

Cohen v City Carter Leasing Inc.
2021 NY Slip Op 30877(U)
March 18, 2021
Supreme Court, Kings County
Docket Number: 523118/2018
Judge: Lillian Wan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 523118/2018
Motion Date: 3/17/21
Motion Seq.: 2

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GARY COHEN,

Plaintiff,

- against -

DECISION AND ORDER

CITY CARTER LEASING INCORPORATED,
MILTON ARIAS, ARIEL GARCIA, and
ANGEL LAGARES,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 02) 32-47, 53, 54 and 56 were read on this motion for summary judgment.

The defendants, City Carter Leasing Incorporated and Milton Arias (hereinafter City Carter and Arias), move pursuant to CPLR § 2221(d) for an order granting them leave to reargue the plaintiff’s prior summary judgment motion (Motion 01) on the issue of liability, and upon reargument, for an order denying that branch of the motion that granted plaintiff summary judgment against them. City Carter and Arias also move for an order granting them summary judgment dismissing the complaint and all cross-claims insofar as asserted against them. The plaintiff and co-defendants Angel Lagares and Ariel Garcia (hereinafter Lagares and Garcia) oppose the motion.

In support of their motion the defendants submit the plaintiff’s moving papers and exhibits on Motion 01, the opposition papers and exhibits of defendants and co-defendants, plaintiff’s replies, this Court’s Decision and Order of September 16, 2020 (hereinafter decision) with notice of entry dated September 17, 2020, and the affidavit of Arias, which was also submitted as an exhibit to defendants’ opposition to the prior motion (Motion 01).

In the underlying action, the plaintiff, Gary Cohen, seeks to recover damages for personal injuries sustained in a rear-end motor vehicle accident that occurred on July 7, 2018. The plaintiff was a rear-seated passenger in an Uber vehicle owned by City Carter and operated by Arias, which was struck in the rear by a vehicle owned by Lagares and operated by Garcia. The plaintiff moved, inter alia, for summary judgment against all defendants on the issue of liability, pursuant to CPLR § 3212. The defendants opposed the motion, arguing that summary judgment was premature, and that there were genuine issues of material fact as to the happening of the accident.

The defendants, City Carter and Arias, argue that in granting summary judgment on liability in favor of the plaintiff, a passenger in Arias' vehicle, it overlooked the sworn affidavit of defendant Arias, the operator of said vehicle. The defendants argue that the reasoning of this Court's decision and the Arias affidavit make clear that there is no basis upon which to find the defendants liable for the accident, and that the affidavit proves that the defendants were not negligent during the course of the accident. The defendants assert that upon reargument, they should be granted summary judgment, and that the plaintiff's motion for summary judgment should be denied.

The co-defendants, Garcia and Lagares, oppose the motion arguing that there are genuine issues of material fact which preclude summary judgment in favor of City Carter and Arias. They submit the affidavit of Garcia, the operator of the vehicle which struck Arias' vehicle, which was also submitted on the prior motion. Defendants Garcia and Lagares argue that Garcia's affidavit raises issues of fact as to how the accident occurred. Garcia claims that the accident occurred when Arias' vehicle suddenly and without signaling, attempted to make a right turn from the middle lane, directly into the path of his vehicle. Garcia avers that he honked the horn and applied the brakes but was unable to stop in time to avoid the accident, striking the rear passenger side of Arias' vehicle. The plaintiff also opposes the motion, and contends that the Arias affidavit was not "uncontradicted" as alleged by the defendants, and that there are questions of fact as to the defendants' comparative fault, precluding summary judgment in their favor. The plaintiff also points to the plaintiff's affidavit, submitted in support of the prior motion, in which the plaintiff states that he was a passenger in Arias' vehicle, and that just prior to the collision Arias slowed his vehicle abruptly to make a right turn without signaling, and that "it appeared that defendant MILTON ARIAS may have almost missed the turn." The plaintiff described the impact as "heavy," causing him to be thrown across the back seat and into the rear left-side door.

A motion for leave to reargue is "addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision. *Mudgett v Long Is. R.R.*, 81 AD3d 614, 614 (2d Dept 2011), quoting *Barnett v Smith*, 64 AD3d 669, 670-671 (2d Dept 2009); *Markovic v J&A Realty, LLC*, 124 AD3d 846 (2d Dept 2015); see also CPLR § 2221(d) (internal quotation marks omitted). Upon further consideration, based on prevailing case law of the Appellate Division, Second Department, the defendants' motion for reargument is granted, and this Court's prior decision of September 16, 2020 is vacated to the extent that the Court found that all defendants were negligent as a matter of law. The Court should have granted the motion only to the extent of finding that the plaintiff was free from fault as a matter of law. "The 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." See *Romain v City of New York*, 177 AD3d 590, 591 (2d Dept 2019); *Phillip v D&D Carting Co., Inc.*, 136 AD3d

18, 24-25 (2d Dept 2015). The plaintiff has demonstrated his freedom from negligence in connection with the motor vehicle accident on July 7, 2018. The plaintiff did not, however, establish his entitlement to judgment as a matter of law on the issue of the negligence of the defendant drivers. *See Medina v Rodriguez*, 92 AD3d 850 (2d Dept 2012). Significantly, in *Phillip v D&D Carting Co., Inc.*, 136 AD3d at 24, the Appellate Division, Second Department noted:

We take this opportunity to caution that trial courts must be careful to avoid concluding, in rear-end accident cases, that just because a plaintiff is a passenger in the lead vehicle, the liability of the rear vehicle is automatically established.

The plaintiff's affidavit constitutes admissible evidence that he was a passenger in the Arias vehicle and that he did not contribute to the happening of the accident. Likewise, nothing contained in the Arias or Garcia affidavit imputes any liability to the plaintiff with respect to the happening of the accident. As such, the plaintiff is entitled to summary judgment on the issue of liability only to the extent that the plaintiff is free from comparative fault. *Phillip v D&D Carting Co., Inc.*, 136 AD3d 18. However, after a review of all the submissions, the Court concludes that the plaintiff is not entitled to judgment as a matter of law on the issue of liability against any of the defendants. Notably, none of the cases cited by the plaintiff in his original motion papers support the plaintiff's proposition that he is entitled to summary judgment as a matter of law on the issue of negligence of the defendant drivers simply because plaintiff was an innocent passenger.

Summary judgment is a drastic remedy and may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). The moving party is required to make a prima facie showing of entitlement to judgment as a matter of law, and evidence must be tendered in admissible form to demonstrate the absence of any material issues of fact. *Alvarez* at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 (1980). If the prima facie burden has been met, the burden then shifts to the opposing party to present sufficient evidence to establish the existence of material issues of fact requiring a trial. CPLR § 3212(b); *see also Alvarez* at 324; *Zuckerman* at 562.

The affidavits of the plaintiff, and the two defendant drivers, Garcia and Arias, all paint a different picture of how the accident occurred. Genuine triable issues of fact exist precluding summary judgment in any defendants' favor. In his affidavit, Garcia claims that Arias' vehicle abruptly moved from the middle lane into the right lane in front of Garcia's vehicle in an attempt to make a right turn without using his turn signal. Garcia alleges that he honked the horn and applied his brakes but was unable to stop his vehicle in time to avoid colliding into Arias' vehicle. Arias' affidavit alleges that his vehicle was struck from behind by Garcia's vehicle when he proceeded to make a right turn with his signal on. The plaintiff's affidavit states that as

Arias approached the intersection he “slowed abruptly” to make a right turn when the vehicle was struck from behind. The plaintiff did not recall seeing Arias put his turn signal on before the impact.

Accordingly, it is hereby

ORDERED, that the motion of defendants, City Carter and Arias for an order granting them leave to reargue Motion 01 is granted, and upon reargument, that branch of plaintiff’s prior motion for summary judgment against all the defendants on the issue of liability is denied and that branch of the motion for summary judgment striking all of the defenses raised by the defendants to the effect that plaintiff’s negligence was a substantial factor in causing the accident is granted. The motion of City Carter and Arias for summary judgment dismissing the complaint insofar as asserted against them and all cross-claims is denied. The decision and order of this court dated September 16, 2020 is hereby recalled and vacated.

This constitutes the decision and order of the Court.

DATED: March 18, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.