

Kapashev v Doucouray
2022 NY Slip Op 35163(U)
March 24, 2022
Supreme Court, Bronx County
Docket Number: Index No. 33121/2018E
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
ULAN M. KAPASHEV,

Plaintiff,

-against-

Index No.: 33121/2018E

MAGAN DOUCOURAY AND SEAN CAB CORP.,
Defendants.

-----X
HON. BEN R. BARBATO:

Plaintiff, ULAN M. KAPASHEV, moves for partial summary judgment in his favor on liability, as against Defendants, and for related relief.

This is an action to recover damages for alleged personal injuries sustained by Plaintiff KAPASHEV in a motor vehicle accident, which occurred on, or about, February 7, 2018, at 9:40 p.m., on Second Avenue, near East 85th Street in New York County, New York State. The motor vehicle operated and owned by Defendants, MAGAN DOUCOURAY and SEAN CAB CORP., came into contact with the motor vehicle operated by Plaintiff.

The Plaintiff's submissions include the pleadings, the Police Accident Report, and Plaintiff's Affidavit. In opposition, Defendants' Counsel submits his Affirmation.

Plaintiff filed the Note of Issue on or about October 4, 2021 (NYSCEF Doc No 18). Defendant DOUCOURAY failed to appear for his deposition, and the

parties stipulated that he would be precluded from testifying at trial. (NYSCEF Doc No 15).

Alleged Facts:

According to Plaintiff KAPASHEV, he was travelling in Manhattan, on Second Avenue, which is a one-way street with multiple lanes for moving traffic. The traffic conditions were medium. Plaintiff describes the accident as follows:

“The crash happened when another vehicle hit mine as that driver was changing lanes. The other car was driving in the same direction as me ... The other driver must not have looked before he changed lanes, because if he had looked, then he would have seen my car. As a result of the crash, the car I was driving was pushed to the left and there was damage to the rear right bumper of the car... I did not do anything to cause or contribute to the crash. When it happened, I was just driving on Second Avenue, minding the road, and staying in my lane when the Defendants' car hit me”. (Plaintiff KAPASHEV’s Affidavit, dated December 2, 2021).

In the Police Accident Report, the accident is described as follows:

“AT T/P/O, DRIVER VEH #1 [DOUCOURAY] STATES THAT HE WAS CHANGING LANES TO AVOID A DOUBLE PARK[ED] VEHICLE WHEN HE WAS STRUCK BY VEH#2 [KAPASHEV]. DRIVER VEH #2 [KAPASHEV] STATES THAT HE WAS DRIVING S/B ON SECOND AVENUE WHEN VEH #1 [DOUCOURAY] ENTERED HIS LANE AND STRUCK VEH #2 [KAPASHEV]”.

Applicable Law/Analysis:

Vehicle and Traffic Law § 1128(a) “Driving on roadways laned for traffic” provides that:

“Whenever any roadway has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

(a) A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety”.

Also, reckless driving is prohibited by Vehicle and Traffic Law § 1212

“Reckless driving”.

A driver has a duty not to enter another lane of traffic until it is safe to do so, pursuant to VTL § 1128, and the “failure to heed this duty constitutes negligence per se” (*Sanchez v Oxcin*, 157 AD3d 561, 564 [1st Dept 2018]). Where a plaintiff’s uncontested testimony was that defendants’ vehicle sideswiped plaintiff’s vehicle when defendants’ vehicle tried to enter plaintiff’s lane of traffic, the Court held that plaintiff established entitlement to summary judgment as to liability. (*Sanchez v Oxcin*, 157 AD3d at 563-564).

Accordingly, Plaintiff made a *prima facie* showing, of his entitlement to partial summary judgment on liability as against Defendants, by his Affidavit wherein he alleges, *inter alia*, that Defendants’ vehicle sideswiped Plaintiff’s vehicle, upon entering Plaintiff’s lane of travel, as aforesaid.

Thus, the burden shifted to Defendants, to advance a non-negligent explanation for this collision.

Defendant driver, DOUCOURAY, is the person having knowledge of the relevant facts concerning the circumstances surrounding the happening of the accident. However, he did not submit his Affidavit; and, because he had failed to submit to his deposition, he is precluded from testifying at trial. In his Counsel's Affirmation in Opposition, there is a recitation of general principals. Defendants have not made the requisite showing.

It is well-established that where the submission on the part of the party opposing a summary judgment motion "consisted only of the bare affirmation of [his] ... attorney who demonstrated no personal knowledge of the manner in which the accident occurred [s]uch an affirmation by counsel is without evidentiary value and thus unavailing" (*Zuckerman v New York*, 49 NY2d 557, 563 [1980]). In *Zuckerman*, as here, the opponent of the motion proffered no affidavit made by a party or eyewitness having knowledge of the relevant facts. (*Zuckerman v New York*, 49 NY2d at 563).

A motion for summary judgment on liability was properly granted, where, as here, in "opposition to plaintiff's prima facie showing, defendants failed to submit any evidence to raise a triable issue of fact, and instead relied solely upon ... the arguments of counsel ... [, who] claimed no personal knowledge of the

accident, his affirmation has no probative value" (*Thompson v Pizzaro*, 155 AD3d 423, 423 [1st Dept 2017]).

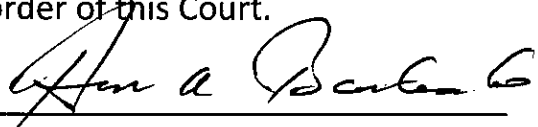
Conclusion:

Accordingly, Plaintiff KAPASHEV's motion for partial summary judgment in his favor on liability, is granted, to the extent that Defendants, DOUCOURAY and SEAN CAB CORP., are found liable for the happening of the accident, and Defendant DOUCOURAY's negligence was a substantial factor in causing the accident.

However, this Court makes no determination as to other issues herein, including whether Plaintiff's alleged injuries were proximately caused by the negligence of Defendants; and whether Plaintiff sustained a "serious injury" within the meaning of the Insurance Law.

This constitutes the decision and order of this Court.

Dated: MAR 24 2022, 2022


HON. BEN R. BARBATO, J.S.C.