

Jones v Dieng

2018 NY Slip Op 33047(U)

November 15, 2018

Supreme Court, New York County

Docket Number: 152611/2018

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 22

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PATRICK JONES,

Plaintiff,

- v -

ABO DIENG, BRINI TRANSIT INC.

Defendant.

INDEX NO. 152611/2016

MOTION DATE 10/26/2018

MOTION SEQ. NO. 002

DECISION AND ORDER

-----X
HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that plaintiff's motion for summary judgment in favor of plaintiff on the issue of liability against defendants is granted. This action stems from a motor vehicle incident which occurred on March 11, 2016, southbound on the West Side Highway of Manhattan, near 90th street in the City, County and State of New York, when a motor vehicle owned by defendant, Brini Transit, Inc. and operated by defendant, Abo Madiyana Dieng allegedly lost control, drove across several lanes of traffic and ultimately collided with a utility pole, and allegedly led to the serious injury of plaintiff, Patrick Jones.

Plaintiff's motion for summary judgment on the issue of liability is granted. The motion, which alleges that defendant, Dieng fell asleep as his cab traveled on the highway and careened out of control, has made a prima facie case of negligence, and the burden shifts to the defendants to raise a triable issue of fact (*See Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]; *see also Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]).

Pursuant to Vehicle and Traffic Law 1130(1), “[w]henver any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. No vehicle shall be driven over, across, or within any such dividing space, barrier, or section, except through an opening in such physical barrier or dividing section or space or at a crossover or intersection, as established, unless specifically authorized by public authority.” Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]).

Summary Judgment in favor of the plaintiff is warranted where the defendant’s own conduct inculcates him (*Uragrizza v Schmieder*, 46 NY2d 471 [1979]). “It is well settled that the right of an innocent passenger to summary judgment is not in any way restricted by potential issues of comparative negligence as between the drivers of the two vehicles” (*Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001] citing *Johnson v Phillips*, 261 AD2d 269, 272 [1st Dept 1990]).

Here, plaintiff affirms that defendants were solely responsible for causing the underlying accident and that plaintiff was free from culpable conduct. Plaintiff attaches his own deposition in which he states that while plaintiff was a passenger in defendants’ taxi, defendant, Dieng lost control of the vehicle, hit the guardrail two or three times “at which point, the vehicle crossed the lanes to the left and then ultimately ran into, I think, it was a lamp post or utility post” (Mot, Exh 5 at 23). Plaintiff claims to have asked defendant, Dieng if he was okay after the first impact against the guardrail, but that defendant was non-responsive (*id.* at 26). In further support of his motion, plaintiff submits the Report of Motor Vehicle Accident MV-104, which is signed by

defendant driver, Dieng and records: “How did the accident happen? #1 (defendants’ vehicle) southbound on west side highway lost control of his taxi, hitting the center median. #1 driver lost consciousness” (Mot, Exh 4). The MV-104 report, according to the Court of Appeals, is admissible as it is considered an admission (*Feldsberg v Nitschke*, 49 NY2d 636, 649 [1980]).

In opposition, Defendants submit the deposition of defendant, Dieng, who states that on the date of the accident it was raining, and another vehicle suddenly cut in front of him, struck his vehicle, and caused him to lose control of his vehicle (Aff in Op, Exh 1 at 8). The Court notes that the MV-104 and Police Report, make no mention of any second vehicle involved in the accident at issue. Defendant Dieng’s testimony appears to be self-serving, in attempt to retract his previous admission, and is insufficient to preclude summary judgment (*Lupinsky v Windham Const. Corp.*, 293 AD2d 317, 318 [1st Dept 2002] [finding that a “self-serving affidavit, submitted in an attempt to retract a previous admission, is insufficient to avoid summary judgment”]; *see also Garzon-Victoria v Okolo*, 116 AD3d 558 [1st Dept 2014] [finding that defendant driver’s “affidavit containing a different version of the facts appears to have been submitted to avoid the consequences of his prior admission to the police officer and, thus, is insufficient to defeat plaintiff’s motion for partial summary judgment”). Thus, defendants have failed to raise an issue of fact.

The court finds that plaintiff has made a prima facie demonstration that he is free from any liability and that defendants were liable for the accident at issue. Absent any issue of fact, plaintiff’s motion for summary judgment on the issue of liability in plaintiff’s favor and against defendants, Abo Madiyana Dieng and Brini Transit Inc., is granted.


Accordingly, it is

ORDERED that plaintiff's motion for summary judgment for a finding that plaintiff is free from liability and that defendants are liable for the accident at issue is granted; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this decision/order upon defendants with notice of entry.

This constitutes the Decision/Order of the Court.

11/15/2018
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	