Taveraz v Krack
2020 NY Slip Op 35670(U)
August 31, 2020
Supreme Court, Bronx County
Docket Number: Index No. 27915/2018E
Judge: Veronica G. Hummel
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 3 1

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TAVERAZ, HECTOR **Index №. 0027915/2018**

-against- **Hon. VERONICA G. HUMMEL**

KRACK, JACOB LEE **Acting Justice Supreme Court**

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The following papers NYSCEF Doc. # 14-23 & 25 were read on this motion (Seq. No. 1) for **SUMMARY JUDGMENT** noticed on JUNE 26, 2020 and submitted JULY 10, 2020.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 14-20
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 21-23
Reply Affirmation	Nyscef Doc. # 25

Upon the foregoing papers, this motion by HECTOR TAVAREZ (Plaintiff) seeking an Order pursuant to CPLR § 3212, granting summary judgment on the issue of liability in favor of the Plaintiff, and against, JACOB LEE KRACK and E.W. WYLIE CORP., (jointly Defendants) and dismissing any and all affirmative defenses alleging comparative fault on the part of the Plaintiff and for an immediate trial pursuant to CPLR § 3212(c) for the purpose of assessing damages, is decided in accordance with the memorandum decision and order of even date.

Dated: August 31, 2020

Hon. VGH
VERONICA G. HUMMEL, A.J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☐ DENIED ☑ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF BRONX IAS PART 31

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HECTOR TAVERAZ,

Plaintiff,

-against-

JACOB LEE KRACK AND E.W. WYLIE CORP.,

Defendants.

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INDEX NO. 27915/2018E

Decision and Order

Mot. Seq. 1

VERONICA G. HUMMEL, A.S.C.J:

In accordance with CPLR R2219(a), the decision herein is made upon consideration of all papers filed in NYSCEF as submitted by the parties regarding plaintiff HECTOR TAVERAZ's motion (plaintiff) [Mot. Seq. 1], made pursuant to CPLR 3212, for an order: granting plaintiff partial summary judgment as to liability against defendants JACOB LEE KRACK AND E.W. WYLIE CORP., (jointly defendants); dismissing any and all affirmative defenses alleging comparative fault on the part of plaintiff; and setting the matter down for an immediate trial pursuant to CPLR 3212(c) for the purpose of assessing damages.

This is a personal injury action arising out of a motor vehicle accident that occurred on May 26, 2017, in the westbound lanes of the Cross Bronx Expressway. Plaintiff claims that his stopped vehicle was rear-ended by defendants' loaded lumber truck after plaintiff's vehicle merged into the lane directly in front of the defendants' vehicle, in heavy, stop and go traffic.

Defendant Krack testified that he did not see plaintiff's vehicle before the accident because plaintiff's vehicle was in his blind spot. He stated that he did not know whether plaintiff's vehicle stopped before the accident occurred and did not know if plaintiff's car had been in the merge lane to the truck's right, in front of the truck, or somewhere else. He testified that he first became aware of the accident when plaintiff honked his horn. Defendant Krack stated that he told the police officer that the plaintiff's vehicle cut him off. This statement is not reflected in the police report.

The police accident report describes the accident as a "sideswipe". Pictures of the damage to the vehicles identified at depositions and attached to defendants' opposition to the motion show

that the defendants' vehicle had damage on the right side of the front bumper and the plaintiff's vehicle sustained damage to the driver side, rear quarter panel. The photographs do not show or prove damage to the rear of plaintiff's vehicle.

On this motion, defendants admit that the contact between the two vehicles occurred and the defendant driver did not see plaintiff's vehicle until after the impact. Plaintiff's counsel argues that, therefore, plaintiff's testimony and defendant's own testimony demonstrate that the defendant driver failed to see what there was to be seen, and failed to operate his vehicle to avoid striking the plaintiff's vehicle. Further, plaintiff argues that the affirmative defense of culpable conduct should be dismissed because the only available testimony describing the circumstances of the accident is by plaintiff, who testified that his vehicle was in defendant's lane and was stopped for forty seconds before it was hit in the rear.

In opposition, defense counsel argues that there is an issue of fact as to how the accident occurred based on the defendant driver's testimony that he told the responding police that plaintiff had cut him off from the blind spot.

The 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 eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985])."Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Id.*). Once this showing has been made, the burden shifts to the nonmoving party to produce "evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim or must demonstrate acceptable excuse for his failure to meet the requirement of tender in admissible form; mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "Under this summary judgment standard, even if the jury at a trial could, or likely would, decline to draw inferences favorable to the [nonmoving party] . . . the court on a summary judgment motion must indulge all available inferences" (*Torres v Jones*, 26 NY3d 742, 763 [2016]). In the presence of a genuine issue of material fact, a motion for summary judgment must

be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous.* Corp., 298 AD2d 224, 226 [1st Dept 2002]).

Based on the record, plaintiff sets forth a *prima facie* showing warranting partial summary judgment as to liability based on the parties' testimony that defendants' vehicle struck the plaintiff's vehicle, causing the accident (*Bachman by Charles v Hong*, 169 AD3d 436 [1st Dept 2019]). Here, it is undisputed that there was contact between the two vehicles and the defendant driver never saw plaintiff's vehicle and proceeded without due caution for that which was there to be seen. Of note, drivers have a duty to see what should be seen and to exercise reasonable care under the circumstances to avoid an accident (*Martinez v WE Transport, Inc.*, 161 AD3d 458 [1st Dept 2018]; *Johnson v. Phillips*, 261 AD2d 269[1st Dept. 1999]; *see Fernandez v Ortiz,* 183 AD3d 443 [1st Dept 2020]). A motorist always has a duty to operate his or her vehicle with reasonable care (PJI 2:77; *Ohlhausen v City of NY*, 73 AD3d 89, 92, [1st Dept 2010]).

The statement by the defendant driver to the police that plaintiff proceeded to merge from the blind spot is inadmissible hearsay and insufficient to create an issue of material to defeat the motion. Thus, plaintiff is entitled to summary judgment as a matter of law with respect to liability. Plaintiff need not prove freedom from comparative fault in order to be granted summary judgment of fault against the defendants (*Rodriguez v. City of New York*, 31 NY3d 312 [2018)]).

The issue regarding the affirmative defense of culpable conduct on the part of the plaintiff which contributed to the accident is not similarly disposed. Plaintiff testimony that he was stopped in front of the defendants' vehicle for forty seconds and was struck in the rear, sets forth a *prima facie* case that he was without negligence for the accident. That testimony, however, is contradicted by the photographs of the damage to the respective vehicles, authenticated at the parties' depositions, which show side-damage to plaintiff's vehicle (*Carthen v. Sherman,* 169 AD3d 416, 1st Dept [2019]). If plaintiff was correct, that the contact between the two vehicles was that the front of defendants' vehicle struck plaintiff's vehicle in the rear, there would be no culpable conduct. Since the photographs clearly indicate a sideswipe, there is a material issue of fact as to the cause of the impact, which must be decided by a jury and with it, the issue of comparable fault.

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief is requested by either party was not addressed by the court, it is hereby denied.

Accordingly, it is

ORDERED that the part of the motion of plaintiff HECTOR TAVERAZ (plaintiff) [Mot. Seq. 1], made pursuant to CPLR 3212, that seeks an order granting plaintiff partial summary judgment as to liability against defendants JACOB LEE KRACK AND E.W. WYLIE CORP. (jointly defendants) is granted; and it is further

ORDERED that the part of the motion of plaintiff [Mot. Seq. 1], made pursuant to CPLR 3212, that seeks an order dismissing any and all affirmative defenses alleging comparative fault on the part of plaintiff is denied; and it is further

ORDERED that the part of the motion of plaintiff [Mot. Seq. 1], made pursuant to CPLR 3212, that seeks an order setting the matter down for an immediate trial pursuant to CPLR 3212(c) for the purpose of assessing damages is denied.

The next appearance in this matter is scheduled for October 27, 2020 at 9:30 A.M.

Dated: August 31, 2020

ENTER,

Hon. Veronica G. Hummel
Veronica Hummel. A.J.S.C.

Taveraz v. Krack
Index # 27915/2018E