

Gallardo v Vacacela
2019 NY Slip Op 30500(U)
February 27, 2019
Supreme Court, New York County
Docket Number: 159994/2016
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

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INDEX NO. 159994/2016

AQUILES GALLARDO,

MOTION DATE 01/09/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

MIGUEL VACACELA, FONS CAB CORP.

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 38, 39, 40

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is for ORDERED that plaintiff, Aquiles Gallardo’s motion for summary judgment, pursuant to CPLR 3212, is granted on the issue of liability in favor of plaintiff. Plaintiff’s motion contends that on January 27, 2016, plaintiff was a passenger in a taxi operated by defendant Miguel Vacacela and owned by defendant Fons Cab Corp., when defendants’ vehicle lost control and collided with a high concrete median on East 86th Street near 1st Avenue in the County, City and State of New York.

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (Winegrad v New York University Medical Center, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]” (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]).

Summary Judgment is appropriate when a vehicle in which plaintiff is a passenger loses control and is involved in a one car accident (*Pane v Cisilino*, 144 AD3d 567 [1st Dep't 2016]). A passenger of a vehicle is entitled to summary judgment on liability for an accident that occurred "while it was snowing heavily, defendant driver suddenly and without warning made a sharp turn and lost control of the taxicab, which left the roadway and struck a wall" (*Al-Nashash v Soutra Limousine, Inc.*, 115 AD3d 534 [1st Dep't 2014]).

Pursuant to New York Vehicle and Traffic Law 1129 "[t]he driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and the traffic conditions upon the highway." Further, drivers have "a duty to be aware for traffic conditions (*Johnson v Phillips*, 261 AD2d 269, 271 [1st Dep't 1999]). Summary Judgment in favor of the plaintiff is warranted where the defendant's own conduct inculcates him (*Uragrizza v Schmieder*, 46 NY2d 471 [1979]).

In support of his motion, plaintiff submits defendant's own examination before trial testimony which establishes defendants' liability for the accident at issue (Mot, Exh B). Plaintiff notes that defendant testified that it was lightly snowing at the time of the incident, the road was covered in 2 inches of ice and snow, and that he saw the rear of a bus turning right 3 or 10 meters in front of him causing defendant to hit his brake and ultimately strike the concrete median (*id.*, at 9-10, 27, 31-39, & 41-44).

Thus, plaintiff has made out a prima facie case of negligence, and the burden shifts to co-defendant to raise a triable issue of fact or provide a non-negligent explanation as to how the accident occurred (*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); *Pane*, 144 AD3d 567; *Al-Nashash*, 115 AD3d 534).

Defendants' opposition claim that defendants have provided a non-negligent explanation for the accident. Defendants submit a copy of defendant Vacacela's examination before trial in support of their opposition (Aff in op, Exh A). Defendants claim that defendant Vacacela's testimony as to the snow and ice conditions on the road, in addition to the presence of a bus in front of defendants' vehicle demonstrate a non-negligent explanation for the accident. Defendants state that "ice and snow made for terrible road conditions and caused the defendants Miguel Vacacela and Fons Cab Corp. vehicle to skid" (Aff in Op, ¶15). The Court does not find the existence of the bus and road conditions to constitute a non-negligent explanation for the accident

Under the emergency doctrine a triable issue of fact may exist as to whether the conduct of a defendant may be excused due to an emergency situation (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991] [finding that "the common-law emergency doctrine which 'recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context,' provided the actor has not created the emergency"]). Where defendants have provided "alternative explanations for the accident, including that plaintiff's vehicle stopped short, and that snow create an emergency condition" the First Department Appellate Division has declined to consider such arguments and granted summary judgment in favor of plaintiff (*Williams v Kadri*, 112 AD3d 442, 443 [1st Dep't 2013]).

Here, like the plaintiff in *Williams*, defendant testified that he applied the brakes when a vehicle presented itself in front of his vehicle on a snow-covered road. The Court finds such an explanation to be insufficient to defeat the present motion for summary judgment. Thus, defendant has failed to raise an issue of fact or provide a non-negligent explanation for the accident at issue. Plaintiff's motion for summary judgment on the issue of liability as against defendants is granted.

Accordingly, it is

ORDERED that plaintiff Aquiles Gallardo's motion for summary judgment in plaintiff's favor as against defendants Miguel Vacacela and Fons Cab Corp. on the issue of liability 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.

2/27/2019

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE