

Batista v Milliken

2022 NY Slip Op 32072(U)

June 23, 2022

Supreme Court, Kings County

Docket Number: Index No. 519598/2020

Judge: Delores J. Thomas

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Term, Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the **23rd** day of **June 2022**.

P R E S E N T :

HON. DELORES J. THOMAS, J.S.C.

-----X
ELIZABETH BATISTA,

Plaintiff,

Index No.: 519598/2020

- against -

DECISION and ORDER
Mot. Seq. # 1

KATHRYN MILLIKEN and ARTNIEL BROOKS,
Defendants.
-----X

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of this motion are as follows:

Papers:

NYSCEF Document Nos.

Notice of Motion and Affidavits (Affirmations) Annexed
Answering Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

NYSCEF Doc. Nos. 14-23
NYSCEF Doc. Nos. 26-28
NYSCEF Doc. No. 29

In this personal injury action, plaintiff seeks an order: (1) pursuant to NY CPLR § 3212, granting plaintiff summary judgment on the issue of liability; (2) pursuant to NY CPLR § 3211(b), striking any and all of the defendants' affirmative defenses relating to the plaintiff's alleged comparative fault herein; and (3) pursuant to NY CPLR § 3212, granting plaintiff summary judgment on the issue of liability against defendants on the issue of liability collectively and that she played no role in the happening of the accident giving rise to this action.

Plaintiff commenced this action by filing a summons and complaint on October 13, 2020.

This case is about a two-car collision on Pennsylvania Avenue in Brooklyn, New York. The

accident happened on a two-way street divided by a double yellow line. Defendant Artniel Brooks owned and operated the vehicle carrying the plaintiff. Defendant Kathryn Milliken owned and operated the other vehicle.

Plaintiff says she was a passenger in Brooks' vehicle when he crossed over the double yellow line to pass a stopped bus (NY St Cts Elec Filing [NYSCEF] Doc No. 22). She continued that after crossing the double yellow line and while driving on the wrong side of Pennsylvania Avenue, Brooks' vehicle collided with Milliken's vehicle (*id.*). Brooks did not refute plaintiff's affidavit. Instead, he averred that Milliken suddenly pulled out of a McDonald's parking lot and attempted to make a left turn when the front of Brooks' vehicle and the front driver side of Milliken's vehicle collided (NYSCEF Doc No. 27).

Plaintiff argues that the evidence unequivocally demonstrates three things: (1) that Brooks was negligent pursuant to Vehicle and Traffic Law § 1126(a); (2) that plaintiff did not contribute to the happening of the accident; and (3) that plaintiff was an innocent passenger. Conversely, Brooks contends plaintiff's motion is premature. Alternatively, Brooks argues plaintiff's motion should be denied because issues of fact exist since, allegedly, defendant Milliken was not on the correct side of the road at the time of the accident. Lastly, Brooks posits that if the Court determines plaintiff established entitlement to summary judgment against the defendants collectively, as an innocent passenger, that the issue of liability as between the defendants be preserved for trial. Defendant Milliken did not respond to the motion.

“A plaintiff in a negligence action moving for summary judgment on the issue of liability must establish, prima facie, that the defendant breached a duty owed to the plaintiff and that the defendant's negligence was a proximate cause of the alleged injuries” (*Shah v MTA Bus Company*, 201 AD3d 833, 834 [2d Dept 2022] quoting *Hai Ying Xiao v Martinez*, 185 AD3d

1014, 1015 [2d Dept 2020]). “To be entitled to partial summary judgment a plaintiff does not bear the double burden of establishing...defendant’s liability and the absence of his or own comparative fault” (*Rodriguez v City of New York*, 31 NY3d 312, 324 [2018]). “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” (*Romain v City of New York*, 177 AD3d 590, 591 [2d Dept 2019]).

“[A] violation of a standard of care imposed by the Vehicle and Traffic Law constitutes negligence per se” (*Callahan v Glennon*, 193 AD3d 1029, 1030 [2d Dept 2021]). “[A] driver who crosses over a double yellow line into opposing traffic, unless justified by an emergency not of the driver’s own making, violated the Vehicle and Traffic Law and is guilty of negligence as a matter of law” (*Hodnett v Westchester County Department of Public Works and Transportation*, 122 NYS3d 111, 114 [2d Dept. 2020] quoting *Sena v Negron*, 832 NYS2d 236, 238 [2d Dept 2007]).

The affidavits of plaintiff and defendant Brooks established that Brooks violated VTL 1126(a) by crossing the median and entering the opposite lane of traffic. Although Brooks contends that Milliken made an illegal left turn while attempting to enter the roadway, Vehicle and Traffic Law § 1126(b) states that the limitations in Vehicle and Traffic Law § 1126(a), namely driving on the left side of the double yellow line, does not apply to the driver of a vehicle turning left while entering or leaving such highway.

Notwithstanding, “[t]he 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” (*Romain*, 177 AD3d 590, 591).

Here, it is uncontested that the injured plaintiff bore no fault in the happening of the accident (*see Romain*, 177 AD3d 590). Therefore, since defendant plaintiff also established her prima facie entitlement to summary judgment as a matter of law dismissing the defendants’ affirmative defenses alleging that plaintiff was comparatively negligent (*see Newfeld v Midwood Ambulance & Oxygen Service, Inc.*, 164 NYS3d 497 [2d Dept 2022]).

Contrary to Brooks’ contention, plaintiff’s motion was not premature. Brooks failed to establish that additional discovery might lead to relevant evidence, or that facts essential to oppose the motion were in the exclusive knowledge and control of the plaintiff (*see Romain*, 177 A.D.3d 590).

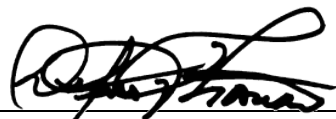
Accordingly, it is hereby **ORDERED** that plaintiff’s motion for summary judgment on the issue of liability is granted; and it is further

ORDERED that defendants’ affirmative defenses relating to the plaintiff’s alleged comparative fault herein are dismissed.

Any issue raised and not specifically addressed by this decision and order is denied.

This constitutes the decision and order of the Court.

E N T E R :



HON. DELORES J. THOMAS, J.S.C.