Florenco v New York City Tr. Auth.
2020 NY Slip Op 31901(U)
June 15, 2020
Supreme Court, New York County
Docket Number: 157496/2016
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19
--X
ERIC FLORENCO,

Plaintiff,

-against-

Index No. 157496/2016

NEW YORK CITY TRANSIT AUTHORITY, AND METROPOLITAN TRANSPORTATION AUTHORITY AND ZAFAR IQBAL, MAXWELL PLUMB MECHANICAL CORP. AND JULIAN ZAPATA,

DECISION

Defendants.
--X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered	NYSCEF #
The Maxwell Defendants' Motion/Affirmation	1	28-38
Plaintiff's Affirmation in Opposition	2	40-42
Plaintiff's Cross Motion/Affirmation/Affidavit	3	43-50
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SOKOLOFF, J.:

In this personal injury action, plaintiff alleges that, on September 14, 2015, he was a passenger on an articulating (accordion) Metropolitan Transit Authority (MTA) M60 bus, operated by defendant Zafar Iqbal (Iqbal), when it was involved in collision with a 2006 box truck, owned by defendant Maxwell Plumb Mechanical Corp. (Maxwell), and operated by defendant Julian Zapata (Zapata). The accident occurred in the vicinity of 125th Street and Second Avenue, when the vehicles were approaching the on-ramp for the Triborough Bridge. Plaintiff alleges that the accident caused and/or exacerbated injuries to his neck, left shoulder, and low back.

Defendants Maxwell and Zapata (collectively, the Maxwell defendants) move, pursuant to CPLR 3212, for an order granting them summary judgment dismissing the complaint as against them.

Plaintiff cross-moves for an order granting him partial summary judgment on the issue of liability against the Maxwell defendants, the MTA, the New York City Transit Authority (the Transit Authority) and Iqbal.

For the reasons set forth below, the Maxwell defendants' motion for summary judgment is denied. Plaintiff's cross motion is granted to a limited extent, and denied in all other respects.

BACKGROUND

Plaintiff testified that the incident occurred on September 14, 2015, at approximately 4:15 p.m., near Second Avenue and 125th Street in Manhattan, New York (pl dep at 12). The weather was clear, dry, and sunny (*id.* at 14). Plaintiff had boarded an M60 MTA bus at 119th Street and Amsterdam Avenue, and was sitting in the rear seat (*id.* at 17), resting his head on the windows (*id.* at 15-16).

Plaintiff testified that he could not recall how long he had been traveling on the bus at the time the accident occurred, as he was "dozing off at the end, so I couldn't tell you the exact amount of length" (*id.* at 11-12). He did recall that the last stop the bus made prior to the accident was at Second Avenue and 125th Street (*id.* at 20). Plaintiff could not remember if there were other passengers on the bus, "[b]ecause I was dozing off..." but that the bus was empty when he got on, because that was the beginning of the route (*id.* at 21). At numerous other points throughout plaintiff's testimony he stated that he had been asleep right before the accident (*see id.* at 23).

Plaintiff also testified that it was the contact between the MTA bus and the Zapata vehicle that caused him to wake up (*id.* at 23 ["I woke up to a large boom"]), and that he "felt the impact and heard the impact" (*id.* at 95). When asked if he knew "if the truck was in a different lane that was adjacent to the bus lane," plaintiff testified that he "was asleep, so dozing off. The only thing I remember is what I saw, and it was the truck making contact, or made contact, with the bus" (*id.* at 47). He further testified that when he first observed the truck in contact with the bus, the side mirror of the truck was already "folded in entirely" (*id.* at 93).

After the impact, plaintiff stated that he witnessed Zapata, the truck driver, attempt to flag down the bus driver (*id.* at 31). Plaintiff spoke with Iqbal, the bus driver, after the accident, who informed him that "he didn't realize" that the accident occurred (*id.* at 38-39). Plaintiff informed the bus driver that "the truck hit the back of the bus and I was in the back" (*id.* at 38). Plaintiff also testified that the only thing he remembers is what he saw: "the truck making contact . . . with the bus" (*id.* at 47; *see also id.* at 48 ["the cabin of the truck is what made contact with the bus"]). He knew it was the truck that hit the bus because the mirror on the truck was completely folded in (*id.* at 93).

Iqbal testified that, on September 14, 2015, he was employed as a bus operator with the Transit Authority (Iqbal dep at 10), and that on that date, he was driving an M60 bus (*id.* at 14). Iqbal came to learn that an accident had occurred involving his bus on September 14, 2015 at approximately 4:14 p.m. (*id.* at 20). However, until Iqbal was flagged down by Zapata, he had no knowledge that an accident had occurred (*id.* at 27 [he first became aware that an accident had occurred "[w]hen I was approaching the bridge and the truck driver got my attention"]). He testified that the truck notified him by "blowing his horn" (*id.* at 29), and that prior to Zapata attempting to get his attention, he never felt any impact to the bus, and denied that any passengers had notified him that an impact had occurred (*id.* at 36).

When discussing the accident with Zapata, Iqbal was told that he hit Zapata's vehicle (*id.* at 34).

Iqbal further testified that he did notice the truck prior to when Zapata honked at him, and that when he was approaching the bridge, he was in the right lane, and the truck was in the left lane, and that the truck remained in the left lane until the time he entered the on-ramp (*id.* at 31-32).

Iqbal testified that, after the accident, he completed an accident diagram on the Operator Daily Trip Sheet (*id.* at 57), and that he created the diagram based on what both Zapata and plaintiff told him (*id.* at 58-59). The X on the diagram reflects the point of contact between the two vehicles – where the bus hit the mirror on the truck (*id.* at 58). According to Iqbal, plaintiff told him that he witnessed the accident, and that he saw "the truck hit the bus" (*id.* at 59). Plaintiff handed Iqbal his business card, and told him that if he needed a witness, to call him (*id.*).

Iqbal also testified that he did not have any personal knowledge of how the accident occurred, but that he believed it happened, based on what others told him, because "the truck driver was trying to get in front of the bus" (*id.* at 81). He further testified that, when the Triborough Bridge police officer showed up, he told Zapata that, based on the way that Zapata described the accident, that "you [Zapata] were at fault, not the bus operator" (*id.* at 82).

Zapata testified that, on September 14, 2015, he was driving a truck owned by Maxwell, with full permission of the owner (Zapata dep at 10). Zapata was employed by Maxwell as a "mechanic plumber" (*id.* at 12). Zapata testified that the subject accident occurred at or near the Triborough Bridge (*id.* at 24). He further testified that, in the time period shortly prior to the accident, including passing through the toll booths and crossing

the first bridge, he never veered from his lane of travel (id. at 35). The accident occurred shortly after the toll booths for the Triborough Bridge (*id.* at 36).

Zapata testified that the other vehicle involved in the accident was an "accordion" (articulating) bus (*id.* at 43). The points of impact for the accident were the right driver's side of the MTA bus, near the rear, and the side view mirror of Zapata's vehicle (*id.* at 49). According to Zapata, just prior to the impact, the bus was in the lane to Zapata's right (*id.* at 49). However, at some point, the rear portion of the articulating bus veered into Zapata's lane of travel (*id.* at 50), causing the contact. After the impact, Zapata attempted to stop the bus driver (*id.* at 57), as the bus driver did not realize he had been involved in an accident (*id.* at 58).

Zapata testified that the accident occurred because the bus was attempting to get into his lane (*id.* at 44). The bus was located in the lane to his immediate right before the accident, and at the time of the accident, the rear portion of the bus was in Zapata's lane (*id.* at 49-50).

The Maxwell Defendants' Motion for Summary Judgment

The Maxwell defendants contend that they are entitled to summary judgment because Zapata is the only individual who had knowledge of the accident, and he testified that he witnessed the rear portion of the MTA bus veer into his lane of travel, and come into contact with the passenger side mirror of his vehicle. The Maxwell defendants also contend that, because plaintiff was dozing at the time of the accident, and Iqbal was not even aware that he had been involved in an accident, there has been no evidence presented in this matter to rebut his version of events, or to demonstrate that Zapata was negligent.

"'[T]he 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 demonstrate the absence of any material issues of fact'" (*Ayotte v Gervasio*, 81 NY2d 1062, 1062 [1993] [citation omitted]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). The burden

is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Auth.*, 27 NY3d 1019, 1021 [2016]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853; *see also Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993]).

The party opposing summary judgment has the burden of presenting evidentiary facts sufficient to raise triable issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *CitiFinancial Co. [DE] v McKinney*, 27 AD3d 224, 226 [1st Dept 2006]). The court is required to examine the evidence in a light most favorable to the party opposing the motion (*Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Summary judgment is drastic remedy that may be granted only when it is clear that no triable issues of fact exist (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]), and "should not be granted where there is any doubt as to the existence of a triable issue" of fact (*American Home Assur. Co. v Amerford Intl. Corp.*, 200 AD2d 472, 473 [1st Dept 1994]; *accord Birnbaum v Hyman*, 43 AD3d 374, 375 [1st Dept 2007]).

Here, the Maxwell defendants have failed to establish prima facie entitlement to summary judgment as a matter of law.

It is well settled that the plaintiff in a negligence action is required to show that the defendant's breach of some duty caused or contributed to the plaintiff's mishap (*Brathwaite v Equitable Life Assur. Socy. of U.S.*, 232 AD2d 352, 353 [2d Dept 1996]). The "mere fact that an accident occurs does not mean that a defendant is liable" (*id.*). "It is a cardinal rule that a defendant may not be cast in damages merely because of the happening of an accident. It must be proven that the accident occurred because of the negligence of the one sought to be charged" (*Shkoditch v One Hundred and Fifty William St. Corp.*, 17 AD2d 168, 169 [1st

Dept 1962], *affd* 16 NY2d 609 [1965]; *see Eiseman v State of New York*, 70 NY2d 175, 187 [1987] [citations omitted] ["Embedded in the law of this State is the proposition that a duty of reasonable care owed by the tortfeasor to the plaintiff is elemental to any recovery in negligence"]; *see also Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 584 [1994]).

Furthermore, "'[t]here can be more than one proximate cause of an accident'" (*Graeber-Nagel v Naranjian*, 101 AD3d 1078, 1078 [2d Dept 2012] [citation omitted]; *see also Cox v Nunez*, 23 AD3d 427, 427 [2d Dept 2005]). A driver who has the right-of-way may still be found partially at fault for an accident if he or she fails to use reasonable care to avoid a collision with another vehicle in the intersection (*see Virzi v Fraser*, 51 AD3d 784, 784 [2d Dept 2008]; *Rotondi v Rao*, 49 AD3d 520, 520 [2d Dept 2008]). Indeed, a movant seeking summary judgment is required to make a prima facie showing that he or she is free from comparative fault (*see Mackenzie v City of New York*, 81 AD3d 699, 700 [2d Dept 2011]; *Bonilla v Gutierrez*, 81 AD3d 581, 582 [2d Dept 2011]).

In support of their motion for summary judgment, the Maxwell defendants rely only on Zapata's self-serving testimony that he witnessed the rear portion of the MTA bus veer into his lane of travel and come into contact with the passenger side mirror of his vehicle. In doing so, they completely ignore any testimony by plaintiff and the bus driver that would support a finding of whole or partial liability on the part of the Maxwell defendants.

"On a motion for summary judgment ... self-serving statements of an interested party which refer to matters exclusively within that party's knowledge create an issue of credibility which should not be decided by the court but should be left for the trier of facts" (*Sacher v Long Is. Jewish–Hillside Med. Ctr.*, 142 AD2d 567, 568 [2d Dept 1988]; *accord Mills v Niagara Frontier Transp. Auth.*, 163 AD3d 1435, 1438 [4th Dept 2018]; *Nahar v Gulati*, 33 Misc3d 1233[A], 2011 NY Slip Op 52230[U], *1 [Sup Ct, NY County 2011]). Indeed, "[i]f everything or anything had to be believed in court simply because there is no witness to

contradict it, the administration of justice would be a pitiable affair" (*Punsky v City of New York*, 129 App Div 558, 559 [2d Dept 1908]). Accordingly, Zapata's self-serving statement is insufficient to establish the Maxwell defendants' "prima facie entitlement to summary judgment as a matter of law" (*see e.g. Quiroz v 176 N. Main, LLC*, 125 AD3d 628, 631 [2d Dept 2015]).

Moreover, given that there may be more than one proximate cause of an accident, the fact that the bus came into contact with Zapata's mirror does not preclude a finding that comparative negligence by Zapata contributed to the accident (*see Mackenzie*, 81 AD3d at 700; *Bonilla*, 81 AD3d at 582). Indeed, it is entirely possible that a jury could reasonably find that Zapata failed to use reasonable care in avoiding this accident by driving too fast, attempting to pass when there was insufficient space, failing to see what there was to be seen, and by not taking appropriate action to avoid contact with the articulating bus.

Accordingly, the Maxwell defendants have not established their entitlement to judgment as a matter of law, as they failed to submit evidence sufficient to establish that they were not liable for this accident, and that their own negligence did not cause or contribute to the occurring of the accident.

Even if the Maxwell defendants had shown a prima facie entitlement to summary judgment, both plaintiff and the Transit Authority have raised issues of fact, requiring denial of the motion.

According to Vehicle and Traffic Law § 1128 (a), "[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." A driver who moves a vehicle from its lane when that movement cannot be made without safety violates Vehicle and Traffic Law § 1128 (a), and is negligent as a matter of law (*see Mitchell*

v Smith, 142 AD3d 861, 861-862 [1st Dept 2016], *Gluck v New York City Tr. Auth.*, 118 AD3d 667, 669 [2d Dept 2014]).

Here, contrary to the Maxwell defendants' contention that Zapata is the only party who provided evidence as to how the accident occurred, both plaintiff and the Transit Authority also present evidence that the accident occurred when one or both of the defendant drivers improperly changed lanes, or part of their vehicle changed lanes. The evidence presented by all of the parties is conflicting as to whether Zapata or Maxwell changed lanes, and who caused the accident, thus raising issues of fact.

First, plaintiff submits an affidavit in opposition to the motion (NYSCEF Doc No. 41), in which he alleges that, after the accident, he observed the truck in the lane occupied by the bus. Specifically, plaintiff alleges that, after hearing the impact,

> I looked out the window to my left and saw that the box truck and bus had impacted. The passenger side near the side mirrors had made contact with the driver's side of the bus near the back where I was sitting. When I looked I saw that the mirror of the box had truck was folded in entirely. When I looked out my window I saw that the bus was completely in the lane for the on-ramp to the RFK Bridge, I also observed that the Maxwell Plumb Mechanical Corp Box truck was partially in the lane the bus was occupying. It seemed that the Maxwell Plumb Mechanical Corp Box truck was attempting to cut into the lane where the bus was in order to get onto the RFK Bridge.

(plaintiff's affidavit, ¶¶ 6-7). This affidavit contradicts Zapata's testimony that the MTA bus veered into his lane.

Plaintiff also submits the Operator Daily Trip Sheet/Accident Report which was filled out by Iqbal (NYSCEF Doc No. 37), and in which Iqbal wrote, as to the description of the accident:

> Just departed 2nd Ave bus stop heading towards RFK Bridge on ramp. I was making a right onto the on ramp, truck on rear side of bus tried to overtake the bus (truck was not in on ramp lane) and made contact on L near b/s of bus leaving scuff makes on bus and shattering p/s mirror on truck...

(*see id.*). Again, this document contradicts Zapata's testimony.

In opposition to the motion, the Transit Authority submits the bus security camera video, as well as the authenticating affirmation of Jazmin Orea (*see* NYSCEF Doc No. 56). The Transit Authority contends that the video provides visual proof that the cause of the accident was not the bus operator. The Transit Authority contends that it is clear from the video that the impact occurred when the bus was within its own lane as it merged onto the ramp, and that the impact is so slight that it is barely noticeable (*see* video at 16:11).

As there is nothing on the bus video that indicates that the bus merged into Zapata's lane, causing the impact, this submission also contradicts Zapata's testimony that the accident was caused by the bus.

Finally, Zapata's deposition testimony itself was conflicting on whether he changed lanes. For instance, even though the Zapata denies changing lanes immediately prior to the accident, he also testified that he intended to go to Queens, and accordingly would need to change lanes into the lane the bus was traveling in:

> Question: After passing though that toll area before reaching the second bridge, did you change lanes at all?
>
> Answer: I was going to my right to Queens, I had to change lanes. If I stayed in the same lane, I am going to the Bronx. I had to go to the next lane to my right

(Zapata dep at 39).

Furthermore, in contradiction to the testimony later in his deposition in which he stated that he saw the bus in the lane to the right of him (*see id.* at 83), earlier in his deposition, Zapata testified that he didn't see the bus until after the accident, and therefore would not be able to testify where it was at the moment of impact. Specifically, he testified:

> Question: The other vehicle that was involved in the accident, did you see it at any time before that impact?
>
> Answer: No.

Question: The first time you saw the other vehicle, was that after the impact occurred?

Answer: Yes.

(*id.* at 43).

These submissions raise issues of fact as to which driver improperly changed lanes, in violation of Vehicle and Traffic Law § 1128 (a), and whose negligence caused the accident. Indeed, "[n]egligence cases by their very nature do not usually lend themselves to summary judgment, since often, even if all parties are in agreement as to the underlying facts, the very question of negligence is itself a question for jury determination" (*Ugarizza v Schmieder*, 46 NY2d 471, 474 [1979]; *accord Bencosme v Allen*, 60 Misc3d 531, 533 [Sup Ct, NY County 2018] ["summary judgment is rarely granted in negligence actions unless there is no conflict at all in the evidence"]; *see e.g. O'Connor v Tishman*, 182 AD3d 502 [1st Dept 2020] [denying motion for summary judgment in negligence action, where numerous issues of fact existed]).

Therefore, the Maxwell defendants' motion for summary judgment is denied.

Plaintiff's Cross Motion for Summary Judgment

Plaintiff cross-moves for summary judgment on the issue of liability against all defendants. Plaintiff contends that, since he was merely a passenger, one of the drivers must have violated Vehicle and Traffic Law § 1128 (a), and a finding of negligence against at least one of them is necessarily warranted, with the apportionment of liability to be decided by a jury at trial.

"Plaintiff, as an innocent rear-seat passenger in one of the vehicles who cannot possibly be found at fault under either defendant's version of the accident, is entitled to partial summary judgment" (*Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206, 207 [1st Dept 2001]). However, plaintiff is not entitled to summary judgment on the issue of liability.

Rather, "plaintiff, as an innocent back-seat passenger, and in the absence of any finding as a matter of law of the defendants' respective liability, was entitled to summary judgment only to the extent of finding no culpable conduct by him on the issue of liability" (*Guzman v Desantis*, 148 AD3d 580, 581 [1st Dept 2017]; *see e.g. Mello v Narco Cab Corp.*, 105 AD3d 634, 634 [1st Dept 2013] ["[p]laintiff established that, as a back-seat passenger in a taxi cab that rear-ended a second vehicle, she was free of negligence as a matter of law"]).

Accordingly, it is

ORDERED that the motion of defendants Maxwell Plumb Mechanical Corp. and Julian Zapata for summary judgment is denied; and it is further

ORDERED that plaintiff's cross motion for summary judgment is granted to the limited extent that he is granted partial summary judgment finding that he is free of negligence as a matter of law. The cross motion is denied in all other respects.

Dated: June 15, 2020

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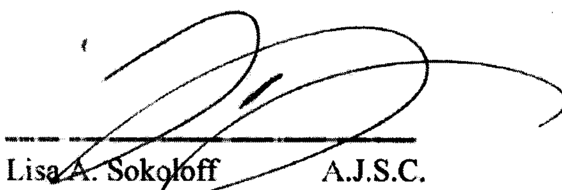

Lisa A. Sokoloff A.J.S.C.

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