

Aguirre v Ortiz

2019 NY Slip Op 35174(U)

November 15, 2019

Supreme Court, Bronx County

Docket Number: Index No. 31782/2017E

Judge: Mary Ann Brigantti

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

RAFAEL AGUIRRE

Index No. 31782/2017E

-against-

Hon. MARY ANN BRIGANTTI

JUAN E. ORTIZ, et al.

Justice Supreme Court

The following papers numbered 1 to 6 were read on this motion (Seq. No. 002) for SUMMARY JUDGMENT LIABILITY/PRECLUDE noticed on July 31, 2019.

Table with 3 columns: Document Description, No(s.), and Count. Rows include Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed (1,2), Answering Affidavit and Exhibits (3,4,5), and Replying Affidavit and Exhibits (6).

Upon the foregoing papers, the plaintiff Rafael Aguirre ("Plaintiff") moves for an order (1) granting him summary judgment, (2) striking the defendants' affirmative defense of comparative negligence, (3) and/or against defendant Navdeep S. Bharjana ("Bharjana"), preclusion against offering any testimony in this case for failure to appear for depositions, and for such other and further relief as the Court may deem just and proper. Bharjana and co-defendant Juan E. Ortiz ("Ortiz") oppose the motion.

In a separate motion, Ortiz moves for summary judgment dismissing Plaintiff's complaint and all cross-claims against him, pursuant to CPLR 3212. Plaintiff and Bharjana oppose the motion.

The two motions are consolidated and disposed of in the following Decision and Order.

1. The Parties' Motions for Summary Judgment

Plaintiff does not specify which defendant he seeks summary judgment against. In a letter to the Court, however, Plaintiff clarified that his motion only seeks summary judgment against defendant Bharjana.

Plaintiff's motion does not contain a complete set of the pleadings, as it fails to include a copy of Ortiz's answer (CPLR 3212[b]). Nevertheless, this procedural defect does not require denial of the motion, since all pleadings are electronically viewable on the New York Court Electronic Filing web site, and thus they are available to the Court and all parties (see Studio A. Showroom, LLC v. Yoon, 99 A.D.3d 632 [1st Dept. 2012]).

This matter arises out of an alleged motor vehicle accident that occurred between three vehicles: one operated by Ortiz, another operated by Plaintiff, and a third operated by Bharjana. It is not disputed that, at relevant times, Ortiz was the first vehicle in the chain, followed by Plaintiff, followed by Bharjana.

Plaintiff's complaint alleges that an impact occurred between his vehicle and the vehicle owned and

Motion is Respectfully Referred to Justice:

Dated:

operated by Ortiz. The complaint does not allege that there was an impact between his vehicle and Bharjana's vehicle. However, in an affidavit submitted with the moving papers, Plaintiff alleges that he was "in the middle lane and stopped in my car and was hit in the rear by [Bharjana]." At an examination under oath, Plaintiff testified that he was stopped in traffic on the Bronx River Parkway when he was struck from behind by another vehicle (Pl EUO at 12). Plaintiff explained that he was stopped because cars in front of him were stopped due to an accident (*id.*), and he said that after that impact, his car did not come into contact with anything else (*id.* at 14).

In opposition to the motion, Bharjana submits the transcripts from the examinations before trial of Plaintiff and Ortiz. Plaintiff, notably, testified that his vehicle was rear-ended by another vehicle but he did not remember whether there were any other impacts with other vehicle (Pl. EBT at 20). Ortiz testified, in pertinent part, that he was traveling in the left lane of southbound Bronx River Parkway when he saw that vehicle ahead of him were stopped due to an accident (Ortiz EBT at 14). When he saw the stopped cars, Ortiz was traveling at about 35-40 miles per hour, and he was "about two cars" of distance away from them (*id.* at 14-15). Ortiz was "putting the brake" on his car when he was "hit," from the rear, and then his car stopped (*id.* at 17). Ortiz did not hear any other impacts (*id.* at 25).

Bharjana also submits his own affidavit in opposition to the motion. Bharjana states that he was traveling in the 2nd lane from the left on the Bronx River Parkway when the vehicle in front of him came to a sudden stop. Bharjana then "attempted to move over to [his] right in to the next lane. Now the vehicle front [sic] of me also attempts to move into the lane to the right. I couldn't stop in time to void [sic] contact. My left front bumper made contact with the right rear bumper of the other vehicle." Bharjana further states there were only two vehicles involved in his accident. Contrary to Plaintiff's contentions, Bharjana's affidavit is admissible because it states that he was "duly sworn" before a notary public (*see Collins v. AA Trucking Renting Corp.*, 209 A.D.2d 363 [1st Dept. 1994]; CPLR 2309[b]).

