

Koso v Escobar

2020 NY Slip Op 34790(U)

March 13, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 612811-2018

Judge: David T. Reilly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 612811-2018

EDWARD J. KOSO,

Plaintiff,

Siben & Siben, LLP
Attorneys for Plaintiff
90 East Main Street
Bay Shore, NY 11706

-against-

McMahon, Martine & Gallagher, LLP
Attorneys for Defendant Escobar
55 Washington Street, 7th Floor
Brooklyn, NY 11201

GERMAN ESCOBAR, GERMAN G. ESCOBAR
and JACK WERTHER,

Defendants.

Zaklukiewicz, Puzo & Morrissey, LLP
Attorneys for Defendant Werther
2701 Sunrise Highway
P.O. Box 389
Islip Terrace, NY 11752

MOTION DATE: 11/06/19
SUBMITTED: 01/15/20
MOTION SEQ. NO.: 1 & 2
MOTION DEC.:
001 MG
002 MG

Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by Plaintiff dated October 4, 2019 and supporting papers; and (2) Notice of "Cross-Motion" by Defendant Werther dated December 4, 2019 (and after hearing counsel in support and in opposition to the motion) it is,

ORDERED, that plaintiff's motion (Seq. 001) and defendant Jack Werther's motion (Seq. 002) are consolidated for purposes of this determination; and it is

ORDERED, that plaintiff's motion seeking an Order granting him partial summary judgment as to the issue of liability against defendant German Escobar, pursuant to Civil Practice Law and Rules (CPLR) 3212, is granted; and it is

ORDERED, that defendant Jack Werther's motion seeking an Order granting him summary judgment and dismissing the plaintiff's complaint as to him, pursuant to CPLR 3212, is granted.

Plaintiff commenced this action with the filing of a summons and complaint on July 5, 2018 seeking to recover money damages for personal injuries allegedly sustained in a motor vehicle accident that occurred on September 29, 2017. Plaintiff alleges that at the time of the accident he was traveling southbound on Route 111, near the intersection of Moffitt Road, in the Town of Islip, County of Suffolk, when his vehicle was struck by a vehicle apparently owned and operated by German Escobar (Escobar). Route 111 is a two-lane highway with one lane going northbound and one lane going southbound. Plaintiff testified that he did not see Escobar's vehicle prior to the accident and described the contact as a "heavy impact." Plaintiff now moves for summary judgment on the issue of liability and submits, in support of the application, a copy of the pleadings, an uncertified police accident report and the stenographic minutes of the depositions of all parties.

Defendant Jack Werther (Werther) has submitted a motion seeking summary judgment and dismissal of the plaintiff's complaint as asserted against him. Werther testified that he was driving southbound on Route 111 on the date of the accident and stopped approximately twenty yards before the stoplight for Moffitt Road. He stated that he chose to stop his vehicle there as he observed a white sedan entering the intersection in an erratic fashion and crossing over a double-yellow street marking. Werther further testified that the white sedan made contact with his vehicle striking his right front passenger side. He observed the driver put the car in reverse and strike a tree. Werther further stated that the driver, after striking the tree, reversed the vehicle and proceeded down the road before Werther heard a loud impact. Escobar has not submitted opposition to either of the pending applications, nor has plaintiff opposed Werther's application to dismiss the complaint.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law by tendering evidence in admissible form sufficient to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The movant has the initial burden of proving entitlement to summary judgment (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, *supra*). Once such proof has been offered, the burden then shifts to the opposing party who must proffer evidence in admissible form and must show facts sufficient to require a trial of any issue of fact to defeat the motion for summary judgment (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

A failure to comply with the Vehicle and Traffic Law constitutes negligence as a matter of law (*Colpan v Allied Cent. Ambulette, Inc.*, 97 AD3d 776, 949 NYS2d 124 [2d Dept 2012]; *Vainer v DiSalvo*, 79 AD3d 1023, 914 NYS2d 236 [2d Dept 2010]). Vehicle and Traffic Law §1127(a) provides that "upon a roadway designated and signposted for one-way traffic, a vehicle shall be driven only in the direction designated." "A driver is not required to anticipate that a vehicle traveling in the opposite direction will cross over into oncoming traffic" (*see Ciraldo v County of Westchester*, 147 AD3d 813, 814, 47 NYS3d 95 [2d Dept 2017]).

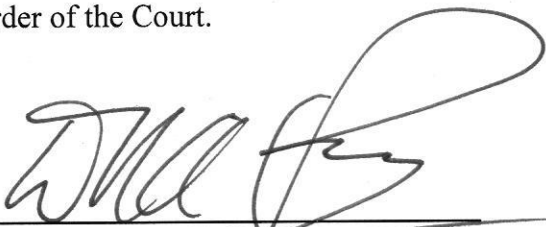
Plaintiff established prima facie entitlement to summary judgment by showing that Escobar struck his vehicle after entering plaintiff's lane of travel. Plaintiff testified that he did not see the Escobar vehicle until immediately before the impact with his truck and trailer. Similarly, Werther has submitted sufficient evidence to establish his entitlement to summary judgment. Werther testified that he was struck by the Escobar vehicle and did not move his vehicle after impact. Werther further testified that he heard the second accident "significantly down the road." From the evidence submitted it is clear to the Court that Werther has demonstrated his freedom from negligence with respect to the second accident between plaintiff and Escobar.

The burden, then, shifted to defendant and plaintiff, respectively, to offer sufficient evidence to establish the existence of an issue of fact. Here, neither defendant, nor plaintiff with respect to the Werther application, offer opposition to the motions. When a respondent fails to oppose matters advanced on a motion, the facts alleged in the moving papers may be deemed admitted by the Court (*Kuehne & Nagel, Inc. v. Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975]).

Accordingly, both plaintiff's and defendant Werther's motions are granted.

This shall constitute the decision and Order of the Court.

Dated: March 13, 2020
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION