

Hoti v Lomita

2021 NY Slip Op 34279(U)

April 20, 2021

Supreme Court, Bronx County

Docket Number: Index No. 33703/2019E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15

HAJRIZ HOTI

Index No. 33703/2019E

-against-

Hon. MARY ANN BRIGANTTI

CRAIG LOMITA, et al.

Justice Supreme Court

The following papers numbered 1 to 13 were read on this motion (Seq. No. 1) for SUMMARY JUDGMENT noticed on October 8, 2020 .

Table with 2 columns: Document Name, Page Numbers. Includes: Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed (1, 2), Answering Affidavit and Exhibits (cross-motions) (3, 4, 5, 6, 7, 8, 9, 10), Replying Affidavit and Exhibits (11, 12, 13).

Motion is Respectfully Referred to Justice:
Dated:

Upon the foregoing papers, the defendant Craig Lomita ("Lomita") moves for an order pursuant to CPLR 3212 and 3211 (a) (7) granting him summary judgment on the issue of liability, and dismissing the complaint of the plaintiff Hajriz Hoti ("Plaintiff") and all cross-claims and counterclaims asserted against him. Co-defendants Ashley M. Jackson ("Jackson") and Murat Damis ("Damis"), and Plaintiff, oppose Lomita's motion. Plaintiff cross-moves for summary judgment against Lomita, Jackson, and Damis (collectively, "Defendants") on the issue of liability and dismissing Defendants' affirmative defenses alleging comparative negligence and failure to use a seat belt on the part of Plaintiff. Jackson opposes Plaintiff's cross-motion. Damis also cross-moves for summary judgment on the issue of liability, and dismissing the complaint of Plaintiff and "all other claims" asserted against him. Jackson and Plaintiff oppose Damis's cross-motion.

I. Background

This case involves an alleged four motor vehicle accident. In support of his motion, Lomita submitted his affidavit wherein he stated that at the time of this accident he was operating a BMW along the Bruckner Expressway, in the Bronx. Lomita was traveling southbound in the left lane and traffic conditions were heavy. After Lomita stopped his vehicle for a vehicle stopped in front of him, Lomita was rear ended by a Lincoln Sedan. Lomita's vehicle did not make contact with the vehicle in front of him. Lomita asserts that there was nothing he could have done to avoid this accident.

In support of his cross-motion, Plaintiff submitted his affidavit wherein he stated that at the time of this accident he was operating a vehicle along the Bruckner Expressway, in the Bronx. Plaintiff was traveling southbound in the left lane. Traffic conditions were "light and moving steadily." As Plaintiff was

traveling "at about 30 mph, for approximately 3-4 minutes," a BMW in front of him "abruptly decreased speed from about 50 mph, down to about 10 mph, before coming to a complete full stop." Plaintiff began to slow down his vehicle, and while doing so, was struck in the rear two separate times by Damis's vehicle before being pushed into the rear of Lomita's vehicle. Plaintiff asserts that at the time of this accident he was wearing a seatbelt and did not contribute to this accident in any way.

In support of his cross-motion, Damis submitted his affidavit wherein he stated that at the time of this accident he was operating a Mercedes Benz along the Bruckner Expressway, in the Bronx. Damis was traveling southbound in the left lane. Traffic conditions were "moderate to heavy." While Damis was slowing his vehicle down for traffic he "felt a heavy impact to the rear" of his vehicle from Jackson's vehicle. As a result of the impact to the rear, Damis's vehicle was "pushed... forward into" the rear of Plaintiff's vehicle. Damis asserts that he should not be held liable for this accident.

In short, it is undisputed in this case that Lomita's vehicle was the lead vehicle in the chain, Plaintiff's vehicles was the second vehicle in the chain, Damis's vehicle was the third vehicle in the chain, and Jackson's vehicle was the rearmost vehicle in the chain.

II. Standard of Review

"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 N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Once this showing is made, the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of triable issues of fact" (*Melendez v Parkchester Med. Servs.*, P.C., 76 A.D.3d 927 [1st Dept 2010], citing *Zuckerman v New York*, 49 N.Y.2d 557, 562 [1980]). "[T]he opposing party must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 A.D.2d 772 [1st Dept 1983], *aff'd* 62 N.Y.2d 686 [1984]). The evidence submitted on a motion for summary judgment is construed in the light most favorable to the opponent of the motion (*see Branham v Loews Orpheum Cinemas, Inc.*, 8 N.Y.3d 931, 932 [2007]).

"In a chain-reaction collision, responsibility presumptively rests with the rearmost driver" (*Mustafaj v Driscoll*, 5 A.D.3d 138 [1st Dept 2004]). It is incumbent upon the rear ending vehicle to provide a "nonnegligent explanation for the accident, or a nonnegligent reason for [their] failure to maintain a safe distance between [their] car and the lead car" (*Woodley v Ramirez*, 25 A.D.3d 451, 452 [1st Dept 2006] [citations omitted]).

III. Lomita's Motion

In this case, Lomita has met his prima facie entitlement to summary judgment as he alleged in his affidavit that his vehicle was the lead vehicle in the chain-reaction collision. The burden, therefore, shifts to the opponents of the motion "to establish the existence of material issues of fact which require a trial of the action" (*Xiang Fu He v Troon Mgt., Inc.*, 34 N.Y.3d 167, 175 [2019], quoting *Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012]).

In opposition to the motion, Plaintiff has raised a triable issue of fact. In *Tutrani v County of Suffolk* (10 N.Y.3d 906 [2008]), a defendant police officer "abruptly decelerated" in the middle lane of the Long Island Expressway (*id.* at 907). The plaintiff, traveling immediately behind the police vehicle, was able to stop "within a half a car length" of the vehicle without striking it (*id.*). "Seconds later," a third car rear-ended the plaintiff's car (*id.*). The jury rendered a verdict apportioning liability 50% against the police officer and 50% against the third car (*id.*). The Appellate Division reversed, and found the rear-most car 100% liable for the accident (*id.*). The Court of Appeals reversed the Appellate Division, holding that the police officer was not absolved of liability because he "abruptly slowed his vehicle to a near stop in a travel lane of a busy highway where vehicles could reasonably expect that traffic would continue unimpeded" (*id.*). The officer's action "created a foreseeable danger that vehicles would have to brake aggressively in an effort to avoid the lane obstruction created by his vehicle, thereby increasing the risk of rear end collisions. That a negligent driver may be unable to stop his or her vehicle in time to avoid a collision with a stopped vehicle is a normal or foreseeable consequence of the situation created by [the police officer's] actions" (*id.* at 908 [internal citations and quotation marks omitted]).

In accordance with *Tutrani*, the First Department recently held that the sudden stop of a lead vehicle on a highway was sufficient to raise a triable issue of fact as to whether the lead car was a proximate cause of the rear end accident (*see Baez-Pena v MM Truck and Body Repair, Inc.*, 151 A.D.3d 473, 477 [1st Dept 2017] [sudden stop by a lead vehicle on a highway where traffic was flowing smoothly constituted a nonnegligent explanation for a rear end collision]; *see also Richards v Mitchell*, 172 A.D.3d 439, 440 [1st Dept 2019]; *Taveras v Ortiz*, — A.D.3d —, 2021 NY Slip Op 01874 [1st Dept 2021]). The First Department noted in *Baez-Pena* that it was not aware of any case "where a sudden stop by a vehicle on a highway, with normal traffic conditions, resulted in summary judgment in favor of that vehicle" (151 A.D.3d at 476).

Here, Plaintiff alleges in his affidavit that traffic conditions at the time of this accident were "light and steadily moving," which is contrary to Lomita's statement that traffic conditions were heavy. In addition, Plaintiff decreased the speed of his vehicle only after Lomita "abruptly decreased" the speed of his vehicle along a smoothly flowing highway. At that point, Plaintiff's vehicle was then struck twice in the

rear by Damis's vehicle, which resulted in Plaintiff's vehicle being pushed into the rear of Lomita's vehicle. Viewing the evidence in a light most favorable to Plaintiff, one of the opponents of Lomita's motion, the Court finds Plaintiff has raised triable issues of fact as to whether Lomita's vehicle which abruptly decreased speed along a smoothly flowing highway "was a 'substantial cause' of the accident" (*Newell v Bronston*, 183 A.D.3d 441 [1st Dept 2020]), and whether the vehicles were "moving" in light or heavy traffic at the time of this accident (*Richards v Mitchell*, 172 A.D.3d 439 [1st Dept 2019]).

For the reasons above, the Court also finds that Jackson and Damis have raised triable issue of fact in opposition to Lomita's motion.

The Court does not address 3211 (a) (7), as referenced in Lomita's notice of motion, since this CPLR provision was not substantively argued in Lomita's moving papers.

IV. Plaintiff's Cross-Motion

Plaintiff has established his prima facie entitlement to summary judgment only against Jackson. As explained above in Section I, there exists issues of fact concerning the collision between Lomita's and Plaintiff's vehicles. With respect to Damis, Damis asserts that his vehicle was pushed into the rear of Plaintiff's vehicle only after being struck in the rear by Jackson. Moreover, there exists an issue of fact as to whether Damis's vehicle struck Plaintiff's vehicle once or twice in the rear. With respect to Jackson, Jackson's vehicle is the rearmost vehicle in this chain-reaction collision, and thus, responsibility presumptively rests with Jackson. Since Jackson's opposition papers are unsupported by any affidavit or testimony, Jackson has failed to raise a triable issue of fact in opposition to Plaintiff's cross-motion.

Plaintiff's cross-motion to dismiss Defendants' affirmative defense alleging comparative negligence on the part of Plaintiff is denied. As explained in Sections I and III, Lomita claims he stopped his vehicle in heavy traffic when Plaintiff rear ended him. Thus, there are issues of fact as to whether Plaintiff contributed to this accident.

With respect to Plaintiff's cross-motion to dismiss Defendants' affirmative defense alleging failure to use a seatbelt, Plaintiff's affidavit states that at the time of this accident he was wearing a seatbelt. Defendants did not submit any evidence refuting Plaintiff's claim. Therefore, Defendants' affirmative defense, alleging failure to wear a seatbelt on the part of Plaintiff is stricken (CPLR 3212 [g]).

V. Damis's Cross-Motion

Damis has failed to establish his prima facie entitlement to summary judgment. As explained above in Section II, Plaintiff's affidavit states that Damis's vehicle struck the rear of Plaintiff's vehicle twice.

Damis's affidavit states that he struck the rear of Plaintiff's vehicle only after being pushed into it after being struck in the rear by Jackson's vehicle. Thus, Plaintiff's and Damis's affidavits conflict insofar as to how many times Plaintiff's vehicle was struck in the rear by Damis's vehicle. Since Damis allegedly struck Plaintiff's vehicle twice there exists an issue of fact as to whether Damis separately struck Plaintiff's vehicle prior to being struck in the rear by Jackson's vehicle and being pushed into the rear of Plaintiff's vehicle (*see Passos v MTA Bus Co.*, 129 A.D.3d 481, 482 [1st Dept 2015]).

VI. Remaining Contentions

The liability motions and cross-motions in this matter are not premature since every party, except Jackson, submitted affidavits, and therefore, the opponents of the motion were "able to submit facts essential to justify opposition to the motion[s]" (*see Jeffrey v DeJesus*, 116 A.D.3d 5742[1st Dept 2014] [internal citations, quotations, and brackets omitted]). Jackson has personal knowledge of relevant facts but has failed to lay bare her proofs since she did not submit any affidavit in opposition to the motions (*see Thompson v Pizzarro*, 155 A.D.3d 423 [1st Dept 2017], citing *Avant v Cepin Livery Corp.*, 74 A.D.3d 533 [1st Dept 2010]). Indeed, Jackson submitted no personal affidavit or an affidavit from anyone else with personal knowledge disputing the series of events as described in any other parties' affidavit.

The above conclusions are reached without considering the description of the accident contained in the certified police accident report as "it recites hearsay and was prepared by an officer who had not observed the accident" (*see Roman v Cabrera*, 113 A.D.3d 541, 542 [1st Dept 2014], citing *Singh v Stair*, 106 A.D.3d 632, 633 [1st Dept 2013]).

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VII. Conclusion

Accordingly, it is hereby,

ORDERED, that Lomita's motion for summary judgment is denied, and it is further,

ORDERED, that Plaintiff's cross-motion for summary judgment on the issue of liability is granted only as to Jackson, and it is further,

ORDERED, that Plaintiff's cross-motion to dismiss Defendants' affirmative defenses alleging comparative negligence and failure to use a seat belt on the part of Plaintiff, is granted only as to failure to use a seat belt, and that affirmative defense is dismissed, and it is further,

ORDERED, that Damis's cross-motion for summary judgment is denied.

This constitutes the Decision and Order of this Court.

Dated: APRIL 20, 2021

Hon. 
MARY ANN BRIGANTTI **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