

**Cohen v Vinar**

2019 NY Slip Op 33368(U)

November 13, 2019

Supreme Court, New York County

Docket Number: 154946/2019

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

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MARK COHEN,

Plaintiff,

- v -

JACQUELINE VINAR, JAY LIEBOWITZ

Defendant.

INDEX NO. 154946/2019

MOTION DATE 07/29/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

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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, 25, 26, 27, 28

were read on this motion to/for DISMISS

Before the Court is defendant Jacqueline Vinar's motion to dismiss plaintiff's complaint against said defendant on the grounds that she is not a proper party to this action. The motion is unopposed and plaintiff cross-moves for an Order granting summary judgment in favor of plaintiff against defendant Jay L. Leibowitz establishing said defendant's negligence as a matter of law; to find plaintiff free from comparative negligence as a matter of law; and to dismiss defendant's first affirmative defense.

This matter stems from a motor vehicle accident which occurred at the intersection of Main Street and Jewel Avenue in the County of Queens, City and State of New York when a vehicle operated by defendant Leibowitz struck plaintiff pedestrian Mark Cohen while he was in the crosswalk with the pedestrian indicator in his favor.

Defendant Vinar avers that she is not liable for the accident at issue. "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]).

In support of her motion, defendant submits her affidavit in which she testified that on the date of the accident she was a passenger in a vehicle involved in a motor vehicle accident but that she was neither operating the vehicle nor the registered owner of said vehicle (Mot, Exh C). Defendant has demonstrated that she was not liable for the accident at issue, thus defendant’s motion to dismiss is granted.

Plaintiff’s cross-motion for summary on the issue of liability as against defendant Liebowitz and to dismiss defendant’s affirmative defense of comparative negligence is granted. A plaintiff makes a prima facie showing of entitlement to summary judgment by offering evidence that they were a pedestrian within a crosswalk, with the light in their favor, when they were struck by a defendant’s vehicle (*Beamud v Gray* 45 AD3d 257 [1st Dep’t] [finding that a lawful pedestrian in a crosswalk who was struck by a turning vehicle was entitled to summary judgment as a matter of law on the issue of liability]). Violation of the Vehicle and Traffic Law (“VTL”) constitutes negligence per se (*See Flores v City of New York*, 66 AD3d 599 [1st Dep’t 2009]). VTL 1146 places a duty upon motorists to exercise due care in their operation of a motor vehicle and avoid colliding into any pedestrian.

In support of his motion plaintiff attaches the deposition of plaintiff, the police report, a picture of the location of the accident, and video surveillance footage of the accident (Cross-Mot, Exh D-G). Plaintiff testified that he had the pedestrian cross-sign in his favor when he entered the crosswalk and was suddenly and unexpectedly truck by defendant’s vehicle (*id*, Exh D, at 2).

Video footage of the accident clearly shows defendant's vehicle turn and strike plaintiff with its sideview mirror while plaintiff was within the crosswalk (*id.*, Exh G). Thus, plaintiff has demonstrated that defendant violated the VTL and has made a prima facie showing of defendant's negligence and the burden shifts to defendant to raise an issue of fact.

In opposition, defendant Leibowitz alleges that an issue of fact exists as to whether both his vehicle and plaintiff were within the crosswalk at the time of the accident. Defendant submits a sworn affidavit in which he states that the accident took place once his vehicle had passed the crosswalk and that "[t]he video surveillance does not demonstrate that the plaintiff was within the crosswalk" (Aff in Op, Exh A). The Court notes that defendant's affidavit is a feigned attempt to raise an issue of fact as the video surveillance clearly demonstrates plaintiff being suddenly struck by defendant's turning vehicle while within the crosswalk. Thus, defendant has failed to raise a triable issue of fact and plaintiff's motion for summary judgment is granted as to defendants' liability.

The branch of plaintiff's motion seeking to dismiss defendants' affirmative defenses alleging comparative negligence, contributory negligence and culpable conduct of plaintiff is granted. While pursuant to *Rodriguez v City of New York*, 31 NY3d 312, 330 [2018], a plaintiff is not obliged to demonstrate whether or not it was comparatively negligent in order to be entitled to partial summary judgment on the issue of defendant's liability, plaintiff's comparative negligence may be determined in a motion for summary judgment when plaintiff has moved for summary judgment to dismiss a defendant's affirmative defense of comparative negligence. Defendant has failed to proffer any credible evidence as to plaintiff's alleged negligence.

Here, plaintiff has met his burden and demonstrated that, as a lawful pedestrian, crossing the street within the crosswalk with the light in his favor, he was free from any contributory

negligence and in no way caused the accident. Thus, the affirmative defenses alleging any comparative negligence, contributory negligence and/or culpable conduct of plaintiff are dismissed and plaintiff's cross-motion is granted in its entirety.

Accordingly, it is

ORDERED that defendant's motion for summary judgment for a finding that defendant Jacqueline Vinar is free from liability and to dismiss plaintiff's Complaint and any cross-claims against defendant is granted; and it is further

ORDERED that the Complaint is dismissed in its entirety as against defendant Jacqueline Vinar with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendant Jay L. Leibowitz; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendant Jacqueline Vinar serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability as against defendant Jay L. Leibowitz is granted; and it is further

ORDERED that the branch of plaintiff's motion to dismiss defendant's affirmative defenses related to comparative negligence of plaintiff is granted; and it is further

ORDERED that counsel for plaintiff and defendant appear for a preliminary conference on December 13, 2019, in room 106 of 80 Centre Street at 9:30AM; and it is further

ORDERED that within 30 days of entry, plaintiff shall serve a copy of this Decision/Order upon defendant with notice of entry.

This constitutes the Decision/Order of the Court.



11/13/2019

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