

Gonzalez v Perez

2020 NY Slip Op 31793(U)

June 5, 2020

Supreme Court, New York County

Docket Number: 158066/17

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

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LUCAS GONZALEZ,
Plaintiff,

- v -

JOSHUA PEREZ, EDGAR PENA, 7 TACOS MEXICAN
CUISINE CORP., and JP VALET PARKING, INC.,
Defendants.

Table with 2 columns: INDEX NO., MOTION DATE, MOTION SEQ. NO. and a large cell containing DECISION AND ORDER.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83

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 all defendants. Plaintiff's motion, which contends that he was the seat belted driver of his vehicle that was stopped at a red light when defendants' vehicle, which was attempting to park, collided with the side of plaintiff's vehicle, has made out a prima facie case of negligence, and the burden shifts to defendants to raise a triable issue of fact. See Winegrad v New York University Medical Center, 64 NY2d 851, 853 (1985); see also Zuckerman v City of New York, 49 NY2d 557, 560 (1980). Pursuant to this Court's Decision/Order dated July 31, 2018, defendants Joshua Perez, 7 Tacos Mexican Cuisine Corp., and JP Valet Parking, Inc. were found in default, with an inquest for damages against them to be held at or shortly after trial.

Here, defendant Edgar Pena opposes plaintiff's motion and cross-moves for a default judgment on his cross-claims against defendants Joshua Perez, 7 Tacos Mexican Cuisine Corp., and JP Valet Parking, Inc., for such co-defendants to indemnify him from and against any

liability to plaintiff, and for summary judgment on the issue of liability finding that defendant Pena was not liable to plaintiff.

Preliminarily, the Court notes that on the date and time of the accident, defendant Pena was not operating his vehicle and did not witness the accident. Thus, defendant Pena's opposition, which is not based upon any personal knowledge, has failed to raise any genuine issues of triable fact. Moreover, the Appellate Division, First Department specifically held that, pursuant to Vehicle and Traffic Law §388 (hereinafter referred to as "VTL") "an owner of a vehicle is responsible for the negligence of whomever, with his consent, operates the vehicle, whether on a public highway, private highway or parking lot. Once proof of ownership has been established...a presumption, rebuttable only by substantial evidence to the contrary, attaches that the operator is using the vehicle with the owner's consent, express or implied." *Carter v Travelers Ins. Co.*, 113 AD2d 178, 180 (1st Dep't 1985)(internal citations omitted).

Here, it is undisputed that defendant Pena was the owner of the vehicle which struck plaintiff's vehicle, and, thus, a presumption of defendant Pena's consent is established. In *Carter*, the Appellate Court went on to state that the owner of the vehicle gave explicit permission for the employees of the parking lot to operate his car by "turning the vehicle over to the attendant with the keys..., or implicit in his actions in parking the vehicle in the lot and leaving it there with the keys." *Id.* at 180-181. "In placing his vehicle under the parking attendant's control, knowing that the attendant could, or would, move it about the lot, he took the situation as he found it." *Id.* at 181. Thus, VTL §388 and the Appellate Division, First Department, is clear that defendant Pena may be held liable for plaintiff's injuries if the valet and its employees had defendant Pena's permission to use the vehicle and negligently used or operated such vehicle. As such, plaintiff's motion is granted as to liability against defendant Edgar Pena.

As to defendant Pena's cross-motion with regards to a default judgment against co-defendants on the cross-claims, CPLR 3215 provides that "[w]hen a defendant has failed to appear, plead or proceed to trial...[a party] may seek a default judgment against him." Similar to the standard for vacating a default judgment, a party seeking to prevent a default judgment from being entered must demonstrate a reasonable excuse for the default and a meritorious defense to the action. *See* CPLR C3215:24; *Wehringer v Brannigan*, 232 AD2d 206, 206 (1st Dep't 1996). Here, defendant Pena's cross-motion for a default judgment is granted against co-defendants Joshua Perez, 7 Tacos Mexican Cuisine Corp., and JP Valet Parking, Inc. as such defendants, to date, have failed to answer defendant Pena's cross-claims or appear in this action. Additionally, such defendants failed to submit any opposition to this cross-motion. Thus, the portion of defendant Pena's cross-motion which seeks a default judgment against the co-defendants is granted.

Defendant Pena further seeks an order determining that co-defendants must indemnify him from any and all liability in which defendant Pena allegedly owes to plaintiff. Here, it is uncontested that prior to the accident, defendant Pena drove his vehicle to co-defendant's restaurant and gave the keys to his vehicle to the valet service. The driver of such vehicle, at the time of the accident, was co-defendant Joshua Perez, who was employed as a valet driver. Thus, the liability against defendant Pena is based entirely upon vicarious liability, pursuant to Vehicle and Traffic Law 388, purely as the owner of the vehicle who entrusted such vehicle to the valet service. However, as stated above, VTL 388 is clear that "[e]very owner of a vehicle used or operated in this state shall be liable and responsible for...injuries to person...resulting from negligence in the use or operation of such vehicle...by any person using or operating the same with the permission, express or implied, of such owner." Thus, the valet's involvement in the

accident, in and of itself, does not shield defendant Pena from liability. As such, the portion of defendant Pena’s cross-motion which seeks indemnification is denied.

Accordingly, it is

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

ORDERED that the portion of defendant Edgar Pena’s cross-motion which seeks a default judgment is granted as against defendants Joshua Perez, 7 Tacos Mexican Cuisine Corp., and JP Valet Parking, Inc, and an inquest shall be held, at or shortly after trial (with scheduling to be determined by the trial judge), assessing damages against such defaulting defendants and entering judgment accordingly, with costs and disbursements; and it is further

ORDERED that the portion of defendant Edgar Pena’s cross-motion which seeks indemnification is denied; and it is further

ORDERED that within 90 days of entry, plaintiff shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

6/5/2020
DATE

ADAM SILVERA, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE