

Fonseca v Rivera

2020 NY Slip Op 35673(U)

November 20, 2020

Supreme Court, Bronx County

Docket Number: Index No. 27752/2018E

Judge: Ben R. Barbato

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CFH
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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Allan Fonseca

Index №. 27752/2018

-against-

Hon. BEN R. BARBATO

**Lee Rivera, Daniel Lugo, Evelyn Fernandez,
Cristobal Francisco Morales and Juan
Hernandez-Reyes**

Justice Supreme Court

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The following papers NYSCEF Doc. # 20 to 29 and 31 to 42 were read on these motions (Seq. Nos.001, 002)

For SUMMARY JUDGMENT/LIABILITY noticed on October 8, 2020.

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	NYSCEF Doc. # 20-29, 31-42
Answering Affidavit and Exhibits	NYSCEF Doc. # 47-53, 55-61
Replying Affidavit and Exhibits	NYSCEF Doc. # 63, 66

Both of the above referenced motions are by defendants for summary judgment on the issue of liability. Since they involve the same incident and common questions, they will be considered together.

Upon the foregoing papers, it is ordered that these motions are denied, as follows:

The motor vehicle accident underlying this case occurred on October 17, 2017 on Castle Hill Avenue near its intersection with Gleason Avenue in the Bronx. At that time, plaintiff Allan Fonseca ("plaintiff") was a bicyclist and he alleges that he had contact with the vehicle owned and operated by defendant Lee Rivera ("Rivera"), as well as the one driven by defendant Daniel Lugo and owned by defendant Evelyn M Fernandez ("Lugo"), and by a third vehicle driven by defendant Cristobal Francisco Morales and owned by defendant Juan Hernandez-Reyes ("Morales").

The instant action was begun by the filing of a summons and complaint on July 3, 2018. Issue was joined by the filing of Rivera's answer on August 8, 2018; by the filing of defendant Lugo's answer on August 20, 2018; and by the filing of defendant Morales' answer on September 11, 2018. Discovery proceeded, and plaintiff filed a note of issue to place the case on the trial calendar on July 20, 2020.

Morales and Lugo each separately move for summary judgment and dismissal of the complaint against them. Morales argues that on the date of the incident he was on Castle Hill Ave. at the intersection of Gleason, and was behind Rivera's vehicle. He testified in his examination before trial that the light at the intersection changed from green to red. Plaintiff was traveling quickly in the bike lane to his right, struck the rear of the Rivera vehicle, was ejected from his bike, came into contact with the

Lugo vehicle (which was proceeding in the opposite direction on Castle Hill Ave.), and then plaintiff struck the left front of Morales' vehicle. Since he was stopped behind Rivera at the intersection, and plaintiff only struck him after hitting the rear of the Rivera vehicle and then having contact with the Lugo vehicle, Morales argues there is no question of fact as to whether he bears any responsibility for the happening of the accident.

Lugo argues that he was proceeding straight on Castle Hill Ave. when plaintiff struck the left front of his vehicle, and then hit the windshield, before falling onto the ground. At no time, Lugo contends, did he run over any portion of plaintiff's body. Since he was confronted with a sudden and unexpected situation not of his own making, he argues that the "emergency doctrine" applies and that no question of fact exists as to any responsibility on his part for the happening of the accident.

Defendant Rivera has neither supported nor opposed either of these motions. Plaintiff, however, has opposed both motions. He argues that his bicycle only struck the rear of the Rivera car after he had been struck by something else, although he could not identify what that was. Additionally, he stated that after striking the Rivera vehicle he went into the oncoming lanes of Castle Hill Ave. and was laying on the ground for 5 to 6 seconds before the Lugo vehicle ran over his leg. He contends that the motion by Morales should be denied since a question of fact exists as to whether it was that vehicle which struck him in the rear, causing him to hit the Rivera vehicle; and, further, the motion by Lugo should be denied because a question of fact exists as to whether he could have taken any evasive action during the 5 to 6 seconds that plaintiff was lying on the ground before being struck by the Lugo vehicle and, in any event, application of the "emergency doctrine" is properly left to the trier of fact.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395 [1957]). "[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. . . . Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. . . . Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 501 N.E.2d 572, 574, 508 N.Y.S.2d 923, 925-926 [1986] [citations omitted].)