Ortiz also submits an affirmation in limited opposition to Plaintiff's motion, to the extent it sought relief against him. Ortiz references his separate motion for summary judgment, and alleges *inter alia* that he was the lead vehicle in this rear-end accident, any inconsistencies in the testimony are irrelevant to the issue of his liability, and Ortiz should not remain in the case because of any unresolved issues between Plaintiff and co-defendant Bharjana.

"It is well settled that a rear-end collision with a stopped or stopping vehicle establishes a prima facie case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate non-negligent explanation for the accident." (*Cabrera v Rodriguez*, 72 A.D.3d 553 [1st Dept. 2010] citing *Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]; *Agramonte v City of New York*, 288 AD2d 75, 76 [1st Dept. 2001]; see also *Dattilo v Best Transp. Inc* 79 A.D.3d 432 [1st Dept. 2010]).

In this matter, the discrepancies between Plaintiff's complaint, his testimony, the testimony from

Ortiz, and the affidavit from Bharjana, raise questions of fact as to Bharjana's liability (*see generally Richards v. Mitchell*, 172 A.D.3d 439 [1st Dept. 2019]). Notably, there are fact issue as to whether Plaintiff abruptly stopped his vehicle and collided with the vehicle in front of it, and/or attempted to change lanes in front of Bharjana's vehicle when it was not safe to do so, and caused the alleged rear-end collision between himself and Bharjana (*see Figueroa v. Cadbury Utility Const. Corp.*, 239 A.D.2d 285 [1st Dept. 1997]).

Notwithstanding these issues, however, defendant Ortiz is entitled to summary judgment. The statements contained in the certified police accident report and the deposition testimony establishes that Ortiz was the lead vehicle in this alleged three-vehicle accident and he was struck in the rear, which raises a presumption that the rearmost vehicles were liable (*Cabrera*, 72 A.D.3d at 553).

In opposition to the motion, Plaintiff and Bharjana fail to raise any triable issue of fact as to Ortiz's liability. Discrepancies as to which lane the accident occurred in are irrelevant to its cause, and Plaintiff's self-conflicting testimony as to whether he actually struck Ortiz's vehicle fails to defeat Ortiz's motion. Under any of the alleged "versions" of the accident, Ortiz bears no liability, as his vehicle was either stopped or stopping when it was struck in the rear, or he was not struck at all by Plaintiff's vehicle. Even assuming that Ortiz stopped in an abrupt or sudden manner, the opponents to the motion present no evidence that their trailing vehicles were maintaining a safe following distance behind him at the time, therefore this contention fails to raise any issue of fact as to Ortiz's potential liability (*see, e.g., Urena v. GVC Ltd.*, 160 A.D.3d 467 [1st Dept. 2018]; *Miller v. DeSouza*, 165 A.D.3d 550 [1st Dept. 2018]). There is no evidence here that the vehicles trailing behind Ortiz "could have 'reasonably expect[ed] that traffic would continue unimpeded'" (*compare Baez-Pena v. MM Truck and Body Repair, Inc.*, 151 A.D.3d 473 [1st Dept. 2017]). Plaintiff, notably, does not even allege that Ortiz suddenly stopped, and asserts that traffic came to a stop due to an accident ahead. Moreover, Bharjana alleges that only two vehicles were involved in this accident - his own, and Plaintiff's.

2. *Plaintiff's Motion to Preclude*

Plaintiff's motion to strike Bharjana's answer and/or preclude Bharjana from offering any testimony is granted only to the extent of directing Bharjana to appear for an examination before trial on or before **December 2, 2019**. If Bharjana fails to appear, absent good cause, Bharjana may be precluded from testifying at trial or offering an affidavit for any purpose, unless otherwise ordered by this Court.

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Accordingly, it is hereby

ORDERED, that Plaintiff's motion for summary judgment on the issue of the defendants' liability, and to strike the defendants' affirmative defense of comparative negligence, is denied, and it is further,

ORDERED, that Ortiz's motion for summary judgment is granted, and Plaintiff's complaint and any cross-claims asserted against Ortiz are dismissed, and the Clerk of the Court is hereby directed to enter judgment accordingly, and it is further,

ORDERED, that Plaintiff's motion to strike and/or preclude is granted only to the extent directed herein.

The above constitutes the Decision and Order of this Court.

Dated: 11/15/19

Hon. Mary Ann Brigantti J.S.C.

- 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