

Sherazi v Riaz

2020 NY Slip Op 32707(U)

August 18, 2020

Supreme Court, Kings County

Docket Number: 507420/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

SYED SHERAZI,

Plaintiff,

-against-

**MUHAMMAD F. RIAZ, MARK P. LANGFORD and
COGNAC LEASING CO. LLC,**

Defendants.

X

DECISION/ORDER

Index No. 507420/2018

Motion Seq. No. 2 and 3

Date Submitted: 07/30/2020

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Riaz's motion and plaintiff's cross motion for summary judgment on liability.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed...	<u>32-41</u>
Affirmation in Opposition, Affidavits, and Exhibits Annexed.....	<u>43</u>
Cross Motion, Affirmation and Exhibits Annexed.....	<u>50-54</u>
Affirmation in Opposition, Affidavits, and Exhibits Annexed.....	<u>57, 61</u>
Reply Affirmations.....	<u>44-48, 58-60, 62</u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

Defendant Riaz moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross-claims asserted against him. Plaintiff cross-moves for summary judgment on the issue of liability as against both defendants. This action arises from a motor vehicle accident which took place on May 3, 2017 on the Brooklyn Queens Expressway. Plaintiff was a passenger in defendant Riaz's automobile, which was allegedly side-swiped by a trailer with a backhoe on it, which was being pulled by a dump truck driven by co-defendant Langford and owned by defendant Cognac Leasing Co. LLC.

Defendant Riaz supports his motion with the pleadings and the EBT transcripts of both drivers and of plaintiff. He avers that he was driving along in the left lane when co-defendant Langford lost control of his vehicle and the trailer came into his lane, sideswiping his Honda Civic, which was then pushed into the cement median.

The co-defendants oppose the motion on the ground that it is defective as it does not include the EBT transcripts. That is not accurate. The transcripts were e-filed on the same date as the notice of motion and other papers.

Next, counsel claims Riaz's EBT transcript [E-file Doc. 39] cannot be considered as he did not sign it. This argument has no merit, as Riaz's deposition can be used by Riaz's attorney even if he has not signed it and even if it is within 60 days from the date Riaz was sent the transcript to review and correct. While it is true that the CPLR provides that "the witness fails to sign and return the deposition within sixty days, it may be used as fully as though signed" (NY CLS CPLR R 3116), it can be used unsigned before the sixty days has expired if it is the transcript of the moving party's deposition, as using it "acknowledges its accuracy" (see *Gallway v Muintir, LLC*, 142 AD3d 948, 949 [2d Dept 2016]; *Pavane v Marte*, 109 AD3d 970, 971 [2d Dept 2013]).

Co-defendants' counsel next claims that Riaz has not made a prima facie case for summary judgment, as the only item submitted in support of the motion is counsel's affirmation, which is not evidence. This is not correct, as stated above.

The court finds that, based on the moving papers, defendant Riaz has made a prima facie case for summary judgment on the issue of liability.

Plaintiff opposes Riaz's motion and cross-moves for summary judgment on the issue of liability. To be clear, a passenger is not negligent for the happening of an

automobile accident unless the passenger in some manner plays a role in the happening of the accident. Defendants do not allege anything of the sort in their EBTs.

Therefore, plaintiff is entitled to an order striking the affirmative defenses of comparative fault and assumption of the risk with regard to plaintiff, a passenger.

With regard to defendant Riaz's motion for summary judgment, plaintiff opposes it and claims that defendant Langford testified that it was the Riaz vehicle that sideswiped the trailer. Plaintiff's counsel thus opines that there are triable issues of fact as to the comparative fault of the drivers. The court notes that this is not an argument put forward by defendant Langford in his opposition to Riaz's motion. Langford testified that he did not actually see Riaz's vehicle and his trailer come into contact with each other [Pages 34-35], nor did he feel it from the cab of the truck. He testified that he was driving a dump truck with six wheels, which was pulling a trailer (which had a backhoe on it) [Page 57] with four wheels. Langford testified that he was "cut off" in the area of the BQE where the LIE merges from the right, as an unidentified car moved in front of his truck, which was in the middle lane, causing him to hit his (air) brakes. When he hit his brakes, the two wheels of his trailer on the passenger side rose up about six inches off the ground, and he performed what he describes as a "counter-steer maneuver" to get the wheels back down, which involved turning his steering wheel first left and then right [Page 55]. During this process, the rear of his trailer came into contact with Riaz's car. Asked whether his trailer left his lane of travel, as opposed to Riaz's vehicle coming into Langford's lane, Langford says [Pages 35-36] "I didn't have enough time to see to the back of the trailer, so as far as I know, no, it didn't change lanes, but I couldn't see the back of the trailer. It's 20 feet behind me." Asked if the trailer moved

left or right as a result of the counter-steer, Langford says [Pages 56-57] "I'm not looking at the left side, I'm looking at the right side, so I can't tell you what the left side was doing. I was focusing on getting the right side down in those couple of seconds [so it didn't flip over]." This is not, as plaintiff's attorney argues, testimony from Langford that asserts that Riaz was negligent in connection with the happening of the accident.

Riaz testified that he was driving along in the left lane [Page 33] "and the truck swerved into my lane. And I saw the truck, so I started braking -- it was in my lane, so I started braking. And then it just -- I saw the -- it hit my side car, like the side of my side door and then just hit me." He continues on Page 35, "So I saw the truck swerve into my lane and then I saw the trailer swerve into my lane, like hitting my car." Riaz testified that he pulled to the left, towards the median, to avoid the contact, but was unable to avoid being hit by Langford's trailer.

Plaintiff himself does not claim that Riaz moved out of his lane of travel, despite his attorney's claim that Riaz cannot be free of fault. He states [Page 48-49] "I just realized like somebody hit us from my side and then we were squeezing between the truck and the divider."

Neither the co-defendant nor the plaintiff raise a triable issue of fact to overcome Riaz's motion.

Accordingly, it is **ORDERED** that Riaz's motion (Seq. # 2) for summary judgment is granted, and the complaint and any cross claims are dismissed as against him. This case shall proceed to trial on the issue of damages only. Plaintiff's motion (Seq. # 3) is granted solely to the extent that any affirmative defenses of comparative negligence or

assumption of the risk asserted against plaintiff by Langford//Cognac are stricken from defendants' answer.

This constitutes the decision and order of the court.

Dated: August 18, 2020

ENTER:



Hon. Debra Silber, J.S.C.

**HON. DEBRA SILBER
JSC**