

Malave v Fernandez
2021 NY Slip Op 33038(U)
December 16, 2021
Supreme Court, Bronx County
Docket Number: Index No. 23417/2016E
Judge: Veronica G. Hummel
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, IAS PART 31**

EDWIN MALAVE, JR.,

Plaintiff,

-against-

FERNANDO FERNANDEZ, COACH USA, INC.,
OLYMPIA TRAILS BUS COMPANY, INC., NEW
TRANSIT PRICARR, and EDWIN MALAVE,

Defendants.

Index No. 23417/2016E**HON. VERONICA G. HUMMEL, A.J.S.C.****Mot. Seq. No. 3**

In accordance with CPLR 2219(a), the decision herein is made upon consideration of all papers filed by the parties in NYSCEF in support of and in opposition to defendant EDWIN MALAVE's ("Malave") motion (Seq. No. 3) seeking an order, pursuant to CPLR 3212, granting him summary judgment dismissing plaintiff complaint and any and all cross-claims alleged against Malave.

This is a personal-injury action arising out of a two-vehicle rear-end accident that occurred on December 5, 2015, near the intersection of 42nd Street and Vanderbilt Avenue in Manhattan, New York (the "Accident"). At the time of the Accident, Plaintiff EDWIN MALAVE, JR.'s ("Plaintiff") was a passenger in a vehicle driven by Malave. Co-defendant FERNANDO FERNANDEZ ("Fernandez") was driving a bus when he allegedly struck Malave's vehicle in the rear while Malave was stopped at a red light on 42nd Street. Plaintiff allegedly suffered serious injuries to his back from the impact. Malave now seeks an order determining that he bears no liability for the Accident and dismissing the complaint and any and all cross-claims alleged against him.

In support of the motion, Malave submits an attorney affirmation, a memorandum of law, copies of the pleadings, and copies the transcripts of the full depositions of Plaintiff and Malave and the first day of the deposition of Fernandez.

In opposition to the motion, defendants Fernandez, COACH USA, INC., OLYMPIA TRAILS BUS COMPANY, INC., and NEW JERSEY TRANSIT PRICARR (collectively, the "Bus Defendants") submit an attorney affirmation (incorporating a counterstatement of facts and memorandum of law); copies of the transcripts of the full deposition of police officer Thomas Brennan (who responded to the scene following the Accident) and the second day of the deposition

of Fernandez; and a copy of a joint letter to the Honorable Katherine Polk Failla of the U.S. District Court for the Southern District of New York addressing whether this action should be remanded to this Court, as it ultimately was. Plaintiff submits only an attorney affirmation in opposition to the motion.

Malave testified that his vehicle was stopped at a red light on 42nd Street when Fernandez's bus struck him in the rear. Fernandez, on the other hand, testified that he brought his bus to a complete stop behind Malave's vehicle and that there was no contact between the bus and vehicle, based on Fernandez's recollection that he did not *feel* any contact. Fernandez further testified that, after he came to a complete stop and prior to any alleged impact, he witnessed Malave maneuvering his vehicle two or three feet to the left as if he were about to take a left turn and, then, after looking away and looking back, observed Malave's vehicle closer to the bus than it had been when Fernandez first stopped. Fernandez testified that Malave's vehicle had backed up, although he also testified that he did not witness it directly.

"The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering evidence sufficient to eliminate any material issues of fact from the case." *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon such a showing, the burden then shifts to the nonmovant to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v. Metro. Museum of Art*, 27 A.D.3d 227, 228 (1st Dep't 2006). "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 N.Y.3d 499, 503 (2012).

Since there can be more than one proximate cause of an accident, a defendant moving for summary judgment is required to make a *prima facie* showing that she is free from fault. *Hilago v. Vasquez*, 187 A.D.3d 683, 684 (1st Dep't 2020); *Harrigan v. Sow*, 165 A.D.3d 463, 464 (1st Dep't 2018). In order for a defendant driver to establish entitlement to summary judgment on the issue of liability in a motor-vehicle-collision case, therefore, the driver must demonstrate, *prima facie*, that she kept the proper lookout, or that her alleged negligence, if any, did not contribute to the accident. *Hilago*, 187 A.D.3d at 684; *Harrigan*, 165 A.D.3d at 464.

It is well settled that "[a] rear-end collision with a stopped or stopping vehicle establishes a *prima facie* case of negligence on the part of the driver of the rear vehicle, and imposes a duty on the part of the operator of the moving vehicle to come forward with an adequate, nonnegligent explanation for the accident." *Urena v. GVC Ltd.*, 160 A.D.3d 467, 467 (1st Dep't 2018) (quoting

Matos v. Sanchez, 147 A.D.3d 585, 586 (1st Dep't 2017)); *Santos v. Booth*, 126 A.D.3d 506, 506 (1st Dep't 2015); *Woodley v. Ramirez*, 25 A.D.3d 451, 452 (1st Dep't 2006). Under New York Vehicle and Traffic Law (“VTL”) § 1129(a), “a driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicle and traffic upon the condition of the highway.” In other words, a driver must maintain a safe distance between his vehicle and the one in front of her. A violation of VTL § 1129(a) is *prima facie* evidence of negligence, and “[t]his rule has been applied when the front vehicle stops suddenly in slow-moving traffic.” *Rodriguez v. Budget Rent-A-Car Sys., Inc.*, 44 A.D.3d 216, 223-24 (1st Dep't 2007) (quoting *Johnson v. Phillips*, 261 A.D.2d 269, 271 (1st Dep't 1999)); *Mascitti v. Greene*, 250 A.D.2d 821, 822 (2d Dep't 1998). In a rear-end collision, there is a presumption of non-negligence of the driver of the lead vehicle. See *Soto-Marouquin v. Mellet*, 63 A.D.3d 449, 450 (1st Dep't 2009).

Viewing the evidence in the light most favorable to the Bus Defendants, Malave's motion must be denied. In the attorney affirmation in support of the motion, Malave's counsel contends that Malave is entitled to summary judgment under either of the two scenarios that the competing facts allegedly represent: (1) if Malave was struck in the rear while stopped at a red light, then he cannot be found liable under the applicable law; and (2) if, as Fernandez has testified, there was no contact between Malave's vehicle and Fernandez's bus, then Malave also cannot be found liable (in which scenario, nor, presumably, could the Bus Defendants be found liable). But counsel's contention is flawed. Certainly, if there was no contact between Malave's vehicle and Fernandez's bus, then there would be no liability on the part of any of the defendants, as there would not have been an Accident. Nevertheless, Plaintiff alleges, and both he and Malave have testified, that there *was* contact between the vehicles and that such contact was caused solely by Fernandez. Fernandez's testimony, however, when viewed in the light most favorable to him, suggests that Malave's vehicle was not at complete stop prior to the Accident and may have backed up into Fernandez's bus, in fact contributing to the cause of the Accident. This testimony is sufficient to raise a genuine, triable issue of fact as to whether it was Malave's negligence that was a proximate cause of the Accident.

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

ORDERED that defendant EDWIN MALAVE’s motion (Seq. No. 3) seeking an order, pursuant to CPLR 3212, granting him summary judgment dismissing the complaint and any and all cross-claims alleged against him is **DENIED**; and it is further

ORDERED that the Clerk shall mark the motion (Seq. No. 3) disposed in all court records.

This constitutes the decision and order of the Court.

Dated: December 16, 2021

Hon. s/Hon. Veronica G. Hummel/signed 12/16/2021

VERONICA G. HUMMEL, A.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 APPEARANCE
 - FIDUCIARY APPOINTMENT REFEREE APPOINTMENT
 - CONVERT TO ELECTRONIC FILING