

Alvarado v Cruz
2024 NY Slip Op 35316(U)
January 12, 2024
Supreme Court, Bronx County
Docket Number: Index No. 806307/2022E
Judge: Bianka Perez
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 14**

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DERIC ALVARADO,

Index No. 806307/2022E

Plaintiff,

-against-

Hon. Bianka Perez

Justice Supreme Court

ROBERT J, CRUZ AND MARIA MOTA,

Defendants.

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The following documents were read on these motions (**NYSCEF Seq. 1 & 2**) to **CONSOLIDATE** & for **SUMMARY JUDGMENT** submitted on **September 18, 2023**.

Notice of Motion #1 - Exhibits and Affidavits Annexed	Nyscef No(s). 13-16
Cross-Motion- Exhibits and Affidavits Annexed	Nyscef No(s). 17-18
Reply Affidavit and Exhibits	Nyscef No(s). N/A
Notice of Motion #2 - Exhibits and Affidavits Annexed	Nyscef No(s). 22-30
Answering Affidavit and Exhibits	Nyscef No(s). 33, 36-38
Reply Affidavit and Exhibits	Nyscef No(s). N/A

Upon the foregoing papers, defendant Robert J. Cruz (hereinafter “Cruz”) moves, under motion sequence #1, for an Order, pursuant to CPLR 602, consolidating the above-captioned action with the action bearing Index 811122/2022E as both actions arise from the same accident. Plaintiff cross-moves, pursuant to CPLR § 3212, for an Order granting plaintiff summary judgment on the issue of liability due to the “hit in the rear” by Defendant Cruz’s vehicle. Both Defendants Cruz and Mota oppose the cross-motion.

Defendant Maria Mota (hereinafter “Mota”) moves, under motion sequence #2, for an Order for summary judgment dismissing the Complaint and all other claims, on the ground that no liability exists as against Defendant Mota. Only Co-Defendant Cruz opposes.

This action arises from a motor vehicle accident that occurred on March 11, 2023, at or near 1321 Rosedale Avenue, Bronx, New York. Plaintiff was a passenger in the vehicle operated by Defendant Mota which was stopped, when the vehicle being operated by Defendant Cruz rear ended Defendant Mota’s vehicle.

Defendant Mota's Motion for Summary Judgment (Seq 2)

In support of her motion, Defendant Mota submits a copy of the pleadings, her sworn affidavit and Plaintiff's deposition transcript. Both Plaintiff and Defendant Mota state Defendant Mota's vehicle was stopped with its hazard lights on when the vehicle operated by Co-Defendant Cruz rear ended Defendant Mota's vehicle.

The proponent of a summary judgment motion has the initial burden of establishing entitlement to judgment as a matter of law, submitting evidence in admissible form demonstrating the absence of any triable issues of fact (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Chance v Felder*, 33 AD3d 645, 645-46 [2d Dept 2006]). Thus, where the movant fails to meet this initial burden, summary judgment must be denied regardless of the sufficiency of the opposing papers (*see Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014]).

A collision with a stationary vehicle amounts to prima facie evidence of negligence on the part of the operator of the moving vehicle (*Guzman v. Schiavone Const. Co.*, 4 A.D.3d 150 [1st Dept 2004]). Further, VTL § 1128(a) provides that "[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 safely." "A driver is negligent if he or she violates Vehicle and Traffic Law § 1128(a) by, inter alia, failing to drive 'as nearly as practicable entirely within a single lane'" (*Kaur v Demata*, 123 AD3d 772, 773 [2d Dept 2014], quoting VTL § 1128 [a]; *see Merola v Beaird*, 185 AD3d 679 [2d Dept 2020]).

Here, Defendant Mota has made a prima facie showing that Co-Defendant Cruz was negligent by striking their vehicle as it was stopped on Rosedale Avenue (*Guzman*, 4 A.D.3d 150 at 150 ["A collision with a stationary vehicle amounts to prima facie evidence of negligence on the part of the operator of the moving vehicle"]; *De La Cruz v Ock Wee Leong*, 16 AD3d 199, 200 [1st Dept 2005]). Thus, the burden shifted to co-defendant Cruz to provide "a non-negligent explanation for the accident".

In opposition, Co-defendant Cruz submits only an attorney affirmation. A mere "attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance," and is thus incapable of raising a triable issue of fact (*Warrington v Ryder Truck*

Rental, Inc., 35 A.D.3d 455, 456 [2d Dept 2006]). As Co-Defendant Cruz failed to raise a triable issue of fact, Defendant Mota's motion is granted.

Plaintiff's Cross-Motion for Summary Judgment

Plaintiff cross-moves for summary judgment on liability as an innocent passenger in a rear ended vehicle, annexing his deposition transcript. Plaintiff establishes a prima facie showing that he was a passenger within Defendant Mota's vehicle and that Defendant Cruz was solely responsible for the subject accident in rearending Defendant Mota's vehicle. Thus, the burden shifts to Defendant Cruz to raise a triable issue of fact.

In opposition, Defendant Cruz failed to submit any non-negligent explanation for the accident, submitting an attorney's affirmation. A mere "attorney's affirmation that is not based upon personal knowledge is of no probative or evidentiary significance," and is thus incapable of raising a triable issue of fact (*Warrington v Ryder Truck Rental, Inc.*, 35 AD3d 455, 456 [2d Dept 2006]). Moreover, this court rejects Defendant Cruz's contention that a motion for summary judgment is premature because discovery is not complete, and all depositions have yet to be taken. "Depositions are unnecessary [before the court determines the liability motion], since defendants have personal knowledge of the facts, yet failed to meet their obligation of laying bare their proof and presenting evidence sufficient to raise a triable issue of fact" (see *Thompson v Pizzaro*, 155 AD3d 423 [1st Dept 2017]).

Accordingly, Plaintiff's cross-motion is granted.

Defendant Cruz's Motion Sequence #2 for Consolidation

As summary judgment has been granted to Plaintiff against remaining Defendant Cruz, this matter will proceed to a trial on damages once the Note of Issue is filed, Therefore, consolidation of this matter with the action bearing Index 811122/2022E is no longer necessary as the matters will not bear common questions of law and fact.

The Court has considered the parties' remaining arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED, that Defendant Mota's motion for summary judgment on the issue of liability, under sequence #2, is granted, and it is further

ORDERED, that the Clerk of the Court is directed to enter judgment in favor of Defendant Mota, and against Plaintiff and co-defendant Cruz on the issue of liability and dismissing the complaint and any and all cross-claims against her, it is further

ORDERED, Plaintiff's cross-motion under motion sequence #1 for summary judgment on the issue of liability is granted, it is further

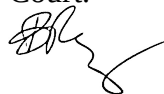
ORDERED, that the Clerk of the Court is directed to enter judgment in favor of Plaintiff and against remaining Defendant Cruz on the issue of liability, it is further

ORDERED, that Defendant Cruz's motion, under sequence #1, for consolidation is denied.

This constitutes the decision and order of the Court.

Dated: January 12, 2024

Hon.



BIANKA PEREZ, J.S.C.

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|------------------------------|---|
| 1. CHECK ONE..... | ☐ CASE DISPOSED IN ITS ENTIRETY ☒ CASE STILL ACTIVE |
| 2. MOTION IS..... | ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER |
| 3. CHECK IF APPROPRIATE..... | ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE |
| | ☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT |