

Swinton v Galarza

2019 NY Slip Op 31710(U)

June 13, 2019

Supreme Court, New York County

Docket Number: 158292/2017

Judge: Adam Silvera

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This opinion is uncorrected and not selected for official publication.

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

-----X
HERBERT SWINTON,

Plaintiff,

- v -

HENRY GALARZA, FRANCISCO PEREZ

Defendant.

INDEX NO. 158292/2017

MOTION DATE 11/16/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

-----X
HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39

were read on this motion to/for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that defendant Francisco Perez' motion for summary judgment, pursuant to CPLR 3212, is granted on the issue of liability in favor of defendant and to dismiss the complaint of plaintiff Herbert Swinton and all Cross Claims of the Co-defendant Henry Galarza against defendant Francisco Perez. Plaintiff and Co-defendant Galarza oppose the motion.

Defendant Perez' motion, which contends that on January 13, 2015, he was the operator of a motor vehicle which was stopped westbound on East 141st Street near Jackson Avenue in the City, County, and State of New York, when it was struck from behind by a vehicle operated by Co-defendant Henry Galarza, has made out a prima facie case of negligence, and the burden shifts to defendant 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).

“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]). “A rear-end collision with a stopped vehicle, or a vehicle slowing down, establishes a prima facie case of negligence on the part of the operator of the rear-ending vehicle, which may be rebutted if that driver can provide a non-negligent explanation for the accident” (*Baez v MM Truck and Body Repair, Inc.*, 151 AD3d 473, 476 [1st Dep’t 2017]).

Here, it is undisputed that defendant Perez was stopped when his vehicle was rear ended by defendant’s vehicle. Defendant attaches his affidavit in which he states that his vehicle was completely stopped when defendant Galarza’s vehicle struck defendant’s vehicle in the rear (Mot, Exh D). Thus, defendant has made a prima facie showing of entitlement to summary judgment on the issue of liability and the burden shifts to plaintiff and Co-defendant to raise an issue of fact or non-negligent explanation for the accident.

In opposition, both plaintiff and co-defendant Galarza allege that defendant Perez stopped short and caused the accident at issue. The Court notes that the law is clear that a claim that the vehicle in front stopped suddenly, standing alone, is insufficient to raise a triable issue of fact (*Cruz v Lise*, 123 AD3d 514 [1st Dept 2014]). Defendant Galarza’s assertion that defendant did not signal his intention to stop does not constitute an additional factor to raise a triable issue of

fact. Galarza further opposes the motion on the grounds that the motion is premature as Examinations Before Trial of all parties have yet to be held.

As to plaintiff and Co-defendant's assertion that the instant case is premature for summary judgment, the Court has continuously held that summary judgment is permissible notwithstanding the fact that depositions have yet to be held (*Avant v Cepin Livery Corp.*, 74 AD3d 533 [1st Dep't 2010]; *see also Rosario v Vasquez* 93 AD3d 509 [1st Dep't 2012]). Thus, plaintiff and Co-defendant Galarza has failed to raise an issue of fact or non-negligent explanation for the rear-end collision and plaintiff is entitled to summary judgment on the issue of liability as against defendants.

Accordingly, it is

ORDERED that defendant Francisco Perez' motion for an order dismissing plaintiff's Complaint and any cross-claims of Co-defendant Henry Galarza is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety as against defendant Francisco Perez, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant Henry Galarza; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendant Francisco Perez serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that within 20 days of entry, counsel for defendant Francisco Perez shall serve a copy of this Decision/Order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

6/13/2019
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"/>	

**HON. ADAM SILVERA
J.S.C.**