

Khan v Calderon

2018 NY Slip Op 34517(U)

November 9, 2018

Supreme Court, Bronx County

Docket Number: Index No.: 27346/2017E

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: **PART 14**



-----X
KHAN, LIAQAT A.

Index No. 27346/2017E

- against -

Hon. JOHN R. HIGGITT,

CALDERON, DARWIN NARAJO, et ano.

A.J.S.C.

-----X
The following papers numbered 7 to 24 in the NYSCEF System were read on this motion for **SUMMARY JUDGMENT (LIABILITY)**, noticed on June 29, 2018 and duly submitted as No. 45 on the Motion Calendar of August 24, 2018

| | NYSCEF Doc. Nos. |
|--|------------------|
| Notice of Motion – Exhibits and Affidavits Annexed | 7-16 |
| Notice of Cross-Motion – Exhibits and Affidavits Annexed | |
| Answering Affidavit and Exhibits | 20-23 |
| Replying Affidavit and Exhibits | 24 |
| Filed Papers | 17 |
| Memoranda of Law | |
| Stipulations | 18-19 |

Upon the foregoing papers, plaintiff’s motion for partial summary judgment on the issue of defendants’ liability for causing the subject motor vehicle accident and dismissal of defendants’ first, second, fourth, fifth and seventh affirmative defenses is granted in part, in accordance with the annexed decision and order.

Dated: 11/9/2018

Hon. 
JOHN R. HIGGITT, A.J.S.C.

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted GIP
- Denied Other

Check if appropriate:

- Schedule Appearance
- Fiduciary Appointment
- Referee Appointment
- Settle Order
- Submit Order

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

-----X
LIAQAT A. KHAN,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 27346/2017E

DARWIN NAJARO CALDERON and VALIANT
CONTRACTING LLC,

Defendants.
-----X

John R. Higgitt, J.

This is a negligence action to recover damages for personal injuries plaintiff allegedly sustained in a motor vehicle accident that took place on January 11, 2017. Plaintiff was traveling Eastbound on the Cross-Bronx Expressway in the center lane when the vehicle operated by defendant Calderon and owned by defendant Valiant Contracting LLC attempted to change lanes and struck the rear left portion of plaintiff's vehicle. Plaintiff seeks partial summary judgment on the issue of defendants' liability and dismissal of defendants' first, second, fourth, fifth and seventh affirmative defenses. For the reasons that follow, plaintiff's motion is granted in part.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]). When there is conflicting evidence as to how the accident occurred, summary judgment is inappropriate (*see Elamin v Robert Express, Inc.*, 290 AD2d 291[1st Dept 2002]). In deciding a summary judgment motion, the court should not weigh the parties' credibility (*see Krupp v Aetna Life & Casualty Co.*, 103 AD2d 252, 262 [2nd Dept 2002]). If there is any doubt as to existence of material issues of fact the motion should be denied

(see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

In support of the motion plaintiff submits his affidavit, a copy of the pleadings and a certified police report. While the police report is not in admissible form (see *Silva v Lakins*, 118 AD3d 556 [1st Dept 2014]), defendant Calderon's statement that he never saw the plaintiff's vehicle prior to attempting to move into the center lane is admissible as an admission against his interest (see *Niyazov v Bradford*, 13 AD3d 501 [2nd Dept 2004]). In his affidavit, plaintiff avers that he was travelling in the center lane of the Cross-Bronx Expressway when defendants' truck, which was traveling behind plaintiff in the left lane, changed lanes without warning. Plaintiff described the conditions of the road as having medium traffic with no obstructions in the road ahead.

On the other hand, defendant Calderon avers in his affidavit that he was traveling in the left lane in the Cross-Bronx Expressway, when he noticed that his lane was occupied by a fire truck, causing the left and center lanes to be closed. As all vehicles were merging to the right, he brought his vehicle to a stop and activated his turn signal. He avers that he noticed a vehicle to his right rear with enough space for his vehicle to safely merge into the lane. He further avers that once he noticed that the space to his right was completely clear, he slowly started to enter the lane by releasing his brakes when the accident occurred. Lastly, defendant Calderon avers that his statement in the police report was misunderstood due to his inability to clearly communicate in English. He stated that once he reviewed the police report, he noticed that his statement to the responding officer that there was a clear space that allowed him to safely merge was omitted from the report.

The conflicting versions as to how the accident occurred create issues of fact and credibility, making summary judgment in plaintiff's favor on the issue of defendants' liability

inappropriate (*see Peritore v Anna & Diane Cab Corp.*, 127 AD3d 669 [1st Dept 2014]).

Additionally, dismissal of defendants' first affirmative defense, alleging plaintiff's culpable conduct, is inappropriate.

As to the second affirmative defense alleging assumption of risk, the defense is dismissed because plaintiff was not obligated to anticipate defendant's entry into his lane or avoid the accident (*see Seiler v Ricci's Towing Servs.*, 210 AD2d 972 [4th Dept 1994]). More importantly, the doctrine of primary assumption of risk does not apply to the facts of this matter (*see Custodi v Town of Amherst*, 20 NY3d 83 [2014]; *Valder v Weston*, 57 AD2d 862 [2nd Dept 1977]).

That aspect of plaintiff's motion seeking dismissal of defendants' fourth affirmative defense alleging failure to state a cause of action is denied (*see Butler v Catinella*, 58 AD3d 145, 147-151 [2nd Dept 2008]).

As to defendants' fifth affirmative defense alleging plaintiff's failure to wear a seat belt, plaintiff does not provide any admissible evidence demonstrating that, at the time of the accident, he was wearing a seat belt. Although counsel affirms that plaintiff was wearing his seat belt, plaintiff's affidavit does not contain such an averment. Further, in this regard, the police report is not competent admissible evidence regarding whether plaintiff was wearing a seatbelt.

The aspect of plaintiff's motion seeking dismissal of defendants' seventh affirmative defense alleging that plaintiff's recovery should be diminished under General Obligation Law § 15-108 is granted. The two defendants are united in interest as employer and employee and are both represented by the same counsel. Thus, at this point, there is no potential for the application of General Obligation Law § 15-108. However, in the event that a General Obligation Law § 15-108 offset is required, defendants can seek to amend their answer (*see Whalen v Kawasaki Motors Corp., U.S.A.*, 92 NY2d 288 [1998]).

Accordingly, it is


ORDERED, that the aspect of plaintiff's motion for partial summary judgment on the issue of defendants' liability is denied; and it is further

ORDERED, that the aspects of plaintiff's motion seeking the dismissal of defendants' second and seventh affirmative defenses are granted, and those defenses are dismissed; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: November 9, 2018



John R. Higgett, A.J.S.C.