

Reyes v Battle

2021 NY Slip Op 31259(U)

April 16, 2021

Supreme Court, New York County

Docket Number: 111299/2008

Judge: Lisa S. Headley

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LISA S. HEADLEY **PART** **IAS MOTION 22**

Justice

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BEATRIZ REYES, AS TEMPORARY ADMINISTRATRIX OF
THE ESTATE OF FELIX HERRERA, DECEASED,

Plaintiff,

INDEX NO. 111299/2008

MOTION DATE N/A

MOTION SEQ. NO. 003

- v -

CARLOS BATLLE, ELADIO GARCIA GOMEZ, JOSE
BISONO

Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, it is ORDERED that Plaintiff's motion for partial summary judgment on the issue of liability, pursuant to *CPLR §3212*, against co-defendant, Carlos Battle, is hereby granted. Plaintiff's motion contends that defendant Battle is negligent as a matter of law by failing to obey the stop sign and failing to yield to the right of way to co-defendant Eladio Garcia Gomez's ("Gomez") vehicle, which resulted in the accident where the plaintiff-pedestrian, Felix Herrera, was struck by defendant Battle's vehicle, and caused the wrongful death of Felix Herrera on August 23, 2006. Thus, the movant-plaintiff contends that defendant Battle is negligent *per se* pursuant to *VTL §1142(a)*. Here, plaintiff has made out a *prima facie* case of entitlement to judgment as a matter of law, and the burden now shifts to co-defendant Battle to raise a triable issue of fact. *See, Winegrad v. New York University Medical Center*, 64 NY2d 851, 853 (1985).

The co-defendants, Gomez and Jose B. Bisono ("Bisono") submitted an affirmation in support of cross-motion for an order pursuant to *CPLR§ 3212(b)*, granting summary judgment and

dismissing the complaint. Plaintiff opposed the cross-motion. Plaintiff also submitted a reply affirmation.

In support of the motion, the plaintiff submits the police report, which states that co-defendant Battle's vehicle struck and killed the plaintiff-pedestrian, Felix Herrera, after the collision of the vehicles involved in the subject accident. *See, Exhibit B.*

In opposition, defendant Battle fails to proffer an "adequate nonnegligent explanation for the accident." Here, the defendant Battle proffers only an attorney's affirmation, and fails to raise any genuine issues of fact regarding plaintiff's prima facie case of negligence with regards to the subject accident. "[A] bare affirmation of . . . [an] attorney who demonstrated no personal knowledge... is without evidentiary value and thus unavailing." *Zuckerman v. City of New York*, 49 N.Y.2d 557, 563 (1980). Thus, defendant's attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See, GTF Marketing Inc. v. Colonial Aluminum Sales, Inc.*, 66 N.Y.2d 965, 968 (1985).

In light of the court's strong policy of resolving disputes on the merits, and in the absence of a claim of prejudice by the plaintiff, the court considered the attorney's affirmation made in opposition to plaintiff's motion. Nonetheless, it is undisputed that the vehicle driven by co-defendant Battle struck plaintiff Felix Herrera, a pedestrian and thereby caused his demise. Co-defendant Battle has failed to proffer an adequate nonnegligent explanation for the accident and has failed to raise any issues of triable facts. As such, Plaintiff's motion for partial summary judgment on the issue of liability is GRANTED as to co-defendant Battle.

Co-defendants Eladio Garcia Gomez and Jose B. Bisono's Cross-Motion for Summary Judgment to Dismiss pursuant to CPLR §3212(b)

Here, co-defendants, Gomez and Bisono ("cross-movants") only offer an attorney affirmation in support of their cross-motion for an order pursuant to *CPLR* § 3212(b), granting

summary judgment and dismissing the complaint and crossclaims. The cross-movants allege that there are no triable issues of fact for a jury to consider.

In support of their motion, the cross-movants solely proffer that, “in the interests of judicial economy and in order not to unnecessarily overburden the Court, cross-movants respectfully adopt as their own and incorporate by reference herein all of the facts, pleadings, exhibits and arguments set forth in plaintiff’s motion for summary judgment, dated May 12, 2020. For the compelling reasons set forth therein, the instant cross-motion for summary judgment should be granted, and the complaint and all crossclaims against cross-movants should be dismissed.”

In opposition to the cross-motion, plaintiff contends that although plaintiff’s motion is against co-defendant Battle, there is no affirmative evidence that co-Defendant Gomez is free from all liability. Plaintiff contends that plaintiff filed said motion regarding liability on co-defendant Battle because defendant Battle could be found negligent, as a matter of law, based on his actions, failing to obey the stop sign and failing to yield to the right of way, which are deemed “*per se*” in violation of New York’s Vehicle and Traffic Laws (VTL). *See, VTL §1142(a)*.

In addition, plaintiff argues that the lawful decision on the motion regarding liability of co-defendant Battle does not specifically or automatically exonerate the remaining co-defendants. Here, plaintiff contends that there still remains a question of fact as to whether co-defendant Gomez was speeding at the time of the collision, which was claimed by co-defendant Battle. Moreover, plaintiff argues that the cross-movants’ motion papers fail to meet their initial burden of summary judgment because co-defendant Gomez’s papers demonstrate affirmatively that Gomez was free from liability.

Therefore, based on the above, there is no dispute that the vehicles driven by both co-defendants Battle and Gomez were involved in the subject accident that resulted in the death of

pedestrian-plaintiff, Felix Herrera. This court considered the police report, which states in part, “Vehicle #2 was struck by Vehicle #1. As a result a pedestrian was struck by Vehicle #2...” In addition, co-defendants both indicate that they did not see one another before the accident took place. Here, this court finds that based on the moving papers, and exhibits annexed thereto, the cross-movants have failed to set forth an “adequate nonnegligent explanation” for the accident absolving them of liability. As such, the motion by cross-movants, Gomez and Bisono, for summary judgment dismissing the complaint and crossclaims is DENIED.

Accordingly, it is hereby

ORDERED that Plaintiff’s motion for summary judgment is GRANTED on the issue of liability as against co-defendant, Carlos Battle only; and it is further

ORDERED that cross-movants’, Eladio Garcia Gomez and Jose B. Bisono, motion for summary judgment to dismiss the complaint and all cross claims is DENIED; and it is further

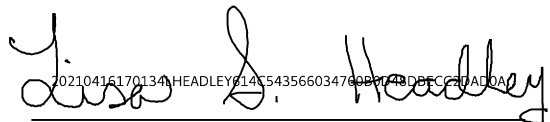
ORDERED that any relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 60 days of entry, Plaintiff shall serve a copy of this decision/order upon Defendants with notice of entry.

This constitutes the Decision/Order of the Court.

4/16/2021

DATE



LISA S. HEADLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE