Vidal-Cross v PV Holdings Corp.
2019 NY Slip Op 31892(U)
May 21, 2019
Supreme Court, Queens County
Docket Number: 708318/2018
Judge: Cheree A. Buggs
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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

LUIS M. VIDAL-CROSS

Plaintiff,

-against-

PV HOLDINGS CORP.
And JUSTIN B. MONTOY,

Defendants.

Index No. 708318/2018

Motion
Date: May 8, 2019

Motion Cal. No.: 44

Motion Sequence No.: 2

JOHN D. KELLER,

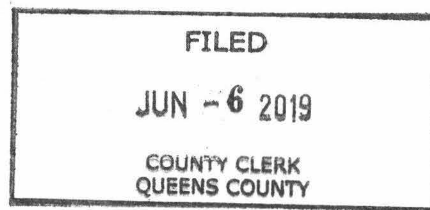
Plaintiff,

-against-

JUSTIN B. MONTOY, PV HOLDING CORP.,
ZIP CAR INC., LUIS VIDAL CROSS and
CORETECH ASSOCIATES CORP.,

Defendants.

Index No.7406/2018



The following e-file papers numbered 21-28 and 39-41 submitted and considered on this motion by plaintiff Luis M. Vidal-Cross (hereinafter referred to as "Plaintiff") seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as "CPLR") 3212 for summary judgment on the issue of defendants PV Holdings Corp. and Justin B. Montoy's (collectively referred to as "Defendants") liability to Plaintiff.

	Papers Numbered
Notice of Motion- Affirmation in Support	EF 21-28
Affirmation in Opp- Exhibits........................	EF 39-41

This is a negligence action arising out of a car collision that occurred on June 23, 2016 while the Plaintiff was traveling westbound along 240 Broadway at or near Havemeyer Street in Kings County. Preceding the accident Plaintiff contends he was slowing down due to traffic on Church Avenue when the car owned by Defendant PV Holdings Corp. and operated by defendant Justin Montoy collided with Plaintiff's vehicle in the rear.

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; *see Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[T]he 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 demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a prima facie demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Montoy

In support of its motion the Plaintiff points to Vehicle Traffic Law (hereinafter referred to as "VTL") § 1129 (a) which states:

> (a) The 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 vehicles and the traffic upon and the condition of the highway.

While the argument seems to suggest that defendant Montoy was following the Plaintiff too closely, within its affidavit Plaintiff fails to attest to the same. Nonetheless, the case law has consistently held "A rear-end collision is sufficient to create a prima facie case of liability and imposes a duty of explanation with respect to the operator of the offending vehicle". (*Rimona Levine et al. v. Clyde Taylor et al.*, 268 A.D.2d 566 [2nd Dept 2000]). In *Levine,* the plaintiff was struck in the rear by the defendant. Defendant attempted to rebut the presumption of negligence by arguing that the plaintiff stopped short. (*Id* at 567). The court held defendant's argument was insufficient to rebut the presumption that he was negligent. (*Id*).

Here, Plaintiff's assertion that he was hit in the rear by defendant "creates a prima facie case of liability". *(Id*).

Defendants argue Plaintiff's motion should be dismissed pursuant to CPLR 3212 (f) which states the following:

> (f) Facts unavailable to opposing party. Should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot than be stated, the court may deny the motion or may order a continuance to permit affidavits to be obtained or disclosure to be had and may make such other order as may be just.

Defendants contend this motion is premature because none of the parties have been deposed. Specifically, Defendants contend that despite Plaintiff's counsel's argument that Montoy was traveling too closely however, Plaintiff's affidavit fails to attest to that assertion. Also, Defendants contends that Plaintiff's affidavit raises questions of fact such as; why Plaintiff was slowing down for traffic on Church if the accident took place at or near 240 Broadway and Havemeyer?; in what manner did plaintiff slow down?; did Plaintiff change lanes prior to slowing down?; what were road conditions?

These questions speak to comparative fault and the question related to road conditions is not a fact unavailable to the Defendants.

In *Francois v. Tang*, plaintiff was injured by a vehicle owned and operated by the defendants. (*Emmanuel Francois v. Jefferson A.R. Tang,* 96 N.Y.S.3d 900 [2nd Dept 2019]). Plaintiff alleged

his vehicle was stationary for 10 to 15 minutes prior to the impact. (*Id*). Plaintiff established prima facie entitlement to summary judgment by proving defendant failed to see that which he should have seen through the proper use of his senses. (*Id*). Defendant sought to dismiss plaintiff's motion for summary judgment on the grounds of CPLR 3212 (f). (*Id*). The court stated the alleged outstanding discovery that the defendants pointed too would only lead to evidence of comparative fault.(*Id* at 901). The court points to *Rodriquez v City of New York,* 31 N.Y.3d 312 (2018) where the Court of Appeals held a plaintiff is not required to show freedom from comparative fault to establish a prima facie case of the defendants liability. (*Id*).

Therefore, Defendants have failed to satisfy their duty to raise an explanation.

PV Holdings Corp.

Plaintiff's claims against the defendant PV Holdings Corp. arise from vicarious liability. Plaintiff contends that the defendant Montoy was acting within the scope of his employment with defendant PV Holdings Corp. when the collision occurred.

Therefore, Plaintiff has established prima facie entitlement to summary judgment.

Defendants contends that defendant PV Holdings Corp. is a rental car company therefore, pursuant to the holding in *Graham v. Dunkley*, Plaintiff's claims against defendant PV Holdings Corp. fails as a matter of law.

In *Graham v. Dunkley,* plaintiff was injured in a collision with defendant Dunkley. (*Graham v. Dunkley,* 50 A.D.3d 55, 56 [2nd Dept 2008]). At the time the defendant Dunkley was leasing the vehicle from defendant NILT. (*Id* at 57). NILT moved to dismiss the complaint on the grounds that the plaintiff's claims were preempted by the Graves Amendment . (*Id)* The Graves Amendment is a federal statute that Congress enacted through the Commerce Clause that prohibits claims of vicarious liability upon owners that rent or lease cars unless, negligence can be proven on the part of the rental company. The Supreme Court, Queens County held the Graves Amendment was unconstitutional in that Congress acted in excess of their powers, however, the Second Department reversed. (*Id).* Therefore, the court granted NILT's motion for summary judgment holding plaintiff failed to state a cause of action. (*Id* at 62).

Therefore, Defendants have successfully raised an issue of fact as to whether Plaintiff may properly bring an action against defendant PV Holdings Corp. sounding in vicarious liability. No reply papers were submitted to oppose the same. Therefore it is,

ORDERED, that based on the foregoing, that branch of Plaintiff's motion seeking summary judgment as to defendant Justin B. Montoy's liability is granted and it is further;

ORDERED, that the branch of Plaintiff's motion seeking summary judgment as to defendant PV Holdings Corp. is denied.

The foregoing constitutes the decision and Order of this Court.

Dated: May 21, 2019

Hon. Chereé A. Buggs, JSC

FILED
JUN - 6 2019
COUNTY CLERK
QUEENS COUNTY