

Mohan v Bottiglieri

2018 NY Slip Op 31395(U)

June 28, 2018

Supreme Court, New York County

Docket Number: 151844/2016

Judge: Adam Silvera

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ADAM SILVERA PART IAS MOTION 22

Justice

-----X INDEX NO. 151844/2016

LILIA TCHEMCHIROVA, BATHINA MOHAN,
Plaintiff,

MOTION DATE 05/23/2018,
05/23/2018

- v -

MOTION SEQ. NO. 002 003

THOMAS BOTTIGLIERI, THOMAS BOTTIGLIERI, EDWARD
GONZALEZ, LEROS POINT TO POINT, INC.,

Defendant.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 71, 73, 74, 75, 76, 77, 78, 81

were read on this motion to/for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 63, 64, 65, 66, 67, 68, 69, 70, 72, 79, 80

were read on this motion to/for PARTIAL SUMMARY JUDGMENT

Upon the foregoing documents, it is ordered that this motion for summary judgment to dismiss (mot. seq. no. 002), by defendants Leros Point to Point, Inc. (hereinafter referred to as “defendant Leros”) and Edward Gonzalez, pursuant to CPLR 3212, is granted. 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 New York University Medical Center*, 64 NY2d 851, 853 (1985). Once such entitlement has been demonstrated by the moving party, the burden shifts to the party opposing the motion to “demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure...to do [so]”. *Zuckerman v City of New York*, 49 NY2d 557, 560 (1980). Defendants Gonzalez and Leros move for summary

judgment to dismiss the complaint and all cross claims against them, arguing that their vehicle, a bus owned by defendant Leros and operated by defendant Gonzalez, was hit head on by co-defendant Thomas J. Bottiglieri Jr. and Thomas J. Bottiglieri Sr.'s vehicle. Defendants Gonzalez and Leros argue that liability rests solely with co-defendants Morgan who unexpectedly crossed the double yellow lines on the roadway and hit the bus. Defendants Gonzalez and Leros have met their burden in establishing entitlement to summary judgment dismissing the action against them, as evidence and deposition testimony established that they were traveling within their lane of traffic when co-defendants' vehicle unexpectedly and without warning crossed the double yellow line and collided with the bus. In fact, such facts are undisputed. Thus, the burden shifts to co-defendants and plaintiff to raise a genuine issue of triable fact.

Preliminarily, the Court notes that co-defendants Bottiglieri Jr. and Sr. failed to submit opposition to the instant motion for summary judgment of dismissal, and, thus, fail to raise any triable issues of fact. Plaintiffs submit only an attorney's affirmation in opposition, arguing that while co-defendants Bottiglieri Jr. and Sr. were negligent, defendants Gonzalez and Leros were also negligent as the bus was traveling over the speed limit of 35 miles per hour in violation of Vehicle and Traffic Law §1180(d), and that defendant Gonzalez failed to take evasive actions to avoid co-defendants' vehicle. It is well settled that "a bare affirmation of . . . [an] attorney who demonstrated no personal knowledge . . . is without evidentiary value and thus unavailing." *Zuckerman v City of New York*, 49 NY2d 557, 563 (1980). Furthermore, an affirmation by an attorney who is without the requisite knowledge of the facts has no probative value. *Di Falco, Field & Lomenzo v Newburgh Dyeing Corp.*, 81 AD2d 560, 561 (1 Dept 1981), aff'd 54 NY2d 715 (1981). Thus, plaintiffs' attorney's conclusory and speculative affirmation, is insufficient to raise any factual issues to warrant a denial of the within motion. *See GTF Marketing Inc. v*

Colonial Aluminum Sales, Inc., 66 NY2d 965, 968 (1985). Moreover, despite plaintiff's attorney's allegation, made without any personal knowledge, that defendant Gonzalez was speeding at the time of the accident, the deposition testimony of non-party witness Sergeant Hufnagle, a patrol sergeant on the Accident Investigation Unit who was called to the scene of the accident to investigate, specifically states that at the point of impact for this accident, the speed limit was 55 miles per hour. See Notice of Motion, Exh. I, Hufnagle Deposition Transcript, P. 46. It is undisputed that defendant Gonzalez was traveling under 55 miles per hour at the time of the accident. Thus, plaintiff's counsel's bare affirmation is unavailing and fails to raise a genuine issue of fact such that defendants' Gonzalez and Leros' motion is granted.

As to plaintiffs' motion for summary judgment on the issue of liability as to defendants Thomas J. Bottiglieri Jr. and Thomas J. Bottiglieri Sr. (mot. seq. 003). Such motion is granted. Plaintiffs also seek to dismiss all of defendants' affirmative defenses alleging comparative negligence, contributory negligence, and culpable conduct on the part of plaintiffs. Plaintiffs' motion, which contends that they were passengers in defendant Gonzalez and Leros' bus when such bus was struck by defendants Thomas J. Bottiglieri Jr. and Thomas J. Bottiglieri Sr.'s vehicle, has made out a prima facie case of negligence, and the burden shifts to defendants Bottiglieri Jr. and Sr. to raise a triable issue of fact. See *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). A plaintiff who establishes that they were an innocent passenger is entitled to summary judgment on the issue of liability. See *Mello v Narco Cab Corp.*, 105 AD3d 634, 635 (1st Dep't 2013). Moreover, pursuant to VTL 1126(a) "[w]hen official markings are in place indicating those portions of any highway where overtaking and passing or driving to the left of such markings would be especially hazardous, no driver of a

vehicle proceeding along such highway shall at any time drive on the left side of such markings.”

Thus, it is undisputed that defendants Bottiglieri Jr. and Sr. violated VTL 1126(a).

In opposition, defendants Bottiglieri Jr. and Sr. submit only an attorney’s affirmation which argues that an issue of fact exists as defendant Gonzalez’s deposition testimony insinuates that liability may be apportioned. Defendants Bottiglieri Jr. and Sr. point to the fact that defendant Gonzalez testified that he first saw defendants Bottiglieri’s vehicle approximately 150 yards away, and saw such vehicle start to cross the double yellow lines about 75 yards away. Defendants Bottiglieri’s sole argument is that liability may be apportioned to defendants Gonzalez and Leros due to the fact that defendant Gonzalez saw defendants Bottiglieri’s vehicle and that defendant Gonzalez did not leave his lane. However, defendants Bottiglieri Jr. and Sr. fail to cite any case law to support their argument that liability can be apportioned to a co-defendant who is traveling within their lane and within the speed limit when such co-defendant is struck, through no fault of their own, by a vehicle that unexpectedly crosses the double yellow line. Moreover, defendant Gonzalez explicitly testified that from the moment he first saw defendants Bottiglieri’s vehicle 150 yards away until the time of impact, only approximately 4-5 seconds elapsed. Thus, from the moment that defendant Gonzalez began to observe defendants Bottiglieri’s vehicle unexpectedly started to cross the double yellow lines at approximately 75 yards away, he had less than 4 seconds until the time of impact. It is well settled that “[t]he emergency doctrine will prevent a finding of negligence against a driver confronted by a sudden and unexpected situation that leaves little time for thought, deliberation or consideration, provided, however, that the driver’s actions were reasonably prudent under emergent circumstances, and s/he did not create or contribute to the emergency.” *Weston v Castro*, 138 AD3d 517, (1st Dep’t 2016). The facts of the case are not disputed. Plaintiffs were passengers in

the bus and were injured when the bus, driven by defendant Gonzalez and owned by defendant Leros, was struck by the vehicle driven by defendant Thomas J. Bottiglieri, Jr. and owned by Thomas J. Bottiglieri Sr., which suddenly and unexpectedly crossed over the double yellow lines and struck the bus. Defendants Bottiglieri Jr. and Sr. have failed to raise a genuine issue of triable fact. As such, plaintiffs' motion for summary judgment is granted as to the two remaining defendants Thomas J. Bottiglieri Jr. and Thomas J. Bottiglieri Sr.'s liability.

Accordingly, it is

ORDERED that defendants Edward Gonzalez and Leros Point to Point, Inc.'s motion for summary judgment to dismiss this action as against them only is granted and this action is dismissed as to defendants Edward Gonzalez and Leros Point to Point, Inc. only; and it is further

ORDERED that any cross-claims against said defendants by defendants Thomas J. Bottiglieri Jr. and Thomas J. Bottiglieri Sr. are dismissed; and it is further

ORDERED that the said claims against defendants Thomas J. Bottiglieri Jr. and Thomas J. Bottiglieri Sr. are severed and the balance of the action shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment in favor of defendants Edward Gonzalez and Leros Point to Point, Inc. dismissing the claims and cross-claims made against them in this action, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiffs' motion for summary judgment is granted in its entirety, and summary judgment on liability is granted to plaintiffs against defendants Thomas J. Bottiglieri Jr. and Thomas J. Bottiglieri Sr., and all of defendants' affirmative defenses alleging comparative negligence, contributory negligence, and culpable conduct on the part of plaintiffs are dismissed; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties with notice of entry.

This constitutes the Decision/Order of the Court.

6/28/2018

DATE



ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: