

Cepeda v Payano

2019 NY Slip Op 35114(U)

May 23, 2019

Supreme Court, Bronx County

Docket Number: Index No. 31518/2017E

Judge: ShawnDya L. Simpson

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 17

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MIGUEL ANGEL CEPEDA,

Plaintiff,

- against -

DECISION AND ORDER

Index No. 31518/2017

FELIX A. PAYANO & BERROSA AUTO CORP.,

Defendants.

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Shawndya L. Simpson, J.:

INTRODUCTION

Plaintiff alleges that on August 7, 2017, he was in a vehicular accident caused solely by defendant that resulted in his severe and permanent personal injury. By notice of motion dated March 7, 2019, and the affirmation and exhibits submitted in support thereof along with all the pleadings and proceedings heretofore, plaintiff seeks summary judgment on liability and to strike defendants' affirmative defense of comparative and contributory negligence. The defendants filed an affirmation in opposition dated April 11, 2019. For the foregoing reasons, after review and consideration of the filings and proceedings, plaintiff's motion for summary judgment on the issue of liability is granted. The motion to strike defendants' affirmative defense of comparative and contributory negligence is also granted.

In support of the motion, plaintiff submits an affidavit from plaintiff, the summons, verified answer with demand for bill of particulars, a March 1, 2019 decision in instant case, police report, and plaintiff's deposition transcript. No exhibits or other documents are attached or submitted along with defendants' affirmation in opposition.

DISCUSSION

On August 7, 2017, plaintiff is said to have stopped his vehicle at a red light on Third avenue facing Tremont avenue. Plaintiff states that he was the first car stopped at the light. Plaintiff is said to have been in the left lane traveling north bound before he stopped at the light. Third avenue at the time is said to have been a two way street with traffic operating in opposite direction in each lane separated by a double yellow line. Plaintiff asserts that defendant was driving his car coming from the opposite direction on Third Avenue. It is said that the defendant disobeyed the red light, went through it, crossed the intersection to plaintiff's side, crossed the double yellow line and hit the plaintiff's vehicle on the driver's side. Plaintiff is said to have attempted to avoid the collision by moving to the right, but was unable to avert the impact. Defendant is said to have struck the drivers side of plaintiff's vehicle and other vehicles in the lane. Plaintiff's testimony is available contrary to defendant who is precluded from offering evidence in this matter by the court's decision and order dated March 1, 2019.

The plaintiff moves for partial summary judgment on the issue of defendant's liability for being the sole cause for the accident. Evidence of defendant's liability is provided with allegation that defendant violated section 1110, 1111, and 1128 of the Vehicle and Traffic Law (VTL) and New York City Department of Highways Rules and Regulation Chapter 4-07(h) in driving pass a red light and crossing the double lines of a divided highway. Plaintiff also submits a certified police accident report that supports plaintiff's description and version of the incident, that defendants' vehicle crossed the steady red light and dividing double yellow lines of the road and struck his vehicle (*see Liburd v. Lulgjuraj*, 156 A.D.3d 532 [App. Div., 1st Dept. 2017]; *Pivetz v. Brusco*, 145 A.D.3d 806 [App. Div., 2nd Dept. 2016]; *Jackson v. Trust*, 103 A.D.3d 851 [App. Div., 2nd Dept. 2013]; *Penn v. Kirsh*, 40 A.D.2d 814 [App. Div., 1st Dept. 1972]; *see also Delgado v.*

Martinez Family Auto, 113 A.D.3d 426 [App. Div., 1st Dept. 2014]). The police report also states that defendant when questioned at the scene stated that he did not remember the incident that occurred.

Plaintiff has provided a *prima facie* case of defendant's negligence and that defendant was solely at fault for the accident. The plaintiff has demonstrated that there are no triable issues of fact on the question of defendant's liability. Defendant is precluded from offering evidence in this case and there is evidence that corroborates plaintiff's assertions. Additionally, a violation of VTL §§ 1110, 1111, and 1128 and NYC Highways Rules and Regulations 4-07(h) may establish negligence when the driver disobeys a red light and crosses the dividing line of a road. Here violation of these statutes are said to have resulted in a collision. Plaintiff has established his entitlement to summary judgment on the issue of defendants' liability (*see Bajrami v. Winkle Cab Corp.*, 147 A.D.3d 649 [App. Div., 1st Dept. 2017]).

Furthermore, as it is undisputed that plaintiff's actions did not contribute to the happening of the accident and he may be granted summary judgment on the issue of his lack of culpable conduct (*see Ramirez v Elias-Tejada*, 168 AD3d 401 [1st Dept 2019]; *Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 2016]). "Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel, Inc. v Baiden*, 36 NY2d 539, 544 [1975]; *Tortorello v Carlin*, 260 AD2d 201 [App. Div., 1st Dept. 1999]), and defendants did not refute plaintiff's assertion of his lack of culpable conduct. Defendants failed to rebut the presumption of their negligence (*see Dattilo v Best Transp. Inc.*, 79 A.D.3d 432 [App. Div., 1st Dept. 2010]), and the presumption of the non-negligence of the plaintiff (*Francisco v Schoepfer*, 30 A.D.3d 275 [App. Div., 1st Dept. 2006]; *Woodley v Ramirez*, 25 A.D.3d 451 [App. Div., 1st Dept. 2006]).

CONCLUSION

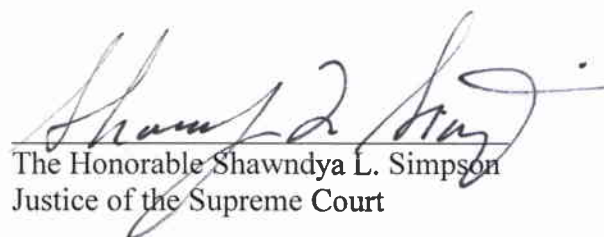
Accordingly, it is:

ORDERED, that plaintiff's motion for partial summary judgment on the issue of defendant's liability for causing the subject accident is granted, and it is further

ORDERED, that defendant's affirmative defense of comparative and contributory negligence are dismissed.

This constitutes the decision, opinion and order of the Court.

Dated: Bronx, New York
May 23, 2019


The Honorable Shawndya L. Simpson
Justice of the Supreme Court