

Gerardo v Breton

2025 NY Slip Op 32671(U)

July 25, 2025

Supreme Court, New York County

Docket Number: Index No. 151451/2019

Judge: Richard Tsai

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD TSAI PART 21

Justice

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RAMONA GERARDO, Plaintiff,
- v -

LUZ BRETON, NEW YORK CITY TRANSIT AUTHORITY, MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY, JOSE ELIAS CARCHIPULLA and J & B GRANITE MARBLE, CORP,

Defendants.

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INDEX NO. 151451/2019
MOTION DATE 12/20/2024
MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 81-109 were read on this motion to/for JUDGMENT - SUMMARY.

In this personal injury action, plaintiff Ramona Gerardo seeks monetary damages for injuries she suffered when she was struck by a vehicle operated by Carchipulla and owned by J & B Granite Marble, Corp (collectively, the Carchipulla defendants), on August 1, 2018 at approximately 10:59 a.m., while she was crossing West 125th Street, near intersection with Amsterdam Avenue (exhibit A in support of motion [NYSCEF Doc. No. 83], complaint ¶¶ 56-58, 71; exhibit C in support of motion [NYSCEF Doc. No. 85], answer by the Carchipulla defendants ¶¶ First-Second [admitting that subject vehicle was operated by Carchipulla with permission of its owner J & B Granite Marble, Corp]).

The Carchipulla defendants now move for summary judgment dismissing the complaint and all cross-claims as against them. Plaintiff opposes the motion. Defendants Luz Breton, New York City Transit Authority (NYCTA) and Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) (collectively, the Transit Defendants) have not submitted any papers on the motion.

DISCUSSION

“On a motion for summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. If the moving party produces the required evidence, the burden shifts to the nonmoving party to establish the existence of material issues of fact which require a trial of the action” (Xiang Fu He v Troon Mgt., Inc., 34 NY3d 167, 175 [2019] [internal citations and quotation marks omitted]).

On a motion for summary judgment, “facts must be viewed in the light most favorable to the non-moving party” (*Vega v Restani Const. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks omitted]).

On this motion, there is no dispute that, before the accident, plaintiff was in the process crossing West 125th Street between Morningside Avenue and Amsterdam Avenue, from the north side of the street towards the south side of the street. There is also no dispute, on this motion, that immediately before the accident, plaintiff crossed in front of a stopped BX15 bus operated by Breton, within the scope of Breton’s employment with MABSTOA (exhibit J in support of motion [NYSCEF Doc. No. 92], Breton EBT at 15, lines 11-13; 22, lines 14-18; 24, lines 11 through 24).

On this motion, the Carchipulla defendants have provided a video of the accident, taken from the north side of 125th Street, between Morningside Avenue and Amsterdam Avenue, which was confirmed to be a true and accurate representation of accident (exhibit H in support of motion [NYSCEF Doc. No. 90], surveillance video; exhibit I in support of motion [NYSCEF Doc. No. 91], plaintiff’s 8/17/21 EBT at 82, line 15 through 86, line 24 [stating that the video was a fair and accurate representation]; exhibit J in support of motion [NYSCEF Doc. No. 92], Breton EBT at 19, line 15 through 21, line 2 [same]; exhibit K in support of motion [NYSCEF Doc. No. 93], Valentino EBT at 117, line 17 through 126, line 9 [same]).

At time stamp 9:59:27 in the video, a bus can be seen stopping in the center lane of travel:



(surveillance video).

At time stamp 9:59:39 in the video, plaintiff can be seen wearing a purple shirt as she begins crossing the roadway outside of the crosswalk, and at roughly the same time the doors of the bus can be seen opening:



(*id.* [plaintiff indicated in video frame with a circle and arrow])

At time stamp 9:59:44 in the video, plaintiff can be seen walking directly in front of the stopped bus and appears about to step into the next lane of traffic, while an individual wearing a white shirt has exited the bus:



(*id.* [plaintiff indicated in video frame with a circle and arrow]).

At time stamp 9:59:45, one second later, a pickup truck operated by Carchipulla appears to have passed in front of the bus:



(id.)

At time stamp 9:59:46, plaintiff has walked into the next lane and is no longer in the video footage:



(id.)

Between 9:59:46 and 9:59:47 in the video, the pickup truck operated by Carchipulla appears to pass the bus to the bus's left in the lane that plaintiff had just entered and come to an abrupt stop; the rear of the vehicle is seen jerking backwards and slightly bouncing up and down:



(*id.*)

On this motion the Carchipulla defendants have also provided the deposition testimony of plaintiff, who testified that, on the day of the accident, she attempted to cross 125th Street “in the middle of the block” rather than at the crosswalk (plaintiff’s 8/17/21 EBT at 48, line 4 through 49, line 18). Plaintiff further testified that as she was crossing 125th Street, “I saw the bus stop and I thought it wasn’t going to move because there was someone coming off the bus. And I looked at the driver and she gave me -- she told me to pass and then I continued to pass” (*id.* at 57, line 19 through 58, line 3).

Plaintiff further testified that when she initially entered the street, she was “walking quickly” but “[w]hen I was almost finishing there I did slow down my pace to look at the driver” (*id.* at 60, line 18 through 61, line 5). Plaintiff testified that at this time, she was about five feet from the bus and that she was unable to stop walking when she was in front of the bus “because I could not see the dividing line and that is why I continued, because I saw her. That’s why I looked at her and I continued” (*id.* at 59, line 22 through 60, line 17).

Plaintiff testified that, before entering the next lane, “I did not stop but I looked” and elaborated that “I think that the driver, she signal me. She made a signal to me to pass and I trusted her. On the other side I saw nobody was coming. I was trusting her to tell me what was happening behind her” (*id.* at 63, line 22 through 64, line 19). When asked about her ability to see oncoming traffic, the following colloquy ensued:

“Q. If you stopped, could you have stopped to look to your left to see if traffic was coming?”

A. No.

Q. Why is it that if you stopped you couldn't have looked to your left to see if traffic was coming?

A. Because I could not see with the bus that was stopped there. It was too close.

Q. Could you have moved closer to Amsterdam to get a better angle, since the bus wasn't moving?

A. No, because I was walking straight and if I would have taken my head the same way I took out my foot they would have crashed my head”

(*id.* at 64, line 25 through 65, line 15).

Plaintiff testified that she attempted to cross the next lane but “[a] truck hit me” with the tire running over her foot (*id.* at 76, lines 12-23). Plaintiff testified that when this happened she was looking “[t]owards the front” and that she was not looking left (*id.* at 76, line 25 through 77, line 11).

The Carchipulla defendants have also provided the deposition testimony of Carchipulla, who testified that right before the accident he was traveling about “five, less than ten” miles per hour and that he was looking “[s]traight ahead in front” as he passed the bus (exhibit N in support of motion [NYSCEF Doc. No. 96], Carchipulla EBT, at 85, line 11 through 87, line 20).

Carchipulla testified that he first became aware that he made contact with plaintiff when he “felt the hit” and that he did not see the plaintiff before the accident because “the bus” prevented him from seeing plaintiff (*id.* at 54, line 6 through 55, line 12). Carchipulla testified that upon the impact, he pushed the brake and brought his vehicle to a stop (*id.* at 55, lines 13-22).

Thus, the Carchipulla defendants have established their prima facie entitlement to summary judgment, as they have put forth evidence establishing that Carchipulla “was driving his vehicle in a non-negligent manner . . . when [] plaintiff suddenly appeared in his lane of traffic” (*Pripkhan v Karmon*, 140 AD3d 634, 635 [1st Dept 2016]). Based on the video footage, there appears to be roughly two to three seconds between when plaintiff stepped into Carchipulla’s lane of travel and the impact. Under these circumstances, Carchipulla cannot be held liable for the happening of the accident as a matter of law (*Dushaj v Martinez*, 225 AD3d 519 [1st Dept 2024] [holding that “court's finding that ‘two to three seconds’ had passed from when defendant saw plaintiff to the time of impact was proper based on defendant's testimony”]).

In opposition, plaintiff has not raised a material issue of fact. Rather, plaintiff argues that Carchipulla's testimony that he did not see plaintiff until the impact raises a question for trial as to whether Carchipulla "failed to see the pedestrian who was there to be seen and as a consequence did not take evasive action until after it was too late" (affirmation in opposition [NYSCEF Doc. No. 107] ¶¶ 20-22). However, as detailed above, Carchipulla's testimony clearly established that he was unable to see plaintiff because his view was blocked by the bus (Carchipulla EBT at 54, line 6 through 55, line 12); and plaintiff likewise testified that she was unable to see Carchipulla's vehicle because her view was blocked by the bus (plaintiff's 8/17/21 EBT at 64, line 25 through 65, line 15).

Further, the argument that the accident could have been prevented had Carchipulla seen plaintiff is "purely speculative" (*Nova Soto-Bay v Prunty*, 115 AD3d 586, 587 [1st Dept 2014]; see also *Brown v City of New York*, 237 AD2d 398, 399 [2d Dept 1997] [holding that it was "clear" the defendant driver "was unable to observe the injured plaintiff at any time prior to the accident" and the argument that he "failed to observe what he should have observed is merely an attempt to ferret out speculative issues to get the case to the jury"] [internal quotation marks omitted]).

Therefore, the motion is granted.

Because the Carchipulla defendants can no longer be held liable to plaintiff, the cross-claims of the Transit Defendants, for common-law indemnification and/or contribution, are dismissed by operation of law (see e.g. *Bendel v Ramsey Winch Co.*, 145 AD3d 500, 501 [1st Dept 2016] [in view of the dismissal of the complaint in its entirety as against a defendant, the cross claims against that defendant are also dismissed]). The Carchipulla defendants' own cross-claims for common-law indemnification and contribution against the other co-defendants are also dismissed as academic (*Rogers v Rockefeller Group Intl., Inc.*, 38 AD3d 747, 750 [2d Dept 2007]).

CONCLUSION

Upon the foregoing documents, it is hereby **ORDERED** that this motion for summary judgment by defendants Jose Elias Carchipulla and J & B Granite Marble, Corp (collectively, the Carchipulla defendants) is **GRANTED**, and the complaint is dismissed in its entirety as against said defendants, and all cross-claims by and against the Carchipulla defendants are dismissed; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly in favor of said defendants with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendants.



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7/25/2025

DATE

RICHARD TSAI, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE