Cordero v Matta
2020 NY Slip Op 35031(U)
November 5, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 610628-2019
Judge: David T. Reilly
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SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY

PRESENT:
HON. DAVID T. REILLY, JSC

INDEX NO.: 610628-2019

JUNIOR CORDERO,

Plaintiff,

- against -

BRANDON MATTA, HENRY G. BEIHOFF and B&B DAIRY, INC.,

Defendants.

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MOTION DATE:		10/31/19
SUBMITTED:		09/23/20
MOTION SEQ. NO.:		2,3,4
MOTION:	002	MD
	003	MG
	004	MG

Upon the reading and filing of the following papers in this matter: (1) Defendants Henry G. Beihoff and B&B Dairy, Inc's Notice of Motion (002) dated October 2, 2019 and supporting papers; (2) Defendants Henry G. Beihoff and B&B Dairy, Inc.'s Notice of Motion (003) dated October 23, 2019 and supporting papers; (3) Plaintiff's Notice of Cross-Motion (005) dated December 5, 2019 and supporting papers; (4) Defendants Henry G. Beihoff and B&B Dairy Inc.'s Affidavit in Opposition to Plaintiff's Motion dated December 6, 2019; and (5) Defendant Brandon Matta's Affidavit in Opposition dated December 11, 2019 (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that Mot. Seq. 002, 003 and 004 are hereby consolidated for purposes of this determination; and it is

ORDERED that defendants Henry G. Beihoff and B&B Dairy, Inc.'s (collectively, the B&B defendants) motion for summary judgment is denied; and it is

ORDERED that plaintiff's motion for partial summary judgment on the issue of liability is granted; and it is

ORDERED that the motion by the B&B defendants for an Order consolidating this action with another action entitled Brandon Mata v. Henry G. Beihoff and B&B Dairy, Inc. under Suffolk County Supreme Court Index No. 613665/2019 (Action #2), is granted, without opposition, to the

extent indicated below; and it is

ORDERED that counsel for the movant shall promptly serve a copy of this Order by first class mail upon all appearing parties in each joined action and the Calendar Clerk of the Court, and shall promptly thereafter file the affidavits of service with the Suffolk County Clerk; and it is further

ORDERED that each action joined for discovery and trial purposes shall retain a separate caption and separate court costs shall be paid in each action, including those costs attendant with the filing of notes of issue.

Plaintiff, Junior Cordero, commenced the instant action with the filing of a summons and complaint on June 4, 2019 seeking money damages for personal injuries sustained in a motor vehicle accident that occurred on May 10, 2018 in the vicinity of Exit 51 in the eastbound lanes of the Long Island Expressway. According to the complaint, plaintiff was a passenger in a vehicle driven by defendant Brandon Mata, s/h/a Brandon Matta (Mata). According to the B&B defendants, Henry G. Beihoff (Beihoff)was operating his vehicle, owned by B&B Dairy, Inc., in the eastbound lane of the Long Island Expressway, traveling at a steady rate of speed, when he was struck from behind by the vehicle operated by Mata. According to Mata, he was operating his vehicle in the center lane of the expressway when Beihoff suddenly, without warning, attempted to change his lane of travel from the right lane to the middle causing the vehicles to come in contact.

The B&B defendants now move for summary judgment claiming that Mata struck him from behind and that Beihoff cannot be held liable for causing the accident. In support of the motion the B&B defendants submit a copy of the pleadings and Beihoff's affidavit.

Plaintiff has submitted a cross-motion seeking summary judgment with respect to the issue of whether he was at fault in the happening of the accident. Plaintiff maintains he was a passenger in the vehicle operated by Mata when it rear-ended the vehicle operated by Beihoff, causing serious and significant injuries. Plaintiff avers that he was simply a passenger in the Mata vehicle and did not contribute in any way to the causing of the accident. In support of his motion plaintiff submits his own affidavit and an uncertified police accident report. Defendant Mata has submitted opposition to each of the motions for summary judgment arguing, initially, that the motions are premature inasmuch as no depositions have been taken to date and that Beihoff caused the accident when he suddenly changed his lane of travel and Mata could do nothing to avoid the accident.

A party moving for summary judgment "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" (***Alvarez v Prospect Hosp.***, 68 NY2d 320, 324, 508 NYS2d 923, 925 [1986]). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 853, 487 NYS2d 316, 318 [1985]). If the moving party produces the requisite evidence, the burden then shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action (*see* ***Vega v Restani Constr. Corp.***, 18 NY3d 499, 942 NYS2d 13 [2012]). Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient to raise a triable issue (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). In deciding the motion, the Court must view all evidence in the light most favorable to the nonmoving party (*see* ***Ortiz v Varsity Holdings, LLC***, 18 NY3d 335, 339, 937 NYS2d 157, 159 [2011]).

A motorist is required to "see that which through proper use of [his or her] senses [he or she] should have seen" (***Bongiovi v Hoffman***, 18 AD3d 686, 687, 795 NYS2d 354 [2d Dept 2005]; *see* ***Lindner v Guzman***, 163 AD3d 947, 82 NYS3d 476 [2d Dept 2018]; ***Aponte v Vani***, 155 AD3d 929, 64 NYS3d 123 [2d Dept 2017]; ***Estate of Cook v Gomez***, 138 AD3d 675, 30 NYS3d 148 [2d Dept 2016]). 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 (VTL) §1129 provides that: "the driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway."

Here, Beihoff maintains in his affidavit submitted in support of the motion that he was traveling at a steady speed on the roadway and was not stopped or stopping when he was struck in the rear by Mata. Based on this affidavit the Court finds that Beihoff has demonstrated *prima facie* entitlement to judgment as a matter of law (*see* ***Singh v Thomas***, 113 AD3d 748, 978 NYS2d 865 [2d Dept 2014]). The burden, then, shifted to Mata to offer a non-negligent explanation for the accident sufficient to raise a triable issue of fact (*see* ***Emil Norsic & Son, Inc. v L.P. Transp., Inc.***, 30 AD3d 368 [2006]). In his affidavit Mata avers that he was driving in the center lane of the expressway and observed Beihoff traveling in front of him in the right lane. Mata further avers that Beihoff, "[w]ithout warning ... rapidly changed lanes and a contact occurred between our vehicles." Given the diametrically opposed testimony as to the true cause of the accident, the Court discounts the facts offered by each party such that a finding of negligence pursuant case law would not be appropriate (*see* ***Merino v Tessel***, 166 AD3d 760, 87 NYS3d 554 [2d Dept 2018]). Under these circumstances the Court finds that Mata has established the existence of a material issue of fact sufficient to defeat Beihoff's motion for summary judgment.

Turning then to the cross-motion for summary judgment, the evidence here sufficiently demonstrates that plaintiff was an innocent passenger who did not engage in any culpable conduct that contributed to the happening of the accident (*see* ***Choi v Schwabenbauer***, 124 AD3d 574, 1 NYS3d 276 [2d Dept 2015]). Further, in ***Medina v Rodriguez*** (92 AD3d 850, 939 NYS2d 514 [2d Dept 2012]), the Court stated,

> [T]he right of an innocent passenger to summary judgment on the issue of whether he or she was at fault in the happening of an accident is not restricted by potential issues of comparative negligence as between two defendant drivers.

Accordingly, plaintiff's cross-motion for summary judgment with respect to the issue of liability is granted.

Finally, the B&B defendants have moved for an Order consolidating this action (Action #1) with another action currently pending before this Court entitled Brandon Mata v Henry G. Beihoff and B&B Dairy, Inc. under Suffolk County Supreme Court Index No. 613665/2019 (Action #2).

CPLR 602(a) provides that "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint trial of any or all of the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Since these actions arise from the same

incident and involve common questions of fact, consolidation is appropriate to avoid inconsistent verdicts (*see* ***Fransen v Maniscalco,*** 256 AD2d 305 [1998]); *see also* ***Okin v White Plains Hospital,*** 97 AD2d 399 [1983]). Moreover, it would be a waste of judicial resources and duplicitous to require two separate trials with the concomitant costs and expenses (*see* ***Wieder v Skala,*** 218 AD2d 507 [1995]).

Based upon the sum of the foregoing, the two actions are hereby consolidated for discovery and trial purposes.

This constitutes the decision and Order of the Court.

Dated: **November 5, 2020**
Riverhead, New York

DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION ___X___ NON-FINAL DISPOSITION