

Campos v Barriento

2020 NY Slip Op 35474(U)

July 23, 2020

Supreme Court, Queens County

Docket Number: Index No. 716967/2018

Judge: Chereé A. Buggs

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Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS**
Justice

IAS PART 30

EVA CAMPOS,

Index No. 716967/2018

Plaintiff,

Motion
Date: July 22, 2020

-against-

FILED
10/5/2020
1:24 PM

JESUS BARRIENTO, SHERMAN AVE THREE,
INC., and JOHN DOE

Motion Cal. No.: 2

COUNTY CLERK
QUEENS COUNTY

Motion Sequence No.: 1

Defendants.

The following e-file papers numbered 14-24 and 33-37 submitted and considered on this motion by defendant JESUS BARRIENTO (hereinafter referred to as “Barriento”) seeking an Order pursuant to Civil Practice Law and Rules (hereinafter referred to as “CPLR”) 3212 for summary judgment on the issue of liability to plaintiff EVA CAMPOS (hereinafter referred to as “Plaintiff”) dismissing all claims and cross claims as against him.

	Papers <u>Numbered</u>
Notice of Motion- Affirmation in Support- Exhibits	EF 14-23
Affirmation in Opp- Exhibits.....	EF 24
Reply Affirmation.....	EF 33
Affirmation in Opp-Exhibits.....	EF 34-36
Affirmation in Reply.....	EF 37

This is a negligence action arising out of a collision between the parties that occurred on September 9, 2016 at 1:30 p.m. on the Major Deegan Highway, in Bronx County. Plaintiff was traveling in the car driven by Barriento.

Summary Judgment

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]; *Santiago v Joyce*, 127 AD3d 954 [2d Dept 2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable'" [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; see also *Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2d Dept 2011]; *Dykeman v. Heht*, 52 AD3d 767 [2d Dept 2008]). Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*, 126 AD3d 927 [2d Dept 2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2d Dept 2002]; see *Chimbo v Bolivar*, 142 AD3d 944 [2d Dept 2016]; *Bravo v Vargas*, 113 AD3d 579 [2d Dept 2014]).

"[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, 1063 [1993], citing *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; see *Schmitt v Medford Kidney Center*, 121 AD3d 1088 [2d Dept 2014]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of a material issue of fact which requires a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

Deposition testimony of Barriento

Barriento testified as follows:

Q: Describe how the accident took place?

A: Well, I was going at the right, I was intending to take the bridge and the other person was in lane 4, and that person came, all of a sudden and struck me in the side. I only felt the impact.

Q: At that point on the highway were there four lanes?

A: Yes.

Q: And you were in the right most lane?

MS. DRUM: Objection

A: Yes, to the right.

Q: And the silver car was in which lane?

A: In the fourth one, in the left.

Q: So the lane all the way to the left?

A: It was in the left, and when it came out, it came out to the right, it swiped.

Q: So he moved from all the way to the left to all the way to the right?

A: Yes.

Q: Do you know where he was trying to go?

MS. DRUM: Objection.

A: To that exit, he told me.

Q: When did he tell you that?

A: When I was talking to him, I asked him what happened. He told me that he was going too fast, and that he was intended to take the exit.

(Pages 8-9 lines 8-25 and 2-17)

Q: Where was the damage to your vehicle?

A: In the front part of the driver's side in the fender.

Q: Where was the damage to the other car?

A: In the back part of the passenger side.

(Page 10-11 lines 20-25 and 2-3)

Q: Do you see the damage in the back right corner of the silver car?

A: Yes, in the corner.

(Page 12 lines 7-9)

Q: Now, while you were traveling on the Major Deegan up to where the accident happened, did anything happen, did anything block or obstruct your visibility in any direction including where the accident happened up until the happening of the accident?

MR. MURRAY: I am going to object to the form. But go ahead, you could answer.

A: No, because I was looking straightforward all the time and I was moving forward and I was going perfectly okay.

(Page 24 lines 10-22)

Barriento alleges he was not speeding and was not the proximate cause of Plaintiff's alleged injuries, because he was not operating the vehicle in a negligent manner. Barriento claims defendant SHERMAN AVE THREE INC. (hereinafter referred to as "Sherman") and the taxi driver were negligent per se and the sole proximate cause of Plaintiff's injuries. Barriento alleges Sherman violated New York Vehicle and Traffic Law ("VTL") § 1128 (a) which states:

Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(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.

According to Barriento, he was proceeding in the far right lane, with the right of way, within the speed limit when the defendant taxi driver suddenly and without warning changed lanes from the far left to the far right.

Barriento has established entitlement to judgment as a matter of law. The burden now shifts to the opposing parties to raise a triable issue of fact.

Plaintiff testified as follows:

Q: At any point before the two vehicles came into contact with one another did you believe an accident was about to occur?

MS. DRUM: Objection to the form.

A: Well, see, the own thing I saw before is the taxi coming over to us to our lane, the only thing I did remember was shouting, because I didn't really know what was going on. So this person hit us, then we hit him and that's all I remember. (Page 22 lines 15-25)

Q: And how many times did the two vehicles come in contact with one another?

MS. DRUM: Objection to the form.

A: The one time. Although, I only felt it once, the impact.

Q: That one impact where on Mr. Barrientos' car was the impact?

MS. DRUM: Objection to the form.

A: It was the front of it, also on the side, think of where the wheel is.

Q: Which wheel? The front driver's side wheel, the front passenger's side wheel, the rear driver's side wheel or the rear passenger's side wheel?

A: It was the side of the driver's.

Q: In the front?

A: Yes.

Q: And where was the point of impact on the taxi?

A: It was on the right side of the taxicab on the back.

Q: And do you mean on the right-hand side of the rear bumper or on the rear end of the passenger's side of the car or something else?

A: Yes, it was on the back, the rear where the bumper is.

(Page 24-25 lines 12-25 and 2-14).

Plaintiff alleges there are triable issues of fact because the undisputed facts indicate that this was a rear end collision, that Barriento's vehicle struck the Sherman vehicle in the rear which suggests comparative fault on the part of Barriento. Plaintiff alleges that it is possible Barriento was not facing forward and was therefore unable to see the taxi in front of him and perform an evasive action to avoid impact.

Sherman alleges there are triable issues of fact surrounding Barriento's comparative negligence because this was a rear end collision. That, Barriento has not supplied evidence sufficient to suggest that he could not have avoided the accident.

The undisputed evidence presented to this Court is as follows: Plaintiff and Barriento were traveling in the same car on the Major Deegan Expressway. There were four lanes at the relevant time and Barriento's vehicle was in the far right lane, at the relevant time. The taxi was traveling in the far left lane of this four lane Expressway. There was damage to the right rear of the Sherman vehicle and the front left fender of the Barriento vehicle as a result of this accident. Barriento claims he was not speeding, was facing forward and was unaware that an accident was about to occur until it did. Sherman did not offer any affidavit or deposition testimony of anyone with personal knowledge.

Plaintiff's testimony supports Barriento's testimony.

Q: In the five minutes before this accident, had Mr. Barrientos used his phone at all for anything, navigation, texting, phone calls, anything?

A: No.

(Page 16 lines 8-12)

Q: From the time you entered onto Exit 1 until the time that the accident occurred, had Mr. Barrientos changed lanes at all?

A: No.

(Page 19-20 lines 22-25 and 2).

Q: Did you ever see the taxi before the accident occurred?

A: No.

Q: Before the accident occurred, did you hear any unusual sounds such as engines revving, brakes squealing, tires screeching, anything like that?

A: No.

(Page 21-22 lines 25 and 2-8)

Q: Immediately before the accident, where was the taxicab driving?

A: He was on the fourth lane to your left.

(Page 23 lines 4-7)

However, Plaintiff's testimony also supports the conjecture that Barriento may have had time to perform an evasive maneuver.

Q: Right before the accident happened, did your hear any car horn sound?

A: Yes.

Q: Car horns coming from which vehicle or vehicles, if you know?

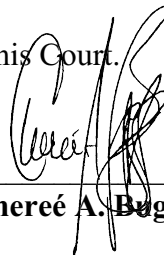
A: Well, I wouldn't be able to tell you, maybe the middle lane.

(Page 43 lines 6-12). Therefore, it is

ORDERED, that defendant Barriento's motion for summary judgment is denied as there remain issues of fact surrounding Barriento's comparative fault.

The foregoing constitutes the decision and Order of this Court.

Dated: July 23, 2020



Hon. Chereé A. Buggs, JSC

FILED

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1:24 PM

**COUNTY CLERK
QUEENS COUNTY**