

Voloshin v Navarro Trucking LLC

2019 NY Slip Op 30391(U)

February 19, 2019

Supreme Court, Kings County

Docket Number: 514426/2018

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

SEMYON VOLOSHIN,

Plaintiff,

-against-

NAVARRO TRUCKING LLC and DONNY A. LOPEZ,

Defendants.

DECISION / ORDER

Index No. 514426/2018

Motion Seq. No. 1

Date Submitted: 1/24/19

Cal No. 55

Recitation, as required by CPLR 2219(a), of the papers considered in the review of plaintiff's motion for summary judgment on liability.

| Papers | NYSCEF Doc. |
|---|--------------|
| Notice of Motion, Affirmation and Exhibits Annexed..... | <u>6</u> |
| Answering Affirmation and Exhibits Annexed..... | <u>10-12</u> |
| Reply Affirmation..... | <u>13</u> |
| Sur-Reply Affirmation..... | <u>14</u> |

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This case arises out of a motor vehicle accident which occurred on May 17, 2018. Plaintiff Semyon Voloshin contends he was traveling in the right lane of the Brooklyn-Queens Expressway near the Hamilton Avenue exit when his vehicle was hit in the rear by a tractor-trailer owned by defendant Navarro Trucking LLC and operated by defendant Donny A. Lopez. Plaintiff claims defendant Lopez moved from the center lane into the right lane unexpectedly, causing the accident. Plaintiff contends that since this was a rear-end collision, he is entitled to summary judgment on liability.

Defendants oppose the motion, contending that the accident was not a rear-end collision, but was a side-swipe, and that plaintiff failed to include his dash-cam video, which may be relevant. In addition, defendant Lopez provides an affidavit which denies that he moved into the right lane, and alleges that it was plaintiff who moved suddenly into the center lane, causing the collision.

In reply, plaintiff provided the dash-cam video footage and an affidavit attesting to its authenticity. The video shows that in the second before the crash, plaintiff was traveling in the right lane and defendant in the center lane. Plaintiff is then spun around perpendicular to and in front of defendant's tractor trailer, where he remains for a few seconds before further spinning, and he comes to rest against the center divider, facing oncoming traffic.

As plaintiff put the video in his reply, defendants were afforded an opportunity to put in a sur reply, and the motion was adjourned. Defendants contend in their sur reply that plaintiff has not made a prima facie showing of entitlement to summary judgment because the court cannot consider evidence first provided in a reply, and that even if the video is considered, this is not a typical rear-end collision and the video does not conclusively eliminate all issues of fact.

Defendants are not correct in averring that the plaintiff's evidence, the video that defendants specifically pointed out was not in plaintiff's motion papers, should not be considered. It was permissible for plaintiff to submit the video in reply (*see 71 Clinton St. Apts. LLC v. 71 Clinton Inc.*, 114 AD3d 583, 584 [1st Dept 2014] ["Plaintiff properly submitted a reply affidavit that responded to defendants' argument that People's United's June 20, 2011 letter cast doubt on whether People's United had really assigned defendant 71 Clinton Inc.'s note and mortgage to plaintiff on June 2, 2011"]);

Dias v City of New York, 110 AD3d 577, 578 [1st Dept 2013] ["The evidence plaintiff offered on reply was properly submitted in response to the evidence submitted and the arguments made by defendants in their opposition papers"]; *Sanford v 27-29 W. 181st Street Ass'n, Inc.*, 300 AD2d 250, 251 [1st Dept 2002] ["There is no merit to plaintiffs' effort to exclude the affidavit of the building manager submitted with the reply papers. Plaintiffs' opposing affidavit virtually demands that defendants supply this statement, asserting that the manager is 'the more appropriate person to address 181 Associates' knowledge, or lack thereof, as to the residency of the infant plaintiffs'"]; *see also Cent. Mortg. Co. v Jahnsen*, 150 AD3d 661, 664–65 [2d Dept 2017] ["the Supreme Court properly considered the reply affidavit because the affidavit was offered in response to the appellant's allegation in opposition to the motion that the plaintiff never had possession of the note, and merely clarified the plaintiff's initial submissions as to its possession of the note at the time of commencement"]. Further, defendants were given an adjournment and an opportunity to submit a sur reply so that there would be no prejudice if the court considered the video submitted in the plaintiff's reply (*see Sally v Keyspan Energy Corp.*, 106 AD3d 894, 896 [2d Dept 2013]; *Basile v Grand Union Co.*, 196 AD2d 836, 837 [2d Dept 1993]).

The court had viewed the forward-facing dash-cam video from plaintiff's vehicle, and has played it numerous times, stopping and starting it at various points in an attempt to determine what happened, but the court cannot definitively determine which vehicle moved out of his lane and caused the collision. The precise location of the vehicles vis-a-vis their lane markings at the moment of contact is not clearly visible in the video. Consequently, plaintiff has not established his entitlement to summary judgment on the issue of liability. The interpretation of the dash-cam video, along with

the other evidence, is left for the finder of the facts.

Accordingly, it is

ORDERED that the motion is denied.

This constitutes the decision and order of the court.

Dated: February 19, 2019

ENTER:



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**