

Marcelo v Elmoudni
2019 NY Slip Op 32859(U)
September 26, 2019
Supreme Court, New York County
Docket Number: 163090/2015
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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ALEJANDRO MARCELO,
Plaintiff,

INDEX NO. 163090/2015

MOTION DATE 05/03/2019

MOTION SEQ. NO. 004

- v -

SAID ELMOUDNI, ANDY TRANS CORP., ELLEN LEIKIND
Defendant.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that plaintiff Alejandro Marcelo's cross-motion is granted and defendant Ellen Leikind and defendants Said Elmoundi and Andy Trans Corp.'s ("Co-Defendants") motion to dismiss plaintiff's Complaint is denied for the reasons set forth below. Before the court is defendant Ellen Leikind's motion, Motion Sequence 004, for (1) an Order pursuant to CPLR §3212 granting summary judgment in favor of defendant Leikind to dismiss plaintiff's Complaint on the grounds that there are no triable issues of fact, in that plaintiff and co-defendants cannot meet the burden of proving that defendant Leikind was negligent and a proximate cause of the accident at issue. Plaintiff opposes the motion and Cross-moves for summary judgment for an Order finding all defendants liable for the accident at issue. Co-Defendants cross-move for an Order finding that Co-Defendants were not liable for the accident at issue and that the accident arose due to plaintiff's actions or in the alternative because of defendant Leikind.

The suit at bar stems from a motor vehicle accident that occurred on November 2, 2014, at West 86th Street and Columbus Avenue in the County, City and State of New York when plaintiff Alejandro Marcelo was allegedly seriously injured while lawfully riding on the roadway when he was struck by the opened driver's door of defendants' motor vehicle.

Defendants' motions for summary judgment on the issue of liability as against defendants are each denied respectively. "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]).

Violation of the Vehicle and Traffic Law constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep't 2009]). Pursuant to VTL § 1231, every person riding a bicycle on a roadway is afforded the same rights and duties applicable to drivers. Under VTL § 1214 "no person shall open the door of a motor vehicle on the side available to moving traffic unless it is reasonably safe to do so and can be done without interfering with the movement of other traffic." A "Plaintiff's affidavit stating that the rear door of defendants' vehicle 'opened without warning' and struck the left side of his vehicle established that defendant driver violated Vehicle and Traffic Law (VTL) § 1214, and that plaintiff was unable to avoid the accident" (*Tavarez v Herrasme*, 140 Ad3d 453 [1st Dep't 2016] citing *Montesinos v Cote*, 46 AD3d 774 [2nd 2007])[finding that "the evidence established that the injured plaintiff violated Vehicle and Traffic Law § 1214 by opening the door on the side of her car adjacent to moving traffic when it

was not reasonably safe to do so, and was negligent in failing to see what, by the reasonable use of her senses, she should have seen”)].

Defendant Leikind’s motion alleges that plaintiff fails to set forth any legitimate legal basis or theory upon which a cause of action for negligence can be maintained against defendant Leikind. In support of their motion, defendant Leikind attaches the deposition of defendant Leikind and of plaintiff (Mot, Exh D & E). Defendant notes that plaintiff did not offer any testimony that would indicate how the passenger of the vehicle at issue, defendant Leikind, may have been negligent. Defendant claims that defendant Leikind’s deposition demonstrates that she exercised due care and caution in carefully checking her surroundings before opening the taxi door as she testified that she looked over her shoulder for three to four seconds before opening the car door (Mot, Exh E at 43-45).

The Court finds that defendant has failed to meet its burden as defendant admitted to opening the rear car door and striking plaintiff. Whether or not defendant did not see plaintiff does not obviate defendant’s duty to not open the car door until it is reasonably safe to do so. Defendant has demonstrated that she violated VTL § 1214, and as such defendant owner and operator of the vehicle are also liable for the accident at issue. Thus, for the aforementioned reasons, defendant Ellen Leikind’s motion for an Order granting summary judgment in favor of defendant Leikind on the issue of liability is denied; defendants Said Elmoundi and Andy Trans Corp.’s cross-motion for an Order granting summary judgment in favor of said defendants on the issue of liability is denied; and plaintiff’s cross-motion for an Order granting summary judgment in favor of plaintiff finding all defendants liable for the accident at issue is granted.

Accordingly, it is

ORDERED that defendant Ellen Leikind's motion for an Order granting summary judgment in favor of defendant Leikind on the issue of liability is denied; and it is further

ORDERED that the defendants Said Elmoundi and Andy Trans Corp.'s cross-motion for an Order granting summary judgment in favor of said defendants on the issue of liability is denied; and it is further

ORDERED that plaintiff's cross-motion for an Order granting summary judgment in favor of plaintiff finding all defendants liable for the accident at issue is granted; and it is further

ORDERED that all parties appear for an blockbuster settlement conference on November 25, 2019, in room 136 of 80 Centre Street at 9:30 AM; and it is further

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

This constitutes the Decision/Order of the Court.

9/26/19

DATE

ADAM SILVERA, J.S.C.

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