

Zayas v Yanqui-Tacuri
2017 NY Slip Op 33420(U)
December 14, 2017
Supreme Court, Westchester County
Docket Number: Index No. 69679/2016
Judge: Lawrence H. Ecker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
THERESA ZAYAS and JAMES ZAYAS,

Plaintiff,

-against-

LUIS BENITO YANQUI-TACURI, MARIO ROLANDO SARI-CARCHI and NATHAN SLOAN,

Defendants.
-----X

ECKER, J.

The following papers numbered 1 through 13 were considered on the motion of LUIS BENITO YANQUI-TUCURI and MARIO ROLANDO SARI-CARCHI ("defendants"), made pursuant to CPLR 3212, for summary judgment, as to liability, as against THERESA ZAYAS and JAMES ZAYAS ("plaintiff") and NATHAN SLOAN ("Sloan"):

PAPERS

NUMBERED

Notice of Motion, Affirmation, Exhibits A-D	1 - 6
Affirmation in Opposition, Exhibits A-D ¹ (Sloan)	7 - 12
Reply Affirmation	13

Upon the foregoing papers, the court determines as follows:

In this multi-car, rear-end collision case, plaintiff alleges she (and her husband derivatively) sustained serious injuries when the vehicle she was operating, while at a full stop at a school crossing area, was struck in the rear by the vehicle operated by defendant Yanqui-Tacuri with the permission of his cousin, defendant Sari-Carchi, the owner of the vehicle.

¹ Court rules require plaintiff to use numbered exhibit tabs.

Yanqui-Tacuri was not licensed and had driven a vehicle 10 times before. The accident took place on a level portion of Croton Avenue in the Village of Ossining (Westchester County) on February 28, 2014, which was a clear and dry day. The vehicle operated by Yanqui-Tucuri was struck in the rear by the vehicle operated by defendant Sloan.

Defendants now move for summary judgment as to liability, arguing that the impact between their vehicle and plaintiff's vehicle occurred while their vehicle was at a full-stop behind plaintiff's stopped vehicle, and that the Sloan vehicle struck their vehicle, thereby causing their vehicle to strike plaintiff's vehicle. Sloan opposes the motion. The parties to this motion concede that Sloan, an elderly gentleman, has no recollection of these events and plaintiff has taken no position on the motion.

The court has read the depositions of plaintiff and Yanqui-Tacuri. It is not contested that plaintiff was at a full stop at the time of the impact and that she felt only one impact. Yanqui-Tacuri testified that he had come to a full stop for a few seconds when he felt the impact from the rear that propelled him 80 centimeters (a distance slightly less than 3 feet) into the rear of plaintiff's vehicle. He used the term "pressing on the brakes" several times in his testimony to describe his conduct when he was struck in the rear, at a full stop. He could not state how far behind plaintiff's vehicle he was prior to the impact caused by Sloan. At page 40, lines 8-23, of his deposition [Def. Ex. C] Yanqui-Tacuri testified

A. "So the first one happened, within a second the second one happened.

Well, what happened is that I was pressing on my brake. I was pressing on my brake as I was heading toward the lady's car. So that one took more like two, three seconds. I got hit and it probably was three seconds before I hit the car ahead of me. I was pressing on the brake.

Q. When you stopped at the light before the impact number one, where was your right foot? ²

A. On the brake, because I was pressing on the brake before."

Sloan submitted the uncertified police accident report [Sloan Ex. D]. The responding officer wrote in his report "Operator of vehicle #2 stated that he was unable to stop and struck into the rear of vehicle #1. Operator of vehicle #3 stated that he was unable to stop and struck into vehicle #2." Contrary to Sloan's position, this portion of the uncertified police accident report is admissible as Yanqui-Tacuri's statement is an admission, and therefor an exception to the hearsay rule. Even if the responding officer

² The court notes that plaintiff testified at page 22 of her deposition that she was stopped at a school crossing by the crossing guard.

was not a witness to the accident, that portion of the uncertified police accident report that contained his admission was admissible. *Pivetz v Brusco*, 145 AD3d 806, 807 [2d Dept 2016, citing *Gezelter v Pecora*, 129 AD3d 1021, 1022-1023 [2d Dept 2015]; *Jackson v Trust*, 103 AD3d 851, 852 [2d Dept 2013]; *Scott v Kass*, 48 AD3d 785 [2d Dept 2008].

There is no indication in this record as to how fast Yanqui-Tacuri or Sloan was traveling prior to the impacts. Perhaps due to language difficulties caused by Yanqui-Tacuri having been assisted by a Spanish interpreter, when he testified he was “pressing on the brakes” it is not clear whether he was doing so prior to the impact in order to slow down or whether his right foot was completely on the brake at a full stop, which was his testimony at page 25 of his deposition.

The moving party is entitled to summary judgment only if it tenders evidence sufficient to eliminate all material issues of fact from the case. *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]. Put another way, in order to obtain summary judgment, there must be no triable issue of fact presented...even the color of a triable issue of fact forecloses the remedy. *In re Cuttitto Family Trust*, 10 AD3d 656 [2d Dept 2004], quoting *LNL Constr. v MTF Indus.*, 190 AD2d 714, 715 [2d Dept 1993]. If a party makes a *prima facie* showing of its entitlement to summary judgment, the opposing party bears the burden of establishing the existence of a triable issue of fact. *Zuckerman, v City of New York, supra*; *Alvarez v Prospect Hosp., supra*. On a motion for summary judgment, the court’s function is to determine if a factual issue exists, and ‘the court must not weigh the credibility of witnesses unless it clearly appears that the issues are feigned and not genuine, and [a]n conflict in the testimony or evidence presented merely raise(s) an issue of fact.’ [internal citations omitted]. *Brown v Kass*, 91 AD3d 894 [2d Dept 2012].

The court has considered the potentially inconsistent testimony by Yanqui-Tacuri, including his admission, as contained in the police accident report and the inability of Sloan to recall what occurred. Yanqui-Tacuri testified during his deposition that he was issued traffic tickets at the scene and “I paid them” [Def’t. Ex. C, p. 39, lines 2-6], which suggests the tickets were not dismissed. No one has advised the court as to the specific VTL violations for which the tickets were issued to Yanqui-Tacuri. In applying the applicable legal principles regarding summary judgment motions, as set forth, *supra*, the court finds that triable issues of fact exist as to whether defendants are responsible for the accident as well as the proximate cause of plaintiff’s claimed injuries, whether alone, or in conjunction with the liability of Sloan. In sum, these issues await a determination by the trier of fact.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by either party was not addressed by the court, it is hereby denied. Accordingly, it is hereby

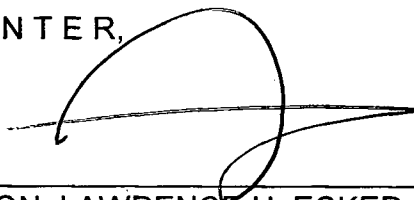
ORDERED that the motion of defendants LUIS BENITO YANQUI-TUCURI and MARIO ROLANDO SARI-CARCHI, made pursuant to CPLR 3212, for summary judgment as to liability, and dismissal of the complaint and cross-claims, is denied; and it is further

ORDERED that the parties shall appear at the Settlement Conference Part of the Court, Room 1600, on January 23, 2018, at 9:15 a.m.

The foregoing constitutes the Decision/Order of the court.

Dated: White Plains, New York
December 4, 2017

ENTER,



HON. LAWRENCE H. ECKER, J.S.C.

Appearances

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Attorneys for Plaintiff
Via NYSCEF

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Attorneys for Defendants Yanqui-Tacuri and Sari-Carchi
Via NYSCEF

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Attorneys for Defendant Nathan Sloan
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