

Gomez v Marte

2019 NY Slip Op 35112(U)

July 26, 2019

Supreme Court, Bronx County

Docket Number: Index No. 30955/2017E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

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



-----X
JONATHAN GOMEZ

Index No. 30955/2017E

-against-

Hon. MARY ANN BRIGANTTI

JOSHUA L. MARTE

Justice Supreme Court

-----X
The following papers numbered 1 to _____ were read on this motion (Seq. No. 1)
for SUMMARY JUDGMENT noticed on January 28, 2019 .

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

Upon the foregoing papers, the defendant Joshua Marte ("Defendant") moves for an order pursuant to CPLR 3212 granting him summary judgment on the issue of liability, and dismissing the complaint of the plaintiff Jonathan Gomez ("Plaintiff"). Plaintiff opposes the motion.

Background

In support of his motion, Defendant submitted his deposition transcript wherein he testified that as he was traveling along Theodore Drive, which turns into Southern Boulevard at an unknown point, in the Bronx, his vehicle was struck by another vehicle (Def. EBT at 10-11, 14-16, 19, 22). Defendant stated that Southern Boulevard is a two-way road, with one lane of travel in each direction, separated by a "cement barrier" in the middle to the left, and another cement barrier to the right "that protects you from the wilderness" (*id.* at 12, 16, 21). The middle cement barrier had a "break in the middle for... cars to make a U-turn" (*id.* at 17). As Defendant was traveling along Southern Boulevard, he "first" noticed another vehicle approaching "towards [him] on the other side of the cement barrier" approximately "4 to 6 car lengths" away (*id.* at 16). Defendant did not keep this approaching vehicle under his constant observation, and once he took his eyes off of this vehicle he did not look back at it for a second time (*id.* at 18-19). Defendant stated that he only saw the approaching vehicle "the first time" because after the subject accident occurred he "lost consciousness" for approximately "ten minutes" (*id.* at 19).

Defendant testified that prior to this accident, as he approached the cement barrier's break in the middle, the subject accident "simultaneously" occurred as he was "passing it" (*id.* at 21). Defendant's vehicle was struck on its "left side" and the vehicle ended up "on the right... concrete barrier" (*id.* at 22). Following this accident Defendant observed damage all around his vehicle (*id.* at 24). Plaintiff was a front

Motion is Respectfully Referred to Justice: _____
Dated: _____

seat passenger in Defendant's vehicle at the time of this accident (*id.* at 9, 23).

Defendant also submitted the deposition transcript of Plaintiff wherein he testified that as he was a front seat passenger in Defendant's vehicle, traveling along Southern Boulevard, in the Bronx, his vehicle was struck by another vehicle (Pl. EBT at 21-23). In the direction that Plaintiff was traveling, Southern Boulevard is a "one lane" road (*id.* at 22). Plaintiff knew that he was involved in an accident when he "felt" that "we got hit" (*id.*). Plaintiff initially stated that as a result of this "impact," he "felt" his vehicle "move" to the "right" (*id.* at 24). Plaintiff later testified that his vehicle "move[d] to the left after the first impact on the right" (*id.* at 25). Plaintiff ultimately stated that he did not know "which direction... the actual impact" came from, but that he did feel "[a]t least two" impacts (*id.*).

Plaintiff further testified that prior to this accident he did not see "any other vehicle in the vicinity of where the accident happened, nor did he hear any warning noises" (*id.* at 27, 31-32). He also stated that prior to the first impact he did not have any indication that there was about to be an impact (*id.* at 32). There was damage all around Plaintiff's vehicle following this accident (*id.* at 32-33).

Relying on the above submissions, Defendant now moves for summary judgment on the issue of liability, alleging that he did not cause or contribute to this accident.

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]). "Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs., P.C.*, 76 A.D.3d 927 [1st Dept 2010], citing *Zuckerman v. New York*, 49 N.Y.2d 557, 562 [1980]). "[T]he opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v. NRX Technologies, Inc.*, 93 A.D.2d 772 [1st Dept 1983], *affd* 62 N.Y.2d 686 [1984]). The evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 [2007]).

Analysis

In this case, Defendant has established his prima facie their entitlement to summary judgment. Defendant's testimony that he was traveling straight along Southern Boulevard, with the right of way,

demonstrated that he was "entitled to anticipate that other vehicles will obey the traffic laws that require them to yield" (*Dinham v. Wagner*, 48 A.D.3d 349, 349-350 [1st Dept 2008], citing *Namisnak by Namisnak v. Martin*, 244 A.D.2d 258, 260 [1st Dept 1997]). A driver with the right-of-way has no duty to watch for and avoid a vehicle that might make an unsafe U-turn (*see Gonzalez v Bishop*, 157 A.D.3d 460 [1st Dept 2018] [vehicle with right-of-way has no duty to watch for and avoid a vehicle that fails to stop at a stop sign]; *Uribe v Pronto Gas Heating Supplies, Inc.*, 129 A.D.3d 509, 509-510 [1st Dept 2015] [vehicle with right-of-way has no duty to watch for and avoid a vehicle that fails to stop at a red light]; compare *Stephens v Elrac, Inc.*, 100 A.D.3d 511, 512 [1st Dept 2012] [speeding vehicle with right-of-way "collided with" vehicle attempting illegal U-turn]). On this record, Defendant's testimony makes it clear that he did not have any chance to avoid the other vehicle making an unsafe U-turn as the U-turn was made "simultaneously" as Defendant's vehicle was passing by the "break in the middle" of the cement barrier (Def. EBT at 17, 21). The burden therefore shifted to Plaintiff to "produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 A.D.3d 553, 554 [1st Dept 2010]).

In opposition to the motion, Plaintiff has failed to raise a triable issue of fact. Plaintiff submits an affidavit stating that as he was a passenger in Defendant's vehicle the "first impact" occurred when Defendant "drove into a concrete barrier from the road, causing [the] vehicle to move to the left." This initial impact, according to Plaintiff's affidavit, resulted in a "second impact" which "came from the left side of the vehicle, when another vehicle was involved in a collision with" Defendant's vehicle. However, Plaintiff testified at his deposition that he knew he was involved in an accident when he "felt" that "*we got hit*" (Pl. EBT at 22 [emphasis added]). Plaintiff also testified that as a result of this "impact," he "felt" his vehicle "move" to his "right" (*id.* at 24). While Plaintiff later claimed that his vehicle "move[d] to the left after the first impact on the right," he ultimately conceded that he did not know "which direction... the actual impact" came from, but that he did feel "[a]t least two" impacts (*id.* at 25). Plaintiff's deposition testimony, alone, does not raise any issue of fact as to Defendant's negligence, as there is no evidence that Defendant caused or contributed to this accident.

Furthermore, Plaintiff did not claim during his deposition, nor did he claim anything remotely related during his deposition, that Defendant "drove into a concrete barrier... causing our vehicle to move to the left," as is asserted in his affidavit. Plaintiff's affidavit is consistent insofar as another vehicle was involved in the subject accident. However, the Court construes the portion of Plaintiff's affidavit wherein he claims that Defendant first drove into a concrete barrier before being stuck by another vehicle as "tailored to avoid the consequences of his deposition testimony" (*Vazquez v Takara Condominium*, 145 A.D.3d 627 [1st Dept 2016], citing *Garcia-Rosales v 370 Seventh Ave. Assoc., LLC*, 88 A.D.3d 464 [1st Dept 2011]; *see also Estate of Mirjani v. DeVito*, 135 A.D.3d 616, 617 [1st Dept 2016]; *Gemini v. Christ*,

61 A.D.3d 477 [1st Dept 2009] [citation omitted]; *Phillips v. Bronx Lebanon Hosp.*, 268 A.D.2d 318, 320 [1st Dept 2000]; *Bloch v RT Long Is. Franchise, LLC*, 70 A.D.3d 993 [2d Dept 2010] [citation omitted]).

The Court additionally notes that it has considered Plaintiff's allegedly untimely opposition papers as Defendant has not demonstrated any prejudice and had an adequate opportunity to submit reply papers (*Serradilla v. Lords Corp.*, 117 A.D.3d 648, 649 [1st Dept 2014]).

Conclusion

Accordingly, it is hereby,

ORDERED, that Defendant's motion for summary judgment on the issue of his liability is granted and the complaint asserted against him is dismissed, 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: 9/26/19

Hon. Mary Ann Brigantti J.S.C.

Hon. Mary Ann Brigantti

- 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