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 [1978].) The burden on the movant is a heavy one, and the facts must be viewed in the light most favorable to the non-moving party. (*Jacobsen v. New York City Health & Hosps. Corp.*, 22 N.Y.3d 824 [2014].) As stated in *Scott v. Long Island Power Auth.* (294 A.D.2d 348, 348, 2002 N.Y. App. Div. LEXIS 4864, *1-2 [2d Dept. 2002]):

"It is well established that on a motion for summary judgment the court is not to engage in the weighing of evidence. Rather, the court's function is to determine whether 'by no rational process could the trier of facts find for the nonmoving party' (*Jastrzebski v North Shore School Dist.*, 223 AD2d 677, 678 [internal quotation marks omitted]). It is equally well established that the motion 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 (see *Dolitsky v Bay Isle Oil Co.*, 111 AD2d 366)."

Morales argues that he is entitled to summary judgment and dismissal of the complaint because he was stopped, plaintiff hit the vehicle in front of him, and then was struck by a vehicle coming in the opposite direction which, only then, resulted in contact between Morales' vehicle and plaintiff's body. Rivera testified that she was struck in the rear by something (which she later realized was plaintiff's bicycle), and Lugo testified he did not see plaintiff at all until plaintiff came into contact with the left front of his vehicle. Plaintiff, however, testified that he struck the Rivera vehicle only after being struck in the rear himself, although he was unable to identify what that was. Since the Morales vehicle was directly behind the Rivera vehicle, a trier of fact could conclude, if it credited plaintiff's version, that it was Morales vehicle which struck him and precipitated the accident. As such, a question of fact exist as to Morales' possible liability, and his motion for summary judgment must be denied.

Lugo argues that he was proceeding straight on Castle Hill Ave. and only saw plaintiff when he came into contact with the left front bumper of Lugo's vehicle. Lugo was unable, he contends, to avoid the accident, and was presented with an emergency. Under the emergency doctrine, "when an actor is faced with a sudden and unexpected circumstance which leaves little or no time for thought, deliberation or consideration, or causes the actor to be reasonably so disturbed that the actor must make a speedy decision without weighing alternative courses of conduct, the actor may not be negligent if the actions taken are reasonable and prudent in the emergency context" (*Miloscia v New York City Bd. of Educ.*, 70 AD3d 904, 905 [2d Dept. 2010], quoting *Rivera v New York City Tr. Auth.*, 77 NY2d 322, 327 [1991]). " 'This is not to say that an emergency automatically absolves one from liability for his [or her] conduct. The standard then still remains that of a reasonable [person] under the given circumstances, except that the circumstances have changed' " (*Williams v City of New York*, 88 AD3d 989, 990 [2d Dept. 2011], quoting *Ferrer v Harris*, 55 NY2d 285 [1982]). Although the existence of an emergency and the reasonableness of the response to it generally present issues of fact, those issues may in appropriate circumstances be determined as a matter of law (*Lopez v Young*, 96 AD3d 724, 724-725 [2d Dept 2012]). While that is his version of events, plaintiff has testified that he was laying in the roadway for 5 to 6 seconds before Lugo's vehicle ran over his leg. If credited by a trier of fact, a question of fact would then exist as to whether Lugo was truly presented with an emergency and whether he could have taken any action in an attempt to avoid contact. Consequently, his motion for summary judgment and dismissal of the complaint must likewise be denied.

Accordingly, it is

ORDERED that the motion for summary judgment and dismissal of the complaint by defendant Morales is denied. It is further

ORDERED that the motion for summary judgment and dismissal of the complaint by defendant Lugo is denied.

This constitutes the decision and order of the court.

Dated: 11/20/2020

Hon. 
BEN R. BARBATO, J.S.C.

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- 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 APPEARANC
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT