

Cohen v Trejo

2019 NY Slip Op 35162(U)

October 28, 2019

Supreme Court, Bronx County

Docket Number: Index No. 25913/2018E

Judge: Mary Ann Brigantti

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This opinion is uncorrected and not selected for official publication.

COUNTY OF BRONX, PART 15

SHMUEL COHEN, et al.

Index No. 25913/2018E

-against-

Hon. MARY ANN BRIGANTTI

LIZAUL TREJO, et al.

Justice Supreme Court

The following papers numbered 1 to 9 were read on this motion (Seq. No. 2) for April 15, 2019

Table with 3 columns: Document Name, No(s), and Page Numbers. Includes rows for Notice of Motion, Answering Affidavit, and Replying Affidavit.

Upon the foregoing papers, the defendant Christopher Mercado ("Mercado") moves for an order granting him summary judgment, dismissing the complaint of the plaintiffs Shmuel Cohen ("Shmuel") and Ettie Cohen ("Ettie") (collectively, "Plaintiffs"), along with any cross-claims asserted against him, pursuant to CPLR 3212. Co-defendants Lizaul A. Trejo ("Trejo") and Reyes Dulce ("Dulce") oppose the motion. Plaintiffs also oppose the motion and cross-move for summary judgment on the issue of liability against the defendants. Mercado opposes the cross-motion.

Mercado's summary judgment motion is denied without prejudice. In a related case arising out of the same accident, Mercado moved for summary judgment on the issue of liability (Rosenberg v. Trejo, et al., Bronx County Index No. 22274/2018E). By decision and order dated May 22, 2019, this Court denied Mercado's motion without prejudice with leave to renew following the completion of discovery. This Court noted that Mercado's sparse affidavit failed to provide all of the essential details of this accident, including the timing of the impacts, and what actually transpired before the series of collisions occurred. In support of the instant motion, Mercado relies on the same affidavit he submitted with the prior motion. The police accident report, while certified, is inadmissible because there is no indication that the drafting officer witnessed the accident (see Jenkins v. Maggies Paratransit Corp., 151 A.D.3d 484, 485 [1st Dept. 2017]), and it otherwise fails to conclusively establish that Mercado was not negligent. Accordingly, since Mercado failed to eliminate all issues of fact as to his lack of fault for this accident, his motion is denied without prejudice, to renew if so advised following the completion of discovery.

Plaintiffs' cross-motion for summary judgment on the issue of all defendants' liability is also denied without prejudice. The cross-motion was not supported by evidence in admissible form (CPLR 3212[b]). Both plaintiffs only submitted "affirmations" in support of the motion that were not notarized. While submitting an affirmation for religious reasons is permissible, the affirmation still has to be made before a notary public or other authorized official to be of probative value (Slavenburg Corp. v. Opus Apparel, 53

Motion is Respectfully Referred to Justice:
Dated:

N.Y.2d 799 at fn.1 [1981]; CPLR 2309). Plaintiff Shmuel submits no notarized affirmation in sur- reply correcting this defect. Plaintiff Ettie does. Even if the Court were to consider this submission, Ettie’s skeletal affirmation lacks any significant detail and fails to establish her entitlement to summary judgment. Ettie claims that she was a passenger and states, in pertinent part: “[a] vehicle owned, and driven by Christopher Mercado, struck my vehicle in the rear, while the vehicle driven by Lizal A. Trejo and owned by Reyes Dulce was racing with an unidentified black vehicle and contributing to the accident. The impact was heavy.” Assuming that the affirmation was sufficient to prove that Mercado rear-ended her vehicle, Mercado’s own affidavit submitted in support of his motion presents a non-negligent explanation for the accident. Ettie’s affirmation also fails to sufficiently explain how exactly the Trejo/Dulce defendants were responsible for the accident. The certified police accident report is inadmissible and otherwise fails to eliminate all triable issues of fact as to which defendant was negligent. Plaintiffs’ motion therefore must be denied (see, e.g., *Oluwatayo v. Dulinayan*, 142 A.D.3d 113, 118 [1st Dept. 2016]).

Plaintiffs did not specifically move for summary judgment on the issue of their lack of comparative negligence or dismissal of any such affirmative defenses, and the Court therefore will not grant relief that was not specifically sought (*compare Poon v. Nisanov*, 162 A.D.3d 804, 808 [2d Dept. 2018]). The Court does note, however, that in the related case, it has already been found that Shmuel was free of any negligence, and plaintiff Rosenberg’s direct claims against him were dismissed (*Rosengberg v. Trejo, et al.*, Bronx County Index No. 22274/2018E May 22, 2019 order).

Accordingly, it is hereby

ORDERED, that Mercado’s motion for summary judgment is denied without prejudice, with leave to renew following completion of relevant discovery, and it is further,

ORDERED, that Plaintiffs’ motion for summary judgment is denied without prejudice, with leave to renew following completion of relevant discovery.

This constitutes the Decision and Order of this Court.

Dated: 10/28/19

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