

Loken v Cosmo

2020 NY Slip Op 30472(U)

February 20, 2020

Supreme Court, New York County

Docket Number: 157328/2017

Judge: Adam Silvera

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X

OISTEEN LOKEN,

Plaintiff,

- v -

JUAN COSMO, MODERN LEASING INC.

Defendant.

-----X

INDEX NO. 157328/2017

MOTION DATE 12/23/2019

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents, it is ORDERED that plaintiff's motion for summary judgment, pursuant to CPLR 3212, is granted on the issue of liability against defendant. Plaintiff's motion contends that on June 23, 2017, on the upper level westbound George Washington Bridge, in the State of New York, a vehicle operated by Juan A. Cosmo and owned by Modern Leasing Inc., entered plaintiff's lane of traffic and sideswiped plaintiff's vehicle. Defendants oppose 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 New York University Medical Center, 64 NY2d 851, 853 [1985]). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to "demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure ... to do [so]" (Zuckerman v City of New York, 49 NY2d 557, 560 [1980]). Plaintiffs have made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable

issue of fact. Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (See *Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]). VTL 1128(a) states:

A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

Here, plaintiff testified that plaintiff’s vehicle was struck by defendants’ vehicle as it attempted to enter plaintiff’s lane (Mot, Exh D at 43, ¶6-9). Plaintiff attaches the police report which contains statements from both plaintiff and defendant as to the occurrence of the accident (Mot, Exh C). Defendant stated that the vehicle ahead of it braked unexpectedly which caused defendant to enter into plaintiff’s lane and strike plaintiff’s vehicle (*id.*). The court notes that defendant’s statement is admissible as a statement against interest. Plaintiff has demonstrated that defendant entered into its lane and struck plaintiff’s vehicle in violation of the VTL. Thus, plaintiff has made a prima facie showing of defendant’s negligence.

In opposition, defendants concede that defendants statements recorded in the police report are not hearsay but rather an admission at the scene (Aff in Opp at 3, ¶ 12). However, defendants aver that the statement does not demonstrate their liability but rather an acceptable excuse for the accident. Defendants claim that defendant Cosmo’s admission is evidence that he was faced with a sudden and unexpected circumstance which led to the accident.

Under the emergency doctrine a triable issue of fact may exist as to whether the conduct of a defendant may be excused due to an emergency situation (*Caristo v Sanzone*, 96 NY2d 172, 174 [2001] quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991] [finding that “the common-law emergency doctrine which ‘recognizes that when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a

speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context,’ provided the actor has not created the emergency”). Where defendants have provided “alternative explanations for the accident, including that plaintiff’s vehicle stopped short, and that snow create an emergency condition” the First Department Appellate Division has declined to consider such arguments and granted summary judgment in favor of plaintiff (*Williams v Kadri*, 112 AD3d 442, 443 [1st Dep’t 2013]).

Here, defendants’ argument that the accident occurred because a vehicle in front of defendant Cosmo stopped short necessitating his sudden lane change to avoid another vehicle does not constitute a nonnegligent explanation (*Urena v GVC Ltd.*, 160 AD3d 467 [1st Dept 2018] [finding that “[i]f he had to complete the attempted lane change to avoid striking the vehicle in front of him, he failed to maintain a safe distance, and the fact that another vehicle prevented him from completing the lane change does not constitute an emergency not of his own making”] citing *Renteria v Simakov*, 109 AD3d 749, 750 [1st Dept 2013]). Defendants’ vehicle should have maintained a safe distance from the vehicle which allegedly stopped short in the lane defendants’ vehicle was travelling in prior to the accident. The fact that defendant Cosmo failed to properly switch lanes and struck plaintiff’s vehicle does not mean that the emergency was not of his own making. Thus, defendants have failed to raise an issue of fact or provide a nonnegligent excuse for striking plaintiff’s vehicle and plaintiffs’ motion for summary judgment on the issue of liability is granted.

ORDERED that plaintiff’s motion for summary judgment is granted on the issue of liability as against defendants; and it is further

ORDERED that all parties appear for a Compliance Conference on March 30, 2020, in room 106 of 80 Centre Street at 9:30AM; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon plaintiff with notice of entry.

This constitutes the Decision/Order of the Court.

2/20/20
DATE


ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE