

Bhuiyan v Sherpa

2019 NY Slip Op 35118(U)

August 26, 2019

Supreme Court, Bronx County

Docket Number: Index No. 20426/2018E

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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MD A. ALAM BHUIYAN & MORJINA BANU,

Plaintiffs,

- against -

DECISION AND ORDER

Index No. 20426/2018E

JANGBU SHERPA & EAN HOLDINGS, LLC,

Defendants.
-----X

Shawndya L. Simpson, J.:

INTRODUCTION

Plaintiff alleges that on March 22, 2016, he was struck and injured by defendants' vehicle while he was standing in the rear loading groceries into the trunk of his parked vehicle. Defendant is said to have been facing his trunk when he was struck. The accident is said to have occurred on Broadway in Jackson Heights in Queens county. By notice of motion dated May 7, 2019, and the affirmation and exhibits submitted in support thereof along with all the pleadings and proceedings heretofore, plaintiffs seek summary judgment on the issue of liability against defendant Sherpa. An affirmation dated June 10, 2019, in opposition was filed by the defense. A reply affirmation dated June 21, 2019, was filed by plaintiff.

In support of the motion, plaintiffs submit their bill of particulars, summons, complaint, answer, note of issue, plaintiff Bhuiyan's deposition transcript, defendant Sherpa's deposition transcript, and police accident report. In opposition, the defense submits the summons, and answer with discovery demands. For the foregoing reasons, after review and consideration of the filings and proceedings, plaintiffs' motion for summary judgment on the issue of liability against defendant Sherpa is granted.

DISCUSSION

Plaintiffs have established their entitlement to partial summary judgment on the issue of defendants' liability (*see Bajrami v. Winkle Cab Corp.*, 147 A.D.3d 649 [App. Div., 1st Dept. 2017]). It is undisputed that plaintiff Bhuiyan was injured while he stood behind his parked vehicle facing his trunk when she was struck by a vehicle operated by defendant Sherpa. Defendant Sherpa admits in his deposition testimony that he struck plaintiff because he forgot to place his vehicle in park as he parked behind plaintiff. Defendant Sherpa's offers in opposition that plaintiff is comparatively negligent in that plaintiff stood behind his vehicle for about one minute while defendant attempted to park his vehicle. The defense states that plaintiff knowingly observed defendant attempt to park, but continued to remain behind his vehicle for one minute without keeping a constant eye on defendant's vehicle. The defense further argues that the accident was foreseeable and that plaintiff Bhuiyan failed to conduct himself in a manner to prevent the accident from occurring. The defense admits in opposition that plaintiff was facing the trunk of his vehicle when he was struck and that the accident occurred because of defendant Sherpa's failure to place the vehicle in park and prevent it from moving and striking plaintiff.

Vehicle and Traffic Law (VTL) § 1146 (a) requires drivers to exercise due care and states in part that ". . . every driver of a vehicle shall exercise due care to avoid colliding with any bicyclist, pedestrian, or domestic animal upon any roadway and shall give warning by sounding the horn when necessary". Section 1162 of the VTL states that "[n]o person shall move a vehicle which is stopped, standing, or parked unless and until such movement can be made with reasonable safety." Under VTL § 1210, drivers cannot leave their vehicles unattended. Vehicle and Traffic Law §1210 states that "[n]o person driving or in charge of a motor vehicle shall permit it to stand unattended without first stopping the engine, locking the ignition, removing the key from the vehicle, and

effectively setting the brake thereon". Section 1226 of the VTL also requires that "[n]o person shall operate a motor vehicle without having at least one hand or, in the case of a physically handicapped person, at least one prosthetic device or aid on the steering mechanism at all times when the motor vehicle is in motion."

Based on the plain language of the statutes above a violation is clear, where as here, the defendant is said to have proceeded to strike plaintiff in the leg when he was supposed to have been control of his vehicle and brought it carefully to a stop and exercised care in parking his vehicle. The evidence demonstrates that defendant did not operate his vehicle in a reasonable manner and caused the collision into the plaintiff. The defense does not dispute that he failed to stop his vehicle and did not exercise care or reasonable safety in the operation of his vehicle in falling to stop his vehicle. Defendant Sherpar's negligence *per se* in violation of the VTL is demonstrated.

Contrary to defendant's assertions, there are no trial issues in dispute. The defense admits that he struck plaintiff because of its failings in not placing the vehicle in park to prevent the vehicle from proceeding to strike the plaintiff. The defense also admits that plaintiff was facing his truck as he was struck by defendant's vehicle the he mistakenly allowed to continue to move forward into the plaintiff. The defendant's argument that the accident should have been foreseen by plaintiff is without merit as defendant is expected to exercise reasonable care in the operation of his vehicle. Consequently, the evidence is such that the plaintiff's actions did not contribute to the happening of the accident and that defendant Sherpa was at fault. Under these circumstances, plaintiff is entitled to summary judgment on the issue of liability against defendants (*see Loch v. Garber*, 69 A.D.3d 814 [App. Div., 2nd Dept. 2010]).

In this case, admissible evidence is unavailable to undermine the plaintiff's claims. Defendant's arguments do not effectively controvert plaintiff's evidence that defendant Sherpa

unreasonably caused the accident. The evidence submitted in support of the motion has established a *prima facie* case that plaintiff was not at fault for the accident and that defendant Sherpa is the sole cause for the collision. Defendant failed effectively to rebut plaintiff's *prima facie* showing of their negligence and sole cause of the accident (*see Amayo v. Salinas*, 2016 NY Slip Op 31357[U] [Sup Ct, Bronx Co. 2016]). Consequently, the motion for summary judgment against defendant Sherpa on the issue of liability is granted (*see Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018]).

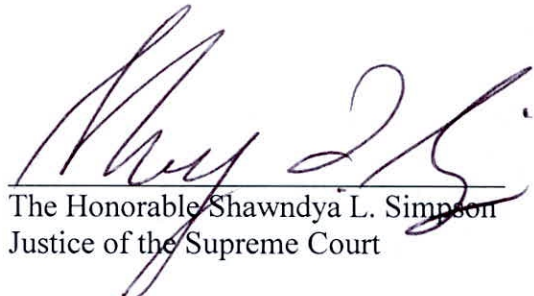
CONCLUSION

Accordingly, it is:

ORDERED, that plaintiff's motion for summary judgment on the issue of liability against defendants' for causing the subject accident is granted.

This constitutes the decision and order of the court.

Dated: Bronx, New York
August 26, 2019



The Honorable Shawndya L. Simpson
Justice of the Supreme Court