

Serafin v Morocho

2018 NY Slip Op 34231(U)

February 28, 2018

Supreme Court, Westchester County

Docket Number: Index No. 53387/17

Judge: David F. Everett

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This opinion is uncorrected and not selected for official publication.

To commence the 30-day statutory time period for appeals as of right under 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
SERGIO SERAFIN,

Plaintiff,

-against-

Index No. 53387/17
Motion Sequence No. 001
Decision and Order

SEGUNDO MOROCHO and OUR TERMS
FABRICATORS INC.,

Defendants.

-----X
EVERETT, J.

The following papers were read on the motion:

- Notice of Motion/Affidavit in Supp/Affirmation in Supp/Exhibits 1-2 (docs 11-19)
- Affirmation in Opp/Exhibits A-D (docs 24-28)
- Reply Affirmation (doc 29)

In this personal injury action arising from a motor vehicle accident, plaintiff Sergio Serafin (Serafin) moves for an order, pursuant to CPLR 3212, granting summary judgment against defendants on the issue of liability, striking defendants' affirmative defenses, and directing a trial as to damages only. Upon the foregoing papers, the opposed motion is denied.

The following facts are taken from the pleadings, motion papers, affidavits, documentary evidence and the record, and are undisputed unless otherwise indicated.

Plaintiff commenced the instant action by filing a summons and complaint in the Office of the Westchester County Clerk on March 16, 2017, to recover damages for injuries he allegedly sustained on October 18, 2016, when his vehicle was struck from behind by a truck owned by defendant Our Terms Fabricators Inc. (Fabricators) and operated by defendant Segundo Morocho (Morocho) on the ramp leading from Interstate 95 south to Interstate 287 east. The complaint

sounds in negligence. Issue was joined by service of defendants’ joint answer with affirmative defenses on or about June 28, 2017. After the parties participated in a preliminary discovery conference, plaintiff served the instant motion for summary judgment.

As the proponent of the motion for summary judgment, Serafin must tender evidentiary proof in admissible form sufficient to warrant the court to direct judgment in her favor as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

To make this showing, Serafin submits copies of the pleadings, the certified police report, and his sworn affidavit attesting to the facts underlying the complaint. In his affidavit, Serafin avers, among other things, that, at approximately 6:45 a.m., on the morning of October 18, 2016, he was driving eastbound on Interstate 287, and was at the ramp to Interstate 95, when his vehicle was struck in the rear by defendants’ truck. Serafin also avers that he had been in a stopped position behind another stopped vehicle for approximately five seconds when the accident occurred (*see* notice of motion, plaintiff affidavit).

Serafin also submits a certified police report relative to the accident. The certified police accident report, which identifies defendants’ truck as “V1,” and Serafin’s vehicle as “V2,” provides the following description of the accident: “V1 & V2 traveling on I-95 SB ramp from I-297 EB. V2 stopped from rear ending another vehicle in front of him. V1 couldn’t slow down in time and rear ended V2” (*id.* at exhibit 2).

It is well settled that, with respect to collisions between moving vehicles, or between a moving vehicle and a stopped vehicle, “[w]hen the driver of an automobile approaches another automobile from the rear, he or she is bound to maintain a reasonably safe rate of speed and control over his or her vehicle, and to exercise reasonable care to avoid colliding with the other

vehicle” (*Taing v Drewery*, 100 AD3d 740, 741 [2d Dept 2012]). It is also well settled law that “[a] rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence with respect to the operator of the moving vehicle and imposes a duty on that operator to rebut the inference of negligence by providing a non-negligent explanation for the collision” (*Chiok v Kouridakis*, 57 AD3d 706, 706 [2d Dept 2008] [internal quotation marks and citations omitted]).

Here, Serafin has satisfied his prima facie burden of establishing negligence on the part of defendants as a matter of law on the issue of liability, shifting the burden to defendants to submit, in admissible form, a non negligent explanation either for the collision, or for Morocho’s failure to maintain a reasonably safe distance under the prevailing traffic conditions between the vehicle (Fabricators’ truck) he was operating and the vehicle in front of him (*Robayo v Aghaabdul*, 109 AD3d 892, 893 [2d Dept 2013]).

