

Concepcion v Contin

2019 NY Slip Op 35175(U)

August 30, 2019

Supreme Court, Bronx County

Docket Number: Index No. 24792/2018E

Judge: Mary Ann Brigantti

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



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GREGORY CONCEPCION

Index No. 24792/2018E

-against-

Hon. MARY ANN BRIGANTTI

YULI PAYANO CONTIN
-----X

Justice Supreme Court

The following papers numbered 1 to _____ were read on this motion (Seq. No. 2)
for SUMMARY JUDGMENT noticed on February 14, 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

Upon the foregoing papers, the plaintiff Gregory Concepcion ("Plaintiff") moves for partial summary judgment against the defendant Yuli Payano Contin ("Defendant") on the issue of liability, striking the Defendant's second and fourth affirmative defenses alleging comparative negligence, striking the affirmative defense of serious injury, and setting this matter down for trial to assess Plaintiff's damages. Defendant opposes the motion.

"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]).

In support of his motion, Plaintiff submitted an affidavit wherein he stated that as he was on his motorcycle traveling "eastbound" on East Tremont Avenue, crossing its intersection with Morris Park Avenue, he was involved in a motor vehicle accident. Tremont Avenue is described as having "2 eastbound lanes," and Plaintiff stated that at the time of this accident he was "in the right lane." As Plaintiff approached the intersection he noticed a "bus waiting to turn in the left lane." Suddenly, and without

Motion is Respectfully Referred to Justice:
Dated: _____

warning," Defendant's vehicle, which was "traveling westbound on East Tremont Avenue," attempted to make a left turn onto Morris Park Avenue and struck Plaintiff's motorcycle. Plaintiff claims that he "did not see the defendant turn until a moment before he struck [his] motorcycle," and further claims that he was "already in the intersection when [he] first saw [Defendant's vehicle] heading towards me." There was "no time to avoid the accident."

Plaintiff's affidavit carries his summary judgment burden on the issue of liability. Plaintiff's testimony that he was traveling straight along East Tremont Avenue, with a green light, demonstrates 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 *Namismak by Namismak 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 makes an unsafe turn (*see Ward v. Cox*, 38 A.D.3d 313, 314 [1st Dept 2007] [citation and internal quotation marks omitted] [driver entitled to anticipate that other drivers would obey traffic laws requiring them to yield]; *see also Harrigan v Sow*, 165 A.D.3d 463, 464 [1st Dept 2018] [citations omitted] [no duty to watch for and avoid a driver who might fail to stop at a stop sign]; *Uribe v Pronto Gas Heating Supplies, Inc.*, 129 A.D.3d 509, 509-510 [1st Dept 2015] [citation omitted] [no duty to watch for and avoid a driver who might fail to stop at a red light]; *Fay v New York City Tr. Auth.*, 149 A.D.3d 593 [1st Dept 2017] [citation omitted] [no duty to anticipate another driver's sudden, illegal maneuver]; *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, Plaintiff's testimony makes it clear that as he entered the intersection of East Tremont Avenue and Morris Park Avenue he had "no time to avoid" Defendant's vehicle that made an unsafe left turn. The burden therefore shifted to Defendant 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, Defendant submitted an affidavit with his own version of events. Defendant's affidavit states that as he was traveling "West Bound" along East Tremont Avenue, he was involved in a motor vehicle accident. East Tremont Avenue is described as a "two way street with two driving lanes in each direction." As Defendant approached the intersection of East Tremont Avenue and Morris Park Avenue he initially stopped for a red light, and then began to move forward when the light changed to green. When the light turned green Defendant "wait[ed] to make a left turn on to Morris park Avenue" as there was a bus from the opposite direction along East Tremont Avenue that was also making a left onto Morris Park Avenue. While Defendant was waiting for the bus to make a left turn Plaintiff "appeared out of the left side of the MTA bus to try to make a turn. As [Plaintiff] continued to go ahead he didn't realize there were holes on the street and drove right into one cause [sic] him to lose control of his motorcycle and crash. The motorist fell off the bike. Which slid across the floor causing his motorcycle to

run into the middle of my vehicle." In other words, Plaintiff lost control of his motorcycle and "slid[] his bike into [Defendant's] vehicle."

Based upon the submitted testimony, the Court finds that Defendant has raised a triable issue of fact as both Plaintiff and Defendant have "differing versions of the way the motor vehicle accident happened" (*Susino v Panzer*, 127 A.D.3d 523, 524 [1st Dept 2015], citing *Talansky v. Schulman*, 2 A.D.3d 355, 357 [1st Dept 2003]). In other words, Plaintiff has failed to "establish[] defendant's liability as a matter of law" (*Rodriguez v City of New York*, 31 N.Y.3d 312, 324 [2018]). In this case, Defendant claims that he had no involvement at all in this accident, as he asserts Plaintiff's motorcycle struck a "hole" in the road, and then the motorcycle slid into Defendant's vehicle. Thus, this Court holds that Plaintiff "did not conclusively establish that [Defendant] was negligent" (*Savall v New York City Tr. Auth.*, 173 A.D.3d 566, 567 [1st Dept 2019]). Rather, Defendant's "version of the accident exonerated him and attributed the accident exclusively to plaintiff's negligence" because if true, it would constitute a nonnegligent explanation for this accident (*id.*). More to the point, "there are triable issues of fact as to whether or not [Defendant] was negligent at all" (*id.*, citing *Ugarriza v Schmieder*, 46 N.Y.2d 471, 474 [1979]).

Contrary to Defendant's contention, the motion is not premature with respect to the issue of liability, since both drivers submitted affidavits, and therefore, Defendant was "able to submit facts essential to justify opposition to the motion" (*see Jeffrey v. DeJesus*, 116 A.D.3d 574 [1st Dept. 2014] [internal citations, quotations, and brackets omitted]). The above conclusions are also reached without considering the police accident report and MV-104 as those documents recite hearsay (*see Roman v Cabrera*, 113 A.D.3d 541, 542 [1st Dept 2014], citing *Singh v Stair*, 106 A.D.3d 632, 633 [1st Dept 2013]; *Johnson v. Phillips*, 261 A.D.2d 269, 270 [1st Dept 1999]).

Finally, the Court finds dismissal of Defendant's affirmative defense asserting that Plaintiff is "expressly prohibited" from maintaining this action pursuant to the Insurance Law appropriate. In this case, Plaintiff was operating a motorcycle, and therefore, he is "not a covered person who [is] entitled to recover first-party benefits under the Insurance Law, and that the issue of whether [he] had sustained a serious injury [is] immaterial" (*Jung v Glover*, 169 A.D.3d 782, 784-785 [2d Dept 2019] [citations omitted]; *see also* Insurance Law §§ 5102 [f], [m]). Moreover, this issue was not addressed in Defendant's opposition papers.

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Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendant's liability is denied, and it is further,

ORDERED, that Plaintiff's motion striking Defendant's second and fourth affirmative defenses alleging comparative negligence is denied, and it is further,

ORDERED, that Plaintiff's motion striking the affirmative defense of serious injury is granted.

This constitutes the Decision and Order of this Court.

Dated: 8/30/19

Hon. Mary Ann Briganti J.S.C.
Hon. Mary Ann Briganti

- 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