

Simpkins v Cossogu
2023 NY Slip Op 35172(U)
June 16, 2023
Supreme Court, Queens County
Docket Number: Index No. 713158/2019
Judge: Phillip Hom
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**SUPREME COURT OF THE STATE OF NEW YORK
QUEENS COUNTY**

PRESENT: HON. PHILLIP HOM

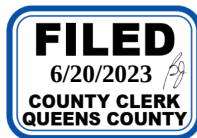
PART 14

Justice

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MARQUIS SIMPKINS,

Plaintiff,



- v -

INDEX NO. 713158/2019MOTION DATE 01/26/2023MOTION SEQ. NO. 003DERLY COSSOGU, RIGO LIMO AUTO CORP, EDWIN
ESPINAL, and FINSTER COURIER INC

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88

were read on this motion to/for

PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that Plaintiff's motion for partial summary judgment and Defendants' cross-motion for summary judgment dismissing the complaint are determined as follows:

Plaintiff Marquis Simpkins ("Plaintiff") commenced this action against Derly Cossogu ("Cossogu") and Rigo Limo Auto Corp. (collectively Uber Defendants") and Edwin Espinal ("Espinal") and Finster Courier, Inc. ("Finster") (collectively "Finster Defendants") to recover for injuries sustained in a motor vehicle accident on April 16, 2019, at 6781 Van Wyck Expressway (the "Van Wyck") at its intersection with Main Street.

Plaintiff moves for an order granting partial summary judgment on the issue of liability and severance of the consolidated action. Uber Defendants cross-move for summary judgment, dismissing the action as against them on the basis that they were not liable for the accident.

In a summary judgment motion, the movant has the initial burden of submitting sufficient evidence eliminating any material issues of fact and demonstrating a prima facie entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 560 [1980]). Only when the movant satisfies this prima facie burden does the burden shift to the opponent to show that material issues of fact exist (*id.*). Thus, where the movant does not satisfy this initial burden, summary judgment is denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

"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” (*Ochoa v Townsend*, 209 AD3d 867, 868 [2d Dept 2022]; see *Morris v Dorota*, 187 AD3d 1174, 1174-75 [2d Dept 2020]; *Romain v City of New York*, 177 AD3d 590, 591 [2d Dept 2019]; *Pinilla v New York City Transit Auth.*, 122 AD3d 703, 705 [2d Dept 2014]; *Medina v Rodriguez*, 92 AD3d 850, 850 [2d Dept 2012]; *Silberman v Surrey Cadillac Limousine Service, Inc.*, 109 AD2d 833, 833 [2d Dept 1985]). “The fact that . . . an innocent passenger . . . was awarded summary judgment as to the [defendants’] liability does not preclude a later apportionment of fault between the drivers of the two vehicles involved in the accident” (*Conigliaro v Premier Poultry, Inc.*, 67 AD3d 954, 955 [2d Dept 2009]).

In support, Plaintiff submits, among other things, the transcript of his examination before trial (“EBT”) (EF Doc 61) and Espinal’s EBT transcript (EF Doc 62), and the police accident report¹ (EF Doc 58).

Plaintiff’s EBT testimony

Plaintiff testified that he was a seat-belted passenger of Uber Defendants’ vehicle at approximately 3:30 p.m. on April 16, 2019, seated in the backseat on the driver’s side of Uber Defendants’ vehicle. Plaintiff stated that his son and his son’s mother were also in the backseat with him at the time of the accident as they were on their way to a doctor’s appointment. Plaintiff recalled the weather as dry and normal. Plaintiff testified that his son’s mother hailed Uber Defendants’ vehicle through the Uber ride-sharing app. Plaintiff stated that the Van Wyck, on which the accident occurred, is a one-way roadway with four or five lanes of traffic. Plaintiff testified that, at the time of the accident, Uber Defendants’ were merging into the exit lane from the second-to-right lane. Plaintiff stated that Uber Defendants’ vehicle was rear-ended by a vehicle in the rightmost lane. Plaintiff recalled that the other vehicle had been traveling in the rightmost lane for approximately two to three minutes before the accident occurred. Plaintiff testified that he did not hear any horns or screeching tires. Plaintiff stated that Uber Defendants’ vehicle was pushed forward due to the impact but did not strike any other vehicles. Plaintiff testified that Uber Defendants were traveling at the speed limit at the time of the accident.