In an attempt to provide a non negligent explanation, defendants offer the sworn affidavit of Morocho, who avers, in relevant part, that:

“3. On October 18, 2016, at approximately 6:45 a.m., I was preparing to merge onto the South-bound ramp of I-95. When I merged, the vehicle driven by SERGIO SERAFIN stopped suddenly. I was able to also stop before hitting Mr. SERAFIN’s vehicle. I was then rear-ended by a Black Accura [sic]. This collision caused my vehicle to propel into the vehicle drive by Mr. SERAFIN.

4. The Black Accura [sic] had extensive front-end damage and was eventually towed from the scene. I am unsure of the driver of the Black Accura [sic] and do not know what happened to the Black Accura [sic]”

(aff in opp. exhibit B). Defendants also offer, what purports to be, a copy of the New York State report of motor vehicle accident report (MV-104) submitted to their insurance company in connection with this accident (*id.* exhibit A), a copy of a photograph of the post-accident Acura, and a certified copy of the White Plains Hospital record pertaining to Serafin’s treatment and

release from the White Plains Hospital emergency room on the date of the accident (*id.* exhibit D). Defendants argue that, by this evidence, they have provided a non negligent explanation for the collision, that being, the cause of their truck striking Serafin’s vehicle was the Acura’s initial striking of the back of their truck, propelling it forward into Serafin’s vehicle.

In a reply affirmation, plaintiff’s counsel challenges defendant’s reliance upon an uncertified copy of a MV-104 insurance report, and the lack of detail about the time it took for the Acura to push defendants’ vehicle forward. The affirmation also questions Morocho’s credibility, refers to the Acura as a “phantom” vehicle, and asks about the location of its driver and why the Acura was not listed on the police report.

It is an established fact of this case that it was defendants’ truck that struck the back of Serafin’s vehicle on October 18, 2016. However, an examination of the parties’ documents reveals that the police report submitted by Serafin is certified, and therefore, admissible into evidence, and that the MV-104 submitted by defendants is not certified, and therefore, not subject to consideration by the Court (*see Torres v Kalloff*, 128 AD3d 1052, 1052 [2d Dept 2015]; *Coleman v Maclas*, 61 AD3d 569, 569 [1st Dept 2009]).

While the Court cannot consider the information contained in the MV-104, it can consider the sworn affidavit of Morocho, who offers a non negligent explanation for the accident. Despite Serafin’s counsel’s effort to convince the Court that Morocho’s sworn statement should be disregarded on the basis that it is not credible, it is the province of the jury, and not the motion court, to pass on issues of credibility (*see Assaf v Ropog Cab Corp.*, 153 Ad2d 520, 521 [1st Dept 1989]). Moreover, a review of the White Plains Hospital record, which, like the police report, is submitted to the Court in admissible form, reveals that there may, in fact, have been a third car

involved in the accident. The triage note relative to Serafin’s admission to the White Plains Hospital emergency room states, in relevant part: “MVC THIS AM AND WAS REARENDED BY TRUCH [sic] WHICH HAD BEEN HIT” (aff in opp, exhibit D). In view of this triage note, the Court is troubled by plaintiff’s reply to defendants’ opposition evidence, which lacks a sworn statement from the plaintiff, or other any competent evidence, specifically denying the contents of the triage note, or otherwise explaining the meaning of the triage note or its inclusion in the hospital record. As a result, the Court cannot find, as a matter of law, that defendants are solely liable for the accident and Serafin’s injuries, and that there is no non negligent explanation for the rear end collision between their truck and the back of Serafin’s vehicle (see *Zuckerman v City of New York*, 49 NY2d at 562; *Chiok v Kouridakis*, 57 AD3d at 706).

Accordingly, it is

ORDERED that the motion for summary judgment as to liability is denied; and it is further

ORDERED that the parties are directed to appear with counsel at the Compliance Conference Part, courtroom 800 of the Westchester County Courthouse, 111 Dr. Martin Luther King, Jr. Blvd., White Plains, New York, on March 20, 2018.

This constitutes the decision and order of the Court.

Dated: White Plains, New York
February 28, 2018

ENTER:


HON. DAVID F. EVERETT, A.J.S.C.

NYSCEF DOC. NO. 32

RECEIVED NYSCEF: 03/01/2018

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