

Mendieta v Liberty Coca Cola Beverages LLC

2024 NY Slip Op 33725(U)

September 30, 2024

Supreme Court, Kings County

Docket Number: Index No. 510791/2022

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 30th day of September 2024

HONORABLE FRANCOIS A. RIVERA

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MARLON MEJIA MENDIETA, XAVIER CARRASCO and JOSE NICOLA-ZAMBRANO,

Plaintiff,

- against -

LIBERTY COCA COLA BEVERAGES LLC, CESAR LOPEZ and DAVID PARRALES

Defendants.

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DECISION & ORDER

Index No.: 510791/2022

Oral Argument: 9/5/2024

Cal. No. 41, 39, 40 & 42

Ms. No.: 4, 5, 6 & 7

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross-motion filed on March 16, 2023, under motion sequence number four, by plaintiff Jose Nicola-Zambrano for an order pursuant to CPLR 3212 granting plaintiff Jose Nicola-Zambrano summary judgment as against defendants Liberty Coca Cola Beverages, LLC and Cesar Lopez on the issue of liability and striking defendants' Liberty Coca Cola Beverages, LLC and Cesar Lopez first, second, fourth, fifth, sixth, ninth, eleventh, twelfth eighteenth, nineteenth, twentieth, twenty-first affirmative defenses. The motion is opposed.

- Notice of cross-motion
- Affirmation in support
 - Exhibits A-F
- Statement of material facts
- Affirmation in opposition
 - Exhibits A-C
- Counter Statement of material facts
- Affirmation in reply

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on September 27, 2024, under motion sequence number five, by defendants Liberty Coca Cola Beverages, LLC and Cesar Lopez for an order pursuant to CPLR 3025 (b), granting defendants leave to amend their answer to assert an affirmative

defense and a counterclaim for common law fraud against the plaintiffs and codefendant David Parrales. The motion is opposed.

-Notice of motion

-Affirmation in support

Exhibits A-D

-Affirmation in opposition, by plaintiffs Mejia Medieta and Jose Nicola-Zambrano

-Affirmation in opposition, by plaintiff Xavier Carrasco

-Affirmation in opposition, by defendant David Parrales

Exhibits A-B

-Affirmation in reply

Exhibits E-G

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of cross-motion filed on March 1, 2024, under motion sequence number six, by plaintiffs Mejia Medieta and Jose Nicola-Zambrano for an order denying defendants Liberty Coco-Cola Beverages, LLC and Cesar Lopez's motion for leave to amend their answer pursuant to CPLR 3025 (b) and in the event that defendants' subject motion is granted, then compelling defendants, pursuant to CPLR 3124 to turn over the entirety of the fruits of any investigation performed by defendants' counsel and defendants' insurance carrier. The motion was unopposed and withdrawn on the record, without prejudice.

-Notice of cross-motion

Recitation in accordance with CPLR 2219 (a) of the papers considered on the notice of motion filed on March 20, 2024 under motion sequence number seven, by plaintiff Xavier Carrasco for an order denying defendants' Liberty Coca-Cola Beverages, LLC and Cesar Lopez motion for leave to amend their answer pursuant to CPLR 3025 (b) and in the event defendants' subject motion is granted, then compelling defendants pursuant to CPLR 3124 to turn over the entirety of the fruits of any investigation performed by defendants' counsel and defendants' carrier. The motion was unopposed and withdrawn on the record, without prejudice.

-Notice of cross-motion

-Affirmation in support

The following papers, numbered EF85 to EF93, EF95 to EF99, and EF103, read on Plaintiff, JOSE NICOLA-ZAMBRANO'S, cross motion for summary judgment (Mot. Seq. #4), on the issue of liability, made pursuant to CPLR § 3212, and to strike certain of Defendants' affirmative defenses, as well as the following papers, numbered EF115 to EF121, EF132 to EF133, EF 135 to EF136, EF145 to EF148, and EF149 to EF152, read on Defendants, LIBERTY COCA

COLA BEVERAGES LLC., and CESAR LOPEZ’s, motion to amend pleadings, have been considered along with the points raised by the parties during oral argument.

Papers Filed

Papers Numbered

Motion Sequence #4:

Notice of Motion - Affidavits (Affirmations) – Exhibits _____	EF85-EF93
Answering Affidavit (Affirmation) – Exhibits _____	EF63-EF72
Reply Affidavit (Affirmation) – Exhibits _____	EF73

Motion Sequence #5:

Notice of Motion - Affidavits (Affirmations) – Exhibits _____	EF115-EF121
Answering Affidavit (Affirmation) – Exhibits _____	EF132-EF133
Answering Affidavit (Affirmation) – Exhibits _____	EF135-EF136
Answering Affidavit (Affirmation) – Exhibits _____	EF149-EF152
Reply Affidavit (Affirmation) – Exhibits _____	EF145-EF148

Upon the foregoing it is ordered that the Plaintiff’s motion, Mot. Seq. #4, is resolved as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on April 4, 2022, when it is alleged that the vehicle in which he was a passenger was struck in the rear by a vehicle alleged to have been owned and operated, respectively, by Defendants, LIBERTY COCA COLA BEVERAGES LLC., and CESAR LOPEZ, as the vehicles were traveling on I-278.

Plaintiff met his *prima facie* burden of demonstrating entitlement to summary judgment by showing, via the evidence and testimony submitted with his moving papers, that Defendants, LIBERTY COCA COLA BEVERAGES LLC., and CESAR LOPEZ, were negligent when they violated New York Vehicle and Traffic Law (“VTL”) §§ 1129(a) and 1180(a), *inter alia*, by following the Plaintiff-occupied vehicle more closely than was reasonable and prudent, by traveling at a rate of speed greater than is reasonable and prudent under the conditions, and by failing to regard to the actual and potential hazards then existing.

The Defendant, CESAR LOPEZ, who made statements concerning the happening of the accident to the responding police officer at the scene of the accident, failed to repudiate his statements via his sworn affidavit testimony, and his subsequent attempt to do so through a sworn affidavit constitutes a feigned issue of fact.

Moreover, Defendants’ first affirmative defense, alleging Plaintiff failed to state a cause of action, and their second, fourth, fifth, sixth and twelfth affirmative defenses, alleging that the Plaintiff’s injuries were caused entirely or partially through the culpable conduct of the Plaintiff or third parties, without negligence of the answering Defendants, and their eleventh affirmative defense, alleging that the condition was open and obvious, are hereby stricken since the Plaintiff did not assume the risk of Defendants’ negligent conduct, and given that Defendants owed Plaintiff a duty under the VTL, *inter alia*.

Defendants' ninth, eighteenth, nineteenth, twentieth, and twenty first affirmative defenses, alleging that Plaintiff: is barred by jurisdictional limits imposed by CPLR §§ 1601 and 1602; failed to mitigate his own damages by failing to wear his seatbelt; violated the VTL; is subject to an emergency doctrine affirmative defense, and; lacks personal jurisdiction over these Defendants, are also stricken.

Upon the foregoing it is ordered that the Defendants' motion, Mot. Seq. #5, is resolved as follows:

Defendants', LIBERTY COCA COLA BEVERAGES LLC. and CESAR LOPEZ, application to amend their answer is denied with leave to renew as Defendants failed to clearly provide the Court the differences between their original pleading and their proposed amended pleading, which is a requirement under CPLR §3025(b).

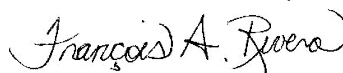
Accordingly, it is

ORDERED that Plaintiff's motion, bearing motion sequence no. 04, for summary judgment on the issue of liability and to strike certain of Defendants' affirmative defenses, is granted as set forth herein, and Defendants' motion, bearing motion sequence no. 05, to amend its pleadings is denied, to the extent set forth above.

IT IS FURTHER ORDERED that motion sequence no. 06 and motion sequence no. 07 are deemed withdrawn as is referenced in this Court's interim order, dated September 5, 2024, and filed by the Court on September 9, 2024, at NYSCEF Docket No. 167.

The foregoing constitutes the decision and order of this Court.

ENTER:



J.S.C.