essentially asks the court to assume that the act of Olmedo cutting off Cabrera not only led to an impact between Olmedo and Cabrera, but also caused Cabrera to impact the rear of Plaintiff's motorcycle, causing it to impact the rear of the Santiago vehicle. There is simply no evidence that this sequence of events actually occurred. Any suggestion that Olmedo's actions contributed to Plaintiff's accident would thus be based purely on speculation, guess, and surmise, which is insufficient to defeat summary judgment (*see generally LoBlanco v. Lake*, 62 A.D.3d 590 [1<sup>st</sup> Dept. 2009], citing *Bernstein v. City of New York*, 69 N.Y.2d 1020, 1022 [1987]).

#### IV. Conclusion

Accordingly, it is hereby

ORDERED, that the motion and cross-motion are both granted, and it is further,

ORDERED, that the plaintiff's complaint and any cross-claims asserted against defendants Santiago, Kennerly, and Olmedo are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: October 6, 2017

  
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Hon. Mary Ann Brigantti, J.S.C.