

<b>Contreras v Rametra</b>
2018 NY Slip Op 32503(U)
October 4, 2018
Supreme Court, New York County
Docket Number: 150519/2018
Judge: Adam Silvera
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART IAS MOTION 22

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OLGA CONTRERAS

Plaintiff,

- v -

SURINDER RAMETRA,

Defendant.

INDEX NO. 150519/2018

MOTION DATE N/A

MOTION SEQ. NO. 001

**DECISION AND ORDER**

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HON. ADAM SILVERA:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER)

Upon the foregoing documents, it is that plaintiff's motion for summary judgment is granted in part. The underlying action stems from a motor vehicle accident which occurred on May 11, 2017, on Van Dam Street between 47<sup>th</sup> Avenue and Thompson Street in Queens County in the City and State of New York. Plaintiff Olga Contreras alleges that she was seriously injured when a vehicle operated by defendant Surinder N. Rametra crossed a double yellow line while passing a stopped vehicle in front of it and struck plaintiff while she was a pedestrian in the crosswalk with the pedestrian indicator in her favor. Plaintiff moves for summary judgment to establish defendants negligence as a matter of law and to establish that plaintiff is free from comparative negligence. Defendant opposes the motion

**Summary Judgment & VTL**

"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]).

Pursuant to Vehicle and Traffic Law 1130(1), “[w]henver any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section so constructed as to impede vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. No vehicle shall be driven over, across, or within any such dividing space, barrier, or section, except through an opening in such physical barrier or dividing section or space or at a crossover or intersection, as established, unless specifically authorized by public authority.” Further, VTL 1124 states that in regard to overtaking on the left, “no vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle proceeding in the same direction.”

### **Comparative Liability**

The Court of Appeals has held that a plaintiff is entitled to partial summary judgment on the issue of a defendant’s liability even if a defendant raises an issue of fact regarding plaintiff’s comparative negligence (*Rodriguez v City of New York*, 31 NY3d 312 [2018]). The issue of a plaintiff’s comparative negligence is addressed and determined only when considering the damages that a defendant owes to a plaintiff (*id.* at 3). Thus, a plaintiff’s motion for summary judgment is appropriate regardless of plaintiff’s potential comparative negligence.

### **Conclusion**

Here, plaintiff has made a prima facie showing of defendant's negligence. Plaintiff has attached a certified police report which states that defendant "attempted to proceed around uninvolved vehicle by passing on center divider when he did strike pedestrian who was crossing in crosswalk" (Mot, Exh E). Further, plaintiff provides the Affidavit of plaintiff who testified that defendant passed from behind that vehicle in front of it, crossed the double yellow line and unexpectedly struck plaintiff within the crosswalk (*id.*, Exh D). Thus, having demonstrated that defendant violated the VTL in surpassing the vehicle in front of it and crossing the double yellow line, plaintiff has made a prima facie showing of negligence and the burden shifts to defendant.

In opposition, defendant relies on an error in the cover of plaintiff's motion which seeks relief for summary judgment as to defendant's liability for striking the rear of plaintiff's vehicle instead of relief for violation of the VTL and striking plaintiff within the crosswalk (Aff in Op, ¶ 6). Defendant posits that plaintiff's motion is defective as it does not list the grounds for the relief which it seeks pursuant to CPLR 2214(a) (*id.*, ¶ 7).

While the cover of plaintiff's motion does contain a mistake as to the grounds for which it seeks summary judgment, plaintiff's affirmation in support clearly lists that the motion seeks relief for violation of the VTL and striking a pedestrian in the crosswalk. To deny plaintiff's motion, only for it to be refiled with a new cover sheet, would not be in the interest of justice and efficiency.

Further, defendant's opposition states that the motion is premature as depositions have not been conducted to date (*id.*, ¶ 8). However, CPLR 3212 allows for any party to move for summary judgment after issue has been joined. The First Department has consistently held that summary judgment may be granted solely based on a party's affidavit before depositions have

been held (*Santos v Booth*, 126 AD3d 506 [1st Dep't 2015]; *see also Davis v Turner*, 132 AD3d 603 [1st Dept 2015]).

Finally, defendant attempts to raise an issue of fact as to whether plaintiff was in the crosswalk at the time of the incident at issue. Plaintiff has provided a certified police report, which is admissible evidence, to show that plaintiff was indeed in the crosswalk. Thus, defendant has failed to raise an issue of fact as to their own negligence and plaintiff has met its burden.

As for plaintiff's negligence, the Court shall not grant the branch of plaintiff's motion for a finding that plaintiff free from comparative negligence. Such a finding is determined only when considering the damages that a defendant owes to a plaintiff and not appropriate at this juncture. Thus, plaintiff's motion for summary judgment is granted as against defendant only as to defendant's negligence for the incident at issue.

Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of liability as against defendants is granted; and it is further

ORDERED that the branch of plaintiff's motion for summary judgment on the issue of plaintiff's comparative negligence is denied; and it is further

ORDERED that all parties appear for a Compliance Conference on November 30, 2018, in room 103 of 80 Centre Street at 9:30AM; and it is further

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

This constitutes the Decision/Order of the Court.

10/4/2018

DATE

ADAM SILVERA, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE