

Troncoso v Iqbal

2019 NY Slip Op 35130(U)

November 26, 2019

Supreme Court, Bronx County

Docket Number: Index No. 20972/2018E

Judge: Mary Ann Brigantti

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 15



-----X
MICHAEL TRONCOSO

Index No. 20972/2018E

-against-

Hon. MARY ANN BRIGANTTI

TAYYAB IQBAL

Justice Supreme Court
-----X

The following papers numbered 1 to _____ were read on this motion (Seq. No. 2)
for SUMMARY JUDGMENT noticed on July 13, 2019 .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s). 1, 2
Answering Affidavit and Exhibits	No(s). 3, 4
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers and oral argument, the plaintiff Michael Troncoso ("Plaintiff") moves for summary judgment on the issue of liability against the defendant Tayyab Iqbal ("Defendant"). Defendant opposes the motion.

Background

Plaintiff submitted an affidavit wherein he stated that as he was traveling along Lydig Avenue, after "turn[ing] left" from Matthews Avenue, in the Bronx, he was involved in a motor vehicle accident. Plaintiff described Lydig Avenue as a "one way street with one lane for travel." As Plaintiff was in the "middle of the block" traveling at a speed of approximately "15 mph" his vehicle's "passenger side front and middle" were impacted by Defendant's vehicle's "front driver's side" as it was pulling out of a parking space to the right. Plaintiff asserted that while Defendant's vehicle was "parked to [his] right" prior to this accident, and although he "heard" the Defendant's vehicle prior to the impact, he "did not see the other vehicle prior to the impact" and that this accident occurred as a result of Defendant "gunn[ing] his vehicle."

Plaintiff also submitted the deposition transcript of Defendant wherein he testified that prior to this accident he was in a "parking spot" along the "right side" of Lydig Avenue "waiting for a fare" (Def. EBT at 9-11). Defendant stated that after his vehicle was parked for "25 to 30 minutes" he moved his vehicle to "go home," and as he moved out of the parking spot he "was hit" (*id.* at 16-17). Defendant testified that he felt an impact to his "[d]river's side middle" near "the driver's door" on "the driver's side" (*id.* at 17, 24). Before moving his vehicle out of the parking spot, Defendant "checked" his mirrors, put his "left-turn signal on," and when he took approximately "25 seconds" to move his vehicle, somebody hit

Motion is Respectfully Referred to Justice:

Dated:

[him] from behind" (*id.* at 19-20, 23). Defendant asserted that he "watched the whole block behind [him]" before moving his vehicle, checked his mirrors "seconds" before the accident occurred, and that the street was "clear" (*id.* at 20-23). However, Defendant also testified later in his deposition that he "observed" Plaintiff's vehicle turn from Matthews Avenue onto Lydig Avenue (*id.* at 26).

Defendant further stated that his vehicle was "90 percent" out of the parking spot when he was struck by the "[f]ront" of Plaintiff's vehicle (*id.* at 23-25). Defendant made clear in his testimony that Plaintiff's vehicle's "front driver's side" first made contact with the "rear" "[d]river's side" of his vehicle "up to the front" of his "driver's side door" (*id.* at 25, 37-38).

Standard of Review

"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" (*Winegrad v. N.Y. Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985] [citations omitted]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* [citations omitted]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986], citing *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 [1980]). "On a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 N.Y.3d 499, 503 [2012] [internal citations and quotations omitted]).

Applicable Law and Analysis

Even assuming that Plaintiff satisfied his prima facie entitlement to summary judgment, Defendant's opposition raises triable issues of fact. Although a driver with the right-of-way is "entitled to anticipate that other vehicles will obey the traffic laws that require them to yield" (*Gonzalez v Bishop*, 157 A.D.3d 460 [1st Dept 2018], quoting *Dinham v. Wagner*, 48 A.D.3d 349, 349-350 [1st Dept 2008], citing *Namisnak by Namisnak v. Martin*, 244 A.D.2d 258, 260 [1st Dept 1997]; see also *Castro v Hatim*, 174 A.D.3d 464 [1st Dept 2019]), such a driver still has a duty to use reasonable care to avoid a collision (see *Gonzalez v Bishop*, 157 A.D.3d 460, 461 [1st Dept 2018], citing *Nevarez v S.R.M. Mgt. Corp.*, 58 A.D.3d 295, 298 [1st Dept 2008]), and to "observe what should have been observed" (*Basabe v Carrozza*, 106 A.D.3d 641, 642 [1st Dept 2013]), because a driver is "obliged to be vigilant for oncoming traffic" (*Parris v Gonzalez-Martinez*, 129 A.D.3d 519 [1st Dept 2015], quoting *Calcano v Rodriguez*, 91 A.D.3d 468, 472

[1st Dept 2012]).

The conflicting testimony submitted with Plaintiff's motion will be addressed first and the photograph submitted with Defendant's opposition will be addressed second. Plaintiff's own affidavit states that he "did not see" Defendant's vehicle "prior to the impact," yet he claimed that he "heard" the Defendant "rev" and "give his car full gas" as their vehicles were "right next to" each other. "Instantly" with these noises, Plaintiff claimed that Defendant "gunned his vehicle" out of his parking spot. Such conflicting statements concerning whether Plaintiff saw Defendant's vehicle prior to the impact, as Plaintiff was aware of and heard the noises of Defendant's vehicle, raises material issues of fact (*compare Davis v Turner*, 132 A.D.3d 603 [1st Dept 2015], citing Vehicle and Traffic Law ("VTL") §§ 1128 [a]; 1162)).

In addition, Defendant stated in his deposition testimony that it was approximately "25 seconds" between when he "started to move [his] vehicle until the accident happened" and that his vehicle was struck on its "rear up to the front" by the "[f]ront" of Plaintiff's vehicle (Def. EBT at 23, 25). Thus, not only is there conflicting testimony as to the points of impact in this case (*compare* Pl. affidavit ¶4 [Plaintiff alleging his vehicle was struck on its "passenger side front and middle" by Defendant's vehicle's "front driver's side"]), but Defendant claims to have been struck from the rear by Plaintiff's vehicle after seeing that Lydig Avenue was "clear" and carefully moving his vehicle out of a parking spot (Def. EBT at 23). Defendant further claimed that his vehicle was "90 percent" out of the parking spot when he was struck in the rear by the "[f]ront" of Plaintiff's vehicle (Def. EBT at 23-25).

Moreover, the unauthenticated, yet undisputed, photographic evidence submitted with Defendant's opposition papers, showing damage to the "Left Rear" of his vehicle, corroborates the points of impact alleged by Defendant (*Oken v A.C. & S. (In re N.Y. City Asbestos Litigation)*, 7 A.D.3d 285 [1st Dept 2004] [citation omitted] ["evidence otherwise excludable at trial may be considered in opposition to a motion for summary judgment as long as it does not become the sole basis for the court's determination"]). Plaintiff's counsel did not object to the photograph in reply or at oral argument.

Accordingly, the record does not "conclusively establish that [Defendant] was negligent" as Defendant's "version of the accident exonerated him and attributed the accident exclusively to [P]laintiff's negligence." In other words, "there are triable issues of fact as to whether or not [Defendant] was negligent at all" (*Savall v New York City Tr. Auth.*, 173 A.D.3d 566, 567 [1st Dept 2019]). The Court of Appeals decision in *Rodriguez v City of New York* (31 N.Y.3d 312 [2018]) does not require a different result. There, the Court held that the "principal rationale of partial summary judgment is to narrow the number of issues presented to the jury," and thus, Plaintiff still has the burden of "establish[ing] defendant's liability as a matter of law" (*id.* at 323-324 [citations omitted]). As previously discussed, Defendant's nonnegligent excuse for this accident, that Plaintiff struck his vehicle from the rear as he was carefully pulling out of a parking space, fails to conclusively show that Defendant was a proximate cause of this accident.

Conclusion

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion for summary judgment on the issue of Defendant's liability is denied.

This constitutes the Decision and Order of this Court.

Dated: 11/26/19

Hon. Mary Ann Brigantti J.S.C.

- 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