

Garay v Colon

2019 NY Slip Op 35107(U)

January 22, 2019

Supreme Court, Bronx County

Docket Number: Index No. 36077/2017E

Judge: Howard H. Sherman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Efrain Garay ,

DECISION AND ORDER

Index No. 36077/2017E

Plaintiff,

-against-

Guillermo Colon ,
Bank of America Leasing and
LKQ Hunts Point Auto Parts Company,
Defendants

Howard H. Sherman
JSC

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion and cross motion as indicated below.

Notice of Motion, Affirmation , Exhibits A-D	1
Affirmation in Opposition	2
Affirmation in Reply	3

In the above-entitled action plaintiff Efrain Garay (Garay) moves for summary judgment on the issue of liability.

Defendants Guillermo Colon (Colon) , Banc of America Leasing and LKQ Hunts Point Auto Parts Corp. oppose the motion . Prior to final submission of the motion the action was discontinued as to Bank of America Leasing per stipulation 04/26/18.

Colon commenced this action seeking damages for personal injuries alleged to have been sustained as a result of a two vehicle rear-end collision that occurred on April 8, 2016 on at or near Saw Mill Road and Farragut Avenue, Hastings, New York. At the time, Garay's vehicle was impacted in the rear by a truck owned by LKQ Hunts Point Auto Part Corp., then being driven by its employee Guillermo Colon (Colon).

Plaintiff now moves for summary judgment on the issue of liability , and defendants oppose.

The motion is supported by a copy of the pleadings , and by a certified copy of the police accident report, and the affidavit of plaintiff attesting to the circumstances of the accident . As pertinent here, Garay states that he was traveling southbound on the Saw Mill River Road and stopped at a red traffic light at the Farragut Avenue intersection when his vehicle was rear-ended by defendants' truck.

Defendants contend that the motion is premature as the drivers have yet to be deposed. Additionally, they argue that there are issues of fact precluding dispositive relief as predicated on Colon's affidavit [Exhibit B]. Colon attests that he was driving his employer's freight truck when plaintiff "stopped short" without warning "for no apparent reason." Colon also states that he tried to avoid the accident by applying his brakes, but his foot slipped off the brake panel. At impact, he was traveling less than five miles per hour , and the contact with plaintiff's vehicle was observed to be "minimal." He disputes plaintiff's assertion that he was stopped at a red traffic light at the moment of impact , and states that Garay was "not completely within his lane of traffic."

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

“To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form” (*Friends of Animals v Associate Fur Mfrs.*, 46 NY2d 1065, 1067-1068 [1979]). Once such a showing has been made, 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 (*see Alvarez v Prospect Hosp.*, 68 NY2d 320; *Zuckerman v City of New York*, 49 NY2d 557). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

When a driver approaches another vehicle from the rear, he or she is bound to maintain a reasonably safe rate of speed to maintain control of his or her vehicle, and to exercise reasonable care to avoid colliding with the other vehicle (*see Passos v MTA Bus Co.*, 129 AD3d 481 [1st Dept 2015]). As a consequence, as here, the occurrence of a rear-end collision with a stopped or stopping vehicle creates a prima facie case of negligence on the part of the operator of the following vehicle and imposes a duty on that operator to come forward with a non-negligent explanation for the collision (*see Tutrani v. County of Suffolk*, 10 N.Y.3d 906, 908, 861 N.Y.S.2d 610, 891 N.E.2d 726 [2008]; *Morgan v Browner*, 138 AD3d 560 [1st Dept 2016]; *Joplin v City of New York*, 116 AD3d 443 [1st Dept 2014]; *Cabrera v Rodriguez*, 72 AD3d 553 [1st Dept 2010]).

Upon consideration of the above as afforded all favorable inferences in favor of the non-moving party, the court finds that plaintiff is entitled to the presumption of defendant Colon's causative negligence, and in opposition, defendants come forward with no proof to raise an issue of fact of a non-negligent explanation for the collision, or for Colon's failure to maintain a safe distance behind Garay's vehicle (see, Vehicle and Traffic Law § 1129[a]). The assertion of the lead vehicle's sudden stop, without more, is insufficient for such purpose even were the issue of plaintiff's comparative fault relevant to the court's inquiry on the motion, which it is not (see, *Rodriguez v. City of New York*, 31 N.Y.3d 312, 317-319, 76 N.Y.S.3d 898, 101 N.E.3d 366 [2018] [-to be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing a prima facie case of defendant's liability and the absence of his or her own comparative fault-]).

Accordingly, it is

ORDERED that the motion for an award of partial summary judgment on the issue of liability is granted, and it is

ORDERED that upon the filing of the Note of Issue and the payment of the appropriate fee therefor, this matter be set down for an assessment of damages to include the issues of "serious injury" and proximate cause, as well as the issue of plaintiff's contributory negligence, if any.

This shall constitute the decision and order of this court.

Dated: January 22, 2019


Howard H. Sherman