

Lugo v Ogbolu

2019 NY Slip Op 35131(U)

November 20, 2019

Supreme Court, Bronx County

Docket Number: Index No.: 21138/2018E

Judge: John R. Higgitt

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This opinion is uncorrected and not selected for official publication.

C

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

-----X
LUGO, RICHARD

- against -

OGBOLU, UGOCHUKWU P., et ano
-----X

Index No. 21138/2018E

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

The following papers numbered 17 to 22 and 35 to 42 in the NYSCEF System were read on this motion for SUMMARY JUDGMENT (LIABILITY), noticed on September 24, 2019 and duly submitted as No. 28 on the Motion Calendar of September 24, 2019

	<u>NYSCEF Doc. Nos.</u>
Notice of Motion – Exhibits and Affidavits Annexed	17-22
Notice of Cross-Motion – Exhibits and Affidavits Annexed	35-37
Answering Affidavit and Exhibits	41, 42
Replying Affidavit and Exhibits	38-40
Filed Papers	
Memoranda of Law	
Stipulations	

Upon the foregoing papers, defendant Mbaye’s motion for summary judgment dismissing the complaint as against him and all cross claims against him is denied and plaintiff’s cross motion for summary judgment on the issue of defendants’ liability for causing the accident is granted in part, in accordance with the annexed decision and order.

Dated: 11/20/2019

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

Check one:

- Case Disposed in Entirety
- Case Still Active

Motion is:

- Granted
- Denied
- GIP
- 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
RICHARD LUGO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 21138/2018E

UGOCHUKWU P. OGBOLU and SOURANG MOR
MBAYE,

Defendants.
-----X

John R. Higgitt, J.

This is a negligence action to recover damages for personal injuries that plaintiff allegedly sustained in a motor vehicle accident that took place on May 17, 2017. Defendant Mbaye seeks summary judgment dismissing the complaint as against him and all cross claims against him on the ground that he is not liable for the accident. Plaintiff cross-moves for summary judgment against defendants on the issue of their liability. For the reasons that follow, defendant Mbaye’s motion for summary judgment is denied and plaintiff’s motion for partial summary judgment is granted in part.

In support of his motion, defendant Mbaye submits the pleadings, the police accident report, and the transcripts of the parties’ deposition testimony. Defendant Mbaye testified that he was driving on Amsterdam Avenue near its intersection with 96th Street in New York County in the lane to the left of lane in which defendant Ogbulo’s vehicle was travelling. According to defendant Mbaye, defendant Ogbolu suddenly moved toward Mbaye’s lane, striking the passenger’s side of his vehicle; defendant Mbaye testified that he remained within his lane at all relevant times.

Defendant Ogbolu testified that he does not have a “clear” recollection of the accident, but that at no point did he change lanes. Defendant Ogbolu also testified that he “thinks that the front of his vehicle touched [defendant Mbaye’s] vehicle.”

Plaintiff Lugo’s testimony is not particularly helpful in gauging which defendant (or defendants) was negligent because Lugo was using his cell phone at the time of the accident. To the extent plaintiff and defendant Mbaye relied on the deposition testimony of Brannigan, another occupant of defendant Ogbolu’s vehicle at the time of the accident, that reliance is misplaced, as that testimony was offered for the first time in reply (*see Migdol v City of New York*, 291 AD2d 201 [1st Dept 2002]).

In support of his cross motion for summary judgment, plaintiff asserts that because defendants were negligent in the operation of their vehicles, defendants are liable for the accident.

Vehicle and Traffic Law § 1128(a) states 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 ascertained that such movement can be made with safety” (*see Delgado v Martinez Family Auto*, 113 AD3d 426, 428 [1st Dept 2014]). A violation of Vehicle and Traffic Law § 1128(a) constitutes negligence per se (*see Flores v City of New York*, 66 AD3d 599 [1st Dept 2009]). A party may demonstrate entitlement to summary judgment by showing that the opposing party’s vehicle entered their lane of travel when it was not safe to do so (*see Sanchez v Oxcin*, 157 AD3d 561, 564 [1st Dept 2018]).

The defendants’ competing deposition testimony raises triable issues of fact regarding which driver (or drivers) was negligence. While defendant Mbaye’s testimony was clearer than defendant Ogbolu’s testimony and Mbaye seemed to have a better recollection of the accident

than Ogbolu, the evaluation of the defendants' respective accounts is for a finder of fact.

Defendant Ogbolu's account of the accident, despite its weaknesses, is not incredible as a matter of law (*cf. Moorhouse v Standard, N.Y.*, 124 AD3d 1 [1st Dept 2014]) or otherwise bereft of probative value.

Under the circumstances, however, plaintiff (an innocent passanger) is entitled to dismissal of defendants' affirmative defenses of comparative fault (*see Oluwatayo v Dulinayan*, 142 AD3d 113 [1st Dept 1999]).

Accordingly, it is

ORDERED, that defendant Mbaye's motion for summary judgment is denied; and it is further

ORDERED, that the aspects of plaintiff's cross motion seeking dismissal of defendant Ogbolu's second affirmative defense alleging plaintiff's culpable conduct and defendant Mbaye's second affirmative defense alleging plaintiff's culpable conduct are granted and those affirmative defenses are dismissed; and it is further

ORDERED, that plaintiff's motion is otherwise denied.

The parties are reminded of the December 2, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: November 20, 2019



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