Villalobos v Rodriguez
2017 NY Slip Op 33492(U)
May 26, 2017
Supreme Court, Westchester County
Docket Number: Index No. 61940/15
Judge: Mary H. Smith
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DECISION AND ORDER

To commence the statutory period of appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this Order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
IAS PART, WESTCHESTER COUNTY

Present: HON. MARY H. SMITH
Supreme Court Justice

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ANTHONY VILLALOBOS,

Plaintiff,

MOTION DATE: 5/26/17
INDEX NO.: 61940/15

-against-

EDWIN RODRIGUEZ and GERSON RODRIGUEZ,

Defendants.

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The following papers numbered 1 to 7 were read on this motion by plaintiff for partial summary judgment on the issue of liability, etc.

Papers Numbered

Notice of Motion - Affirmations (Chiariello) - Exhs. (A-J) 1-4
Answering Affirmation (Melchione) - Exhs. (A-B) 5-6
Replying Affirmation (Chiariello) 7

Upon the foregoing papers, it is Ordered and adjudged that this motion by plaintiff for partial summary judgment on the issue of liability is disposed of as follows:

This negligence action arises out of a single vehicle crash occurring, at approximately midnight, on October 23, 2014, on Route 9A-Albany Post Road, in the Town of Pleasantville. At the time, plaintiff had been a front seat passenger in a Mitsubishi

Evolution special edition sports vehicle being driven by defendant Edwin Rodriguez ("defendant"), then 22 years of age, which had been owned by defendant's brother, defendant Gerson Rodriguez. It had been raining hard and, according to plaintiff's examination before trial testimony, immediately preceding the subject crash, defendant had been driving north in the left lane of the two lane roadway.

Plaintiff had testified that traffic at that time had been "light," and that a red Mercedes vehicle, traveling north in the right lane of Old Albany Post Road, at a certain point, had passed defendant's vehicle, whereupon defendant had accelerated his vehicle to "catch up." Plaintiff had testified that defendant's speed at that time had been "maybe" approximately 70 to 80 miles per hour. According to plaintiff's testimony, neither he nor defendant had said anything at that time. The vehicles then both had continued driving "kind of fast," maintaining their speed, but then the Mercedes had passed defendant's vehicle for the second time. At that point, as defendant's vehicle had been continuing "up the hill," where the road curves to the left, the posted speed limit had been approximately 30 or 35 miles per hour. Plaintiff had testified that defendant's vehicle had "started veering to the left," whereupon defendant had lost control of his vehicle, crossing over the double solid lane into the southbound traffic lane, across that traffic lane, eventually crashing into a telephone pole. Plaintiff had testified that he thought the car had flipped but that he "really don't remember because it happened just so fast." When the vehicle eventually stopped, it was upright on all four tires.

Plaintiff had testified that, "[i]f [he is] not wrong, [he's] pretty sure [defendant] told [him] that his tires were bald."

Defendant too had testified regarding the circumstances the night of the crash.

According to defendant, the surrounding traffic on Route 9A at that time had been "medium." Defendant had not been specifically questioned regarding whether a red Mercedes also had been driving northbound on Route 9A at that time. According to defendant, the speed limit on 9A is 30 or 35 miles per hour and that his maximum rate of speed had been 30 to 35 miles per hour. Once defendant's vehicle had reached the area of the roadway that defendant himself has described as "a dangerous uphill curve," his vehicle has begun to slide across the southbound lane. Defendant had yelled to his passengers, "yo, I can't control it. I was like, yo, hold on," and he had downshifted from fifth gear to third gear, and then into neutral. Defendant had testified that his vehicle had slid approximately 100 feet and that, at the point that it had struck the pole, it had been riding on two wheels. The vehicle never had flipped over, according to defendant.

Defendant had testified that his Mitsubishi vehicle had been purchased 6 to 7 months before the subject crash as a race car and that he had raced it several times at a professional racetrack. Defendant had testified that he had been employed in 2014 as an auto mechanic, that he had been "the mechanic" for the car, and that the vehicle "always had, like, a little something going on with it," "[s]uspension wise," "[i]t always felt funny ... so [he] tried to make any turns with it or nothing for that reason." Defendant had put the vehicle up on the lift prior to the crash and, although he had observed the vehicle's "control arm"and that there had been some "light" rust forming around it, he never had found a problem. After mentioning the suspension issue to his brother about one or two months prior to the collision, they together had taken the vehicle to the dealer that they had purchased it from. The dealer had test drove the vehicle and inspected it on a lift; ultimately, the dealer had advised that they could not find anything wrong with the vehicle

and that it "was good, perfect." Defendant had testified that he had tweaked 'the boost" on the vehicle's turbo engine.

Approximately two years after the crash, defendant had received a safety recall notice from Mitsubishi regarding the vehicle's control arm suspension. This recall notice, a copy of which is included at bar, states that here is defect related to motor vehicle safety in vehicles operated in cold weather states where road salt is used and

> [t]he inside and outside surfaces of the front cross members used on certain vehicles, if exposed long term to snow melt water and anti-freezing agents, may corrode due to insufficient performance of the rust protection ... Should significant corrosion occur over time, a lower control arm could eventually become detached resulting in loss of vehicle control and a potential collision.

Included in the record at bar is a copy of the MV-104A Police Accident Report wherein the responding police officer had recorded that defendant "states that he lost control of his vehicle on the wet pavement and decline of the roadway, causing the vehicle to spin out and hit telephone pole."

Presently, plaintiff is moving for partial summary judgment on the issue of liability, arguing that he had been an "innocent passenger" in defendant's speeding vehicle over which defendant had lost control and that plaintiff accordingly is entitled to liability judgment against defendants.

Defendants oppose the motion, arguing that there are clear questions of fact as to whether or not this crash had been caused by the defect of the vehicle's control arm and not due to any action or inaction on defendants' part. Defendants maintain that the vehicle had been maintained in pristine condition, that the noted mechanical problem had been thoroughly checked out with the dealer ultimately having represented that the vehicle had

been fine, that at the time of the crash defendant had been driving within the speed limit, in traffic, whereupon he had been confronted with an "emergency situation," and that he had done everything a reasonably prudent person would have done to avoid the crash, and thus that defendants have no liability therefor.

"'An innocent passenger . . . who, in support of [his or] her motion for summary judgment, submits evidence that the accident resulted from the driver losing control of the vehicle, shifts the burden to the driver to come forward with an exculpatory explanation.'" Pandey v. Parikh, 57 A.D.3d 634, 635 (2nd Dept. 2008), citing Siegel v. Terrusa, 222 A.D.2d 428, 428-429 (2nd Dept. 1995).

Plaintiff made a prima facie showing of his entitlement to judgment as a matter of law by submitting evidence establishing that this had been a single-vehicle crash that occurred when defendant had lost control of the vehicle he had been driving. See Pane v. Cisilino, 144 A.D.3d 567 (1st Dept. 2016); Johnson v. Braun, 120 A.D.3d 765 (2nd Dept. 2014); Mughal v. Rajput, 106 A.D.3d 886, 88 (2nd Dept. 2013).

It appears to this Court that defendants actually are raising two separate defenses in support of their argument that plaintiff's summary judgment motion must be denied; first, that the vehicle had a mechanical malfunction which proximately had caused defendant to lose control and crash, for which defendant is not liable, and second, that defendant had been operating his vehicle within the speed limit in a safe manner and that the vehicle had gone into an unavoidable skid for which defendants do not have liability.

Firstly, this Court finds that defendants have failed to raise any triable issue of fact regarding whether a mechanical failure had caused the vehicle to skid and crash, on October 23, 2014. Notwithstanding both the Mitsubishi safety recall notice that defendants

had received two years post-crash and defendant's testimony that he always had felt that the vehicle's suspension was not right, defendant, himself a mechanic, had testified that he previously personally had inspected the vehicle on a lift, that he had found nothing wrong with the vehicle's suspension, and that he had removed and examined the control arm which had been fine except for some light rust. Defendant also had testified that, just one or two months prior to the subject crash, he had brought the vehicle to a dealer who had put the vehicle on a lift and had concluded, after inspection, that the vehicle was perfect.

The inescapable fact is that, regardless of defendants having received two years later notice about a potential safety problem involving the vehicle, that notice merely had advised of a potential problem; defendants fatally have offered no proof, including any post-crash inspection evidence or mechanical expert's affidavit, supporting the finding that the vehicle control arm of defendants' vehicle in fact had failed, thereupon proximately having caused defendant to have lost control of the vehicle. Indeed, as above-noted, actual inspection of the control arm just shortly prior to the crash had revealed no problem with it. This Court necessarily finds that any claim by defendants that a mechanical failure had been responsible for the skid and ensuing crash is impermissible conjecture.

Moreover, the fact remains that defendant had made the decision to continue to drive the vehicle notwithstanding his expressed, albeit mechanically unfounded, concern regarding the vehicle's suspension. Upon these circumstances, defendants cannot successfully interdict plaintiff's prima facie showing of entitlement to judgment.

With respect to what this Court perceives to be defendants' additional separate defense that, at the time of the subject crash, defendant had been operating his vehicle in a safe manner, within the posted speed limits, and that the vehicle's skid from which

defendant could not recover had been an unavoidable emergency not of his own making, and for which defendants thus have no liability, the Court finds no genuine issue of fact has been raised. While the parties do dispute what had been defendant's vehicle's speed at the time of the skid,[1] the Court finds nothing in the record suggesting that the proximate cause of the skid resulting in the crash and plaintiff's injuries had been anything other than defendant's operation of the vehicle at a speed in excess of what the dark, wet and curving road conditions had warranted. See Vehicle and Traffic Law §1180, subds. (a), (e); Gleich v. Volpe, 32 N.Y.2d 517 (1973); Matter of Vaeth v. NYS Dept. of Motor Vehicles, 83 A.D.3d 460 (1st Dept. 2011); Pinkow v. Herfield, 264 A.D.2d 356, 357-358 (1st Dept. 1999). A loss of traction on a wet and curvy roadway are obvious motoring hazards requiring a driver to exercise caution and, given that it had been raining heavy at the time of the subject crash, the Court cannot find that defendant's self-serving claim that he had been driving within the posted speed limit at 30 to 35 miles per hour demonstrates that he had operated the vehicle at a prudent speed for the "dangerous uphill curve" roadway condition. Cf. Rutledge v. Petrocelli Elec. Co., Inc., 307 A.D.2d 871 (1st Dept. 2003).

Defendant has failed to submit any evidence raising a genuine triable issue of fact with respect thereto, and thus plaintiff's motion for liability judgment is hereby granted. See Johnson v. Braun, supra; Felberbaum v. Weinberger, 40 A.D.3d 808 (2nd Dept. 2007);

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[1]The Court observes that, although there had been an identified third occupant of defendants' vehicle at the time of the crash, this person has not provided testimony, nor an affidavit, as to the prevailing circumstances and specifically as to what had been defendant's speed at the time that it had begun to skid. Moreover, and although not addressed by the parties, it would appear by defendant's own admission that he had downshifted from fifth gear to third gear at the time that his vehicle had gone into a skid that he had been traveling at least 40miles per hour , if not more.

Dudley v. Ford Credit Titling Trust, 307 A.D.2d 905 (2nd Dept. 2003) .

The parties shall appear in the Settlement Conference Part, room 1600, at 9:15 a.m., on June 20, 2017, for the scheduling of trial on damages and, if warranted, on the issue of threshold injury.

Dated: May, 26 2017
White Plains, New York

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J.S.C.

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