

Fowler v Zapata

2022 NY Slip Op 33354(U)

October 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 525027/2021

Judge: Francois A. Rivera

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At an IAS Term, Part 52 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 3rd day of October 2022

HONORABLE FRANCOIS A. RIVERA

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ERNEST JAY FOWLER,

Plaintiff,

DECISION & ORDER

Index No.: 525027/2021

- against -

HUGO ZAPATA and RAYS ENTERPRISES, INC.,

Defendants.

-----X

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on April 5, 2022, under motion sequence one, by plaintiff Ernest Jay Fowler (hereinafter plaintiff) for an order pursuant to CPLR 3212, among other things, (1) granting the plaintiff summary judgment on the issue of liability as against the defendants Hugo Zapata and Rays Enterprises, Inc. (hereinafter collectively as defendants); (2) dismissing the defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff. This motion was opposed.

- Notice of Motion
- Affirmation in Support
- Exhibits A-D
- Statement of Material Fact
- Affirmation in Opposition
- Exhibit A
- Response to Statement of Material Facts
- Affirmation in Reply

BACKGROUND

On October 1, 2021, the plaintiff commenced the instant action for damages for personal injury by electronically filing a summons and verified complaint with the Kings County Clerk's office. By a joint answer dated December 6, 2021, the defendants joined issue.

The verified complaint alleges the following salient facts. On March 6, 2021, defendant Hugo Zapata (hereinafter Zapata) was operating a certain motor vehicle bearing New Jersey State license plate number XJNG16 at or near 68 Street between 4th and 5th Avenue in Brooklyn, New York with the permission and consent of its owner Rays Enterprises Inc. At that time, the plaintiff was stopped and parked at the same location when he was struck by the motor vehicle operated by Zapata (hereinafter the subject accident). The subject accident was due to Zapata's negligent operation of his vehicle and caused the plaintiff to sustain serious physical injuries.

LAW AND APPLICATION

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts (*Guiffirda v Citibank*, 100 NY2d 72 [2003]).

A failure to make that showing requires the denial of the summary judgment motion, regardless of the adequacy of the opposing papers (*Ayotte v Gervasio*, 81 NY2d

1062 [1993]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of material issues of fact (*Alvarez*, 68 NY2d at 324).

Pursuant to CPLR 3212 (b), a court will grant a motion for summary judgment upon a determination that the movant's papers justify holding, as a matter of law, that there is no defense to the cause of action or that the cause of action or defense has no merit. Furthermore, all of the evidence must be viewed in the light most favorable to the opponent of the motion (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [2nd Dept 1990]).

In support of the motion, the plaintiff submitted, inter alia, his own affidavit, a police accident report and photographs of the plaintiff's motor vehicle and the defendants' motor vehicle at the accident scene along with defendants' registration and insurance card.

Plaintiff's affidavit asserted the following facts. The subject accident occurred on March 26, 2021. At the time of the collision, the plaintiff was sitting in his stopped and parked motor vehicle on 68th Street between 4th Avenue and 5th Avenue, Brooklyn, New York when he was struck by the defendants' motor vehicle. The plaintiff was wearing his seat belt at the time. The collision occurred without warning.

Where a police report has not been certified, and a foundation for its admissibility has not been laid by some other method, the report and its contents constitute inadmissible hearsay (CPLR 4518[c]; *Yassin v Blackman*, 188 AD3d 62 [2nd Dept 2020]). The police accident report submitted by the plaintiff was uncertified and the

plaintiff offered no other method to lay a foundation for its admission. It is, therefore, disregarded.

In opposition to the motion, the defendants submitted, inter alia, the affidavit of Zapata. Zapata's affidavit asserted the following facts. At the time of the accident, he was operating a motor vehicle at or near 68th Street between 4th Avenue and 5th Avenue, Brooklyn, New York. As he was operating his vehicle, he observed for a split second prior to the accident that the plaintiff began to move his vehicle out of its parked position into the roadway where he was lawfully operating his vehicle. He immediately engaged his breaks in a strong and forceful fashion; however, he was unable to bring his vehicle to a stop prior to the collision with the plaintiff's vehicle. Zapata contended that the subject accident was due to the plaintiff's unsafe movement from a parking lane into moving traffic in the roadway. He also contended that no depositions have been conducted and that the plaintiff's motion is premature.

The function of the court on a motion for summary judgment is not to resolve issues of fact or determine matters of credibility, but merely to determine whether such issues exist (CPLR 3212 [b]; *Castlepoint Ins. Co. v Command Sec. Corp.*, 144 AD3d 731 [2nd Dept 2016]).

The affidavit of the plaintiff and Zapata presented conflicting material facts as to how the accident occurred. Whether the plaintiff was stopped and parked when struck or in motion from a parking lane into the roadway is a material fact that must be resolved by the trier of fact. Consequently, the plaintiff's motion for summary judgment in his favor

on the issue of liability and to strike the affirmative defenses of plaintiff's culpable conduct must be denied.

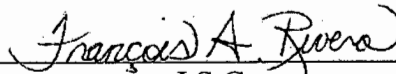
CONCLUSION

The branch of the motion by the plaintiff Ernest Jay Fowler for an order pursuant to CPLR 3212 granting the plaintiff summary judgment on the issue of liability as against the defendants Hugo Zapata and Rays Enterprises, Inc. is denied.

The branch of the motion by the plaintiff Ernest Jay Fowler for an order pursuant to CPLR 3212 dismissing the defendants' Hugo Zapata and Rays Enterprises, Inc. affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of the plaintiff is denied.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.

FRANCOISA. RIVERA