Espinal’s EBT testimony

Espinal testified that, at the time of the accident he was employed by Finster as a freight driver, transporting flammable 55-gallon drums. Espinal stated that there are no restrictions as to the type of vehicle that may drive on the Van Wyck, to his knowledge. Espinal recalled the Van Wyck as having three or four lanes of moving traffic. Espinal testified that traffic was moving normally at the time of the accident. Espinal stated that he had been in the rightmost lane since entering the Van Wyck at Rockaway and was traveling at approximately thirty miles per hour at the time of the accident. Espinal testified that Uber Defendants’ vehicle came into his lane from the middle lane. Espinal stated that he did not see Uber Defendants use a turning signal and that Uber Defendants entered Espinal’s lane with only approximately one car length of clearance between Uber Defendants’ vehicle and Espinal’s tractor-trailer. Espinal stated that Uber Defendants cut him off. Espinal testified that Uber Defendants’ car moved forward approximately

¹ The Court notes that no party objects to the admissibility of the police accident report.

half a car length after the impact. Espinal stated that he believed there were brake marks on the roadway from his truck. Espinal stated that he called the police and set up caution triangles at the back of his truck. Espinal testified that there were no vehicles in front of Uber Defendants at the time of the accident.

The police accident report

The police accident report contains, in pertinent part, the following: “At TPO [Espinal] states he was traveling northbound on the [Van Wyck] in the right lane when [Cossogu] was in the center lane and changed lanes last minute causing him to rear end her. . . [Cossogu] states she was in the right most lane traveling northbound about to exit the expressway when she was rear ended by [Espinal].”

The Court finds Plaintiff meets his prima facie burden of showing that he did not engage in any culpable conduct that contributed to the happening of the accident (*see Morris*, 187 AD3d at 1174; *Romain*, 177 AD3d at 591).

Finster Defendants oppose, arguing that Espinal rebuts the presumption of negligence per se by his EBT testimony stating that Uber Defendants cut him off with inadequate space to stop his vehicle. The Court finds Finster Defendants raise triable issues of fact as their liability in the instant matter. As such, summary judgment as against Finster Defendants is denied (*see Pinilla*, 122 AD3d at 705).

In opposition, Uber Defendants submit Cossogu’s affidavit (EF Doc 83). Cossogu avers that the Van Wyck is a four-lane roadway and Cossogu was driving in the rightmost lane for approximately two to three minutes when Espinal struck Uber Defendants’ vehicle from the rear. The Court notes that this testimony is consistent with the police accident report. Thus, the Court finds that triable issues of fact exist as to Uber Defendants’ liability in the instant matter.

Therefore, Plaintiff’s motion for partial summary judgment on the issue of liability is granted to the extent that Plaintiff is found to be free of comparative fault. Plaintiff’s motion is otherwise denied as there remain triable issues of fact as to the liability of each defendant. Accordingly, Plaintiff’s motion for severance of the consolidated action is also denied.

Uber Defendant’s Motion for Summary Judgment

As set forth above, triable issues of fact remain regarding, among other things, whether Uber Defendants were in the middle or right lane just prior to the accident and whether Uber Defendants improperly changed lanes, cutting Finster Defendants off. Therefore, Uber Defendants’ cross-motion for summary judgment dismissing the complaint as against them is denied.

In accordance with the foregoing, it is hereby **ORDERED** that Plaintiff’s motion is granted in part and denied in part; and it is further

ORDERED that Plaintiff is found to be free of comparative fault; and it is further

ORDERED that the affirmative defenses of Defendants Derly Cossogu, Rigo Limo Auto Corp., Edwin Espinal, and Finster Courier Inc. based upon Plaintiff's comparative negligence, assumption of risk, and/or culpable conduct are hereby dismissed; and it is further

ORDERED that Plaintiff's motion for partial summary judgment is otherwise denied; and it is further

ORDERED that Plaintiff's motion for severance is denied; and it is further

ORDERED that the cross-motion by Defendants Derly Cossogu and Rigo Limo Auto Corp. is denied; and it is further

ORDERED that Plaintiff shall serve a copy of this Order with Notice of Entry upon Defendants within twenty (20) days of entry of this Order.

This constitutes the Decision and Order of the Court.



6/16/2023

DATE

Philip Hom
PHILIP HOM, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

☐

GRANTED

☐

DENIED

☒

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

☐

SUBMIT ORDER

CHECK IF APPROPRIATE:

☐

INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE