

Casimir v Gargiulo

2018 NY Slip Op 30561(U)

March 23, 2018

Supreme Court, New York County

Docket Number: 158287/15

Judge: Lisa A. Sokoloff

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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ANDRISE CASIMIR

Plaintiffs,

DECISION AND ORDER

158287115

Index No.: ~~150473/2014~~

Mot. Seq. 3

-against-

ROBERT GARGIULO, INNOVATIVE DESIGN LLC,
CESAR ENRIQUE RINCON AND
YORK CITY TRANSIT AUTHORITY,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYCEF #
Defendant's Summary Judgment Motion / Affirmation	<u>1</u>	34-47
Plaintiff's Opposition/ Cross-Motion	<u>2</u>	50-51
Defendant's Motion / Affirmation Cross-Motion	<u>3</u>	55-60
Defendants' Affirmation in Reply	<u>4</u>	61

LISA A. SOKOLOFF, J.

Plaintiff Andrise Casimir commenced this action against Defendant Cesar Enrique Rincon (Rincon), operator of a bus owned by Defendant New York City Transit Authority (Transit) (Rincon and Transit, collectively, the Transit Defendants) in which Plaintiff was a passenger, claiming she sustained personal injury when the bus came in contact with a motor vehicle driven by Defendant Robert Gargiulo (Gargiulo) and owned by Defendant Innovative Design, LLC (Innovative) (Gargiulo and Innovative, collectively, the Car Defendants) at the intersection of First Avenue and 21st Street.

The Transit Defendants move for an order pursuant to CPLR § 3025(b) for leave to amend their answer and pursuant to CPLR §§ 3212 and 3211 for summary judgment on the issue of liability as to the Car Defendants and to dismiss the complaint and the Car

Defendants' cross-claims with prejudice. Plaintiff Casimir cross-moves for summary judgment on the issue of liability against the Car Defendants.

Transit seeks to amend its answer to add the affirmative defense of collateral estoppel based on the June 27, 2016 order of Hon. Michael D. Stallman issued in a related action (Index No. 157390/2014) by another passenger on the subject bus, Christine Dwyer, plaintiff, against the Transit Defendants¹, arising from the same May 13, 2014 accident. Judge Stallman's order granted summary judgment to Defendants, finding that videographic evidence from the front window of the bus at the time of the accident established that "... a vehicle changed lanes into the lane of travel of the bus, apparently without signaling." As a result, "Defendant Rincon, the bus operator, was faced with an emergency, not of his own making as a matter of law, and the sudden braking of the bus to narrowly avoid collision with the vehicle that changed lanes does not constitute negligence as a matter of law."

Subsequently, Judge Stallman issued an order on October 13, 2016 joining the instant action with a second action by Christine Dwyer (Index No. 161450/2015) against the Car Defendants and Daimler Trust.

A party may amend a pleading at any time by leave of the court and leave shall be freely given upon such terms as may be just, absent prejudice or surprise resulting directly from the delay (CPLR § 3025(b); (*Tri-Tec Design, Inc. v Zatek Corp.*, 123 AD3d 420 [1st Dept 2014]) and the determination is entirely at the court's discretion (*Gonfiantini v Zino*, 184 AD2d 368 [1st Dept 1992]). The type of prejudice necessary to warrant denial of the motion requires some indication that the opposing party has been hindered in the preparation of its case or has been prevented from taking some measure in

¹ In addition to the Transit Defendants, Metropolitan Transportation Authority, MTA Bus Company, and Manhattan and Bronx Surface Transit Operating Authority.

support of its position (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011]).

Neither Plaintiff nor Defendants oppose Transit's motion for leave to amend its answer, nor is there prejudice to the other parties as they are all aware of Judge Stallman's June 27, 2016 order granting the Transit Defendants summary judgment on the issue of liability. Accordingly, the branch of Transit's motion for leave to amend the answer to assert the defense of collateral estoppel, is granted and the answer is deemed so amended.

The proponent of a motion for summary judgment has the burden of establishing that there are no material issues of fact in dispute and thus that it is entitled to judgment as a matter of law (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [NY 1985]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Id.*). Once the defendant demonstrates its entitlement to summary judgment, the burden shifts to the plaintiff to present facts, in admissible form, demonstrating that genuine, triable issues exist precluding the granting of summary judgment (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Vega v Restani Const. Corp.*, 18 NY3d 499 [2012]).

Here, Transit claims entitlement to summary judgment on the issue of liability and dismissal of the complaint and cross-claims based on the emergency doctrine and collateral estoppel. The Transit Defendants argue that in his affidavit, Mr. Gargiulo did not dispute that he improperly entered the bus lane without properly signaling that he was changing lanes. Nor did he claim to have ascertained that he could safely change lanes before doing so. Transit contends that bus driver Rincon was faced with an emergency situation created solely by the actions of Mr. Gargiulo and that his actions were

reasonable under the circumstances (*Brooks v New York City Transit Authority*, 19 AD3d 162 [1st Dept 2005]). Mr. Rincon was not speeding at the time of the accident, traveling at 12-15 mph when Mr. Gargiulo's vehicle first entered the bus lane, promptly applied his brakes and, according to Transit, avoided collision when Mr. Gargiulo's vehicle came to a sudden stop in the bus lane.

Gargiulo attests that, to the contrary, that the video demonstrates that the bus was a few car lengths behind his vehicle when he began to change lanes, that he was traveling at about 5 mph, and when his vehicle was more than halfway into the bus lane, he felt a light impact to his rear bumper. Gargiulo asserts he never stopped his vehicle, abruptly or otherwise, just prior to the impact.

The Car Defendants argue that, under these circumstances, the emergency doctrine should not apply. "If, under some reasonable view of the evidence, an actor was confronted by a sudden and unforeseen occurrence not of the actor's own making, then the reasonableness of the conduct in the face of the emergency is for the jury" (*Rivera v New York City Transit Authority*, 77 NY2d 322 [1991]). Where the manner in which the events unfold leaves open the possibility that a defendant should have seen the other vehicle in enough time to avoid the accident, summary judgment should be denied (*Abreu Rabassa v Caldas*, 306 AD2d 137 [1st Dept 2003]; *Williams v City of New York*, 188 AD3d 989 [2nd Dept 2011]). The Car Defendants have presented sufficient evidence to rebut the Transit Defendants' *prima facie* case by raising a question of fact as to whether Defendant Gargiulo was solely responsible for the situation that caused the accident.

The Transit Defendants argue that collateral estoppel applies to this case as they have already been granted summary judgment as to liability with respect to another bus passenger involved in the same accident.

To successfully invoke the doctrine of collateral estoppel, which precludes a party or those in privity from relitigating in a subsequent action an issue clearly raised and decided against that party in a prior action, the identical issue must have been decided in the first action and decisive in the present action and the party to be precluded must have had a full and fair opportunity to litigate the issue in the earlier action (*Kaufman v Eli Lilly & Co.*, 65 NY2d 449 [1985]; *Netzahuall v All Will, LLC*, 145 AD3d 492 [1st Dept 2016]). In the instant case, it is undisputed that the issue to be decided is identical to the issue decided in the prior related action. The Car Defendants, however, were not named defendants in the prior action and thus did not have a full and fair opportunity to litigate the issue in the prior proceeding.

Therefore, notwithstanding the June 27, 2016 order of Hon. Michael D. Stallman in the prior action finding Defendant Rincon not negligent as a matter of law, the decision was not conclusive. A court deciding a motion for summary judgment is empowered to search the record (*New Hampshire Ins. Co. v MF Global, Inc.*, 108 AD3d 463 [1st Dept 2013]) which this court has done. In view of the more developed record presented here, the reasonableness of the Transit Defendants' conduct in the face of the emergency is for the jury (*Brooks v New York City Transit Authority*, 19 AD3d 162 [1st Dept 2005]).

Accordingly, it is

ORDERED, that the Transit Defendants' motion for leave to amend their answer is granted and the amended answer is deemed served upon service of a copy of this Order with notice of entry;

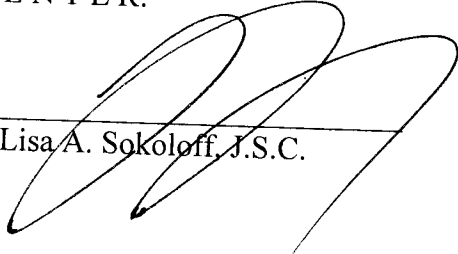
ORDERED, that the Transit Defendants' motion for summary judgment and to dismiss the complaint and cross-claim is denied;

ORDERED, that Plaintiff Casimir's cross-motion for summary judgment is denied.

This constitutes the decision and order of the Court. Any other requested relief not expressly granted is denied.

Dated: March 23, 2018
New York, New York

ENTER:



Lisa A. Sokoloff, J.S.C.