

Gonzalez v Carmona

2019 NY Slip Op 35106(U)

November 25, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30788/2017E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15



TAMIKA GONZALEZ

Index No. 30788/2017E

-against-

Hon. MARY ANN BRIGANTTI

CARMEN CARMONA, et al.

Justice Supreme Court

The following papers numbered 1 to _____ were read on this motion (Seq. No. 2)
for SUMMARY JUDGMENT noticed on April 24, 2019 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3, 4, 5
Replying Affidavit and Exhibits	No(s). 6

Upon the foregoing papers and oral argument, the defendant ("Defendant") Luis Cruz-Cordero moves for an order granting him summary judgment on the issue of liability, dismissing all cross-claims asserted against him, and dismissing the complaint of the plaintiff Tamika Gonzalez ("Plaintiff") pursuant to CPLR 3212. Co-defendants Carmen Carmona ("Carmona") and Alfredo Ortiz (collectively, "co-defendants") oppose the motion. Additionally, Plaintiff submits a cross-motion for summary judgment on the issue of liability against Defendant and co-defendants. The cross-motion is unopposed.

I. Background

In this case, Defendant submitted his deposition transcript wherein he testified that as he was traveling "eastbound" along 112th Street, in-between First Avenue and Second Avenue, he was involved in a motor vehicle accident (Def. EBT at 15-17). Defendant described 112th Street as a "[o]ne-way" street with one lane of travel and parking on both sides (id. at 16-17, 24). At "some point" when Defendant was traveling eastbound along 112th Street, in-between First Avenue and Second Avenue, a parked adverse vehicle ("AV") "pull[ed] out" from a "parking spot" and struck his "passenger's side" (id. at 17-19). Defendant asserted that he did not see the AV pull out "even for a split second," and that the "first indication [he] had that the [AV] was pulling out was when it hit [him]" (id. at 17-18). Defendant further stated that he was not distracted as he was driving (id. at 24).

Defendant also submitted the deposition transcript of Plaintiff wherein she stated that as she was a passenger in a vehicle for "hire[]" traveling along "112th Street, going towards First Avenue," her vehicle was involved in a motor vehicle accident (Pl. EBT at 9, 48, 78). Plaintiff described 112th Street as a "one-way road" with "one lane for travel" and parking on both sides (id. at 52, 56). The vehicle that Plaintiff was

Motion is Respectfully Referred to Justice: _____

Dated: _____

a passenger in was struck on its "[p]assenger back door" and "passenger front door" by he AV (id. at 69). The AV involved in this accident sustained damage to its "driver's side" as a result of this accident (id. at 73). Plaintiff stated that she did not see the AV before this accident occurred (id. at 59). Plaintiff claimed that there were "two" separate impacts to the vehicle in which she was a passenger at approximately "five to six seconds" apart from each other (id. at 58, 61-62). The first impact was to the "right side passenger door," and the second impact was to the "front passenger door" (id. at 60-62, 78). Following the accident, Plaintiff observed that the AV was a "half a car length" behind her vehicle (id. at 119). Plaintiff stated at her deposition that she did not know if the AV came from a "parking spot" (id. at 121-122). Plaintiff also stated that the driver of her vehicle was not distracted at the time of this accident (id. at 47-48).

II. Standard of Review

"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 N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal citations and quotations omitted]).

III. Applicable Law and Analysis

A. Defendant's Motion

In this case, Defendant's testimony supports his prima facie entitlement to summary judgment because this accident occurred within a split second of when the AV moved into a lane of moving traffic (*see Davis v Turner*, 132 A.D.3d 603 [1st Dept 2015], citing Vehicle and Traffic Law ("VTL") §§ 1128 [a]; 1162)). In addition, both Defendant and Plaintiff testified that they did not see the AV prior to this accident occurring, and the first indication that they were involved in this accident is when they felt contact between the two vehicles. The burden therefore shifts to the opponents of the motion "to establish the existence of material issues of fact which require a trial of the action" (*Xiang Fu He v Troon Mgt.*, — N.Y.3d —, 2019

NY Slip Op 07643 at *11, quoting *Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012]).

In opposition to the motion, and viewing the evidence in the light most favorable to co-defendants, they have failed to raise a triable issue of fact. Co-defendants do not submit any of their own deposition testimony in support of their opposition,¹ but rather, submits Plaintiff's deposition testimony. Since the AV was moving from a parked position, the AV was "prohibited from moving 'until such movement [could] be made with reasonable safety'" (*Davis*, 132 A.D.3d 603, quoting VTL § 1162 [brackets in original]). The drivers of the AV also had "a duty not to enter a lane of moving traffic until it was safe to do so" (*id.*, citing VTL § 1128 [a]; *see also Sanchez v Oxcin*, 157 A.D.3d 561, 563-564 [1st Dept 2018]). Moreover, there is no submitted testimony from the driver of the AV in this case, and the only conclusion that this Court can draw is that the AV failed "to see that which, through the proper use of senses, should have been seen," specifically, an oncoming vehicle along a one-way road (*see Abboud v Pawelec*, 141 A.D.3d 438 [1st Dept 2016] [internal quotation marks and citations omitted] [improper left turn]; *see also Sarac-Marshall v Mikalopas*, 125 A.D.3d 570 [1st Dept 2015] [same]). Thus, the opponents of this motion do not articulate any way in which Defendant was at fault, as it is undisputed that this accident occurred within a split second of the AV pulling out of its parking spot "and before plaintiff had any opportunity to avoid the collision" (*Cruz v Skeritt*, 140 A.D.3d 554 [1st Dept 2016] [citations omitted]). Accordingly, under these circumstances, co-defendants have failed to raise a triable issue of fact.

B. Plaintiff's Cross-Motion

The Court will now address Plaintiff's cross-motion for summary judgment on the issue of liability against Defendant and co-defendant. For the reasons expressed above, Plaintiff is not entitled to summary judgment against Defendant as there has been no showing from any of the submitted testimony that Defendant was a proximate cause of this accident. However, Plaintiff is entitled to summary judgment on the issue of liability against co-defendants as they did not refute the submitted testimony that they were negligent in pulling their car out into a lane of moving traffic, resulting in a motor vehicle accident with Defendant's vehicle (*see* Section III.A.).

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¹ By order dated January 15, 2019, Carmona was ordered to appear for depositions on or before February 15, 2019, but Defendant represented in his moving papers that Carmona did not appear on or before that date.

IV. Conclusion

Accordingly, it is hereby,

ORDERED, that Defendant Luis Cruz-Cordero's motion for summary judgment dismissing the complaint asserted against him is granted, and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment on the issue of co-defendants Carmona and Ortiz's liability is granted, and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment on the issue of Defendant Luis Cruz-Cordero's liability is denied, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of this Court.

Dated: 11/25/19

Hon. Mary Ann Brigantti
Hon. Mary Ann Brigantti J.S.C.

- 1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE
- 2. MOTION IS..... GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT REFEREE APPOINTMENT